RECEIVED
2023 JAN 19 P 4: 10
SPEAKER'S OFFICE

Ralph S. Cushnie *pro se, in propria persona*
PO Box 864
Kalaheo, Hawaii 96741
Ph. 808 645-0955
Email: ralph@cushniecci.com

PETITION FOR REDRESS OF GRIEVENCES

PETITION FOR ELECTION AUDIT PURSUANT TO STATUTE, AND PURSUANT TO THE CONSTITUTION FOR THE STATE OF HAWAII ARTICLE I SECTION 4 AND HOUSE RULE 46.1, WITH EXHIBITS A-F

Petitioners respectfully request written response as to the intended action by the House of Representatives within 7 days from receipt of this petition.

Petitioners respectfully request oral hearing to adjudicate this grievance.

EXECUTIVE SUMMARY

The people of Hawaii are not counting our vote in our elections - a company from the mainland is, and the people have no way of knowing the result they are producing are accurate results of the election. Every effort by the people to ensure the accuracy of elections pursuant to statute has been thwarted by the Office of Elections (Respondent). HRS § 16-42 requires that a random audit of ten percent of precincts be conducted to compare the votes cast on the paper ballot match the output of the electronic voting system. The Respondent has maladministered the application of this statute to avoid audits, and is now sponsoring a bill which negates and dilutes audit requirements in their entirety. The Respondent is operating in "bad faith" and not upholding the will of the people, as demanded by legislative action through statute, and which is intended to ensure the accuracy of our elections against any and all questions. The people maintain that without an accurate audit as intended by statute, the results of our elections are indeterminate.

THE PETITION

I, Ralph S. Cushnie, one of the people, along with more than Thirty Voters (Petitioners) representing we the people, hereby bring this Petition for preservation and enforcement of the conduct of Election Audits Pursuant to Statute to the State of Hawaii House of Representatives (the House).

Petitioners' rights and responsibilities are protected and pursuant to the Constitution for the State of Hawaii Article I Section 1, Article I Section 2, and the peoples right to redress pursuant to Article I Section 4, and House Rule 46.1.

Petitioners aver that the House has original jurisdiction for HRS § 16-42 through the inception of House Bill 1740 and Act 200 of 2005, and is the appropriate legislative body for redress of this grievance.

Petitioners plead that Scott T. Nago, personally and in his official capacity as Chief Elections Officer; for the Office of Elections; State of Hawaii is the appropriate Respondent for this petition.

Petitioners plead that Reese R. Nakamura, personally and in his official capacity as Deputy Attorney General for the State of Hawaii is complicit in defending misapplication of this statute and is also an appropriate Respondent for this petition.

Petitioners plead the House to identify other Respondents as necessary for adjudication of this grievance.

Petitioners plead that the question for the House pertains to clarification, preservation, and enforcement of the requirement for the use of a specific method for the conduct of post-election pre-certification audits for precincts employing electronic voting systems and as specified in HRS § 16-42.

Petitioners plead the House for oral hearings to eliminate any controversy with understanding the gravity of this grievance.

OVERVIEW

Hawaii Revised Statute § 16-42 was introduced by the House of Representatives as HB 1740 and passed into law via Act 200 during the Thirty-third legislature of 2005. This statute identifies specific requirements for post-election pre-certification audits when using electronic voting systems, and is intended to ensure the accuracy of elections against any and all questions, and as required by HRS § 16-2.

During the 2022 primary and general election, election observers identified that the Office of Elections was not following audit procedures as prescribed in the statute. These observers identified that during an audit, elections personnel were comparing ballot images to the output of the electronic voting systems instead of comparing the actual ballot to the output of the electronic machine and as required by statute. This discrepancy was identified to Office of Elections personnel, and when no action was taken, the people subsequently brought this grievance through multiple election complaints to the Hawaii Supreme Court. In their judgement, the Court identified that HRS § 16-42 is not within the original jurisdiction of the Court and could not provide a declaratory judgement. Based on this finding, the people now bring this grievance to the House of Representatives who has original subject matter jurisdiction for the creation and interpretation of this statute.

During the exchange of information that accompanied the election complaints in the Hawaii Supreme Court, it became clear that the Respondent does not recognize HRS § 16-42 as an affirmative statute. The Respondent through multiple pleadings has emphasized the application of local administrative procedures over statutory procedures, and has argued the exemption for the auditing requirements for "electronic voting systems" entirely. Now, the Respondent via representative has brought House Bill 132 to dilute and eliminate existing audit requirements through a revised statute, and wherein the accuracy of elections will remain indeterminate.

It is now even more apparent to the people that our vote is not being audited as intended by the legislature and as subsequently embodied in statute, and as necessary to ensure the accuracy of our election. Before the use of electronic voting systems, the people of Hawaii hand counted paper ballots and tallied the total vote in Hawaii's individual precincts. Since the introduction of electronic voting systems, the counting of votes has been outsourced to a mainland company who uses a centralized process to produce an election result, and what goes on inside the electronic machine that tallies the vote is "proprietary" information. There is no safeguard for the people to verify the accuracy of the reported election result.

When the legislature enacted HRS § 16-42 they took the counting of the ballots out of the hands of the people of Hawaii and gave it to a private corporation, but included a provision for an audit that in theory would ensure the accuracy of the vote and the election result. This statute specifies that when electronic voting systems are used, they must be audited by randomly selecting 10% of precincts for a comparison that ensures that the output of votes on the electronic machines is equal to the input of votes on the paper ballot.

The Respondent claims that audits are not required by law for electronic voting systems if a mechanical tabulation system is used to generate electronic tallies, has used permissive administrative procedures to negate statutory requirements, and questions if an audit is required at all. Now, the Respondent is attempting to rewrite and dilute the audit requirement out of the statute, and strip the last safeguard for ensuring the accuracy of the results of the election.

The people of Hawaii believe otherwise, and demand reasonable assurance that the results of an election correctly represent the actual vote of the people. The audit, as originally intended by the legislature is the only remaining protection.

The people maintain that without an audit of the paper ballots as the legislature intended, the electronic voting system cannot be assured to accurately count all

votes cast, for or against any and all questions, and that the accuracy of Hawaii elections remains questionable and indeterminate.

REQUEST FOR OFFICIAL NOTICE

Petitioners request the House take official notice of the following:

The Constitution for the State of Hawaii Article I Section 1, Section 2, Section 4, and Article II, Section 10.

Hawaii House of Representatives Twenty-Third Legislature of 2005 House Bill 1740 and The Legislature of the State of Hawaii Act 200 approved 6 July 2005. (See EXHIBIT A)

Hawaii Revised Statute, Chapter 16 Voting Systems, and specifically HRS § 16-2, HRS § 16-41, and specifically HRS § 16-42. (See EXHIBIT B)

Petitioners respectfully requests the House take notice and include by reference all other appropriate constitutional clauses, state statutes, and uncontested facts, whether referenced or cited in this pleading or from the outside, and which form the basis of lawful procedure and due process, or as necessary to establish any element which may be in question.

Petitioners move the House to recognize witnesses as identified during discovery.

STATEMENT OF THE GRIEVANCE

Petitioners aver that accurate elections are fundamental to the preservation of inalienable rights and through the creation of government authority as determined through the election of public servants by the people. Ref: The Constitution for the State of Hawaii Article I Section 1 and Section 2.

Petitioners aver that statutes are used to codify the will of the people through the legislative process wherein a bill through approval in the house and the senate becomes an act, and with approval by the governor becomes a statutory law.

Statute. A law passed by a legislative body; specifically, legislation enacted by any lawmaking body, including legislatures, administrative boards, and municipal courts. Blacks Law 9th Edition.

Petitioners aver that an "affirmative statute" requires that something be done.

Affirmative Statute. A law requiring that something be done; one that directs the doing of an act. Blacks Law 9th Edition.

Petitioners aver that HRS § 16-2 specifies that "All voting systems…shall satisfy the following requirements:" (3) "shall correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions." (Ref: HRS § 16-2).

Petitioners aver that HRS § 16-2 is an affirmative statute.

Hawaii Revised Statute 16-42 was introduced with House Bill 1740 during the State of Hawaii twenty-third legislature in 2005, and as signed into law by the governor as Act 200 on 6 July 2005. (See EXHIBIT A)

Petitioners aver that based on the inception of HB 1740, that the House of Representatives has original jurisdiction to redress this grievance pertaining to the interpretation and application of this statute.

Petitioners aver that HRS § 16-42 allows for the use of electronic voting machines and subsequently specifies the audit procedure necessary for ensuring the accuracy of elections when employing the use of electronic voting systems.

Petitioners respectfully request the House note HRS § 16-42 specifically states that "No electronic voting system shall be used in any election unless it generates a

paper ballot or voter verifiable paper audit trail that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot or voter verifiable paper audit trail is retained as the definitive record of the vote cast." (Ref: HRS § 16-42) [underline for emphasis]

"Voter verifiable paper audit trail - means the paper record that constitutes a complete record of ballot selections that is verified by the voter. The record may also be used to assess the accuracy of the voting machine's electronic record and to verify the election results." (Ref: HRS § 16-41).

Petitioners respectfully request the House note HRS § 16-42(b)(3) specifies that:

(b) "The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:

(3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts;" (Ref: HRS § 16-42).

Petitioners aver that HRS § 16-42 is an affirmative statute.

Petitioners aver that this affirmative statute requires a post-election pre-certification audit of a random sample, of not less than ten percent of precincts, that compares the hand tallies of the votes on the paper ballots for all races is equal to the electronic tallies generated by the voting system – in order to ensure the accuracy of the voting system.

Petitioners aver that this affirmative statute is fundamental in ensuring the accuracy of the results of an election.

Petitioners aver that the Respondent is not following this affirmative statute in determining the electronic tallies created by the electronic voting system accurately reflect the record and is equal to the vote as cast on the paper ballot by the voters.

Petitioners aver that the post-election pre-certification audits as administered by the Respondent fail the requirements specified in HRS § 16-42 in that:

1) the procedure being used does not verify the voters complete record of ballot selections for all races in the randomly selected precincts, but rather only compares one race in those precincts, and

2) the procedure being used does not verify the tallies of votes as registered on the paper ballots is equal to the output of the tallies of the electronic voting system, but rather compares the electronic image of the ballot to the output of the electronic voting system.

Petitioners aver that it is a well-documented fact that the ballot images can be manipulated within and electronic voting system, and that the random audit of the original paper ballots is the necessary safeguard to ensure that the output of the electronic voting system is accurate. (See EXHIBIT C)

Petitioners aver that procedures being used by the Respondent do not meet the requirements of a post-election pre-certification audit as specified in HRS § 16-42.

Audit. A formal examination of an individual's or organization's accounting records, financial situation, or compliance with some other set of standards. Ref: Blacks Law 9th Edition.

Petitioners aver that failure to perform an accurate post-election pre-certification audit is an error that could cause a difference in the election results, and that without the audit the accuracy of an election is questionable and indeterminate.

Petitioner has identified this grievance through several actions:

1) Initially through personal dialogue with the Respondent prior to the 2022 elections, and

2) Formally to the Hawaii Supreme Court in Cushnie v. State 22-SCEC-0000505 regarding the conduct of audits in the 2022 Primary Election (See EXHIBIT D), and

3) Subsequently to the Hawaii Supreme Court in Cushnie v. State 22-SCEC-0000703 regarding the conduct of audits in the 2022 General Election. (See EXHIBIT E).

Petitioner respectfully request the House note that this grievance has also been identified and is being formally challenged in the 1st Circuit Court of Hawaii in HRP v.Nago as 1CCV-22-0001499.

Petitioner avers that this grievance obvious to many of the people and is well documented.

Petitioners respectfully request the House review this petition and the exhibits in their entirety for the full scope and understanding of this grievance.

PRAYER FOR RELIEF AND REMEDY

Petitioners move the House for a thorough investigation into this grievance.

Petitioners plead the House for determination that Hawaii Revised Statute HRS §16-42 is an affirmative statute.

Petitioners plead the House to preserve and enforce the audit requirements of HRS § 16-42 which requires a post-election pre-certification audit of ten-percent of randomly selected precincts, that verifies that the electronic tallies of all votes cast are equal to the hand tallies of all votes cast on the paper ballots when using an electronic voting system.

Petitioners plead the House to prohibit the Respondent from re-defining any type of electronic voting system as a mechanical tabulation system, in a local procedure or in statute, and for the purpose of circumventing the requirement for a post-election pre-certification audit.

Petitioners plead the House to prohibit the Respondent from using a comparison of ballot images, which can be manipulated, during the conduct of the post-election pre-certification audit, and to enforce the audit requirement for using the actual paper ballot as the original source of the vote for this comparison.

Petitioners plead the House to direct the Respondent to ensure that Hawaii Administrative Rules used by the Office of Elections in administration of elections are in compliance with HRS § 16-42, and as intended by the legislature.

Petitioners plead the House for the incorporation of a legal remedy into HRS § 16-42 for application when audits are not conducted pursuant to this statute.

Petitioners plead the House to direct the Respondent for an audit of the 2022 Hawaii General Election pursuant to HRS § 16-42, and as required when using electronic voting systems.

Petitioners plead the House to OPPOSE House Bill 132 which rewrites HRS § 16-42 and eliminates any effective audit procedure for ensuring the accuracy of Hawaii elections. (See EXHBIT F).

SUMMARY

Petitioners maintain that the post-election pre-certification audit procedures currently used by election officials in the counting center do not in any way verify that the votes cast by the voter on the paper ballot are correctly tallied by the electronic voting system. Petitioners maintain that without a valid audit, a correct result of the election cannot be ascertained.

Now, through the introduction of House Bill 132 it is clear that the Respondent is aware of the safeguard provided by the audit requirement, and is attempting to remove or dilute these audit procedures for convenience, and not per the will of the people.

Petitioners maintain that without a valid and verifiable audit, there is no way to determine any level of accuracy in the election, and our elections remain indeterminate.

Plaintiffs reserve all rights, without prejudice.

Date: 19 January, 2023 City: Kauai, Hawaii

1. By: Ralph S. Cushnie Signature:

2. Signatures of more than Thirty Voters (See ATTACHMENT 1)

ENCLOSURE LIST

EXHIBIT A	HOUSE BILL 1740 AND STATE OF HAWAII ACT 200
EXHIBIT B	HAWAII REVISED STATUTE, CHAPTER 16 VOTING SYSTEMS, HRS § 16-2, HRS § 16-41, AND HRS § 16-42
EXHIBIT C	UNCLEARBALLOT: AUTOMATED BALLOT IMAGE MANIPULATION REPORT OF 2019
EXHIBIT D	CUSHNIE V. STATE OF HAWAII; SCEC-22-0000515
EXHIBIT E	CUSHNIE V. STATE OF HAWAII; SCEC-22-0000703
EXHIBIT F	HOUSE BILL 132
ATTACHMENT 1	SIGNATURE OF THIRTY VOTERS

EXHIBIT A

HOUSE BILL 1740 AND STATE OF HAWAII ACT 200

Hawaii State Legislature
2005 Legislative Session

HB1740 HD1 SD2

Generated on 8/9/2005 10:40:17 AM

Measure Title: RELATING TO ELECTRONIC VOTING.

Report Title: Electronic Voting; Requirements; Election Fraud ($)

Description: Prohibits use of electronic voting system unless the system generates a paper ballot that may be inspected and corrected, and unless every ballot is retained as a definitive record; allows the chief election officer to rely on electronic tallies created by electronic voting systems under certain conditions; establishes that every person who causes electronic voting systems to record, tally, or report votes inaccurately shall be deemed guilty of election fraud. (SD2)

Package: None

Companion:

Introducer(s): LUKE, ABINSAY, BERG, CALDWELL, EVANS, HALE, HERKES, ITO, KARAMATSU, MAGAOAY, MARUMOTO, MORITA, B. OSHIRO, M. OSHIRO, SAIKI, SHIMABUKURO, SONSON, THIELEN, TSUJI, WATERS, Chong, Green, Kahikina, Kanoho, Wakai

Current Referral: JHW, WAM

Date		Status Text
1/27/2005	H	Introduced and Pass First Reading
1/31/2005	H	Referred to JUD, FIN, referral sheet 7
2/4/2005	H	Bill scheduled to be heard by JUD on Tuesday, 02-08-05 at 2:00 pm in House conference room 325.
2/8/2005	H	The committees on JUD recommend that the measure be PASSED, WITH AMENDMENTS. The votes were as follows: 9 Ayes: Representative(s) Luke, B. Oshiro, Caldwell, Herkes, Morita, Sonson, Souki, Marumoto, Thielen; Ayes with reservations: none; 0 Noes: none; and 1 Excused: Representative(s) Kanoho.
2/17/2005	H	Reported from the committee on JUD (Stand. Com. Rep. No. 545) as amended in (HD 1), recommending passage on Second Reading and referral to the committee on FIN.
2/18/2005	H	Passed Second Reading as amended in (HD 1) and referred to the committee(s) on FIN with none voting no and Representative(s) Moses, Souki, Takumi, Tanaka excused.
2/21/2005	H	Bill scheduled to be heard by FIN on Thursday, 02-24-05 at 4:30 pm in House conference room 308.
		The committees on FIN recommend that the measure be PASSED, UNAMENDED. The votes were as follows: 16 Ayes: Representative(s) Takamine, Kawakami, Carroll, Chong, Evans, Lee, Magaoay, Nakasone,

2/24/2005	H	Nishimoto, Tanaka, Tsuji, Wakai, Yamane, Yamashita, Fox, Moses; Ayes with reservations: none; 0 Noes: none; and 3 Excused: Representative(s) Karamatsu, Meyer, Pine.
3/3/2005	H	Reported from the committee on FIN (Stand. Com. Rep. No. 790), recommending passage on Third Reading.
3/4/2005	H	Passed Third Reading as amended in (HD 1) with none voting no and Arakaki, Herkes, Saiki, Takai excused.
3/4/2005	H	Transmitted to Senate.
3/8/2005	S	Received from House (Hse. Com. No. 108).
3/8/2005	S	Passed First Reading.
3/8/2005	S	Deferred until 03/10/05.
3/10/2005	S	Referred to JHW, WAM.
3/17/2005	S	The committee(s) on JHW has scheduled a public hearing on 03-21-05 at 9:00 am in conference room 229.
3/21/2005	S	The committee on JHW deferred the measure until 03-22-05 at 9:30 am in conference room 229.
3/22/2005	S	The committee(s) on JHW recommend(s) that the measure be PASSED, WITH AMENDMENTS. The votes in JHW were as follows: 6 Aye(s): Senator(s) Hanabusa, Hee, Chun Oakland, English, Ihara, Whalen; Aye(s) with reservations: none ; 0 No(es): none; and 0 Excused: none.
3/24/2005	S	Reported from JHW (Stand. Com. Rep. No. 1219) with recommendation of passage on Second Reading, as amended (SD 1) and referral to WAM.
3/24/2005	S	Report adopted; Passed Second Reading, as amended (SD 1) and referred to WAM.
3/28/2005	S	The committee on WAM has scheduled a decision making hearing on 03-31-05 at 9:00 am in conference room 211.
3/31/2005	S	The committee on WAM recommend(s) that the measure be PASSED, WITH AMENDMENTS. The votes in WAM were as follows: 13 Aye(s): Taniguchi, Tsutsui, English, Espero, Hooser, Inouye, Kim, Kokubun, Nishihara, Sakamoto, Hemmings, Slom, Trimble; Aye(s) with reservations: none ; 0 No(es): none; and 2 Excused: Fukunaga, Kanno.
4/8/2005	S	Reported from WAM (Stand. Com. Rep. No. 1535) with recommendation of passage on Third Reading, as amended (SD 2).
4/8/2005	S	48 Hrs. Notice 04-12-05.
4/12/2005	S	Passed Third Reading, as amended (SD 2). Ayes, 25; Aye(s) with reservations: none . Noes, 0 (none). Excused, 0 (none). Transmitted to House.
4/12/2005	H	Returned from Senate (Sen. Com. No. 638) in amended form (SD 2).
4/14/2005	H	House disagrees with Senate amendment (s).
4/15/2005	S	Received notice of disagreement (Hse. Com. No. 606).
4/18/2005	H	House conferees appointed: Luke, Lee Co-Chairs; Thielen.
		Senate Conferees appointed: Hanabusa, Chair; Taniguchi, Co-Chair(s); Hee,

4/18/2005	S	Tsutsui, Whalen.
4/18/2005	H	Received notice of Senate conferees (Sen. Com. No. 717).
4/19/2005	H	Bill scheduled for Conference Committee Meeting on Wednesday, 04-20-05 at 2:00 pm in conference room 325.
4/20/2005	S	Received notice of appointment of House conferees (Hse. Com. No. 662).
4/21/2005	H	Conference Committee Meeting will reconvene on Friday 04-22-05 at 2:00 pm in conference room 325.
4/23/2005	H	Conference Committee Meeting will reconvene on Monday 04-25-05 at 2:00 pm in conference room 325.
4/25/2005	H	Conference Committee Meeting will reconvene on Tuesday 04-26-05 at 2:00 pm in conference room 325.
4/26/2005	H	Conference Committee Meeting will reconvene on Thursday 04-28-05 at 2:00 pm in conference room 325.
4/28/2005	H	The House Conference Managers recommend to agree to the Senate Amendments. The votes were as follows: 3 Ayes: Representative(s) Luke, Lee, Thielen; Ayes with reservations: none; 0 Noes: none; and 0 Excused: none.
5/3/2005	H	Reconsideration of action taken on 04/14/05.
5/5/2005	S	Received notice of House reconsideration of action in disagreeing to the amendments proposed by the Senate (Hse. Com. No. 789).
5/5/2005	H	House agrees to Senate amendment(s).
5/5/2005	H	Passed Final Reading as amended in (SD 2) with none voting no and none excused.
5/5/2005	H	Transmitted to Governor.
5/9/2005	S	Received notice of House agreement and passage on Final Reading (Hse. Com. No. 798).
7/6/2005	S	Act 200, 7/6/2005 (Gov. Msg. No. 1021).
7/6/2005	H	Act 200, on 7/6/2005 (Gov. Msg. No. 401).

$ = Appropriation measure
ConAm = Constitutional Amendment

Report Title:

Electronic Voting; Requirements; Election Fraud

Description:

Prohibits use of electronic voting system unless system generates a paper ballot; establishes conditions that allow chief election officer to rely on electronic tallies created by electronic voting system. Adds causing an electronic voting system to inaccurately record votes cast as election fraud.

HOUSE OF REPRESENTATIVES

TWENTY-THIRD LEGISLATURE, 2005

STATE OF HAWAII

H.B. NO. 1740

A BILL FOR AN ACT

relating to electronic voting.

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

SECTION 1. Section 16-42, Hawaii Revised Statutes, is amended to read as follows:

"**§16-42 Electronic voting requirements.** (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections the equipment shall reject all votes for an office when the number of votes therefor exceeds the number [~~which~~] that the voter is entitled to cast.

No electronic voting system shall be used in any election unless it generates a paper ballot that may be inspected and corrected by the voter before the vote is cast, and every paper ballot is retained as the definitive record of the vote cast.

(b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system, only if:

(1) The electronic voting system is subject to public inspection, audit, and experimental testing, before the election, pursuant to administrative rules;

(2) No upgrades, patches, fixes, or alterations of any sort are

applied to the system after the public inspection, audit, and experimental testing, through sixty days after the election;

(3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; and

(4) If discrepancies appear in the pre-certification audits in (3), the chief election officer, pursuant to rules adopted to implement this section, shall immediately conduct an expanded audit to determine the extent of misreporting in the system."

SECTION 2. Section 19-3, Hawaii Revised Statutes, is amended to read as follows:

"**§19-3 Election frauds.** The following persons shall be deemed guilty of an election fraud:

(1) Every person who, directly or indirectly, personally or through another, gives, procures, or lends, or agrees or offers to give, procure, or lend, or who endeavors to procure, any money or office or place of employment or valuable consideration to or for any elector, or to or for any person for an elector, or to or for any person in order to induce any elector to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, or who does any such act on account of any person having voted or refrained from voting for any particular person at any election;

(2) Every person who advances or pays, or causes to be paid, any money to, or to the use of, any other person, with the intent that the money, or any part thereof, shall be expended in bribery at any election, or for any purpose connected with or incidental to any election; or who knowingly pays or causes to be paid any money to any person in the discharge or repayment of any money wholly or partly expended in bribery at any election, or for any purpose connected with or incidental to any election;

(3) Every elector who, before, during or after any election, directly or indirectly, personally or through another, receives, agrees, or contracts for any money, gift, loan, or valuable consideration, office, place, or employment for oneself or any other person for voting or agreeing to vote, or for refraining to vote or agreeing to refrain from voting, or for voting or refraining to vote for any particular person or party;

(4) Every person who, directly or indirectly, personally or through another, makes use of, or threatens to make use of, any force, violence, or restraint; or inflicts or threatens to inflict any injury, damage, or loss in any manner, or in any way practices intimidation upon or against any person in order to induce or compel the person to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, at any election, or on account of the person having voted or refrained from voting, or voted or refrained from voting for any particular person or party; or who by abduction, distress, or any device or contrivance impedes, prevents, or otherwise interferes with the free exercise of the elective franchise;

(5) Every person who, at any election, votes or attempts to vote in the name of any other person, living or dead, or in some fictitious name, or who, having once voted, votes or attempts to vote again, or knowingly gives or attempts to give more than one ballot for the same office at one time of voting;

(6) Every person who, before or during an election, knowingly publishes a false statement of the withdrawal of any candidate at the election;

(7) Every person who induces or procures any person to withdraw from being a candidate at an election in consideration of any payment or gift or valuable consideration; or of any threat; and every candidate who withdraws from being a candidate in pursuance of such inducement or procurement;

(8) Every public officer by law required to do or perform any act or thing with reference to any of the provisions in any law concerning elections who wilfully fails, neglects, or refuses to do or perform the same, or who is guilty of any wilful violation of any of the provisions thereof; [~~and~~]

(9) Any person wilfully tampering or attempting to tamper with, disarrange, deface, or impair in any manner whatsoever, or destroy any voting machine while the same is in use at any election, or who, after the machine is locked in order to preserve the registration or record of any election made by the same, tampers or attempts to tamper with any voting machine[~~.~~]; and

(10) Every person who, directly or indirectly, personally or through another, wilfully designs, alters, accesses, or programs any electronic voting system to cause the system to inaccurately record, tally, or report votes cast on the electronic voting system."

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

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

INTRODUCED BY: _____

Report Title:

Electronic Voting; Requirements; Election Fraud

Description:

Prohibits use of electronic voting system unless the system generates a paper ballot that may be inspected and corrected, and unless every ballot is retained as a definitive record; allows the chief election officer to rely on electronic tallies created by electronic voting systems under certain conditions; establishes that every person who causes electronic voting systems to record, tally, or report votes inaccurately shall be deemed guilty of election fraud; appropriates funds for costs incurred in acquiring technology to create a paper trail for electronic ballots. (HB1740 HD1)

HOUSE OF REPRESENTATIVES

TWENTY-THIRD LEGISLATURE, 2005

STATE OF HAWAII

H.B. NO. 1740 H.D. 1

A BILL FOR AN ACT

relating to electronic voting.

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

SECTION 1. Section 16-42, Hawaii Revised Statutes, is amended to read as follows:

"**§16-42 Electronic voting requirements.** (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections, the equipment shall reject all votes for an office when the number of votes therefor exceeds the number [~~which~~] that the voter is entitled to cast.

No electronic voting system shall be used in any election unless it generates a paper ballot that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot is retained as the definitive record of the vote cast.

(b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system, only if the chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that

the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; provided that if discrepancies appear in the post-election, pre-certification audits, the chief election officer, pursuant to rules adopted to implement this section, shall immediately conduct an expanded audit to determine the extent of misreporting in the system."

SECTION 2. Section 19-3, Hawaii Revised Statutes, is amended to read as follows:

"**§19-3 Election frauds.** The following persons shall be deemed guilty of an election fraud:

(1) Every person who, directly or indirectly, personally or through another, gives, procures, or lends, or agrees or offers to give, procure, or lend, or who endeavors to procure, any money or office or place of employment or valuable consideration to or for any elector, or to or for any person for an elector, or to or for any person in order to induce any elector to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, or who does any such act on account of any person having voted or refrained from voting for any particular person at any election;

(2) Every person who advances or pays, or causes to be paid, any money to, or to the use of, any other person, with the intent that the money, or any part thereof, shall be expended in bribery at any election, or for any purpose connected with or incidental to any election; or who knowingly pays or causes to be paid any money to any person in the discharge or repayment of any money wholly or partly expended in bribery at any election, or for any purpose connected with or incidental to any election;

(3) Every elector who, before, during or after any election, directly or indirectly, personally or through another, receives, agrees, or contracts for any money, gift, loan, or valuable consideration, office, place, or employment for oneself or any other person for voting or agreeing to vote, or for refraining to vote or agreeing to refrain from voting, or for voting or refraining to vote for any particular person or party;

(4) Every person who, directly or indirectly, personally or through another, makes use of, or threatens to make use of, any force, violence, or restraint; or inflicts or threatens to inflict any injury, damage, or loss in any manner, or in any way practices intimidation upon or against any person in order to induce or compel the person to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, at any election, or on account of the person having voted or refrained from voting, or voted or refrained from voting for any particular person or party; or who by abduction, distress, or any device or contrivance impedes, prevents, or otherwise interferes with the free exercise of the elective franchise;

(5) Every person who, at any election, votes or attempts to vote in the name of any other person, living or dead, or in some fictitious name, or who, having once voted, votes or attempts to vote again, or knowingly gives or attempts to give more than one ballot for the same office at one time of voting;

(6) Every person who, before or during an election, knowingly publishes a false statement of the withdrawal of any candidate

at the election;

(7) Every person who induces or procures any person to withdraw from being a candidate at an election in consideration of any payment or gift or valuable consideration; or of any threat; and every candidate who withdraws from being a candidate in pursuance of such inducement or procurement;

(8) Every public officer by law required to do or perform any act or thing with reference to any of the provisions in any law concerning elections who wilfully fails, neglects, or refuses to do or perform the same, or who is guilty of any wilful violation of any of the provisions thereof; [~~and~~]

(9) Any person wilfully tampering or attempting to tamper with, disarrange, deface, or impair in any manner whatsoever, or destroy any voting machine while the same is in use at any election, or who, after the machine is locked in order to preserve the registration or record of any election made by the same, tampers or attempts to tamper with any voting machine[~~.~~]; and

(10) Every person who, directly or indirectly, personally or through another, wilfully designs, alters, accesses, or programs any electronic voting system to cause the system to inaccurately record, tally, or report votes cast on the electronic voting system."

SECTION 3. There is appropriated out of the general revenues of the State of Hawaii the sum of $ or so much thereof as may be necessary for fiscal year 2005-2006 for costs incurred in purchasing or otherwise acquiring technology necessary to provide paper ballots as specified in section 1 of this Act.

The sum appropriated shall be expended by the office of elections for the purposes of this Act.

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval, provided that section 3 shall take effect on July 1, 2005.

Report Title:

Electronic Voting; Requirements; Election Fraud

Description:

Prohibits use of electronic voting system unless the system generates a paper ballot that may be inspected and corrected, and unless every ballot is retained as a definitive record; allows the chief election officer to rely on electronic tallies created by electronic voting systems under certain conditions; establishes that every person who causes electronic voting systems to record, tally, or report votes inaccurately shall be deemed guilty of election fraud; appropriates funds for costs incurred in acquiring technology to create a paper trail for electronic ballots. (SD1)

HOUSE OF REPRESENTATIVES
TWENTY-THIRD LEGISLATURE, 2005
STATE OF HAWAII

H.B. NO. 1740 H.D. 1 S.D. 1

A BILL FOR AN ACT

relating to electronic voting.

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

SECTION 1. Section 16-42, Hawaii Revised Statutes, is amended to read as follows:

"**§16-42 Electronic voting requirements.** (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections, the equipment shall reject all votes for an office when the number of votes therefor exceeds the number [~~which~~] that the voter is entitled to cast.

No electronic voting system shall be used in any election unless it generates a paper ballot that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot is retained as the definitive record of the vote cast.

(b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:

(1) The electronic voting system is subject to inspection,

audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;

(2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;

(3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; and

(4) If discrepancies appear in the pre-certification audits in paragraph (3), the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of misreporting in the system."

SECTION 2. Section 19-3, Hawaii Revised Statutes, is amended to read as follows:

"**§19-3 Election frauds.** The following persons shall be deemed guilty of an election fraud:

(1) Every person who, directly or indirectly, personally or through another, gives, procures, or lends, or agrees or offers to give, procure, or lend, or who endeavors to procure, any money or office or place of employment or valuable consideration to or for any elector, or to or for any person for an elector, or to or for any person in order to induce any elector to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, or who does any such act on account of any person having voted or refrained from voting for any particular person at any election;

(2) Every person who advances or pays, or causes to be paid, any money to, or to the use of, any other person, with the intent that the money, or any part thereof, shall be expended in bribery at any election, or for any purpose connected with or incidental to any election; or who knowingly pays or causes to be paid any money to any person in the discharge or repayment of any money wholly or partly expended in bribery at any election, or for any purpose connected with or incidental to any election;

(3) Every elector who, before, during or after any election, directly or indirectly, personally or through another, receives, agrees, or contracts for any money, gift, loan, or valuable consideration, office, place, or employment for oneself or any other person for voting or agreeing to vote, or for refraining to vote or agreeing to refrain from voting, or for voting or refraining to vote for any particular person or party;

(4) Every person who, directly or indirectly, personally or through another, makes use of, or threatens to make use of, any force, violence, or restraint; or inflicts or threatens to inflict any injury, damage, or loss in any manner, or in any way practices intimidation upon or against any person in order to induce or compel the person to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, at any election, or on account of the person having voted or refrained from voting, or voted or refrained from voting for any particular person or party; or who by abduction,

distress, or any device or contrivance impedes, prevents, or otherwise interferes with the free exercise of the elective franchise;

(5) Every person who, at any election, votes or attempts to vote in the name of any other person, living or dead, or in some fictitious name, or who, having once voted, votes or attempts to vote again, or knowingly gives or attempts to give more than one ballot for the same office at one time of voting;

(6) Every person who, before or during an election, knowingly publishes a false statement of the withdrawal of any candidate at the election;

(7) Every person who induces or procures any person to withdraw from being a candidate at an election in consideration of any payment or gift or valuable consideration; or of any threat; and every candidate who withdraws from being a candidate in pursuance of such inducement or procurement;

(8) Every public officer by law required to do or perform any act or thing with reference to any of the provisions in any law concerning elections who wilfully fails, neglects, or refuses to do or perform the same, or who is guilty of any wilful violation of any of the provisions thereof; [~~and~~]

(9) Any person wilfully tampering or attempting to tamper with, disarrange, deface, or impair in any manner whatsoever, or destroy any voting machine while the same is in use at any election, or who, after the machine is locked in order to preserve the registration or record of any election made by the same, tampers or attempts to tamper with any voting machine[~~.~~]; and

(10) Every person who, directly or indirectly, personally or through another, wilfully designs, alters, accesses, or programs any electronic voting system to cause the system to inaccurately record, tally, or report votes cast on the electronic voting system."

SECTION 3. There is appropriated out of the general revenues of the State of Hawaii the sum of $, or so much thereof as may be necessary for fiscal year 2005-2006, for costs incurred in purchasing or otherwise acquiring technology necessary to provide paper ballots as specified in section 1 of this Act.

The sum appropriated shall be expended by the department of accounting and general services for the purposes of this Act.

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval, provided that section 3 shall take effect on July 1, 2005.

Report Title:

Electronic Voting; Requirements; Election Fraud

Description:

Prohibits use of electronic voting system unless the system generates a paper ballot that may be inspected and corrected, and unless every ballot is retained as a definitive record; allows the chief election officer to rely on electronic tallies created by electronic voting systems under certain conditions; establishes that every person who causes electronic voting systems to record, tally, or report votes inaccurately shall be deemed guilty of election fraud. (SD2)

HOUSE OF REPRESENTATIVES
TWENTY-THIRD LEGISLATURE, 2005
STATE OF HAWAII

H.B. NO. 1740 H.D. 1 S.D. 2

A BILL FOR AN ACT

relating to electronic voting.

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

SECTION 1. Section 16-42, Hawaii Revised Statutes, is amended to read as follows:

"**§16-42 Electronic voting requirements.** (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections, the equipment shall reject all votes for an office when the number of votes therefor exceeds the number [~~which~~] that the voter is entitled to cast.

No electronic voting system shall be used in any election unless it generates a paper ballot that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot is retained as the definitive record of the vote cast.

(b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:

(1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before

and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;

(2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;

(3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; and

(4) If discrepancies appear in the pre-certification audits in paragraph (3), the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of misreporting in the system."

SECTION 2. Section 19-3, Hawaii Revised Statutes, is amended to read as follows:

"**§19-3 Election frauds.** The following persons shall be deemed guilty of an election fraud:

(1) Every person who, directly or indirectly, personally or through another, gives, procures, or lends, or agrees or offers to give, procure, or lend, or who endeavors to procure, any money or office or place of employment or valuable consideration to or for any elector, or to or for any person for an elector, or to or for any person in order to induce any elector to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, or who does any such act on account of any person having voted or refrained from voting for any particular person at any election;

(2) Every person who advances or pays, or causes to be paid, any money to, or to the use of, any other person, with the intent that the money, or any part thereof, shall be expended in bribery at any election, or for any purpose connected with or incidental to any election; or who knowingly pays or causes to be paid any money to any person in the discharge or repayment of any money wholly or partly expended in bribery at any election, or for any purpose connected with or incidental to any election;

(3) Every elector who, before, during or after any election, directly or indirectly, personally or through another, receives, agrees, or contracts for any money, gift, loan, or valuable consideration, office, place, or employment for oneself or any other person for voting or agreeing to vote, or for refraining to vote or agreeing to refrain from voting, or for voting or refraining to vote for any particular person or party;

(4) Every person who, directly or indirectly, personally or through another, makes use of, or threatens to make use of, any force, violence, or restraint; or inflicts or threatens to inflict any injury, damage, or loss in any manner, or in any way practices intimidation upon or against any person in order to induce or compel the person to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, at any election, or on account of the person having voted or refrained from voting, or voted or refrained from voting for any particular person or party; or who by abduction, distress, or any device or contrivance impedes, prevents, or

otherwise interferes with the free exercise of the elective franchise;

(5) Every person who, at any election, votes or attempts to vote in the name of any other person, living or dead, or in some fictitious name, or who, having once voted, votes or attempts to vote again, or knowingly gives or attempts to give more than one ballot for the same office at one time of voting;

(6) Every person who, before or during an election, knowingly publishes a false statement of the withdrawal of any candidate at the election;

(7) Every person who induces or procures any person to withdraw from being a candidate at an election in consideration of any payment or gift or valuable consideration; or of any threat; and every candidate who withdraws from being a candidate in pursuance of such inducement or procurement;

(8) Every public officer by law required to do or perform any act or thing with reference to any of the provisions in any law concerning elections who wilfully fails, neglects, or refuses to do or perform the same, or who is guilty of any wilful violation of any of the provisions thereof; [~~and~~]

(9) Any person wilfully tampering or attempting to tamper with, disarrange, deface, or impair in any manner whatsoever, or destroy any voting machine while the same is in use at any election, or who, after the machine is locked in order to preserve the registration or record of any election made by the same, tampers or attempts to tamper with any voting machine[~~.~~]; and

(10) Every person who, directly or indirectly, personally or through another, wilfully designs, alters, accesses, or programs any electronic voting system to cause the system to inaccurately record, tally, or report votes cast on the electronic voting system."

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

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

ACT 200 H.B. NO. 1740

A Bill for an Act Relating to Electronic Voting.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Section 16-42, Hawaii Revised Statutes, is amended to read as follows:

"**§16-42 Electronic voting requirements.** (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections, the equipment shall reject all votes for an office when the number of votes therefor exceeds the number [~~which~~] that the voter is entitled to cast.

No electronic voting system shall be used in any election unless it generates a paper ballot that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot is retained as the definitive record of the vote cast.

(b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:

(1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;

(2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;

(3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; and

(4) If discrepancies appear in the pre-certification audits in paragraph (3), the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of misreporting in the system."

SECTION 2. Section 19-3, Hawaii Revised Statutes, is amended to read as follows:

"**§19-3 Election frauds.** The following persons shall be deemed guilty of an election fraud:

(1) Every person who, directly or indirectly, personally or through another, gives, procures, or lends, or agrees or offers to give, procure, or lend, or who endeavors to procure, any money or office or place of employment or valuable consideration to or for any elector, or to or for any person for an elector, or to or for any person in order to induce any elector to

vote or refrain from voting, or to vote or refrain from voting for any particular person or party, or who does any such act on account of any person having voted or refrained from voting for any particular person at any election;

(2) Every person who advances or pays, or causes to be paid, any money to, or to the use of, any other person, with the intent that the money, or any part thereof, shall be expended in bribery at any election, or for any purpose connected with or incidental to any election; or who knowingly pays or causes to be paid any money to any person in the discharge or repayment of any money wholly or partly expended in bribery at any election, or for any purpose connected with or incidental to any election;

(3) Every elector who, before, during or after any election, directly or indirectly, personally or through another, receives, agrees, or contracts for any money, gift, loan, or valuable consideration, office, place, or employment for oneself or any other person for voting or agreeing to vote, or for refraining to vote or agreeing to refrain from voting, or for voting or refraining to vote for any particular person or party;

(4) Every person who, directly or indirectly, personally or through another, makes use of, or threatens to make use of, any force, violence, or restraint; or inflicts or threatens to inflict any injury, damage, or loss in any manner, or in any way practices intimidation upon or against any person in order to induce or compel the person to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, at any election, or on account of the person having voted or refrained from voting, or voted or refrained from voting for any particular person or party; or who by abduction, distress, or any device or contrivance impedes, prevents, or otherwise interferes with the free exercise of the elective franchise;

(5) Every person who, at any election, votes or attempts to vote in the name of any other person, living or dead, or in some fictitious name, or who, having once voted, votes or attempts to vote again, or knowingly gives or attempts to give more than one ballot for the same office at one time of voting;

(6) Every person who, before or during an election, knowingly publishes a false statement of the withdrawal of any candidate at the election;

(7) Every person who induces or procures any person to withdraw from being a candidate at an election in consideration of any payment or gift or valuable consideration; or of any threat; and every candidate who withdraws from being a candidate in pursuance of such inducement or procurement;

(8) Every public officer by law required to do or perform any act or thing with reference to any of the provisions in any law concerning elections who wilfully fails, neglects, or refuses to do or perform the same, or who is guilty of any wilful violation of any of the provisions thereof; [~~and~~]

(9) Any person wilfully tampering or attempting to tamper with, disarrange, deface, or impair in any manner whatsoever, or destroy any voting machine while the same is in use at any election, or who, after the machine is locked in order to preserve the registration or record of any election made by the same, tampers or attempts to tamper with any voting machine[~~.~~]; and

(10) Every person who, directly or indirectly, personally or through another, wilfully designs, alters, accesses, or programs any electronic voting

system to cause the system to inaccurately record, tally, or report votes cast on the electronic voting system."

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

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

(Approved July 6, 2005.)

Hawaii State Legislature
2005 Legislative Session

GM1021

Generated on 8/9/2005 11:26:30 AM

Measure Title: Informing the Senate that on July 6, 2005, the Governor signed the following bill into law: HB1740, HD1, SD2 (Act200)

Report Title: Act200

Description:

Package: None

Companion:

Introducer(s): None

Current Referral:

Date		Status Text
7/6/2005	S	Filed.

$ = Appropriation measure
ConAm = Constitutional Amendment

EXHIBIT B

Hawaii Revised Statute, Chapter 16 Voting Systems, HRS § 16-2, HRS § 16-41, and HRS § 16-42

HAWAII REVISED STATUTES

CHAPTER 16

PART I. GENERAL PROVISIONS

§16-2 Voting system requirements. All voting systems adopted under this chapter by the chief election officer or the legislature shall satisfy the following requirements:

(1) It shall secure to the voter secrecy in the act of voting;

(2) It shall provide for voting for all candidates of as many political parties as may make nominations, nonpartisans, and for or against as many questions as are submitted;

(3) It shall correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions. [L 1970, c 26, pt of §2]

PART IV. ELECTRONIC VOTING SYSTEM

§16-41 Definitions. "Counting center" means the computer facilities and surrounding premises designated by the chief election officer or the clerk in county elections where electronic voting system ballots are counted.

"Defective ballot" means any ballot delivered to the counting center in accordance with section 11-152 that cannot be read by the ballot reading device.

"Electronic voting system" means the method of recording votes which are counted by automatic tabulating equipment.

"Voter verifiable paper audit trail" means the paper record that constitutes a complete record of ballot selections that is verified by the voter. The record may also be used to assess the accuracy of the voting machine's electronic record and to verify the election results. [L 1970, c 26, pt of §2; am L 1975, c 36, §5(6); am L 2006, c 5, §1]

§16-42 Electronic voting requirements. (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections, the equipment shall reject all votes for an office when the number of votes therefor exceeds the number that the voter is entitled to cast.

No electronic voting system shall be used in any election unless it generates a paper ballot or voter verifiable paper audit trail that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot or voter verifiable paper audit trail is retained as the definitive record of the vote cast.

(b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:

(1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;

(2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;

(3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; and

(4) If discrepancies appear in the pre-certification audits in paragraph (3), the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of misreporting in the system. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(g); am L 1979, c 139, §12; am L 2005, c 200, §1; am L 2006, c 5, §2]

EXHIBIT C

UNCLEARBALLOT: AUTOMATED BALLOT IMAGE MANIPULATION REPORT OF 2019

UnclearBallot: Automated Ballot Image Manipulation

Matthew Bernhard(✉), Kartikeya Kandula, Jeremy Wink, and J. Alex Halderman

Department of Electrical Engineering and Computer Science, University of Michigan, Ann Arbor, USA
{matber,kartkand,jreremy,jhalderm}@umich.edu

Abstract. As paper ballots and post-election audits gain increased adoption in the United States, election technology vendors are offering products that allow jurisdictions to review ballot images—digital scans produced by optical-scan voting machines—in their post-election audit procedures. Jurisdictions including the state of Maryland rely on such image audits as an alternative to inspecting the physical paper ballots. We show that image audits can be reliably defeated by an attacker who can run malicious code on the voting machines or election management system. Using computer vision techniques, we develop an algorithm that automatically and seamlessly manipulates ballot images, moving voters' marks so that they appear to be votes for the attacker's preferred candidate. Our implementation is compatible with many widely used ballot styles, and we show that it is effective using a large corpus of ballot images from a real election. We also show that the attack can be delivered in the form of a malicious Windows scanner driver, which we test with a scanner that has been certified for use in vote tabulation by the U.S. Election Assistance Commission. These results demonstrate that post-election audits must inspect physical ballots, not merely ballot images, if they are to strongly defend against computer-based attacks on widely used voting systems.

Keywords: Optical scan · Paper ballots · Image manipulation · Drivers · Image processing

1 Introduction

Elections that cannot provide sufficient evidence of their results may fail to adequately gain public confidence in their outcomes. Numerous solutions have been posited to this problem [9], but none has been as elegant, efficient, and immediately practical as post-election audits [21,25,39]. These audits—in particular, ones that seek to limit the risk of confirming an outcome that resulted from undue manipulation—are one of the most important layers of defense for election security [32].

© Springer Nature Switzerland AG 2019
R. Krimmer et al. (Eds.): E-Vote-ID 2019, LNCS 11759, pp. 14–31, 2019.
https://doi.org/10.1007/978-3-030-30625-0_2

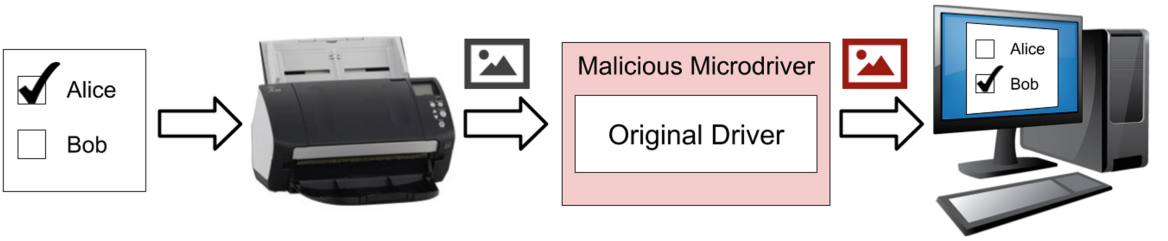


Fig. 1. Attack overview—A voter's paper ballot is scanned by a ballot tabulator, producing a digital image. Malware in the tabulator—in our proof-of-concept, a microdriver that wraps the scanner device driver—alters the ballot image before it is counted or stored. A digital audit shows only the manipulated image.

Risk-limiting audits (RLAs) rely on sampling robust, independent evidence trails created by voter-verified paper ballots. However, other types of post-election audits are gaining popularity in the marketplace. In particular, Clear Ballot, an election technology vendor in the United States, pioneered audit software designed to perform audits of *images* of ballots which have been scanned and tabulated, which we shall refer to as "image audits". Other vendors have adopted support for this kind of audit, and one U.S. state, Maryland, relies on image audits to provide assurances of its election results [33].

While image audits can help detect human error and aid in adjudicating mismarked ballots, we show that they cannot provide the same level of security assurance as audits of physical ballots. Since ballot images are disconnected from the actual source of truth—physical paper ballots—they do not necessarily provide reliable evidence of the outcome of an election under adversarial conditions.

In this paper, we present UnclearBallot, an attack that defeats image audits by automatically manipulating ballot images as they are scanned. Our attack leverages the same computer vision approaches used by ballot scanners to detect voter selections, but adds the ability to move marks from one target area to another. Our method is robust to inconsistent or invalid marks, and can be adapted to many ballot styles.

We validate our attack against a corpus of over 180,000 ballot images from the 2018 election in Clackamas County, Oregon, and find that UnclearBallot can move marks on 34% of the ballots while leaving no visible anomalies. We also test our attack's flexibility using six widely used styles of paper ballots, and its robustness to invalid votes using an established taxonomy of voter marks. As a proof-of-concept, we implement the attack in the form of a malicious Windows scanner driver, which we test using a commercial-off-the-shelf scanner certified for use in elections by the U.S. Election Assistance Commission.

UnclearBallot illustrates that post-election audits in traditional voting systems must involve rigorous examination of *physical ballots*, rather than ballot images, if they are to provide a strong security guarantee. Without an examination of the physical evidence, it will be difficult if not impossible to assure that computer-based tampering has not occurred.

The remainder of this paper is organized as follows: Sect. 2 provides background on image audits, ballot scanners, and image processing techniques we use to implement our attack. Section 3 describes the attack scenarios against optical scanners and image audits. Section 4 explains the methodology of our attack. In Sect. 5 we present data indicating that our attack can be robust to various ballot styles and voter marks. Section 6 contextualizes our attacks and discusses mitigations. We conclude in Sect. 7.

2 Background

Our attack takes advantage of two aspects of optical scanner image audits: the scanning and image processing techniques used by scanners, and the reliance on scanned images by image audits. Here we provide a brief discussion of both.

2.1 Ballot Images

Jones [23] put forth an analysis of the way that ballot scanners work, particularly the mark-sense variety that is most common today. All optical scanners currently sold to jurisdictions, as well as the vast majority of scanners used in practice in the U.S., rely on mark-sense technology [44]. Scanners first create a high-resolution image of a ballot as it is fed past a scan head. Software then analyzes the image to identify dark areas where marks have been made by the voter.[1] Once marks have been detected, systems may use template matching to translate marks into votes for specific candidates, typically relying on a barcode or other identifier on the ballot that specifies a ballot style to match to the scanned image.

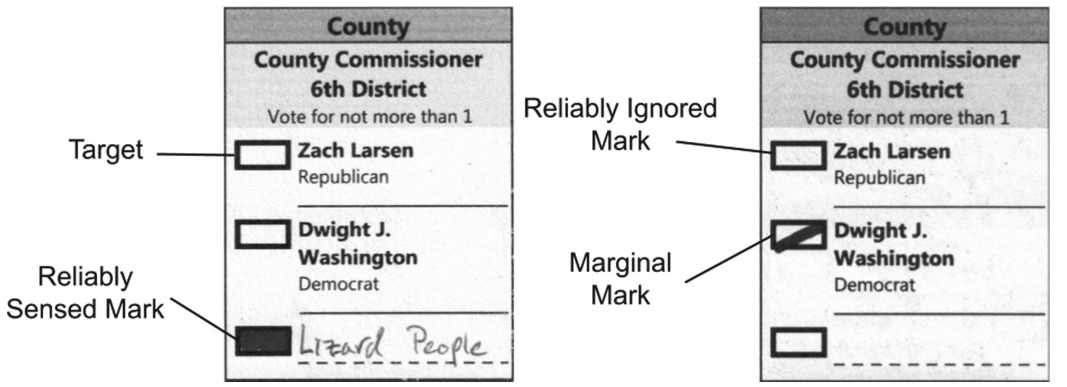


Fig. 2. Terms for parts of a marked ballot, following Jones [23].

Detecting and interpreting voter marks can be a difficult process, as voters exhibit a wide range of marking and non-marking behavior, including not filling

[1] The details of how marks are identified vary by hardware and scanning algorithm. See [13] for an example.

in targets all the way, resting their pens inside targets, or marking outside the target. The terms Jones developed to refer to the ballot and marks are illustrated in Fig. 2. Marks that adequately fill the target and are unambiguously interpreted as votes by the scanner are called *reliably sensed* marks, and targets that are unambiguously not filled and therefore not counted are *reliably ignored* marks. Marks of other types are deemed *marginal*, as a scanner may read or ignore them. Moreover, whether a mark should be counted as a vote is frequently governed by local election statute, so some marginal marks may be unambiguously counted or ignored under the law, even if not by the scanner.

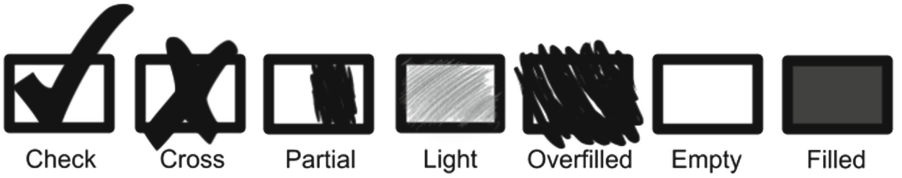


Fig. 3. Taxonomy of voter marks adapted from Bajcsy [2], including the five leftmost marks that may be considered marginal marks.

Bajcsy et al. [2] further develops a systematization of marginal marks and develops some improvements on mark-detection algorithms to better account for them. An illustration of Bajcsy et al.'s taxonomy is shown in Fig. 3. Ji et al. [22] discuss different types of voter marks as applied to write-in votes, as well as developing an automated process for detecting and tabulating write-in selections.

2.2 Image Audits

Risk-limiting post-election audits rely on physical examination of a statistical sample of voter-marked ballots [24,26,39,40]. However, this can create logistical challenges for election officials, which has prompted some to propose relaxations to traditional audit requirements. To reduce workload, canvass audits and recounts in many states rely on retabulation of ballots through optical scanners (see the 2016 Wisconsin recount, for example [31]).

Some election vendors take retabulation audits a step further: rather than physically rescan the ballots, the voting system makes available images of all the ballots for independent evaluation after the election [15,16,42].[2] While the exact properties of these kinds of image audits vary by vendor, they typically rely on automatically retabulating all or some images of cast ballots, as well as electronic adjudication for ballots with marginal marks. These "audits" never examine the physical paper trail of ballots, which our attack exploits.

Several jurisdictions have relied on these image audits, including Cambridge, Ontario, which used Dominion's AuditMark [17], and the U.S. state of Maryland,

[2] While the review is made available to the public, the actual images themselves are seldom published in full out of concern for voter anonymity.

which uses Clear Ballot's ClearAudit [28]. Maryland has also codified image audits into its election code, requiring that an image audit be performed after every election [27].

3 Attack Scenarios

Elections in which voters make their selections on a physical ballot are frequently held as the gold standard for conducting a secure election [32]. However, the property that contributes most to their security, software independence [34], only exists if records computed by software are checked against records that cannot be altered by software without detection. Image audits enable election officials to view images of ballots and compare them with the election systems' representation of the particular ballot they are viewing (called a cast vote record or CVR). While these two trails of evidence may be independent from each other (for example, Clear Ballot's ClearAudit [15] technology can be used to audit a tabulation performed by a different election system altogether), they are not software independent. A clever attacker can exploit the reliance on software by both evidence trails to defeat detection.

To surreptitiously change the outcome of the election in the presence of an image audit, the attacker must alter both the tabulation result as well as the ballot images themselves. Researchers have documented numerous vulnerabilities that would allow an attacker to infect voting equipment and change tabulation results (see [10,20,30] among others), so we focus on the feasibility of manipulating ballot images once an attacker has successfully infected a machine where they are stored or processed.

The most straightforward attack scenario occurs when the ballot images are created by the same equipment that produces the CVR. In this case, the attacker can simply infect the scanner or tabulator with malware that corrupts both the CVR and the images at the same time. The attack could change the image before the tabulator processes it to generate the CVR, or directly alter both sets of records.

In some jurisdictions, the ballot images that are audited are collected in a separate process from tabulation—that is, by scanning the ballots again, as in Maryland's use of ClearAudit from 2016 [28]. In this case, the adversary has to separately attack both processes, and has to coordinate the cheating to avoid mismatches between the initial tally and the altered ballot images.

Depending on the timing of the audit, manipulation of ballot images need not be done on the fly. For example, if the ballot images are created during tabulation but the image audit does not occur until well after the election, an attacker could modify the ballot images while they are in storage.

For ease of explication, the discussion that follows assumes that ballot images are created at the time of tabulation, in a single scan. The attack we develop targets a tabulation machine and manipulates each ballot online as it is scanned.

4 Methodology

To automatically modify ballot images, an attacker can take a few approaches. One approach would be to completely replace the ballot images with ballots filled in by the attacker. However, this risks being detected if many ballots have the same handwriting, and requires sneaking these relatively large data files into the election system without being detected. For these reasons, we investigate an alternative approach: automatically and selectively doctoring the ballot scans to change the vote selections they depict.

For the attack to work successfully, we need to move voter marks to other targets without creating visible artifacts or inconsistencies. We must be able to dynamically detect target areas and marks, alter marks in a way that is consistent with the voter's other marks, and do so in a way that is undetectable to the human eye. However, there is a key insight that works in the adversary's favor: an attacker seeking to alter election results does not have to be able to change *all* ballots undetectably, only sufficiently many to swing the result. This means that the attacker's manipulation strategy is not required to be able to change *every* mark—it merely has to reliably detect *which* marks it can safely alter and change enough of them to decide the election result.

4.1 Reading the Ballot

To interpret ballot information, we rely on the same techniques that ballot scanners use to convert paper ballots into digital representations. Attackers have access to the ballot templates, as jurisdictions publish sample ballots well ahead of scheduled elections. Using template matching, an attacker does not have to perform any kind of sophisticated character recognition, they simply have to find target areas and then detect which of the targets are filled.

Our procedure to read a ballot is illustrated in Fig. 4. First, we perform template matching to extract each individual race within a ballot. Next, we use OpenCV's [11] implementation of the Hough transform to detect straight lines that separate candidates and break the race into individual panes for each candidate. Notably, the first candidate in each race may have the race title and extra information in it (see Fig. 4c), which is cropped out based on white space.

Target areas are typically printed on the ballot as either ovals or rectangles. To detect them, we construct a bounding box around the target by scanning horizontally from the left of the race and then vertically from the bottom up, and compute pixel density values. The bounds are set to the coordinates where the density values first increase and last decrease. Once we have detected all the target areas, we compute the average pixel density of the area within the bounding box to determine whether or not a target area is marked. We then use our template to convert marks into votes for candidates.

4.2 Changing Marks

Once we have identified which candidate was marked by the voter, we can move the mark to one of the other target locations we identified. If the vote is for a

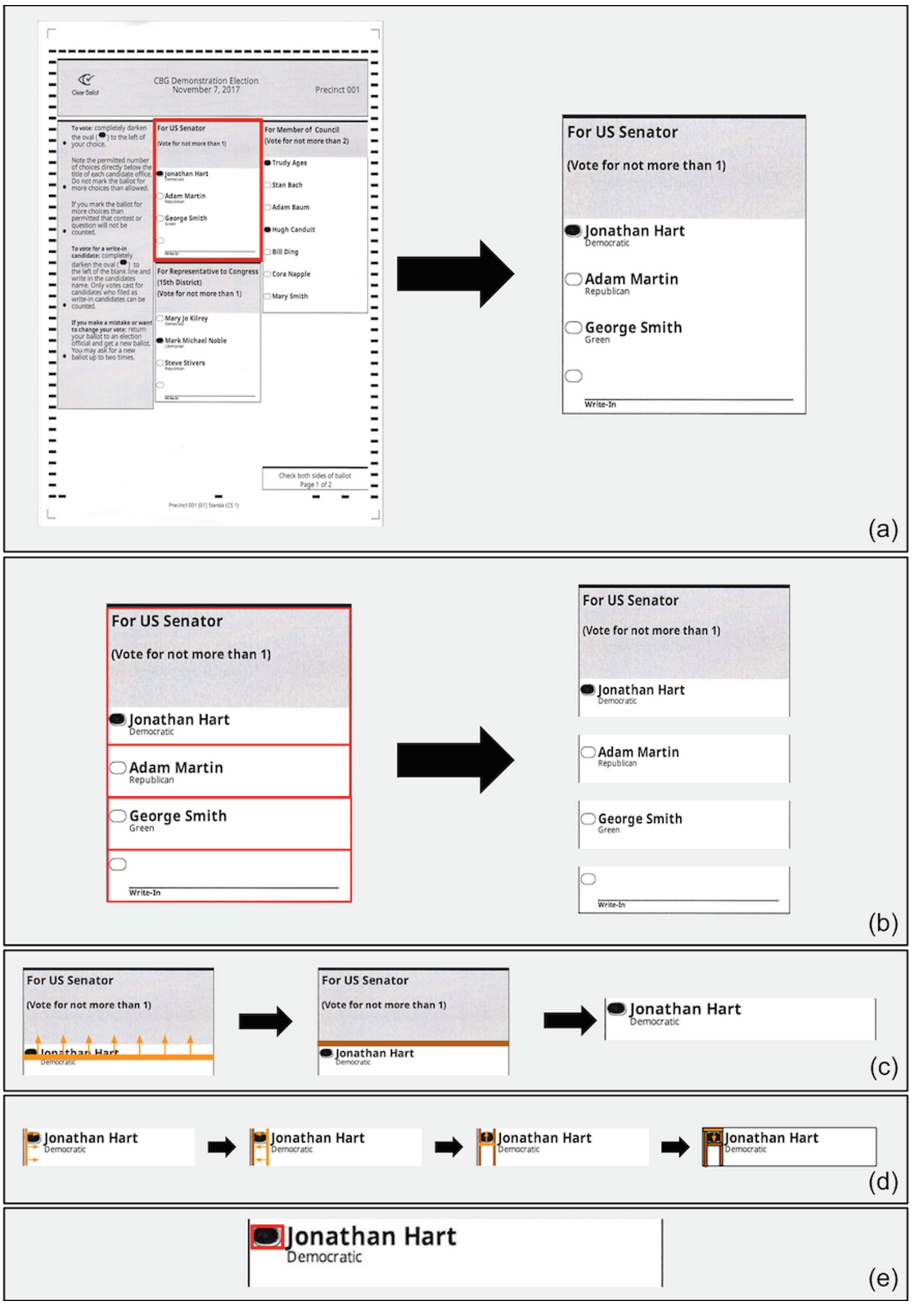


Fig. 4. Ballot manipulation algorithm—First, (a) we apply template matching to extract the race we intend to alter. Then, (b) we use Hough line transforms to separate each candidate. If the first candidate has a race title box, (c) we remove it by computing the pixel intensity differences across a straight line swept vertically from the bottom. For each candidate, (d) we identify the target and mark (if present) by doing four linear sweeps and taking pixel intensity. Finally, (e) we identify and move the mark. At each step we apply tests to detect and skip ballots where the algorithm might leave artifacts.

candidate the attacker would like to receive fewer votes—or if it is not a vote for a candidate they would like to win—the attacker can simply swap the pixels within the bounding boxes of the voter's marked candidate and an unmarked candidate. By moving marks on each ballot separately, we ensure that the voter's particular style of filling in an oval is preserved and consistent across the ballot. Figure 5 shows some marks swapped by our algorithm, and how the voters original mark is completely preserved in the process.

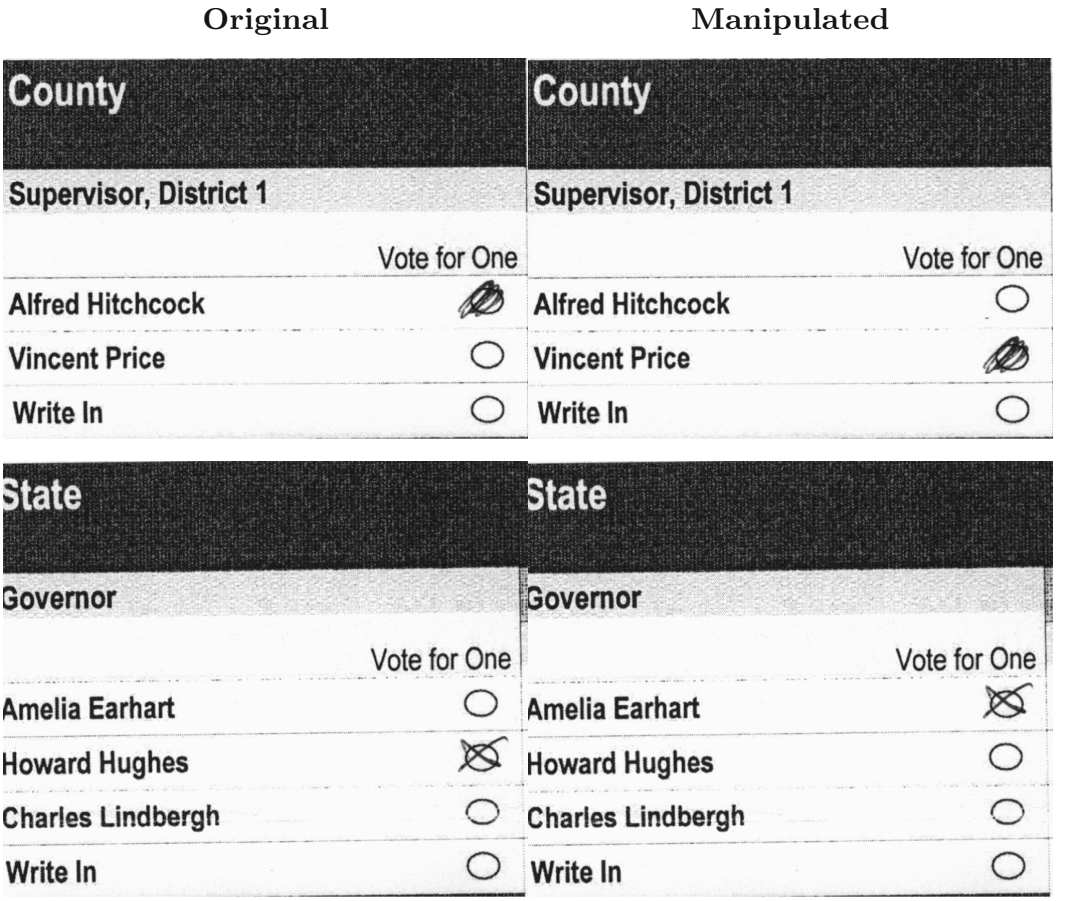


Fig. 5. Automatically moving voter marks—UnclearBallot seamlessly moves marks to the attacker's preferred candidate while preserving the voter's marking style. It is effective for a wide variety of marks and ballot designs. In the examples above, original ballot scans are shown on the left and manipulated images on the right.

4.3 UnclearBallot

To illustrate the attack, we created UnclearBallot, a proof-of-concept implementation packaged as a malicious Windows scanner driver, which consists of 398 lines of C++ and Python. We tested it with a Fujistu fi-7180 scanner (shown in Fig. 6), which is federally certified for use in U.S. elections as part of Clear Ballot's ClearVote system [43]. These scanners are typically used to handle small

Fig. 6. The **Fujitsu fi-7180 scanner** we used to test our attack has been certified by the U.S. Election Assistance Commission for use in voting systems. Our proof-of-concept implementation is a malicious scanner driver that alters ballots on the fly.

volumes of absentee ballots, and must be attached to a Windows workstation that runs the tabulation software.

The UnclearBallot driver wraps the stock scanner driver and alters images from the scanner before they reach the election management application. We chose this approach for simplicity, as the Windows driver stack is relatively easy to work with, but the attack could also be implemented at other layers of the computing stack. For instance, it could be even harder to detect if implemented as a malicious change to the scanner's embedded firmware. Alternatively, it could be engineered as a modification to the tabulation software itself.

Once a ballot is scanned, the resulting bitmap is sent to our image processing software, which manipulates the ballot in the way described in Sect. 4.1. Prior to the election, the attacker specifies the ballot template, which race they would like to affect, and by how much. While ballots are being scanned, the software keeps a running tally of the actual ballot results, and changes ballot images on the fly to achieve the desired election outcome. To avoid detection, attackers can specify just enough manipulated images so that the race outcome is changed.

5 Evaluation

We evaluated the performance and effectiveness of UnclearBallot using two sets of experiments. In the first set of experiments, we marked different ballot styles by hand using types of marks taxonomized by Bajcsy et al. [2]. In the second set of experiments, we processed 181,541 ballots from the 2018 election in Clackamas County, Oregon.

5.1 Testing Across Ballot Styles

In order for our application to succeed at its goal (surreptitiously changing enough scanned ballots to achieve a chosen election outcome), it must be able to detect marks that constitute valid votes as well as distinguish marks which would be noticeable if moved. The marks in the latter case represent a larger

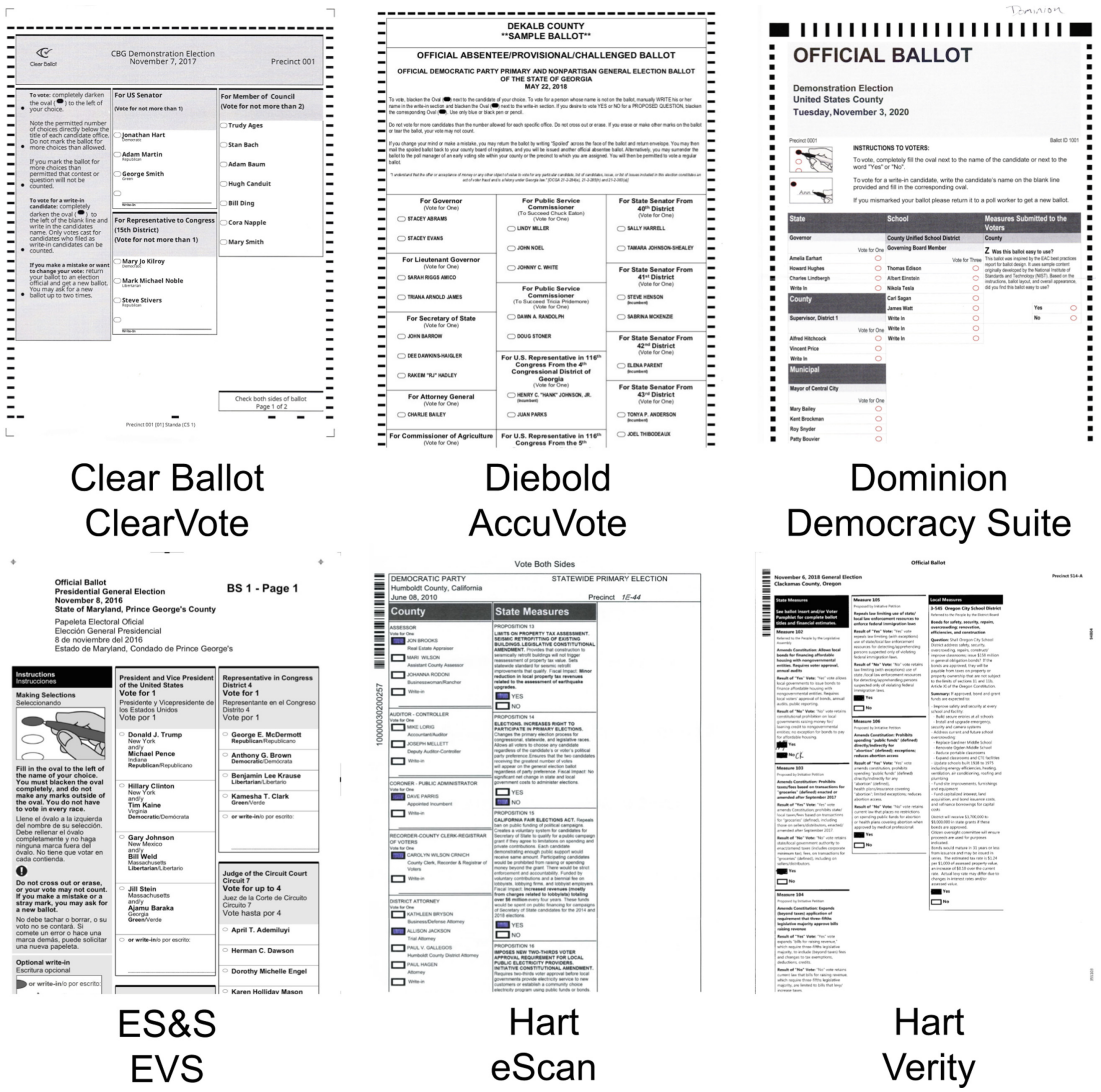


Fig. 7. Ballots Styles—We tested ballot designs from five U.S. voting system vendors: Clear Ballot, Diebold, Dominion, ES&S, and Hart (two styles, eScan and Verity).

set than just marginal marks, as they may indeed be completely valid votes, but considered invalid by our mark-moving algorithm. For example, if we were to swap the targets on a ballot where the user put a check through their target, we may leave a significant percentage of the check around the original target when swapping. The same applies for marked ballots where the filled in area extends into the candidate's name, which could lead our algorithm to swap over parts of the candidate's name when manipulating the image.

To detect anomalies for invalid ballots, we leverage the same intensity checking algorithm that first found the marked areas. The program checks if the width or height is abnormally large, which would indicate an overfilled target, as well as if there are too few or too many areas of high intensity, which would indicate no target or too many targets are filled out. If the program detects an invalid ballot, it will not be modified by the program.

Table 1. Performance of UnclearBallot—We tested how accurately our software could manipulate voter marks for a variety of ballot styles using equal numbers of invalid and valid marks. The table shows how often the system skipped a mark, successfully altered one, or erroneously created artifacts we deemed to be visible upon manual inspection. We also report the mean processing time for successfully manipulated races, excluding template matching.

Ballot style	Invalid marks			Valid marks			Time/Success
	Skipped	Success	Failure	Skipped	Success	Failure	
Clear Ballot	55	5	0	26	34	0	25 ms
Diebold	60	0	0	6	54	0	11 ms
Dominion	38	22	0	7	53	0	30 ms
ES&S	52	8	0	29	31	0	54 ms
Hart (eScan)	60	0	0	38	22	0	46 ms
Hart (Verity)	60	0	0	27	33	0	21 ms

To show our attack is replicable on a variety of different ballot styles, we modified our program to work on six different sample ballot styles, shown in Fig. 7. The ballots we tested come from the four largest election vendors in the U.S. (ES&S, Hart InterCivic, Dominion, and Clear Ballot), as well as two older styles of ballots from Hart and Diebold.

Our first experiment was designed to characterize the technique's effectiveness across a range of ballot styles and with both regular and marginal marks. We prepared 720 marked contests, split evenly among the six ballot styles shown in Fig. 7. For each style, we marked 60 contests with what Bajcsy [2] calls "Filled" marks, i.e. reliably detected marks that should be moved by our attack. We marked another 60 ballots in each ballot style with marginal marks, ten each for the five kinds of marginal marks shown in Fig. 2 and ten empty marks.

Because the runtime of the template matching step of our algorithm is highly dependent on customization for the particular races on a ballot, we opted to skip it for this experiment. Rather than marking full ballots, we marked cropped races from each ballot style and then ran them through our program. We then manually checked to ensure that the races the program moved were not detectable by inspection. Results for these experiments are shown in Table 1.

Despite rejecting some valid ballots, our program is still able to confidently swap a majority of valid votes. In a real attack, only a small percentage of votes would need to actually be modified, a task easily accomplished by our program. Our program also correctly catches all votes that we have deemed invalid for swapping. This would make it unlikely to be detected in an image audit.

Dominion ballots saw a much higher rate of invalid mark moving, and Diebold and Dominion ballots saw a much higher rate of valid mark moving. This is likely due to the placement of targets: on the Dominion ballots, the mark is right justified, separating it significantly from candidate label information, as can be seen in Fig. 7. Similarly, the Diebold ballot provides more space around

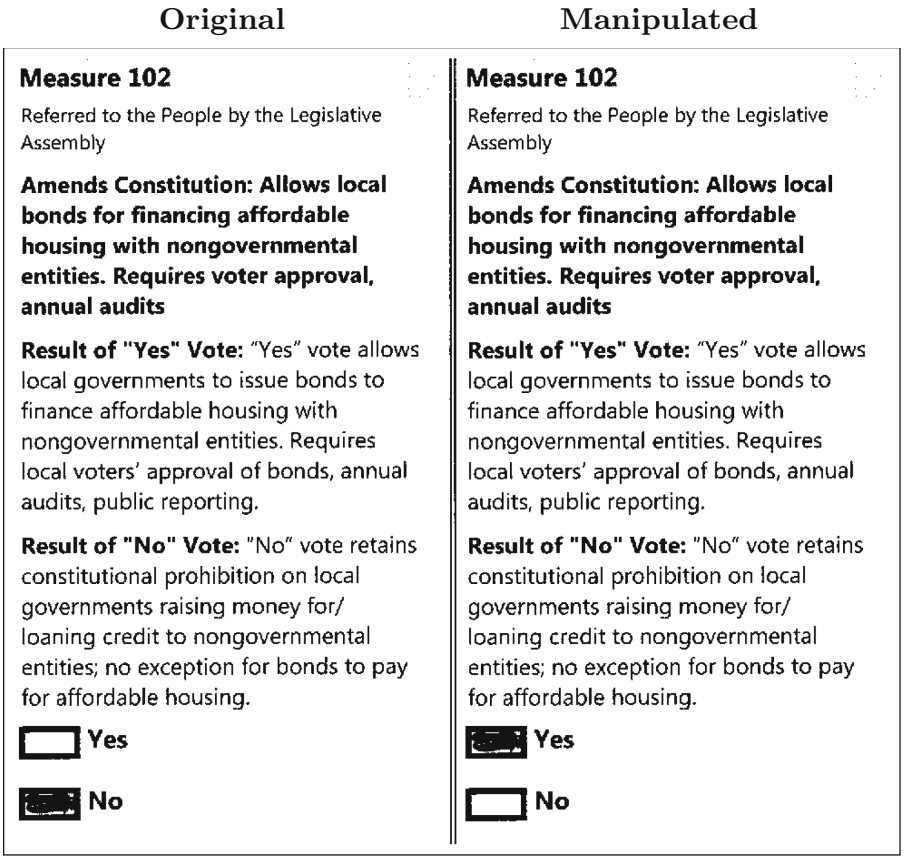


Fig. 8. Attacking Real Ballots—Using 181,541 images of voted ballots from Clackamas County, Oregon, we attempted to change voters' selections for the ballot measure shown above. UnclearBallot determined that it could safely alter 34% of the ballots. For reference, Measure 102 passed by a margin of 5%, well within range of manipulation [14]. We inspected 1,000 of them to verify that the manipulation left no obvious artifacts.

the target and less candidate information that can be intercepted by marks, which would cause Unclear Ballot to skip moving the mark.

In an online attack scenario (such as if a human is waiting to see the output from the scanner), the attacker needs to be able to modify ballot scans quickly enough not to be noticed. Factors which might affect how quickly our program can process and manipulate ballots include ballot style, layout, and type of mark. During the accuracy experiment just described, we collected timing data for successfully manipulated ballot, and report the results in Table 1. The results show that after the target race has been extracted, the algorithm completes extremely quickly for all tested ballot styles. We present additional timing data at the end of the following section.

5.2 Testing with Real Voted Ballots

To assess the effectiveness of UnclearBallot in a real election, we used a corpus of scans of 181,541 real ballots from the November 6, 2018, General Election

in Clackamas County, Oregon, which were made available by Election Integrity Oregon [18]. Like all of Oregon, Clackamas County uses vote-by-mail as its primary voting method, and votes are centrally counted using optical scanners. All images were Hart Verity-style ballots, as shown in Fig. 7.

We selected a ballot measure that appeared on all the ballots (Fig. 8) and attempted to change each voter's selection. UnclearBallot rejected 20,117 (11%) of the ballots because it could not locate the target contest. We examined a subset of the rejected ballots and found that they contained glitches introduced during scanning (such as vertical lines running the length of the ballot), which interfered with the Hough transform.

To simulate a real attacker, we configured UnclearBallot with conservative parameters, so that it would only modify marks when there was high confidence that the alteration would not be noticeable. As a result, it would only manipulate marks that were nearly perfectly filled in. In most cases, marks that were skipped extended well beyond the target, but the program also skipped undervotes, overvotes, or mislabeled scans. Under these parameters, the program altered the target contest in 62,400 (34%) of the ballot images.

Two authors independently inspected a random sample of 1,000 altered ballots to check whether any contained artifacts that would be noticeable to an attentive observer. Such artifacts might include marks which were unnaturally cut off, visible discontinuities in pixel darkness (i.e. dark lines around moved marks), and so on. If these artifacts were seen during an audit, officials might recheck all of the physical ballots and reverse the effects of the attack. None of the altered ballots we inspected contained noticeable evidence of manipulation.

We also collected timing data while processing Clackamas County ballots. Running on a system with a 4-core Intel E3-1230 CPU running at 3.40 GHz with 64 GB of RAM, UnclearBallot took an average of 279 ms to process each ballot. For reference, Hart's fastest central scanner's maximum scan rate is one ballot per 352 ms [37], well above the time needed to carry out our attack.

These results show that UnclearBallot can successfully and efficiently manipulate ballot images to change real voters' marks. Moreover, the alterations likely would be undetectable to human auditors who examined only the ballot images.

6 Discussion and Mitigations

UnclearBallot demonstrates the need for a software-independent evidence trail against which election results can be checked. It shows that audits based on software which is independent from the rest of the election system is still not software independent. To date, the only robust and secure election technology that is widely used is optical-scan paper ballots with risk-limiting audits based on a robust, well-maintained, *physical* audit trail. However, image audits are not useless, and here we discuss uses for them as well as potential mitigations for our attack.

Uses for Image Audits. So long as image audits are not the sole mechanism for verifying election results, they do provide substantial benefits to election officials. Using an image audit vastly simplifies some functions of election administration, like ballot adjudication in cases where marks cannot be interpreted by scanners or are otherwise ambiguous. Image audits can be used to efficiently identify and document election discrepancies, as has occurred in Maryland where nearly 2,000 ballots were discovered missing from the audit trail in 2016 [28]. Image audits also identified a flaw in the ES&S DS850 high speed scanner, where it was causing some ballots to stick together and feed two at a time [29].

Another way to utilize image audits is a transitive audit. Methods like SOBA [8] seek to construct an audit trail using all available means of election evidence, rooting the audit in some verification of physical record. By using physical records to verify other records, like CVRs or ballot images, confidence in election outcomes can be transitively passed on to non-physical audit trails. The drawback with this kind of audit is that it usually requires the same level of work as an RLA, plus whatever work is needed to validate the other forms of evidence. However, since ballot image audits already require a low amount of effort, they may augment RLAs and provide better transparency into the auditing process.

Image audits are an augmentation and a convenience for election administration, however, and should not be viewed as a security tool. Only physical examination of paper ballots, as in a risk-limiting audit, can provide a necessary level of mitigation to manipulated election results.

End-to-end (E2E) Systems. Voting systems with rigorous integrity properties and tamper resistance such as Scantegrity [12] and Prêt à Voter [35] provide a defense to UnclearBallot. In Scantegrity, when individuals mark their ballots, a confirmation code is revealed that is tied to the selected candidate. This enables a voter to verify that their ballot collected-as-cast and counted-as-collected, as they can look up their ballot on a public bulletin board. Since each mark reveals a unique code, moving the mark would match the code with the wrong candidate, so voters would be unable to verify their ballots. If enough voters complain, this might result in our attack being detected.

Prêt à Voter randomizes the candidate order on each ballot, which creates a slightly higher barrier for our attack, as an additional template matching step would be needed to ascertain candidate order. More importantly, the candidate list is physically separated from the voter's marks upon casting the ballot, so malware which could not keep track of the correct candidate order could not successfully move marks to a predetermined candidate. Since the candidate order is deciphered via a key-sharing scheme, malicious software would have to infect a significant portion of the election system and act in a highly coordinated way to reconstruct candidate ordering. Moreover, as with Scantegrity, votes are published to a public bulletin board, so any voter could discover if their vote had not been correctly recorded.

Other E2E systems which make use of optical scanning and a bulletin board, like STAR-Vote [6], Scratch and Vote [1], and VeriScan [7], are similarly protected from attacks like UnclearBallot.

Other Mitigations. Outside of E2E, there may be other heuristic mitigations that can be easily implemented even in deployed voting systems to make our attack somewhat more difficult. As mentioned above, randomizing candidate order on each ballot increases the computation required to perform our attack. Voters drawing outside the bubbles can also defeat our attack, though this might also result in their votes not counting and may be circumvented by replacing the whole race on the ballot image with a substituted one. Collecting ballot images from a different source than the tabulator makes our attack more difficult, as votes now have to be changed in two places. Other standard computer security technologies, like secure file systems, could be used to force the attacker to alter ballot images in a way that also circumvents protections like encryption and permissions.

Detection. Technologies that detect image manipulation may also provide some mitigation. Techniques like those discussed in [3–5,38], among others, could be adapted to try to automatically detect moved marks on ballots. However, as noted by Farid [19], image manipulation detection is a kind of arms race: given a fixed detection algorithm, adversaries can very likely find a way to defeat it. In our context, an attacker with sufficient access to the voting system to implant a manipulation algorithm would likely also be able to steal the detector code. The attacker could improve the manipulation algorithm or simply use the detector as part of their mark-moving calculus: if moving a mark will trip the detector, an attacker can simply opt not to move the mark.

While a fixed and automatic procedure for detecting manipulation can provide little assurance, it remains possible that an adaptive approach to detection could be a useful part of a post-election forensics investigation. However, staying one step ahead of sophisticated adversaries would require an ongoing research program to advance the state of the art in detection methods.

A less costly and more dependable way to detect ballot manipulation detection would be to use a software independent audit trail to confirm election outcomes. This can be accomplished with risk-limiting audits, and the software independence enabled by RLAs provides other robust security properties to elections, including defending against other potential attacks on tabulation equipment and servers.

Future Work. We have only focused on simple-majority elections here, because those are the kinds of elections used by jurisdictions that do image audits. Audits of more complex election methods, like instant-runoff voting or D'Hondt, have been examined to some extent [36,41], but future work is needed into audits of these kinds of elections altogether. Because the marks made in these elections are

different than the kind we've discussed here, manipulating these ballot images may not be able to employ the same image processing techniques we have used. Additionally it may be difficult for malware to know how many marks it needs to move, since margins in complex elections are difficult to compute. We leave exploration of image manipulation of these elections to future work.

7 Conclusion

In this paper, we demonstrated an attack that defeats ballot image audits of the type performed in some jurisdictions. We presented an implementation using a real scanner, and evaluated our implementation against a set of real ballots and a set of systematically marked ballots from a variety of ballot styles. Our attack shows that image audits cannot be relied upon to verify that elections are free from computer-based interference. Indeed, the only currently known way to verify an election outcome is with direct examination of physical ballots.

Acknowledgements. The authors thank Vaibhav Bafna and Jonathan Yan for assisting in the initial version of this project. They also thank Josh Franklin, Joe Hall, Maurice Turner, Kevin Skoglund, Jared Marcotte, and Tony Adams for their invaluable feedback. We also thank our anonymous reviewers and our shepherd, Roland Wen. This material is based upon work supported by the National Science Foundation under grant CNS-1518888.

References

1. Adida, B., Rivest, R.L.: Scratch and Vote: self-contained paper-based cryptographic voting. In: ACM Workshop on Privacy in the Electronic Society, pp. 29–40 (2006)
2. Bajcsy, A., Li-Baboud, Y.S., Brady, M.: Systematic measurement of marginal mark types on voting ballots. Technical report, National Institute for Standards and Technology (2015)
3. Bayar, B., Stamm, M.C.: A deep learning approach to universal image manipulation detection using a new convolutional layer. In: Proceedings of the 4th ACM Workshop on Information Hiding and Multimedia Security, pp. 5–10. ACM (2016)
4. Bayram, S., Avcıbaş, İ., Sankur, B., Memon, N.: Image manipulation detection with binary similarity measures. In: 2005 13th European Signal Processing Conference, pp. 1–4. IEEE (2005)
5. Bayram, S., Avcibas, I., Sankur, B., Memon, N.D.: Image manipulation detection. J. Electron. Imaging **15**(4), 041102 (2006)
6. Bell, S., et al.: STAR-vote: a secure, transparent, auditable, and reliable voting system. USENIX J. Election Technol. Syst. **1**(1) (2013)
7. Benaloh, J.: Administrative and public verifiability: can we have both? In: USENIX/ACCURATE Electronic Voting Technology Workshop, EVT 2008, August 2008
8. Benaloh, J., Jones, D., Lazarus, E., Lindeman, M., Stark, P.B.: SOBA: secrecy-preserving observable ballot-level audit. In: Proceedings of USENIX Accurate Electronic Voting Technology Workshop (2011)

9. Bernhard, M., et al.: Public evidence from secret ballots. In: Krimmer, R., Volkamer, M., Braun Binder, N., Kersting, N., Pereira, O., Schürmann, C. (eds.) E-Vote-ID 2017. LNCS, vol. 10615, pp. 84–109. Springer, Cham (2017). https://doi.org/10.1007/978-3-319-68687-5_6
10. Bowen, D.: Top-to-Bottom Review of voting machines certified for use in California. Technical report, California Secretary of State (2007). https://www.sos.ca.gov/elections/voting-systems/oversight/top-bottom-review/
11. Bradski, G.: The OpenCV Library. Dr. Dobb's J. Softw. Tools **120**, 122–125 (2000)
12. Carback, R., et al.: Scantegrity II municipal election at Takoma Park: the first E2E binding governmental election with ballot privacy. In: 18th USENIX Security Symposium, August 2010
13. Chung, K.K.T., Dong, V.J., Shi, X.: Electronic voting method for optically scanned ballot, US Patent 7,077,313, 18 July 2006
14. November 6, 2018 general election. https://dochub.clackamas.us/documents/drupal/f4e7f0fb-250a-4992-918d-26c5f726de3c
15. Clear Ballot: ClearAudit. https://clearballot.com/products/clear-audit
16. Dominion Voting: Auditmark. https://www.dominionvoting.com/pdf/DD
17. Dominion Voting: Cambridge Case Study. https://www.dominionvoting.com/field/cambridge
18. Election Integrity Oregon. https://www.electionintegrityoregon.org
19. Farid, H.: Digital forensics in a post-truth age. Forensic Sci. Int. **289**, 268–269 (2018)
20. Feldman, A.J., Halderman, J.A., Felten, E.W.: Security analysis of the Diebold AccuVote-TS voting machine. In: USENIX/ACCURATE Electronic Voting Technology Workshop, EVT 2007, August 2007
21. Hall, J., et al.: Implementing risk-limiting post-election audits in California. In: 2009 Workshop on Electronic Voting Technology/Workshop on Trustworthy Elections, p. 19. USENIX Association (2009)
22. Ji, T., Kim, E., Srikantan, R., Tsai, A., Cordero, A., Wagner, D.A.: An analysis of write-in marks on optical scan ballots. In: EVT/WOTE (2011)
23. Jones, D.W.: On optical mark-sense scanning. In: Chaum, D., et al. (eds.) Towards Trustworthy Elections. LNCS, vol. 6000, pp. 175–190. Springer, Heidelberg (2010). https://doi.org/10.1007/978-3-642-12980-3_10
24. Lindeman, M., Halvorson, M., Smith, P., Garland, L., Addona, V., McCrea, D.: Principles and best practices for post-election audits, September 2008. http://electionaudits.org/files/bestpracticesfinal_0.pdf
25. Lindeman, M., Stark, P.: A gentle introduction to risk-limiting audits. IEEE Secur. Priv. **10**, 42–49 (2012)
26. Lindeman, M., Stark, P., Yates, V.: BRAVO: ballot-polling risk-limiting audits to verify outcomes. In: 2011 Electronic Voting Technology Workshop/Workshop on Trustworthy Elections (EVT/WOTE 2012). USENIX (2012)
27. Maryland House of Delegates: House Bill 1278: An act concerning election law - postelection tabulation audit. http://mgaleg.maryland.gov/2018RS/bills/hb/hb1278E.pdf
28. Maryland State Board of Elections: 2016 post-election audit report, December 2016. http://dlslibrary.state.md.us/publications/JCR/2016/2016_22-23.pdf
29. Maryland State Board of Elections: December 15, 2016 meeting minutes, December 2016. https://elections.maryland.gov/pdf/minutes/2016_12.pdf
30. McDaniel, P., Blaze, M., Vigna, G.: EVEREST: evaluation and validation of election-related equipment, standards and testing. Technical report, Ohio Secretary of State (2007). http://siis.cse.psu.edu/everest.html

31. Mebane Jr., W.R.M., Bernhard, M.: Voting technologies, recount methods and votes in Wisconsin and Michigan in 2016. In: Zohar, A., et al. (eds.) FC 2018. LNCS, vol. 10958, pp. 196–209. Springer, Heidelberg (2019). https://doi.org/10.1007/978-3-662-58820-8_14
32. National Academies of Sciences, Engineering, and Medicine: Securing the Vote: Protecting American Democracy. The National Academies Press, Washington, DC (2018). https://www.nap.edu/catalog/25120/securing-the-vote-protecting-american-democracy
33. National Conference of State Legislatures: Post-election audits, January 2019. http://www.ncsl.org/research/elections-and-campaigns/post-election-audits635926066.aspx
34. Rivest, R.: On the notion of 'software independence' in voting systems. Phil. Trans. R. Soc. A **366**(1881), 3759–3767 (2008)
35. Ryan, P.Y.A., Bismark, D., Heather, J., Schneider, S., Xia, Z.: Prêt à Voter: a voter-verifiable voting system. IEEE Trans. Inf. Forensics Secur. **4**(4), 662–673 (2009)
36. Sarwate, A.D., Checkoway, S., Shacham, H.: Risk-limiting audits and the margin of victory in nonplurality elections. Stat. Polit. Policy **4**(1), 29–64 (2013)
37. ScannerOne: Kodak i5600. http://www.scannerone.com/product/KOD-i5600.html
38. Stamm, M.C., Liu, K.R.: Forensic detection of image manipulation using statistical intrinsic fingerprints. IEEE Trans. Inf. Forensics Secur. **5**(3), 492–506 (2010)
39. Stark, P.: Conservative statistical post-election audits. Ann. Appl. Stat. **2**(2), 550–581 (2008)
40. Stark, P.: Super-simple simultaneous single-ballot risk-limiting audits. In: 2010 Electronic Voting Technology Workshop/Workshop on Trustworthy Elections (EVT/WOTE 2010). USENIX (2010)
41. Stark, P.B., Teague, V., Essex, A.: Verifiable European elections: risk-limiting audits for D'Hondt and its relatives. {USENIX} J. Election Technol. Syst. ({JETS}) **1**, 18–39 (2014)
42. Unisyn Voting Solutions: OpenElect OCS Auditor. https://unisynvoting.com/openelect-ocs/
43. U.S. Election Assistance Commission: Certificate of conformance: ClearVote 1.5, March 2019. https://www.eac.gov/file.aspx?A=zgte4IhsHz
44. Verified Voting Foundation: The Verifier: Polling place equipment (2019). https://www.verifiedvoting.org/verifier/

EXHIBIT D

CUSHNIE V. STATE
SCEC-22-0000515

8 Pages plus this Cover Sheet

August 25, 2022

Chief Clerk, Hawaii State Supreme Court
417 South King Street
Honolulu, Hawai`i 96813-2943

Dear Chief Clerk of the Hawaii Supreme Court

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS 11-74.5 to stop the certification of the 2022 Primary Election (per HRS 11-155) until a manual recount of the paper ballots of one randomly selected District in each County is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail and be compared to the computer-generated tallies in order to certify the 2022 Primary Election. Election officials failed to perform audits in accordance to HRS 16-42 and therefore, per HRS 11-155 (1), the election results cannot be certified.

§11-172 Contests for cause; generally. With respect to any election, any candidate, or qualified political party directly interested, or any thirty voters of any election district, may file a complaint in the supreme court. The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results. The complaint shall also set forth any reasons for reversing, correcting, or changing the decisions of the voter service center officials or the officials at a counting center in an election using the electronic voting system. A copy of the complaint shall be delivered to the chief election officer or the clerk in the case of county elections. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(xx); am L 1975, c 36, §1(15); am L 1991, c 9, §2; am L 2021, c 213, §31]

HRS 11-174.5 At the hearing, the court shall cause the evidence to be reduced to writing and shall give judgment, stating all findings of fact and of law. The judgment may invalidate the general, special general, special, or runoff election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the voter service center officials; or decide that a certain candidate, or certain candidates, received a majority or plurality of votes cast and were elected.

2 audits were performed for the 2022 Primary Election. Neither audit satisfied the requirements of HRS 16-42. HRS 16-42 allows the use of election machines if a random audit of the paper ballots is done to ensure the machine is accurately recording the vote on the verifiable voter paper audit trail.

The first audit that was conducted was performed on carefully preselected ballots chosen by election officials and employees of Hart inter-civic. These ballots were the first batch of ballots run through the tabulators. Machines are capable of identifying prepositioned ballots and treating them differently from other ballots. The ballots were not chosen randomly, therefore, the first audit is invalid.

The second audit was performed by comparing ballot images to the machine tallies of 2 precincts. Ballot images can be changed or manipulated by election machines. **HRS 16-42 requires the electronic tallies generated by the system in those precincts equal *hand tallies* of the paper ballots.** Attachment 2

Therefore, the second audit is invalid.

According to HRS 16-42 (b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if 3) The chief election officer conducts a post-election, pre-certification audit of a ***random*** sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal ***hand tallies*** of the paper ballots generated by the system in those precincts;

Background:
No one outside of Hart is allowed to look at the source code of the voting machines but we (the public) have to trust the results. The Counties and the State do not control the machines. The process of adding votes should not be proprietary or secret. Adding of votes is simple math. Any coding of the machines is done by employees of Hart inter-civic a company based in Austin, Texas and is not controlled by government officials. HRS 16-42 was enacted to allow the use of voting machines on the condition that audits would be performed to ensure the accuracy of vote count. The State Office of Elections did not comply with HRS 16-42. Aulii Tenn of the Office of Elections was asked if the audits performed in 2020 were conducted per the law. The answer was a tentative "we believe the audit that was conducted complied with the law". The State Office of Elections was then notified prior to the 2022 Primary Election that audits being performed on past elections did not comply with HRS 16-42. The State was asked to look at its audit procedures and make corrections to comply with the law. See communication to County of Kauai and State Office Elections attachment #1.

HRS 11-155 states that election results cannot be certified until (1) The results of the canvass of ballots conducted pursuant to chapter 16;

§11-155 Certification of results of election. On receipt of certified tabulations from the election officials concerned, the chief election officer, or county clerk in a county election, shall compile, certify, and release the election results by district and precinct after the expiration of the time for bringing an election contest. The certification shall be based on a comparison and reconciliation of the following:

(1) The results of the canvass of ballots conducted pursuant to chapter 16;
(2) The audit of records and resultant overage and underage report;
(3) The audit results of the manual audit team;
(4) The results of any mandatory recount of votes conducted pursuant to section 11-158; and
(5) All logs, tally sheets, and other documents generated during the election and in the canvass of the election results.

A certificate of election or a certificate of results declaring the results of the election as of election day shall be issued pursuant to section 11-156; provided that in the event of an overage or underage, a list of all precincts in which an overage or underage occurred shall be attached to the certificate. The number of candidates to be elected receiving the highest number of votes in any election district shall be declared to be elected. Unless otherwise provided, the term of office shall begin or end as of the close of voter service centers on election day. The position on the question receiving the appropriate majority of the votes cast shall be reflected in a certificate of results issued pursuant to section 11-156. [L 1970, c 26, pt of §2; am L 1980, c 264, §1(b); am L 1986, c 305, §3; am L 1997, c 61, §2; am L 2019, c 135, §2; am L 2021, c 213, §30]

HRS16-42 allows election machines to be used in elections if random audits of the paper ballots be done on 10 percent precincts/districts.

§16-42 Electronic voting requirements. (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections, the equipment shall reject all votes for an office

when the number of votes therefor exceeds the number that the voter is entitled to cast.

No electronic voting system shall be used in any election unless it generates a paper ballot or voter verifiable paper audit trail that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot or voter to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts

(b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:

(1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;

(2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;

(3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; and

(4) If discrepancies appear in the pre-certification audits in paragraph (3), the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of misreporting in the system. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(g); am L 1979, c 139, §12; am L 2005, c 200, §1; am L 2006, c 5, §2]

For the 2022 Primary Election, the first audits of ballots were preselected by election officials ahead of time and were not chosen randomly by election observers. Ballots were carefully preselected by election officials and prepositioned for volunteers to conduct an audit on. These ballots were the first ballots run through the tabulators. Machines can treat ballots differently if they are prepositioned for an audit. The entire pool of ballots was not presented to be chosen from. The audit was not random and therefore, is invalid. There is a famous case of

Volkswagen cars recognizing when they were hooked up to emission testing equipment and modifying its engine performance to pass the emission audit/tests.

The second audit was performed on 2 randomly selected precincts using ballot images. Ballot images can be manipulated. HRS 16-42 clearly states that paper ballots (not ballot images) need to be compared to machine tallies. therefore, the second audit is invalid.

The County of Kauai carefully sorted envelopes according to the precincts that they were in. This was done during the signature verification process. The envelopes were then given to the State Office of Elections to open envelopes, separate ballots from the envelopes and count ballots. During this process the precincts that were previously sorted were mixed together. We are requesting hand counting the paper ballots of one entire district because the precincts within each district were mixed together.

Remedy to complaint:
With the help of election observers, hand count one randomly chosen district using the "voter verifiable paper audit trail" for the Island of Kauai for 2022 Primary Election and compare them to the machine tallies of that district. All races should be counted and confirmed to be equal to the official results in order to certify the election. This also should be done for all Counties in the State. "Voter verifiable paper audit trail" means the paper record that constitutes a complete record of ballot selections that is verified by the voter. The record may also be used to assess the accuracy of the voting machine's electronic record and to verify the election results. [L 1970, c 26, pt of §2; am L 1975, c 36, §5(6); am L 2006, c 5, §1]

Restating the intent of this letter, the certification of the 2022 Primary Election (HRS 11-155) should be halted until a manual recount of the paper ballots of one randomly selected District in each County is performed by election officials and official volunteer observers.

Much appreciation of your time and attention to this urgent matter.

Aloha,

Ralph Cushnie

Ralph Cushnie

Encl: Attachment #1 #2

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS 11-74.5 to stop the certification of the 2022 Primary Election (per HRS 11-155) until a manual recount of the paper ballots of one randomly selected District in each County is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail and be compared to the computer-generated tallies in order to certify the 2022 Primary Election. Election officials failed to perform audits in accordance to HRS 16-42 and therefore, per HRS 11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Jerimiah Dillberg		2711 c Alakinoiki Koloa
ASHLEY JOHNSON		3875 OMAO RD. KOLOA
Nathan Metzger		4451 AHOPUEO DR. KALAHEO
Lila Metzger		4451 Ahopueo Dr. Kalaheo
Melissa Roxburgh		5382 Menehune Rd. Waimea
Christopher Prague		5200 Paanau road Koloa
Cynthia Metzger		4451 Ahopueo Drive 96741 Kalaheo
Malana deSilva		5031A KiKALA Rd Kalaheo 96741
TY OWEN	~~P.O.BOX 727~~	P.O.BOX 727 Koloa 96756
Ariana Owen		P.O. Box 727 Koloa 96756
ROSEMARIE JAUCH		4460 IKENA PLACE #56 KALAHEO 9674
Michael Jauch		4460 Ikena Pl #56 Kalaheo 96741

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS 11-74.5 to stop the certification of the 2022 Primary Election (per HRS 11-155) until a manual recount of the paper ballots of one randomly selected District in each County is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail and be compared to the computer-generated tallies in order to certify the 2022 Primary Election. Election officials failed to perform audits in accordance to HRS 16-42 and therefore, per HRS 11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Raquel DelaCruz		433 Kaumakani Ave, 96674
AUREL DOMINGO		3921 MAMAKI ST, KAUA 96756
Clianne Mangayayam		Pakala Village A-18 Makaweli, 96769
WILLYS LABANG		5154 TEXT RD. HANAPEPE 9676
Ben Silva		439 Kaumakani Ave 96747
Matthew Capua		B06 Pakala Village Makaweli 96769
Kobey Dias		4624 Lawa'a St. 96766
Louis Matias III		PO 252 Makaweli 96769
James Marques III		3370A Iwipoo Rd 96741
Marcellino DeFabian		3490 Eleu Rd Hanapepe 967
RODNEY LAWRENCE		4894B LATE RD KAHAHEO 96741

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS 11-74.5 to stop the certification of the 2022 Primary Election (per HRS 11-155) until a manual recount of the paper ballots of one randomly selected District in each County is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail and be compared to the computer-generated tallies in order to certify the 2022 Primary Election. Election officials failed to perform audits in accordance to HRS 16-42 and therefore, per HRS 11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Charles W Pimentel Sr.		4547 Nanamua St. Kekaha Hi. 96752
Chris A. Soares		2285 A Pua Rd Kalaheo 96741
Elliot Davis		2497 pua Rd. 96741
Kalvin A. Souza		4870 Puu Wai Kalaheo
Dawson Barzaga		8331 elepaio rd
Paul Schwab		4706 Lae Rd. 96741
Alfred P. Sarmento		7779 Iwipolena Rd Kekaha Hi 96752
Daniel O'Connell		4252 Omao Road Koloa 96756
Ellen O'Connell		PO Box 1440 Koloa HI 96756
Danielle Powers		4252 Omao Road Koloa HI 96756 PO Box 1440 Koloa HI 96756
Megan Ganzagan		POB 1440 Koloa Hi 96754
Ross F. Young		3600 Punkeni Keni St. Lanai 96763
		P.O. Bx 797 Hanapepe Hi. 96716

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS 11-74.5 to stop the certification of the 2022 Primary Election (per HRS 11-155) until a manual recount of the paper ballots of one randomly selected District in each County is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail and be compared to the computer-generated tallies in order to certify the 2022 Primary Election. Election officials failed to perform audits in accordance to HRS 16-42 and therefore, per HRS 11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Forrest Callahan		4434 Papalina, Kalaheo
George Kanna		4700 Lae Rd. Kalaheo
Keana Kia-Kinzie		4270 UDa Rd Koloa 96756
GLENN KOTO		4328 LELE RD HANAPEPE
Rex Badua		4594 Pueo rd KeKaha 9675
Michael Broyles		3554 Pilialoha St, Hanapepe 96716
Kira Lanning		4909D Menehune Rd. 967
Michael Remigio		3751 C Hanapepe 96716
Patricia Rutt		4710 Maikai St 96741
Malia Allen		5610 Kaapuni Rd. Unit B 967
Todd Martin		3595 Lilikoi A 96741
Timothy Gale		4945 Kikala RD
Travis Heumen		Po. Box 906 Kalaheo Hi
Bob Vegas TR		P.O. Box 985 Lawai Hi,
Branden Distelli		P.O Box 814 Lawai H,
Randy Brun		po Box 1276 Kalaheo 9674
Dylan Martin		Po Box 906 Kalaheo hi
Braden Peralta		Po Box 906 Kalaheo hi

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS 11-74.5 to stop the certification of the 2022 Primary Election (per HRS 11-155) until a manual recount of the paper ballots of one randomly selected District in each County is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail and be compared to the computer-generated tallies in order to certify the 2022 Primary Election. Election officials failed to perform audits in accordance to HRS 16-42 and therefore, per HRS 11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Ralph Cushnie	Ralph Cushnie	4702 Lae Rd. Kalaheo 96741
Laura L. Cushnie	Laura L. Cushnie	4702 Lae Rd, Kalaheo 96741
Sandra S. Sterker	Sandra S. Sterker	4460 Ikena Pl. #68 Kalaheo 96741
James Hasenyager	James Hasenyager	4070A Pai St. Kalaheo HI 96741
Puanani K. Lawrence	Puanani K. Lawrence	4694B Lae Rd, Kalaheo HI 96741
Leanne Hubbard		2497 Texeira Tract, Kalaheo HI 96741
Lenie Nishihira		4371 Ahopueo Dr Kalaheo 96741
Kelly Clemensen		3611 Kua Aina St Kalaheo HI 96741
Joseph S. Clemens		3611 Kua Aina St. Kalaheo. HI 96741
JOHN A. JENKINS		1020 PUU RD KALAHEO HI 96741
AARON HOFF		2668 HOONANEA RD POIPU 96756
RICK BUNDSCHUH		2733 A'A KINO IKI KOLOA 967
KAI CHRISTENSEN		4580-F Puuwai Rd Kalaheo 967
Karen Johnson	Karen Johnson	3070 Pua Akala Pl, Koloa
Marilyn Schaefer	Marilyn Schaefer	Koloa
Tammie Medeiros	Tammie Medeiros	Koloa
David Callahan		4434 - Papalina

Attachment #1

Ralph Cushnie

From: Ralph Cushnie
Sent: Thursday, August 4, 2022 7:23 AM
To: OE.Elections
Cc: Jade Tanigawa; Lyndon Yoshioka; Kataoka, Jaime N
Subject: RE: Audits/Early Counting

Good morning Aulii, for the 2022 primaries please keep detailed records of the audits that your office performs that comply with HRS 16-42. This should include a narrative of how the audits were performed.
Please be prepared to answer how your audit compiles with HRS 16-42 section (b) (3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts.

Audits need to contain both highlighted items in each Audit:
Audits need to be random. Preselecting the first ballot batch for an Audit is not random and does not comply with HRS 16-42.
They need to be performed using the original paper ballots. Using ballot images for an audit does not comply with HRS16-42. (Ballot images can be manipulated)

Please ensure that official observers are present and sign audits.
The Election Manual page 247 post-election audit states that "The Manual Audit Team, with Official Observers, review each batch to confirm it was counted as marked." "Election Officials and Official Observers confirm the results reports and certify the audit." Also, on page 247 it says that "Official Observers serve as the "eyes and ears" of the public".

We look forward to a transparent primary election.

Sincerely

Ralph Cushnie

From: Ralph Cushnie
Sent: Wednesday, August 3, 2022 5:47 AM
To: OE.Elections <elections@hawaii.gov>
Cc: Jade Tanigawa <jtanigawa@kauai.gov>; Lyndon Yoshioka <lyoshioka@kauai.gov>; Kataoka, Jaime N <jaime.n.kataoka@hawaii.gov>
Subject: RE: Audits/Early Counting

Aulii, thank you for responding. I look forward to having further discussions on this.

Ralph Cushnie

From: OE.Elections <elections@hawaii.gov>
Sent: Wednesday, August 3, 2022 5:43 AM
To: Ralph Cushnie <ralph@cushniecci.com>; OE.Elections <elections@hawaii.gov>
Cc: Jade Tanigawa <jtanigawa@kauai.gov>; Lyndon Yoshioka <lyoshioka@kauai.gov>; Kataoka, Jaime N <jaime.n.kataoka@hawaii.gov>
Subject: RE: Audits/Early Counting

Dear Mr. Cushnie,

This is written in response to your email, dated July 31, 2022, concerning the audit of the 2020 General Election. As it relates to your question, the audit on November 19, 2022 was conducted on Kauai. In regard to your thoughts on HRS § 16-42, as we noted in our prior email, any questions or issues you may have involving the interpretation of the law are legal matters that we cannot provide you advice about. In such circumstances, we note that individuals may wish to consult with a private attorney.

Further, we are conducting the 2022 Primary Election and we may not be able to respond to emails. We will return to our desks after the Primary Election operations have concluded, around August 29, 2022.

We appreciate your cooperation and patience.

Aloha,
Aulii Tenn
Counting Center Operations

State of Hawaii
Office of Elections
(808) 453-VOTE (8683)
elections.hawaii.gov

From: Ralph Cushnie <ralph@cushniecci.com>
Sent: Sunday, July 31, 2022 5:09 PM
To: OE.Elections <elections@hawaii.gov>
Cc: Jade Tanigawa <jtanigawa@kauai.gov>; Lyndon Yoshioka <lyoshioka@kauai.gov>; Kataoka, Jaime N <jaime.n.kataoka@hawaii.gov>
Subject: [EXTERNAL] RE: Audits/Early Counting

Aulii, after reading HRS 16-42 and your email, I have the following observations and question:

Question:

Was the Audit on November 19, 2020, done on Kauai?

Observations:

The audits spelled out in the election's manual are not designed to catch discrepancies or fraud.

An audit must be Random and prove the Machines are tallying the original paper ballots correctly and must be done with official observers (that serve as the eyes and ears of the public). An Audit must contain all these components to catch discrepancies or fraud.

Election day November3,2020. Kauai Audit done on November 19, 2020, *9:56 am* . Official state results posted November 19, 2020, *10:21am*

Official state results posted 25 minutes after Kauai audit.

The Audit done on November 19, 2020, did not comply with HRS 16-42

Background:

HRS 16-42 section (b) (3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts.

The Election Manual page 247 post-election audit states that "The Manual Audit Team, with Official Observers, review each batch to confirm it was counted as marked." "Election Officials and Official Observers confirm the results reports and certify the audit." Also, on page 247 it says that "Official Observers serve as the "eyes and ears" of the public".

Conclusion: November 19, 2020 audit did not comply with HRS 16-42

First: There are 2 requirements per HRS 16-42; (1) they are random and (2) they are done using original paper ballots. There is no documentation for either of these components. The audit documentation is missing the Ballot Review Log, Ballot Audit Log, Batch Audit Tally, and the Results of Votes Cast. Also, it is missing a narrative of how the audit was performed.

Second: Per the elections Manual "Election Officials and Official Observers confirm the results reports and certify the audit." And that "Official Observers serve as the "eyes and ears" of the public". The language is plain, "and" means both parties need to be present. Per your response below only Oahu Election officials performed the audit. No Kauai election officials and no official observers ("eyes and ears" of the public") were present at the November 19 audit.

Solution:
Randomly Audit One Complete District with official observers (to serve as the eyes and ears of the public) to verify machines are counting original paper ballots correctly. No ballot images should be used in audits. Volunteers from both parties will hand count one randomly selected district using original paper ballots. All races will be tallied and compared to official computer results.

I look forward to your response to these questions. Let's keep in mind that Public trust in Election Integrity is at an all-time low and the public is paying attention to the process. Fair elections require transparency.

Sincerely,

Ralph Cushnie
Board of Registration Kauai and Nihau

From: OE.Elections <elections@hawaii.gov>
Sent: Friday, July 29, 2022 2:25 PM
To: Ralph Cushnie <ralph@cushniecci.com>; OE.Elections <elections@hawaii.gov>
Cc: Jade Tanigawa <jtanigawa@kauai.gov>; Lyndon Yoshioka <lyoshioka@kauai.gov>
Subject: RE: Audits/Early Counting

Dear Mr. Cushnie,

This is written in response to your email, dated July 27, 2022, concerning the audit of the 2020 General Election.

As a starting point, we believe the audit that was conducted complied with the law. Any questions or issues you may have involving the interpretation of the law are legal matters that we cannot provide you advice about. In such circumstances, we note that individuals may wish to consult with a private attorney.

However, we can address your general questions about the timing of the audit and who was involved. Specifically, the audit takes place over a period of time, as opposed to solely on election night. The reason for this is that the law provides that election results will not be certified "unless all ballots verified as valid by the clerk within seven days following an election day have been added to the final tabulation." HRS § 11-108. This results in the audit occurring on election night and after these additional ballots are received from the county clerk.

This window of time for the county clerks to verify additional ballots corresponds with the five business day window of time that HRS § 11-106 provides voters to cure issues with their return identification envelopes that were received by the close of voting on election day. The curing process generally involves situations in which the voter did not sign their envelope or their signature did not initially appear to match what was on file.

In terms of the logistics of resuming the audit after verification of the additional ballots, election officials from the Office of Elections on Oahu travel to each of the neighbor island counting centers across the state to participate in the audit. In other words, the audits are completed within these counties, as opposed to on Oahu. Official observers are informed of the dates of the resumption of the audit and can either participate in the audit or observe, consistent with their duties and responsibilities.

The signatures on the various audit forms reflect election officials, counting center officials, or official observers, depending on who participated in the audit. Official observers ultimately have the ability to participate in the audit or simply observe. As it relates to Kauai, assigned counting center officials constituted the audit team on November 3, 2020 and signed, while on November 19, 2020 the election officials from Oahu constituted the audit team and signed.

Finally, as it relates to your recommendations concerning the audit, we will take them into consideration. Please note that if discrepancies are found in an audit, election officials are able to authorize an expanded audit to determine the extent of any misreporting within the system.

Aloha,
Aulii Tenn
Counting Center Operations

State of Hawaii
Office of Elections
(808) 453-VOTE (8683)
elections.hawaii.gov

From: Ralph Cushnie <ralph@cushniecci.com>
Sent: Wednesday, July 27, 2022 6:13 AM
To: OE.Elections <elections@hawaii.gov>
Cc: Jade Tanigawa <jtanigawa@kauai.gov>; Lyndon Yoshioka <lyoshioka@kauai.gov>
Subject: [EXTERNAL] RE: Audits/Early Counting

Thank you, Aulii, Does this audit comply with HRS section 16-42? It appears that one audit was done on election day the other was done 11/19/20 , 2 weeks after the election. What was the reason for the time lapse? Was the second audit done on Kauai or Oahu? Are the signatures from Kauai Poll watchers?

An Audit should be able to check the actual paper ballots and compare them to the machine results. I recommend auditing one complete district after each election.

Ralph Cushnie

From: OE.Elections <elections@hawaii.gov>
Sent: Tuesday, July 26, 2022 4:23 PM
To: Ralph Cushnie <ralph@cushniecci.com>; OE.Elections <elections@hawaii.gov>
Cc: Jade Tanigawa <jtanigawa@kauai.gov>; Lyndon Yoshioka <lyoshioka@kauai.gov>
Subject: RE: Audits/Early Counting

Dear Mr. Cushnie,

Please see the attached audit certification from the 2020 General Election.

Aloha,
Aulii Tenn
Counting Center Operations

From: Ralph Cushnie <ralph@cushniecci.com>
Sent: Monday, July 25, 2022 6:32 AM
To: OE.Elections <elections@hawaii.gov>
Cc: Jade Tanigawa <jtanigawa@kauai.gov>; Lyndon Yoshioka <lyoshioka@kauai.gov>
Subject: [EXTERNAL] RE: Audits/Early Counting

Good morning, Aulii, I need to make a correction. I would like the documentation for the 2020 general election. Especially " Section 16-42 provides that the voting system be tested to ensure ballots are counted logically and accurately and that a random sample of not less that 10% of precincts be audited" Also please include documentation of the election day audit , and post-election audit.
Please address my specific points on the audit process. An audit should compare the paper ballots to the machine results and it should be random.

Ralph Cushnie

From: Ralph Cushnie
Sent: Friday, July 22, 2022 4:01 PM
To: OE.Elections <elections@hawaii.gov>
Cc: Jade Tanigawa <jtanigawa@kauai.gov>; Lyndon Yoshioka <lyoshioka@kauai.gov>
Subject: RE: Audits/Early Counting

Aulii, thank you, I will be working on a response to your reply over the weekend. In the meantime, please send me the Documentation for the 2020 primary election audit that you did that complies with Section Hawaii Revised Statutes 16-42 . "This provides that the voting system be tested to ensure ballots are counted logically and accurately and that a random sample of not less that 10% of precincts be audited." Also please Include the Election Day Audit, Post-Election Audit, documentation.

Sincerely

Ralph Cushnie
Board of Registration Kauai and Niihau

From: OE.Elections <elections@hawaii.gov>
Sent: Friday, July 22, 2022 2:32 PM
To: Ralph Cushnie <ralph@cushniecci.com>
Cc: Jade Tanigawa <jtanigawa@kauai.gov>; Lyndon Yoshioka <lyoshioka@kauai.gov>; OE.Elections <elections@hawaii.gov>
Subject: RE: Audits/Early Counting

Aloha Mr. Cushnie,
We received your email from the County of Kauai Elections Division as the State Office of Elections is responsible for the counting of ballots. We appreciate your comments and interest in the counting process. We want to note that the processes serve as checks and balances to ensure that all ballots are counted and counted correctly as well as the security and integrity of the election.

We also want to highlight, Hawaii Revised Statutes, Section 16-42 provides that the voting system be tested to ensure ballots are counted logically and accurately and that a random sample of not less that 10% of precincts be audited. These processes work together to first confirm the voting equipment is working correctly and then confirm the election results.

Mahalo for your participation in the electoral process.

Aulii Tenn
Counting Center Operations

State of Hawaii
Office of Elections
(808) 453-VOTE (8683)
elections.hawaii.gov

From: Lyndon Yoshioka
Sent: Wednesday, July 20, 2022 9:02 PM
To: Ralph Cushnie <ralph@cushniecci.com>
Cc: Jade Tanigawa <jtanigawa@kauai.gov>
Subject: RE: Audits/Early Counting

Received.

From: Ralph Cushnie <ralph@cushniecci.com>
Sent: Tuesday, July 19, 2022 6:22 AM
To: Lyndon Yoshioka <lyoshioka@kauai.gov>; Jade Tanigawa <jtanigawa@kauai.gov>
Subject: Audits/Early Counting

CAUTION: This email originated from outside the County of Kauai. Do not click links or open attachments even if the sender is known to you unless it is something you were expecting.

Lyndon, Jade, I have read through the election manual and have the following observations:
Audits:

Background:

CISA has recently put out a report that vulnerabilities exist in election machines.

Traditionally audits are done on the terms of the auditor. The elections manual carefully dictates the terms of election audit. Therefore, the auditee is dictating the terms of the audit to the auditor.

The Election Day audit is done for the first batch of ballots run through the scanners. This is specially planned and is not random. It is possible without County Officials being aware to have different code in the machines after the first batch is run. Also, if machines are online, they can be hacked into. The post-election audit is done on ballot images. The ballot images are not compared to the actual paper ballot. Machines can change ballot images. Neither audit verifies that the votes(paper ballots) were counted correctly. On a national level primary elections were contested from both parties and hand counts of the paper ballots revealed different results from the machine count. Parameters of the machine can be changed or programed differently without local election officials knowing. It our understanding that the election machines are proprietary and that a private contractor controls the machines themselves. It is our understanding that County officials turn them on and off and can operate different key functions. County officials do not have control of the machine programing.

Solution:

In order to maintain the Public's trust in Elections: Random and comprehensive audit should be done immediately after the election. The audit terms should be made by the auditors. (Representatives of parties involved in the election). No partial or % audits.

Recommendation:

Audit 1 full District.
Kauai has three districts with individual unique ballots. Randomly chose one district (by Auditors) Compare paper ballots (hand count all races) to official machine tally results immediately following all elections..

Early Counting:

Background: Mail in ballots are run through the machine up to a week prior to election day.
Results of early tabulation are not released to the public.

Discussion: If ballots are run through the voting machines early someone knows the results. This can give some candidates an unfair advantage over others.

Recommendation: No ballots should be run through scanners until election day.

Ralph Cushnie
Board of Registration Kauai and Niihau

Attachment #2

Affidavit of Election Observer

STATE OF HAWAII / COUNTY OF Kauai.

The undersigned, George Kanna, declares under penalty of perjury and under the laws of Hawaii that the foregoing is true and correct: (AFFIANT NAME)

1. I am over the age of 18 and am a resident of the state of Hawaii. I have personal knowledge of the facts herein, and, if called as a witness, could testify to the truth and accuracy thereto.
2. I suffer no legal disabilities and have personal knowledge of the facts set forth below.
3. I affirm that

HRS 16-42 section (b) (3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts.

My name is George Kanna, I was an observer for the County of Kauai election 2022 On August 24th 2022 an Audit was performed on the primary election which was held at the voter counting center at KCC.
I did not observe hand tallies of paper ballots which is in violation of HRS 16-42(b)(3)

. I affirm I am under no duress to sign this affidavit, and I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.

Executed this 25 day of August, 2022 at this address 4700 Lae Rd 96716

AFFIANT SIGNATURE: George Kanna

NOTARY ACKNOWLEDGMENT

STATE OF HAWAII, COUNTY OF _____, ss:

This Affidavit was signed and acknowledged before me on this _____ day of _____ 202____ by _____, who, being first duly sworn on oath according to law, did depose and say that he/she has read the foregoing Affidavit subscribed by him/her, and that the matters stated herein are true and correct to the best of his/her information, knowledge and belief.

_____
Notary Public (name)

_____
Title and Rank

My commission expires _____

Electronically Filed
Supreme Court
SCEC-22-0000515
29-AUG-2022
08:03 AM
Dkt. 8 CR

SCEC-22-0000515

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

RALPH CUSHNIE, Plaintiff,

vs.

STATE OF HAWAIʻI, CHIEF ELECTION OFFICER,
Defendant.

ORIGINAL PROCEEDING

CERTIFICATE OF RECUSAL
(By: Recktenwald, C.J.)

The undersigned Chief Justice hereby recuses himself from sitting as a member of the Supreme Court of the State of Hawaiʻi in the above-entitled proceeding, except to the extent necessary for him to assign a substitute justice or justices.

DATED: Honolulu, Hawaiʻi, August 29, 2022.

/s/ Mark E. Recktenwald

Chief Justice

Electronically Filed
Supreme Court
SCEC-22-0000515
31-AUG-2022
01:26 PM
Dkt. 10 MD

No. SCEC-22-0000515

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

RALPH CUSHNIE, Plaintiff, v. STATE OF HAWAII, OFFICE OF ELECTIONS, CHIEF ELECTION OFFICER, SCOTT T. NAGO Defendants.	ORIGINAL PROCEEDING

DEFENDANTS STATE OF HAWAII, OFFICE OF ELECTIONS AND CHIEF ELECTION OFFICER, SCOTT T. NAGO'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FILED ON AUGUST 26, 2022, OR IN THE ALTERNATIVE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

MEMORANDUM IN SUPPORT OF MOTION

DECLARATION OF REESE R. NAKAMURA; EXHIBIT A

CERTIFICATE OF SERVICE

HOLLY T. SHIKADA 4017
Attorney General of Hawai‘i

PATRICIA OHARA 3124
REESE R. NAKAMURA 4822
Deputy Attorneys General
425 Queen Street
Honolulu, Hawai‘i 96813
Telephone: (808) 586-0618
Facsimile: (808) 586-1372

Attorneys for Defendants
STATE OF HAWAII, OFFICE OF ELECTIONS,
CHIEF ELECTION OFFICER, SCOTT T. NAGO

DEFENDANTS STATE OF HAWAII, OFFICE OF ELECTIONS AND CHIEF ELECTION OFFICER, SCOTT T. NAGO'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FILED ON AUGUST 26, 2022, OR IN THE ALTERNATIVE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendant STATE OF HAWAII, OFFICE OF ELECTIONS and CHIEF ELECTION OFFICER, SCOTT T. NAGO (hereinafter collectively referred to as "Defendants"), by and through their attorneys HOLLY T. SHIKADA, Attorney General of Hawai'i, and Deputy Attorneys General PATRICIA OHARA and REESE R. NAKAMURA, hereby respectfully move this Honorable Court for an order dismissing with prejudice the Election Complaint filed herein by Plaintiff RALPH CUSHNIE ("Plaintiff") on August 26, 2022. Alternatively, should this Honorable Court find that matters outside the pleadings are presented to and not excluded by this Court, Defendants respectfully request that this motion be treated as one for summary judgment and disposed of as provided by Rule 56(a) of the Hawai'i Rules of Civil Procedure ("HRCP").

This Motion is brought pursuant to Rules 12(b)(6) and 56(a) of the HRCP, and is based upon the Memorandum in Support of Motion, Declaration of Reese R. Nakamura, and Exhibit A, all of which are attached hereto and are incorporated by reference herein.

DATED: Honolulu, Hawai'i, August 31, 2022.

HOLLY T. SHIKADA
Attorney General of Hawai'i

/s/ Reese R. Nakamura
PATRICIA OHARA
REESE R. NAKAMURA
Deputy Attorneys General

Attorneys for Defendants
State of Hawai'i, Office of Elections,
Chief Election Officer, Scott T. Nago

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

I. INTRODUCTION 1

II. BACKGROUND 2

A. ELECTRONIC VOTING AND AUDITING REQUIREMENTS 2

B. PLAINTIFF'S COMPLAINT 4

III. STANDARDS OF REVIEW 5

A. ELECTION CONTESTS UNDER HRS §§ 11-173.5 AND 11-173.5(b) 5

B. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER HRCP RULE 12(b)(6) 6

IV. ARGUMENT 7

A. THE APPLICABLE LAW DOES NOT PROVIDE FOR THE RELIEF THAT PLAINTIFFS SEEK 7

B. PLAINTIFF'S SPECULATIVE CLAIMS FALL SHORT OF DEMONSTATING ACTUAL ERRORS, MISTAKES, OR IRREGULARITIES THAT WOULD CHANGE THE OUTCOME OF THE ELECTION 7

V. CONCLUSION 8

TABLE OF AUTHORITIES

Federal Cases

Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC,
151 F.Supp.3d 287 (E.D.N.Y. 2015) 6

State Cases

AFL Hotel & Rest. Workers Health & Welfare Tr. Fund v. Bosque,
110 Hawai‘i 318, 132 P.3d 1229 (2006) 6

Akaka v. Yoshina,
84 Hawai‘i 383, 935 P.2d 98 (1997) 6, 8

Andrade v. Cnty. of Hawai‘i,
145 Hawai‘i 265, 451 P.3d 1 (App. 2019) 6

Funakoshi v. King,
65 Haw. 312, 651 P.2d 912 (1982) 5, 7

Tataii v. Cronin,
119 Hawai‘i 337, 198 P.3d 124 (2008) 6

Hawaii Revised Statutes (HRS)

HRS § 11-172 ..... 5, 6, 7
HRS § 11-173.5 ..... 4, 5
HRS § 11-173.5(b) 5, 7
HRS § 16-42 ..... 1, 2, 3, 4

Hawaii Administrative Rules (HAR)

HAR § 3-177-762 3
HAR § 3-177-762(a) 3
HAR § 3-177-762(b) 3
HAR § 3-177-762(c) 4
HAR § 3-177-762(d) 4

Hawaii Rules of Civil Procedure (HRCP)

HRCP Rule 12(b)(6) 6
HRCP Rule 56(a) 8

No. SCEC-22-0000515

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

RALPH CUSHNIE, Plaintiff, v. STATE OF HAWAII, OFFICE OF ELECTIONS, CHIEF ELECTION OFFICER, SCOTT T. NAGO Defendants.	ORIGINAL PROCEEDING MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On August 26, 2022, Plaintiff RALPH CUSHNIE ("Plaintiff") filed an Election Complaint ("Complaint") against Defendant STATE OF HAWAII, OFFICE OF ELECTIONS and CHIEF ELECTION OFFICER, SCOTT T. NAGO (hereinafter collectively referred to as "Defendants") with this Honorable Court. Plaintiff alleges that Defendants violated Hawaii Revised Statutes ("HRS") § 16-42 by failing to properly perform required audits for the 2022 Primary Election. Plaintiff contends that although audits were performed, such audits did not comply with HRS § 16-42 because ballots were not chosen at random for testing and ballot images, as opposed to paper ballots, were used to verify the electronic tallied results. Plaintiff's Complaint requests that this Honorable Court issue an order to stop the certification of the 2022 Primary Election until a manual recount of paper ballots from one randomly selected district in each county can be performed. Plaintiff additionally requests that ballots be hand-counted and compared to computer-generated tallies prior to certifying the 2022 Primary Election results.

For the reasons discussed below, Plaintiff's Complaint should be dismissed with prejudice because the applicable law does not provide for the relief that Plaintiff seeks and Plaintiff's claims fall short of demonstrating actual errors, mistakes, or irregularities that would change the outcome of the election.

II. BACKGROUND

A. ELECTRONIC VOTING AND AUDITING REQUIREMENTS

Hawaii Revised Statutes ("HRS") § 16-42 governs electronic voting requirements and provides that:

> (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections, the equipment shall reject all votes for an office when the number of votes therefor exceeds the number that the voter is entitled to cast.
>
> No electronic voting system shall be used in any election unless it generates a paper ballot or voter verifiable paper audit trail that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot or voter verifiable paper audit trail is retained as the definitive record of the vote cast.
>
> (b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:
>
> (1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;
>
> (2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;
>
> (3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; and
>
> (4) If discrepancies appear in the pre-certification audits in paragraph (3), the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of misreporting in the system.

HRS § 16-42. The applicable administrative rule concerning the auditing of electronic voting systems is HAR § 3-177-762. *See* HAR § 3-177-762. HAR § 3-177-762(a) states that

> [t]he chief election officer or the clerk shall conduct an audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts.
>
> (1) The manual audit may be conducted by election officials or by counting center officials;
>
> (2) Except for designated election officials, counting center officials, or official observers, no person shall be permitted to witness the audit without the authorization of the chief election officer, clerk, or designated representative. The area in which the audit is conducted shall be kept secure;
>
> (3) Observers may request to conduct a manual audit;
>
> (4) Whenever ballots are removed from storage, the handling of the ballots shall be witnessed by not less than two representatives who are not of the same political party or official observers;
>
> (5) Election officials and counting center officials shall certify the conduct of and results of the manual audit; and
>
> (6) The manual audit shall not be considered a recount pursuant to the election contest provisions of the law.

Id. § 3-177-762(a). As to the procedure for discrepancies found during an audit, subsection (b) provides that:

> the chief election officer may authorize an expanded audit to determine the extent of misreporting within the system.
>
> (1) The chief election officer may use official observers, election day officials, county or state election employees, or other designated individuals as part of the expanded audit.
>
> (2) The chief election officer will determine when the expanded audit is concluded.
>
> (3) The results of the expanded audit will be filed with the office of elections.

Id. § 3-177-762(b). Moreover,

> [i]n lieu of relying on the initial results from an electronic voting system, the chief election officer may count ballots or voter verifiable paper audit trails by hand or with a mechanical tabulation system, or a combination thereof.
>
> (1) Any counting of ballots or voter verifiable paper audit trails, through the use of a mechanical tabulation system, will conform to the marking and vote disposition rules relating to the voting system that the ballot or voter verifiable paper audit trails were associated with.

> (A) As the marksense ballot voting system, is a mechanical tabulation system, and the ballots were intended to be read by the devices associated with that system, the chief election officer, will to the extent possible, use those voting devices of the system that did not experience misreporting problems; and

Id. § 3-177-762(c). To the extent possible, the chief election officer will "resolve any misreporting problem, prior to the end of the contest period stated in HRS § 11-173.5, in the case of a primary, or special primary election, . . . Any resolution of a misreporting problem shall be documented and filed with the office of elections." *Id.* § 3-177-762(d).

B. PLAINTIFF'S COMPLAINT

Plaintiff filed this Complaint before this Honorable Court on August 26, 2022, alleging that Defendants violated HRS 16-42 because "2 audits were performed for the 2022 Primary Election. Neither audit satisfied the requirements of HRS § 16-42." Plaintiff states that the first audit conducted "was performed on carefully preselected ballots chosen by election officials and employees of Hart inter-civic. . . . The ballots were not chosen randomly, therefore, the first audit was invalid." Plaintiff contends that "[m]achines can treat ballots differently if they are prepositioned for an audit." Next, Plaintiff asserts that the "second audit was performed by comparing ballot images to the machine tallies of 2 precincts. Ballot images can be changed or manipulated by election machines." Citing HRS § 16-42, Plaintiff states that "the second audit is invalid" because it "was performed by comparing ballot images to the machine tallies of 2 precincts" rather than hand tallied results. Plaintiff's Complaint requests that this Honorable Court order Defendants to stop the certification of the 2022 Primary Election until a manual recount of paper ballots from one randomly selected district in each county can be performed. Plaintiff additionally requests that ballots be hand-counted and compared to computer-generated tallies prior to certification the 2022 Primary Election results.

III. STANDARDS OF REVIEW

A. ELECTION CONTESTS UNDER HRS §§ 11-172 AND 11-173.5(b)

HRS § 11-172 governs election contests and states in pertinent part:

> [w]ith respect to any election, any candidate, or qualified political party directly interested, or any thirty voters of any election district, may file a complaint in the supreme court. The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results.

HRS § 11-172. The legal standard for election contests concerning a primary election can be found in HRS § 11-173.5. *See id.* § 11-173.5. Subsection (b) provides:

> In primary and special primary election contests, and county election contests held concurrently with a regularly scheduled primary or special primary election, the court shall hear the contest in a summary manner and at the hearing the court shall cause the evidence to be reduced to writing and shall not later than 4:30 p.m. on the fourth day after the return give judgment fully stating all findings of fact and of law. The judgment shall decide what candidate was nominated or elected, as the case may be, in the manner presented by the petition, and a certified copy of the judgment shall forthwith be served on the chief election officer or the county clerk, as the case may be, who shall place the name of the candidate declared to be nominated on the ballot for the forthcoming general, special general, or runoff election. The judgment shall be conclusive of the right of the candidate so declared to be nominated; provided that this subsection shall not operate to amend or repeal section 12-41.

See id. § 11-173.5(b) (emphases added). Furthermore, this Honorable Court has held in *Funakoshi v. King*, that

> [b]y the omission of language providing for the invalidation of an election and the allowance of a new election in HRS § 11-173.5(b), the legislature clearly intended that the only remedy that could be given for primary election irregularities was the statutory remedy of having this Court decide which candidate was nominated or elected.

65 Haw. 312, 316, 651 P.2d 912, 914 (1982) (emphasis added).

B. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER HRCP RULE 12(b)(6)

Rule 12(b)(6) of the HRCP addresses the dismissal of a Complaint for failure to state a claim upon which relief can be granted. HRCP R. 12(b)(6). A complaint challenging the results of a primary election fails to state a claim unless the plaintiff demonstrates errors, mistakes, or irregularities that would change the outcome of the election. *See* HRS § 11-172; *Tataii v. Cronin*, 119 Hawai‘i 337, 339 198 P.3d 124, 126 (2008) ; *Akaka v. Yoshina*, 84 Hawai‘i 383, 387, 935 P.2d 98, 102 (1997). A plaintiff challenging a primary election must show "actual information of mistakes or errors sufficient to change the result." *Tataii*, 119 Hawai‘i at 339, 198 P.3d at 126 (citing *Akaka*, 84 Hawai‘i at 387–88, 935 P.2d at 102–03). "An election contest cannot be based upon mere belief of indefinite information." *Id.* at 340, 198 P.3d at 127 (citing *Akaka*, 84 Hawai‘i at 387–88, 935 P.2d at 102–03).

Additionally,

> "[A]court must accept plaintiff's allegations as true and view them in the light most favorable to the plaintiff; dismissal is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief."

Id. at 341, 198 P.3d at 127 (citing *AFL Hotel & Rest. Workers Health & Welfare Tr. Fund v. Bosque*, 110 Hawai‘i 318, 321, 132 P.3d 1229, 1232 (2006)). Moreover, "[w]hen matters outside the pleadings are presented in connection with an HRCP 12(b)(6) motion to dismiss, the trial court has discretion to either exclude the material or to convert the motion to dismiss into a motion for summary judgment." *Andrade v. Cnty. of Hawai‘i*, 145 Hawai‘i 265, 268 n.3, 451 P.3d 1, 4 n.3 (App. 2019) (citing *Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC*, 151 F.Supp.3d 287, 291 (E.D.N.Y. 2015)).

IV. ARGUMENT

A. THE APPLICABLE LAW DOES NOT PROVIDE FOR THE RELIEF THAT PLAINTIFF SEEKS

Plaintiff's Complaint requests that this Honorable Court order Defendants to stop the certification of the 2022 Primary Election until a manual recount of paper ballots from one randomly selected district in each county can be performed. Plaintiff also requests that ballots be hand-counted and compared to computer-generated tallies prior to certification the 2022 Primary Election. However, HRS § 11-173.5(b) does not confer such power upon this Honorable Court to do so and Plaintiff cite to no authority that would authorize such relief. *See* HRS § 11-173.5(b). The only statutory remedy that this Honorable Court can issue concerning the primary election is to determine "which candidate was nominated or elected." *See Funakoshi*, 65 Haw. at 316, 651 P.2d at 914. Furthermore, this Honorable Court has already dismissed a recent election complaint in *Lam v. State of Hawai'i, Office of Elections*, case number SCEC-22-0000500, because the remedy of "ordering a manual recount of the ballots cast" is "not authorized by HRS § 11-173.5(b)." *See* Ex. A, attached hereto and Declaration of Reese R. Nakamura ("Nakamura Decl.") at para. 2. Accordingly, this Complaint should be dismissed with prejudice.

B. PLAINTIFF'S SPECULATIVE CLAIMS FALL SHORT OF DEMONSTATING ACTUAL ERRORS, MISTAKES, OR IRREGULARITIES THAT WOULD CHANGE THE OUTCOME OF THE ELECTION

Defendants reiterate that Plaintiff's claims regarding electronic voting and auditing requirements are outside the scope of remedies that are available to this Honorable Court under HRS § 11-173.5(b). *See* HRS § 173.5(b). Moreover, Plaintiff's allegations do not concern issues related to election results as required by HRS § 11-172. *See id.* § 11-172. This Honorable

Court has already expressed in *Lam* that "[a] complaint challenging the results of a primary election fails to state a claim unless the plaintiff demonstrates errors, mistakes, or irregularities that would change the outcome of the election." Ex. A (emphasis added). Furthermore, "it is not sufficient that a plaintiff points to a 'poorly run and inadequately supervised election process' that shows 'room for abuse' or possibilities of fraud.'" *Id.* (citing *Akaka*, 84 Hawai'i at 388, 935 P.2d at 103) (internal citation omitted). Here, Plaintiff's Complaint fails to provide any evidence that errors, mistakes, or irregularities would change the outcome of the 2022 Primary Election. Rather, Plaintiff surmises that "[m]achines are capable of identifying prepositioned ballots and treating them differently from other ballots" and that "ballot images can be changed or manipulated by election machines." Because there is no evidence to support a finding that the outcome of the election would have been changed, this Complaint should be dismissed.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Honorable Court dismiss this Complaint with prejudice. Alternatively, should this Honorable Court find that matters outside the pleadings are presented to and not excluded by this Court, Defendants respectfully request that this motion be treated as one for summary judgment and disposed of in accordance with Rule 56(a) of the HRCP.

DATED: Honolulu, Hawai'i, August 31, 2022.

/s/ Reese N. Nakamura
PATRICIA OHARA
REESE R. NAKAMURA
Deputy Attorneys General

Attorneys for Defendants
State of Hawai'i, Office of Elections,
Chief Election Officer, Scott T. Nago

No. SCEC-22-0000515

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

RALPH CUSHNIE, Plaintiff, v. STATE OF HAWAII, OFFICE OF ELECTIONS, CHIEF ELECTION OFFICER, SCOTT T. NAGO Defendants.	ORIGINAL PROCEEDING DECLARATION OF REESE R. NAKAMURA; EXHIBIT A

DECLARATION OF REESE R. NAKAMURA

I, REESE R. NAKAMURA, declare as follows:

1. I am a Deputy Attorney General in the Department of the Attorney General for the State of Hawaii, counsel to Defendant STATE OF HAWAII, OFFICE OF ELECTIONS. Unless otherwise indicated below, I have personal and first-hand knowledge of the facts set forth herein and, if called upon to do so, I would and could testify under oath regarding them.

2. Attached hereto as Exhibit A is a true and correct copy of the Hawaii Supreme Court's Findings of Fact, Conclusions of Law, and Judgment in *Lam v. State of Hawaii, Office of Elections*, case number SCEC-22-0000500, issued on August 29, 2022.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF HAWAIʻI THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: Honolulu, Hawaiʻi, August 31, 2022.

/s/ Reese N. Nakamura
REESE R. NAKAMURA

EXHIBIT A

Electronically Filed
Supreme Court
SCEC-22-0000500
29-AUG-2022
08:52 AM
Dkt. 15 FFCL

SCEC-22-0000500

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

ADRIEL LAM, Plaintiff,

vs.

STATE OF HAWAIʻI, OFFICE OF ELECTIONS, Defendant.

ORIGINAL PROCEEDING

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

(By: Recktenwald, C.J., Nakayama, McKenna, Wilson, and Eddins, JJ.)

On August 18, 2022 Plaintiff Adriel Lam (Lam) filed a letter, which we construe as an election complaint, as well as documents attached and submitted in support. On August 23, 2022 Defendant State of Hawaiʻi Office of Elections (Office of Elections) filed a motion to dismiss. On August 25, 2022, Lam filed a "Memorandum; Objection to Defendant's Motion to Dismiss and in Support of Motion for Hand Recount" (objection). Upon consideration of the complaint, motion to dismiss, and objection, and having heard this matter without oral argument, we enter the following findings of fact, conclusions of law, and judgment.

FINDINGS OF FACT

1. Lam was one of two Primary Election Republican

EXHIBIT A

Party candidates in the Senate District 24 race.

2. The 2022 Primary Election was held on August 13, 2022.

3. Following a mandatory recount, the election result for this race was, as follows:

Fernandez, Antionette	1,490
Lam, Adriel C	1,446
Blank votes	787

4. The election result was later updated on August 22, 2022, with the following result that included the last ballots validated by the City Clerk for the City and County of Honolulu:

Fernandez, Antionette	1,513
Lam, Adriel C	1,474
Blank Votes	800

5. On August 18, 2022, Lam filed a letter seeking to file a complaint under Hawaiʻi Revised Statutes (HRS) § 11-172 (Supp. 2021), which requests the following relief:

(a) That an order be issued requiring a halt in the certification of the 2022 Primary Election so that a manual recount may be conducted of the 2022 Republican Party Senate District 24 Primary Election race; and

(b) An order requiring certain requests be granted "to restore public confidence and assurances regarding the integrity of Hawaii elections and reduce vulnerability to election and voter fraud" that include maintenance of the voter

rolls, voter education, certain ballot handling procedures, an adequate elections budget, increased access to voting to increase voter participation, and preserving all elections records from the "2020 General Election" beyond the federally mandated twenty-two month retention period to improve transparency and access to public records.

6. Lam asserts a lack of transparency during the mandatory recount process, lack of resolution on certain election integrity inquiries, and pending final ballot counts support his requested relief.

7. With regard to his assertion that there was a lack of transparency during the mandatory recount process, Lam recounts his observations and interactions with the Office of Elections during the mandatory recount process, including the lack of a response from the Office of Elections during the mandatory recount process.

8. With regard to his concern about the lack of resolution on certain election integrity inquiries, Lam asserts there were many deficiencies concerning: (a) a Manual Audit Certification that was raised regarding the 2020 General Election; (b) cybersecurity threats from foreign and other non-state threats to alter the election results to conform to their interests; (c) maintenance of the voter registration rolls in light of a "specific case of a registered voter" in the 2020

General Election; and (d) various aspects with elections by mail.

9. With regard to his assertion that a pending final ballot count supports his requested relief, Lam attached an email dated August 17, 2022, from the Office of the City Clerk of the City and County of Honolulu that states the "number of ballots that still need to be verified is approximately 3,700[,]" and the "number of ballots pending verification for Senate District 24 is 235." He also asserts there were 34,559 ballots received on August 14, 2022, that "could have met the deadline for receipt by 7 p.m., Aug 13, 2022," if receipt of these 34,559 ballots were recorded in Greenwich Mean Time (GMT) because Hawai‘i standard time is ten hours behind GMT.

10. Lam cites Hawai‘i Revised Statutes (HRS) § 11-172, as well as HRS §§ 11-109 (Supp. 2021), 16-42 (2009), and 19-3 (Supp. 2014), in support of his assertions and requested remedies.

11. The Office of Elections asserts that the complaint should be dismissed with prejudice.

12. Lam's objection asserts that "[a] manual recount is in order and the motion to dismiss should be overruled."

CONCLUSIONS OF LAW

1. HRS § 11-172 governs election contests and provides in relevant part: "With respect to any election, any candidate, or qualified political party directly interested, or

any thirty voters of any election district, may file a complaint in the supreme court. The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results."

2. HRS § 11-173.5 (2009 & Supp. 2021) provides for contest for cause to be filed in the supreme court involving primary elections, special primary elections, and county elections held concurrent with a regularly scheduled primary or special primary election.

3. A complaint challenging the results of a primary election fails to state a claim unless the plaintiff demonstrates errors, mistakes, or irregularities that would change the outcome of the election. See HRS § 11-172; Tataii v. Cronin, 119 Hawaiʻi 337, 339, 198 P.3d 124, 126 (2008); Akaka v. Yoshina, 84 Hawaiʻi 383, 387, 935 P.2d 98, 102 (1997); Funakoshi v. King, 65 Haw. 312, 317, 651 P.2d 912, 915 (1982); Elkins v. Ariyoshi, 56 Haw. 47, 48, 527 P.2d 236, 237 (1974).

4. A plaintiff challenging a primary election must show actual information of mistakes or errors that would have changed the election result. Tataii, 119 Hawaiʻi at 339, 198 P.3d at 126; Funakoshi, 65 Haw. at 316-17, 651 P.2d at 915.

5. For a complaint to be legally sufficient, it must "show[] that the specific acts and conduct . . . complain[ed of]

would have had the effect of changing the results of the primary election." Elkins, 56 Haw. at 49, 527 P.2d at 237.

6. An election contest cannot be based upon mere belief or indefinite information. Tataii, 119 Hawai‘i at 339, 198 P.3d at 126; Akaka, 84 Hawai‘i at 388, 935 P.2d at 103. For example, it is not sufficient that a plaintiff points to a "poorly run and inadequately supervised election process" that shows "room for abuse" or "possibilities of fraud." Akaka, 84 Hawai‘i at 388, 935 P.2d at 103 (quoting Elkins, 56 Haw. at 48, 527 P.2d at 237).

7. The remedy provided by HRS § 11-173.5(b) of having the court decide which candidate was nominated or elected is the only remedy that can be given in primary election contests. Funakoshi, 65 Haw. at 316, 651 P.2d at 914; see HRS § 11-173.5(b).

8. When reviewing a request to dismiss a complaint, the court must accept plaintiff's allegations as true and view them in the light most favorable to the plaintiff; dismissal is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. AFL Hotel & Restaurant Workers Health & Welfare Trust Fund v. Bosque, 110 Hawai‘i 318, 321, 132 P.3d 1229, 1232 (2006).

9. The court's consideration of matters outside the

pleadings converts a motion to dismiss into one for summary judgment. Foytik v. Chandler, 88 Hawai‘i 307, 313, 966 P.2d 619, 625 (1998). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Estate of Doe v. Paul Revere Ins. Group, 86 Hawai‘i 262, 269-270, 948 P.2d 1103, 1110-1111 (1997).

10. Taking Lam's allegations as true and viewing them in the light most favorable to him, this court does not have jurisdiction to grant Lam the relief he seeks because ordering a manual recount of the ballots cast in the Republican Primary Election for the Senate District 24 seat, and granting certain requests "to restore public confidence and assurances regarding the integrity of Hawaii elections and reduce vulnerability to election and voter fraud," are not authorized by HRS § 11-173.5(b). See Funakoshi, 65 Haw. at 316, 651 P.2d at 914.

JUDGMENT

Based upon the foregoing findings of fact and conclusions of law, judgment is entered dismissing the complaint.

DATED: Honolulu, Hawai‘I, August 29, 2022.

/s/ Mark E. Recktenwald
/s/ Paula A. Nakayama
/s/ Sabrina S. McKenna
/s/ Michael D. Wilson
/s/ Todd W. Eddins

No. SCEC-22-0000515 IN THE SUPREME COURT OF THE STATE OF HAWAI'I RALPH CUSHNIE, Plaintiff, v. STATE OF HAWAII, OFFICE OF ELECTIONS, CHIEF ELECTION OFFICER, SCOTT T. NAGO Defendants. ORIGINAL PROCEEDING

September 1, 2022

Chief Clerk, Hawaii State Supreme Court
417 South King Street
Honolulu, Hawai`i 96813-2943

Dear Chief Clerk of the Hawaii Supreme Court:

Your Honor, I am writing this in rebuttable of the Office of Elections motion to dismiss our case filed on Aug 26,2022. The defendant violated HRS16-42. The defendant does not dispute violating 16-42 in his motion to dismiss.

The Standard of Review
Election Contests under HRS 11-72

HRS 11-172 cause for contest requires provable fraud. The provable fraud is that the Chief Elections Officer violated HRS 16-42. The Chief Elections officer has not disputed this. The court can reverse, correct, or change the Chief Elections Officer decision to certify the election.

Voter trust in election results is at an all-time low. No one outs side of Hart InterCivic is allowed to look at the source code of election machines. The County of Kauai tabulators are connected on line and can be compromised. A correct result cannot be ascertained if audits are not performed in accordance with HRS 16-42. The State Office of Elections did not perform audits in accordance with HRS 16-42 and they do not deny it. By not performing proper audits the Office of Elections will continue to erode trust in the election system. People who have nothing to hide, hide nothing. We need a transparent election.

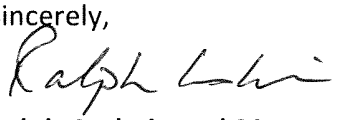
§11-172 Contests for cause; generally. With respect to any election, any candidate, or qualified political party directly interested, or any thirty voters of any election district, may file a complaint in the supreme court. The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results. The complaint shall also set forth any reasons for reversing, correcting, or changing the decisions of the voter service center officials or the officials at a counting center in an election using the electronic voting system. A copy of the complaint shall be delivered to the chief

election officer or the clerk in the case of county elections. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(xx); am L 1975, c 36, §1(15); am L 1991, c 9, §2; am L 2021, c 213, §31]

There is no way of confirming/validating or ascertaining election results because HRS16-42 was not followed.

We are asking the court to hear our complaint in its entirety and compel the Chief Election Officer to follow the Law and audit the election in accordance with HRS16-42.

Sincerely,



Ralph Cushnie and 30 voters from district 17

No. SCEC-22-0000515 IN THE SUPREME COURT OF THE STATE OF HAWAI'I RALPH CUSHNIE, Plaintiff, v. STATE OF HAWAII, OFFICE OF ELECTIONS, CHIEF ELECTION OFFICER, SCOTT T. NAGO Defendants. ORIGINAL PROCEEDING

September 1, 2022

Chief Clerk, Hawaii State Supreme Court
417 South King Street
Honolulu, Hawai`i 96813-2943

Dear Chief Clerk of the Hawaii Supreme Court:

Your Honor, I am writing this in rebuttable of the Office of Elections motion to dismiss our case filed on Aug 26,2022. The defendant violated HRS16-42. The defendant does not dispute violating 16-42 in his motion to dismiss.

The Standard of Review
Election Contests under HRS 11-72

HRS 11-172 cause for contest requires provable fraud. The provable fraud is that the Chief Elections Officer violated HRS 16-42. The Chief Elections officer has not disputed this. The court can reverse, correct, or change the Chief Elections Officer decision to certify the election.

Voter trust in election results is at an all-time low. No one outs side of Hart InterCivic is allowed to look at the source code of election machines. The County of Kauai tabulators are connected on line and can be compromised. A correct result cannot be ascertained if audits are not performed in accordance with HRS 16-42. The State Office of Elections did not perform audits in accordance with HRS 16-42 and they do not deny it.

§11-172 Contests for cause; generally. With respect to any election, any candidate, or qualified political party directly interested, or any thirty voters of any election district, may file a complaint in the supreme court. The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results. The complaint shall also set forth any reasons for reversing, correcting, or changing the decisions of the voter service center officials or the officials at a counting center in an election using the electronic voting system. A copy of the complaint shall be delivered to the chief election officer or the clerk in the case of county elections.

[L 1970, c 26, pt of §2; am L 1973, c 217, §1(xx); am L 1975, c 36, §1(15); am L 1991, c 9, §2; am L 2021, c 213, §31]

There is no way of confirming/validating or ascertaining election results because HRS16-42 was not followed.

We are asking the court to hear our complaint in its entirety and compel the Chief Election Officer to follow the Law.

Sincerely,

Ralph Cushnie

Ralph Cushnie and 30 voters from district 17

Electronically Filed
Supreme Court
SCEC-22-0000515
06-SEP-2022
10:41 AM
Dkt. 16 FFCL

SCEC-22-0000515

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

RALPH CUSHNIE, Plaintiff,

vs.

STATE OF HAWAIʻI - CHIEF ELECTION OFFICER, Defendant.

ORIGINAL PROCEEDING

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT
(By: Nakayama, Acting C.J., McKenna, Wilson, and Eddins, JJ., and Circuit Judge Johnson, in place of Recktenwald, C.J., recused)

On August 26, 2022, Plaintiff Ralph Cushnie (Cushnie), and a group of 30 voters in District 17 on the island of Kauaʻi, submitted a letter that we construe as an election contest complaint (complaint). On August 31, 2022, Defendant State of Hawaiʻi - Chief Election Officer (Defendant) filed a motion to dismiss Cushnie's complaint. On September 2, 2022, Cushnie filed a letter in rebuttal to the motion to dismiss (rebuttal). Upon consideration of the complaint, motion to dismiss, and rebuttal, and having heard this matter without oral argument, we enter the following findings of fact, conclusions of law, and judgment.

FINDINGS OF FACT

1. Cushnie filed the complaint on August 26, 2022.

2. Cushnie asserts that two audits were performed for the 2022 Primary Election that did not satisfy the requirements of Hawai‘i Revised Statutes (HRS) § 16-42 (2009) because, in the first audit, the ballots were not chosen randomly, and, in the second audit, ballot images were incorrectly compared to electronic tallies when HRS § 16-42 requires paper ballots to be compared to electronic tallies.

3. Cushnie requests that the certification of the 2022 Primary Election be halted until a manual recount of the paper ballots of one randomly selected district in each county is performed by election officials and official volunteer observers.

4. In addition to HRS § 16-42, Cushnie cites HRS §§ 11-172 (Supp. 2021) and 11-174.5 (2009 & Supp. 2021) in support of his assertions and requested relief.

5. Cushnie emphasizes the following language in HRS § 11-174.5: "The judgment may invalidate the general, special general, special, or runoff election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the voter service center officials[.]"

6. Defendant asserts that the complaint should be dismissed with prejudice, or, alternatively, that summary judgment be entered in its favor.

7. Cushnie filed a rebuttal on September 2, 2022, maintaining that an audit in compliance with HRS § 16-42 has not been completed.

CONCLUSIONS OF LAW

1. When reviewing a request to dismiss a complaint, the court's review "is based on the contents of the complaint, the allegations of which [the court] accept[s] as true and construe[s] in the light most favorable to the plaintiff. Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Casumpang v. ILWU, Local 142, 94 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000) (quotation marks and citation omitted).

2. When considering a request to dismiss a complaint, the court need not accept conclusory or formulaic recitations on the legal effects of the events alleged. Kealoha v. Machado, 131 Hawai'i 62, 74, 315 P.3d 213, 225 (2013).

3. A complaint challenging the results of a primary election fails to state a claim unless the plaintiff demonstrates errors, mistakes, or irregularities that would change the outcome of the election. See HRS § 11-172; Funakoshi v. King, 65 Haw. 312, 317, 651 P.2d 912, 915 (1982).

4. Plaintiffs challenging a primary election must show that they have actual information of mistakes or errors sufficient to change the election result. Funakoshi, 65 Haw. at 316-17, 651 P.2d at 915.

5. HRS § 11-172 provides in relevant part: "With respect to any election, any candidate, or qualified political party directly interested, or any thirty voters of any election

district, may file a complaint in the supreme court. The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results."

6. In order for a primary election complaint to be legally sufficient, it must "show[] that the specific acts and conduct . . . complain[ed of] would have had the effect of changing the results of the primary election[.]" Elkins v. Ariyoshi, 56 Haw. 47, 49, 527 P.2d 236, 237 (1974); see Funakoshi, 65 Haw. at 314, 651 P.2d at 913 ("'[D]ifference in the election results' in HRS § 11-172 . . . mean[s] 'a difference sufficient to overturn the nomination of any particular candidate or candidates in the primary.'" (Quoting Elkins, 56 Haw. at 49, 527 P.2d at 237)).

7. HRS § 11-173.5 (2009 & Supp. 2021) sets forth, among other matters, the time requirements for primary election contests to be filed in the supreme court, as well as the remedy allowed to be provided in primary election contests.

8. Having the court decide which candidate was nominated or elected is the only remedy that can be given in a primary election contest. Funakoshi, 65 Haw. at 315-16, 651 P.2d at 914. In other words, the "only statutory relief to which plaintiff is entitled under HRS § 11–173.5(b) would be to have this Court declare the name of the candidate to be nominated or elected." Id. at 315, 651 P.2d at 914.

9. HRS § 11-174.5 sets forth, among other matters,

the remedies allowed to be provided in general election contests, which includes "invalidat[ing] the general . . . election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the voter service center officials[.]"

10. HRS § 11-174.5 does not apply here because the 2022 General Election has not happened yet, and thus there are no general election results to invalidate. See Funakoshi, 65 Haw. at 315, 651 P.2d at 914 ("HRS § 11-173.5(b) does not provide for a judgment that would invalidate the primary election and allow a new election. The legislature only provided for this extraordinary remedy in its statutory provisions pertaining to general . . . elections.").

11. Taking Cushnie's allegations as true and viewing the allegations in a light most favorable to him, Cushnie's requested relief of seeking an order halting the certification of the 2022 Primary Election results until a manual recount is performed is not a remedy authorized by HRS § 11-173.5(b) ("[t]he judgment shall decide what candidate was nominated or elected"). See Funakoshi, 65 Haw. at 315-16, 651 P.2d at 914.

12. The complaint thus fails to state a claim upon which relief may be granted.

JUDGMENT

Based upon the foregoing findings of fact and conclusions of law, judgment is entered dismissing the complaint.

DATED: Honolulu, Hawai‘i, September 6, 2022.

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

/s/ Todd W. Eddins

/s/ Ronald G. Johnson

EXHIBIT E

CUSHNIE VS. STATE
SCEC-22-0000703

Ralph S. Cushnie *pro se, in propria persona*
PO Box 864
Kalaheo, Hawaii 96741
Ph. 808 645-0955
Email: ralph@cushniecci.com

Electronically Filed
Supreme Court
SCEC-22-0000703
22-NOV-2022
08:38 AM
Dkt. 1 CMP

IN THE SUPREME COURT OF THE STATE OF HAWAII

Ralph S. Cushnie *pro se,* along with more than Thirty Voters *pro se*

Plaintiff

VS.

Scott T. Nago, personally and in his official capacity as Chief Elections Officer; for the Office of Elections; STATE OF HAWAII *et al*

Defendant

CASE NO. _____

ELECTION COMPLAINT
PURSUANT TO
HRS § 11-172 and HRS § 11-174.5

AND
REQUEST FOR DECLARATORY JUDGEMENT PURSUANT TO HRCP RULE 57

WITH EXHIBITS A-E

I, Ralph S. Cushnie pro se, along with more than Thirty Voters pro se (Plaintiffs) hereby bring this Election Complaint and request for Declaratory Judgement without Relief pursuant to the Hawaii Revised Statutes, the Hawaii Rules of Civil Procedure Rule 57 and the Constitution of the State of Hawaii Article I Section 4 for redress of grievances and for determination of a fact upon which legal relations depend.

Plaintiffs' rights and responsibilities are pursuant to the Constitution for the State of Hawaii Article I Section I, Article I Section II, and the State of Hawaii Title 2 Part XI Elections Contest, HRS §11.172 Contests for cause, and HRS § 11-174.5 Contests for cause in...general election.

RECEIVED
NOV 22 2022
SUPREME COURT
CLERK'S OFFICE

Plaintiffs aver that the Supreme Court for the State of Hawaii is a court of competent jurisdiction and has jurisdiction of this matter pursuant to the Constitution for the State of Hawaii Article II Section 10, the Hawaii Revised Statutes Title 32 Chapter 602 Part I HRS § 602-5 Jurisdiction and HRS § 602-11 Rules, and Title 2 Part XI HRS § 11-175 Powers of supreme court.

Plaintiffs plead that Scott T. Nago, personally and in his official capacity as Chief Elections Officer; for the Office of Elections; STATE OF HAWAII is the Defendant for this petition.

Plaintiffs pleads that the question for the court pertains to identification and requirement for the use of a specific method for the conduct of post-election certification audits for precincts employing electronic voting systems.

REQUEST FOR JUDICIAL NOTICE

Plaintiffs respectfully requests the court acknowledge the Plaintiffs rights to plead in plain language as a pro-se litigant.

Plaintiffs request the court take Judicial Notice of the following pursuant to the Hawaii Rules of Evidence Rule 201:

The Constitution for the State of Hawaii Article I Section I, Section II, and Section IV. (See EXHIBIT A)

Hawaii Revised Statute, Chapter 11 Elections, and specifically, HRS § 11-171, HRS § 11-172 and HRS § 11-174.5. (See EXHIBIT B)

Hawaii Revised Statute, Chapter 16 Voting Systems, and specifically HRS § 16-2, HRS § 16-41, and HRS § 16-42. (See EXHIBIT C)

Plaintiffs respectfully requests the court take judicial notice and include by reference all other appropriate constitutional clauses, state and federal statutes, relevant case law, and uncontested facts, whether referenced or cited in this

pleading or from the outside, and which form the basis of lawful procedure and due process, or as necessary to establish any element which may be in question.

Plaintiffs move the court to recognize witnesses as identified during discovery.

STATEMENT OF THE COMPLAINT

Plaintiffs aver that accurate elections are fundamental to the preservation of inalienable rights and through the creation of government authority as determined through the election of public servants by the people. Ref: The Constitution for the State of Hawaii Article I Section I & II.

Plaintiffs aver that statutes are used to codify the will of the people through the legislative process.

Statute. A law passed by a legislative body; specifically, legislation enacted by any lawmaking body, including legislatures, administrative boards, and municipal courts. Blacks Law 9th Edition.

Plaintiffs aver that "affirmative statutes" require that something be done.

Affirmative Statute. A law requiring that something be done; one that directs the doing of an act. Blacks Law 9th Edition.

Plaintiffs aver that HRS § 16-2 specifies that "All voting systems...shall satisfy the following requirements:" (3) "shall correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions." (Ref: HRS § 16-2).

Plaintiffs aver that HRS § 16-2 is an affirmative statute.

Plaintiffs aver that HRS § 16-42 subsequently specifies the procedure for ensuring the accuracy of elections against any and all questions.

Plaintiffs respectfully request the court note HRS § 16-42 specifically states that "No electronic voting system shall be used in any election unless it generates a paper ballot or voter verifiable paper audit trail that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot or voter verifiable paper audit trail is retained as the definitive record of the vote cast." (Ref: HRS § 16-42) [underline for emphasis]

"Voter verifiable paper audit trail - means the paper record that constitutes a complete record of ballot selections that is verified by the voter. The record may also be used to assess the accuracy of the voting machine's electronic record and to verify the election results." (Ref: HRS § 16-41).

Plaintiffs respectfully request the court note HRS § 16-42(b)(3) specifies that (b) "The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if: (3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts;" (Ref: HRS § 16-42).

Plaintiffs aver that HRS § 16-42 is an affirmative statute.

Plaintiffs aver that this affirmative statute requires a post-election pre-certification audit of a random sample, of not less than ten percent of precincts, that compares the hand tallies of the votes on the paper ballots is equal to the electronic tallies generated by the voting system – in order to ensure the accuracy of the voting system.

Plaintiffs aver that this affirmative statute is fundamental in ensuring the accuracy of elections.

Plaintiffs aver that the Defendant is not following this affirmative statute in determining the electronic tallies created by the electronic voting system accurately reflect the record and is equal to the vote as cast on the paper ballot by the voters.

Plaintiffs aver that the Defendant has substituted a less restrictive local procedure in place of this affirmative statute and is not in compliance with the statutory by-law.

Plaintiffs aver that the post-election pre-certification audits as administered by the Defendant fail the requirements specified in HRS § 16-42 in that:

1) the procedure being used does not verify the voters complete record of ballot selections for all races in the randomly selected precincts, but rather only compares one race in those precincts, and

2) the procedure being used does not verify the tallies of votes as registered on the paper ballots is equal to the output of the tallies of the electronic voting system, but rather compares the electronic image of the ballot to the output of the electronic voting system.

Plaintiffs aver that these procedures do not meet the requirements of a post-election pre-certification audit as specified in HRS § 16-42.

Audit. A formal examination of an individual's or organization's accounting records, financial situation, or compliance with some other set of standards. Ref: Blacks Law 9th Edition.

Plaintiffs aver that the requirement for correct interpretation and compliance with this statute was brought to the attention of the Defendant by multiple observers and representatives of the people. (See EXHIBIT D and EXHIBIT E)

Plaintiffs aver that failure to perform an accurate post-election pre-certification audit is an error that could cause a difference in the election results, and that the accuracy of the general election is questionable and indeterminate.

Plaintiffs aver that until an accurate post-election pre-certification audit is performed in compliance with the requirements of HRS § 16-42, the 2022 Hawaii General Election held on 8 November 2022 a "contested election."

Contested Election. An election is contested whenever an objection is formally urged against it which, if found to be true in fact, would invalidate it. This is true both as to objections founded upon some constitutional provision and to such as are based on statutes. Blacks Law 6th Edition [underline for emphasis]

Plaintiffs respectfully request the court note that Hawaii Revised Statute Chapter 11 will apply "whenever a contested election is subject to determination by a court of competent jurisdiction in the manner provided by law." Ref HRS § 11-171.

Plaintiffs respectfully request the court note that pursuant to the Hawaii Revised Statute Chapter 11 that "With respect to any election...any thirty voters of any election district, may file a complaint in the supreme court." Ref: HRS §11-172

Plaintiffs respectfully request the court note that pursuant to the Hawaii Revised Statute Chapter 11 that "The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results." And that "The complaint shall also set forth any reasons for reversing, correcting, or changing the decisions of the precinct officials or the officials at a counting center in an election using the electronic voting system." Ref: HRS 11-172. [underline for emphasis]

Plaintiffs aver that the post-election pre-certification audit procedures used by election officials in the counting center do not in any way verify that the votes cast

by the voter on the paper ballot are correctly tallied by the electronic voting system, and that without a valid audit, a correct result cannot be ascertained. Without a verifiable audit, there is no way to determine any level of accuracy in the election.

Plaintiffs respectfully request the court note that pursuant to the Hawaii Revised Statute Chapter 11 that "In cases involving general...elections the complaint shall be heard by the supreme court in which the complaint was filed as soon as it reasonably may be heard." Ref: HRS § 11-174.5(b).

Plaintiffs move the court for an Oral Hearing pursuant to the Hawaii Rules of Appellate Procedure Rule 34(c) and Hawaii Rules of Civil Procedure Rule 72(f)(3).

Plaintiffs respectfully request the court note that pursuant to the Hawaii Revised Statute Chapter 11 that "The judgment may invalidate the general...election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the precinct officials..." Ref HRS § 11-174.5(b)

Plaintiffs aver that there is a justiciable controversy that is well established in SCEC-22-0000515 regarding the correct application of the procedures required by HRS § 16-42 and the remedies that are available to the court. (See EXHIBIT E).

In Cushnie vs State of Hawaii, the court acknowledged that "HRS § 11-173.5(b) does not provide for a judgment that would invalidate the primary election and allow a new election. The legislature only provided for this extraordinary remedy in its statutory provisions pertaining to general . . . elections." (Ref: Cushnie v. State, No. SCEC-22-0000515, at *4 (Haw. Sep. 6, 2022)).

Plaintiffs request the court note that the remedy to invalidate a general election is available and is a statutory provision provided by the legislature in HRS § 11-174.5.

Plaintiffs aver that the court has jurisdiction and may invalidate the general election because of a mistake or fraud on part of the precinct officials.

Plaintiffs aver that a correct election result cannot be ascertained if the post-election pre-certification audit requirements are not conducted pursuant to HRS § 16-42 and that this error could change the outcome of the election.

Plaintiffs aver that until the application of the post-election pre-certification audit requirements can be determined as defined in this affirmative statute the 2022 Hawaii General Election is a "contested election" and should not be certified.

CALL TO QUESTION

Is Hawaii Revised Statute HRS § 16-42 an affirmative statute?

Is an affirmative statute required to be followed by persons responsible for the application of a statute?

Is a less restrictive local procedure allowed to be substituted for an affirmative statute?

REQUEST FOR RELIEF AND REMEDY

Plaintiffs plead this court for declaratory judgement without relief in determining Hawaii Revised Statute HRS §16-42 as an affirmative statute.

Plaintiffs plead this court to direct the Defendant to comply with the provisions of HRS § 16-42 in the conduct of post-election pre-certification audits of elections, among other things.

Plaintiffs plead this court to direct the Defendant to ensure local procedures comply with the requirements of HRS §16-42.

Plaintiffs plead the court to define any terms that are in question by the Defendant and not defined by statute or common legal and English language references.

Plaintiffs plead the court to define any procedures that are not clearly understood by their English language interpretation and aligned with sound audit principles.

If the court is unable to determine that HRS § 16-42 is an affirmative statute and unable to direct compliance with the post-election pre-certification audit requirements, then:

Plaintiffs plead this court to invalidate the general election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the precinct officials.

AFFIRMATION

We the Plaintiffs, under threat of perjury, do swear that the foregoing allegations, questions, and statements are true and accurate to the best of our knowledge.

Plaintiffs reserve all rights, without prejudice, and pursuant to UCC § 1-308.

And we shall remain,

Date: 21 November, 2022 City: Kauai, Hawaii

1. By: Ralph S. Cushnie Signature: Ralph S. Cushnie

2. Signatures of more than Thirty Voters (See ATTACHMENT 1)

IN THE SUPREME COURT OF THE STATE OF HAWAII

Ralph S. Cushnie pro se, along with Thirty Voters pro se (Plaintiffs)

vs

Scott Nago, personally and in his official capacity as Chief Elections Officer; for the Office of Elections; STATE OF HAWAII et al (Defendant)

PROPOSED DECLARATORY JUDGMENT

Upon consideration of the Petition for Declaratory Judgment, it is hereby ordered, adjudged, and decreed that this court grants the petition and directs the Defendant to comply with ALL the provisions of Hawaii Revised Statute HRS § 16-42, and that are necessary in ensuring the accuracy of electronic voting systems.

Specifically, the Defendant shall conduct post-election pre-certification audits in accordance with this affirmative statute.

Defendant shall not substitute less restrictive local procedures for this statute.

Dated: On this _____ day of _____ in the year 2022, Honolulu, Hawaii.

_____

The Honorable _____

HAWAII SUPREME COURT Judge Presiding

ENCLOSURE LIST

EXHIBIT A	THE CONSTITUTION FOR THE STATE OF HAWAII ARTICLE I SECTION I, SECTION II, AND SECTION IV
EXHIBIT B	HAWAII REVISED STATUTE, CHAPTER 11 ELECTIONS, AND SPECIFICALLY, HRS § 11-171, HRS § 11-172 AND HRS § 11-174.5
EXHIBIT C	HAWAII REVISED STATUTE, CHAPTER 16 VOTING SYSTEMS, AND SPECIFICALLY HRS § 16-2, HRS § 16-41, AND HRS § 16-42
EXHIBIT D	OBSERVER AND REPRESENTATIVE CORRESPONDENCE
EXHIBIT E	CUSHNIE VS. STATE OF HAWAII; SCEC-22-0000515
ATTACHMENT 1	SIGNATURE OF THIRTY VOTERS

EXHIBIT A

The Constitution for the State of Hawaii Article I Section I, Section II, and Section IV

THE CONSTITUION FOR THE STATE OF HAWAII

Article I

Bill Of Rights

POLITICAL POWER

Section 1. All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority. [Am Const Con 1978 and election Nov 7, 1978]

RIGHTS OF INDIVIDUALS

Section 2. All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities. [Am Const Con 1978 and election Nov 7, 1978]

FREEDOM OF RELIGION, SPEECH, PRESS, ASSEMBLY AND PETITION

Section 4. No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances. [Ren and am Const Con 1978 and election Nov 7, 1978]

EXHIBIT B

Hawaii Revised Statute, Chapter 11 Elections, and specifically, HRS § 11-171, HRS § 11-172 and HRS § 11-174.5

13 Pages plus this Cover Sheet

HAWAII REVISED STATUTES

CHAPTER 11

PART XI. ELECTION CONTESTS

§11-171 Applicability of this part. This part shall apply whenever a contested election is subject to determination by a court of competent jurisdiction in the manner provided by law. [L 1970, c 26, pt of §2]

§11-172 Contests for cause; generally. With respect to any election, any candidate, or qualified political party directly interested, or any thirty voters of any election district, may file a complaint in the supreme court. The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results. The complaint shall also set forth any reasons for reversing, correcting, or changing the decisions of the precinct officials or the officials at a counting center in an election using the electronic voting system. A copy of the complaint shall be delivered to the chief election officer or the clerk in the case of county elections. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(xx); am L 1975, c 36, §1(15); am L 1991, c 9, §2]

§11-174.5 Contests for cause in general, special general, special, and runoff elections. (a) In general, special general, special, or runoff elections, the complaint shall be filed in the office of the clerk of the supreme court not later than 4:30 p.m. on the twentieth day following the general, special general, special, or runoff election and shall be accompanied by a deposit for costs of court as established by rules of the supreme court. The clerk shall issue to the defendants named in the complaint a summons to appear before the supreme court not later than 4:30 p.m. on the tenth day after service thereof.

(b) In cases involving general, special general, special, or runoff elections the complaint shall be heard by the supreme court in which the complaint was filed as soon as it reasonably may be heard. On the return day, the court, upon its motion or otherwise, may direct summons to be issued to any person who may be interested in the result of the proceedings.

At the hearing, the court shall cause the evidence to be reduced to writing and shall give judgment, stating all findings of fact and of law. The judgment may invalidate the general, special general, special, or runoff election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the precinct officials; or decide that a certain candidate, or certain candidates, received a majority or plurality of votes cast and were elected. If the judgment should be that the general, special general, special, or runoff election was invalid, a certified copy

thereof shall be filed with the governor, and the governor shall duly call a new election to be held not later than one hundred twenty days after the judgment is filed. If the court shall decide which candidate or candidates have been elected, a copy of that judgment shall be served on the chief election officer or county clerk, who shall sign and deliver to the candidate or candidates certificates of election, and the same shall be conclusive of the right of the candidate or candidates to the offices. [L 1973, c 217, §1(bbb); am L 1979, c 133, §6; gen ch 1985; am L 1998, c 22, §3 and c 123, §1]

EXHIBIT C

Hawaii Revised Statute, Chapter 16 Voting Systems, and specifically HRS § 16-2, HRS § 16-41, and HRS § 16-42

HAWAII REVISED STATUTES

CHAPTER 16

PART I. GENERAL PROVISIONS

§16-2 Voting system requirements. All voting systems adopted under this chapter by the chief election officer or the legislature shall satisfy the following requirements:

(1) It shall secure to the voter secrecy in the act of voting;

(2) It shall provide for voting for all candidates of as many political parties as may make nominations, nonpartisans, and for or against as many questions as are submitted;

(3) It shall correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions. [L 1970, c 26, pt of §2]

PART IV. ELECTRONIC VOTING SYSTEM

§16-41 Definitions. "Counting center" means the computer facilities and surrounding premises designated by the chief election officer or the clerk in county elections where electronic voting system ballots are counted.

"Defective ballot" means any ballot delivered to the counting center in accordance with section 11-152 that cannot be read by the ballot reading device.

"Electronic voting system" means the method of recording votes which are counted by automatic tabulating equipment.

"Voter verifiable paper audit trail" means the paper record that constitutes a complete record of ballot selections that is verified by the voter. The record may also be used to assess the accuracy of the voting machine's electronic record and to verify the election results. [L 1970, c 26, pt of §2; am L 1975, c 36, §5(6); am L 2006, c 5, §1]

§16-42 Electronic voting requirements. (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections, the equipment shall reject all votes for an office when the number of votes therefor exceeds the number that the voter is entitled to cast.

No electronic voting system shall be used in any election unless it generates a paper ballot or voter verifiable paper audit trail that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot or voter verifiable paper audit trail is retained as the definitive record of the vote cast.

(b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:

(1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;

(2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;

(3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; and

(4) If discrepancies appear in the pre-certification audits in paragraph (3), the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of misreporting in the system. [L 1970, c 26, pt of §2; am L 1973, c 217, §6(g); am L 1979, c 139, §12; am L 2005, c 200, §1; am L 2006, c 5, §2]

EXHIBIT D

Observer and Representative Correspondence

5 Pages plus this Cover Sheet

November 7, 2022

Mr. Scott Nago
Office of Elections
802 Lehua Avenue
Pearl City, Hawaii 96782

Mr. Scotty Anderson
Elections Commission
c/o Office of Elections
802 Lehua Avenue
Pearl City, Hawaii 96782

Re.: Formal Demand that Audit of the 2022 General Election Results be Conducted in Accordance with Hawaii Revised Statutes §16-42 (b)

Dear Mr. Nago and Mr. Anderson,

The Republican Party County Chairs respectfully demand that the Chief Elections Officer Scott Nago perform the prescribed audit of the election results, in every County Elections Division across the State of Hawaii pursuant to Hawaii Revised Statutes (HRS) §16-42 (b), which states:

> (b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:
> (1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;
> (2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;
> (3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten percent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; and
> (4) If discrepancies appear in the pre-certification audits in paragraph (3), the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of misreporting in the system.

During the 2022 Primary Election, the majority of County Elections Divisions relied on observing scanned electronic images of the ballots in order to verify the electronic tallies for the aforementioned audit of election results, instead of pulling and counting paper ballots. This method is clearly contrary to the laws as written in (1) through (4) of HRS §16-42 (b).

HRS16-42 authorizes the Chief Elections Officer to utilize electronic voting systems *IF* the chief election officer conducts a post-election, pre-certification audit of a **random sample of not less than ten per cent of the precincts employing the electronic voting system**, to verify that the **electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots** generated by the system in those precincts;

Electronic tallies and hand tallies mean the total count of all contests and all ballots in those precincts not just one contest. Counting all the contests and ballots is the only means of verification that the Elections systems are accurately reporting votes.

We appreciate your time and attention to this very important matter. We will also send our request via email to all parties concerned and look forward to a written email response from each of you affirming your compliance with HRS §16-42 (b) (3) within 1 day (24 hours) from receipt of electronic copy of this letter.

Dalene McCormick
County Chair
West Hawai'i County Republican Party

Kahiolani Papalimu
County Chair
East Hawai'i County Republican Party

Tamara McKay
County Chair
Maui County Republican Party

Ana Mo Des
County Chair
Kauai County Republican Party

Brett Kulbis
County Chair
Honolulu County Republican Party

Adriel Lam
Vice Chair, Election Integrity
Hawai'i Republican Party

Laura Nakanelua
Republican National Committeewoman
Hawai'i Republican Party

Copy to:

Glenn Takahashi, Honolulu County Elections Division
Jade Tanigawa, Kaua'i County Elections Division
Lyndon Yoshioka, Kaua'i County Elections Division
Mr. Jon Henricks, Hawaii County Elections Division
Ms. Kathy Kaohu, Maui County Elections Division
Members, Hawai'i Elections Commission

From: Ralph Cushnie <ralph@cushniecci.com>
Date: November 13, 2022 at 12:39:00 PM HST
To: "OE.Elections" <elections@hawaii.gov>
Cc: "Kataoka, Jaime N" <jaime.n.kataoka@hawaii.gov>, William Dean <william@ohanalawfirm.com>, Lillian B Koller <lillian.b.koller@gmail.com>, stantonproperties@sbcglobal.net, Michael Curtis <mike@r7r.com>, Lyndon Yoshioka <lyoshioka@kauai.gov>, Jade Tanigawa <jtanigawa@kauai.gov>
Subject: Audits that comply with HRS16-42

Aulii,

I am writing this to notify the office of elections that the 2022 general election post audit must be done in accordance with HRS 16-42. The Counting Center manual does not comply with HRS16-42 because the audits in the manual are either not random or they are not performed using the original paper ballots. The Counting Center manual the Office of Elections has been following specifically states on the second page that "the manual is not a substitute for the statutes and rules governing elections". HRS 16-42 requires that the paper ballots must be used for the post election/precertification audit. This means the computer images are not allowed to be used in audits checking the validity of the electronic voting machines. Audits need to be able to be cross checked to publicly available information. As a result the post election/precertification audit for Kauai County must be performed by randomly picking 2 precincts and comparing the hand tallies of the original paper ballots to the precinct results posted on-line. HRS 16-42 also states that the post election/precertification audit must make sure the electronic tallies generated by the system is those precincts "equal" the hand tallies of the paper ballots. The only way to determine if those tallies are "equal" is to audit all the contests in the chosen precincts not just one contest in each precinct. Hard copies of the precinct results generated by the audits must be verified to be the same results posted online. The in-person votes must also be included in this audit. The precinct results posted on-line are already separated into in-person and mail reports. The in-person paper ballots must also be hand counted in accordance with HRS16-42. The audit must also be done in the presence of County Officials and Official Observers who are the eyes and ears of the public.

Please notify us how the Office of Elections plans to comply with HRS 16-42 for the post election/precertification audit of the Kauai general Election results?

Ralph Cushnie

Jaimie Please send this to the other commision members that were not copied.

§16-42 Electronic voting requirements. (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections, the equipment shall reject all votes for an office when the number of

votes therefor exceeds the number that the voter is entitled to cast.

No electronic voting system shall be used in any election unless it generates a paper ballot or voter verifiable paper audit trail that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot or voter verifiable paper audit trail is retained as the definitive record of the vote cast.

(b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:

(1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;

(2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;

(3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts; and

(4) If discrepancies appear in the pre-certification audits in paragraph (3), the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of misreporting in the system.

[L 1970, c 26, pt of §2; am L 1973, c 217, §6(g); am L 1979, c 139, §12; am L 2005, c 200, §1; am L 2006, c 5, §2]

EXHIBIT E

CUSHNIE VS. STATE
SCEC-22-0000515

6 Pages plus this Cover Sheet

Electronically Filed
Supreme Court
SCEC-22-0000515
06-SEP-2022
10:41 AM
Dkt. 16 FFCL

SCEC-22-0000515

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

RALPH CUSHNIE, Plaintiff,

vs.

STATE OF HAWAIʻI - CHIEF ELECTION OFFICER, Defendant.

ORIGINAL PROCEEDING

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT
(By: Nakayama, Acting C.J., McKenna, Wilson, and Eddins, JJ., and Circuit Judge Johnson, in place of Recktenwald, C.J., recused)

On August 26, 2022, Plaintiff Ralph Cushnie (Cushnie), and a group of 30 voters in District 17 on the island of Kauaʻi, submitted a letter that we construe as an election contest complaint (complaint). On August 31, 2022, Defendant State of Hawaiʻi - Chief Election Officer (Defendant) filed a motion to dismiss Cushnie's complaint. On September 2, 2022, Cushnie filed a letter in rebuttal to the motion to dismiss (rebuttal). Upon consideration of the complaint, motion to dismiss, and rebuttal, and having heard this matter without oral argument, we enter the following findings of fact, conclusions of law, and judgment.

FINDINGS OF FACT

1. Cushnie filed the complaint on August 26, 2022.

2. Cushnie asserts that two audits were performed for the 2022 Primary Election that did not satisfy the requirements of Hawai'i Revised Statutes (HRS) § 16-42 (2009) because, in the first audit, the ballots were not chosen randomly, and, in the second audit, ballot images were incorrectly compared to electronic tallies when HRS § 16-42 requires paper ballots to be compared to electronic tallies.

3. Cushnie requests that the certification of the 2022 Primary Election be halted until a manual recount of the paper ballots of one randomly selected district in each county is performed by election officials and official volunteer observers.

4. In addition to HRS § 16-42, Cushnie cites HRS §§ 11-172 (Supp. 2021) and 11-174.5 (2009 & Supp. 2021) in support of his assertions and requested relief.

5. Cushnie emphasizes the following language in HRS § 11-174.5: "The judgment may invalidate the general, special general, special, or runoff election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the voter service center officials[.]"

6. Defendant asserts that the complaint should be dismissed with prejudice, or, alternatively, that summary judgment be entered in its favor.

7. Cushnie filed a rebuttal on September 2, 2022, maintaining that an audit in compliance with HRS § 16-42 has not been completed.

CONCLUSIONS OF LAW

1. When reviewing a request to dismiss a complaint, the court's review "is based on the contents of the complaint, the allegations of which [the court] accept[s] as true and construe[s] in the light most favorable to the plaintiff. Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Casumpang v. ILWU, Local 142, 94 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000) (quotation marks and citation omitted).

2. When considering a request to dismiss a complaint, the court need not accept conclusory or formulaic recitations on the legal effects of the events alleged. Kealoha v. Machado, 131 Hawai'i 62, 74, 315 P.3d 213, 225 (2013).

3. A complaint challenging the results of a primary election fails to state a claim unless the plaintiff demonstrates errors, mistakes, or irregularities that would change the outcome of the election. See HRS § 11-172; Funakoshi v. King, 65 Haw. 312, 317, 651 P.2d 912, 915 (1982).

4. Plaintiffs challenging a primary election must show that they have actual information of mistakes or errors sufficient to change the election result. Funakoshi, 65 Haw. at 316-17, 651 P.2d at 915.

5. HRS § 11-172 provides in relevant part: "With respect to any election, any candidate, or qualified political party directly interested, or any thirty voters of any election

district, may file a complaint in the supreme court. The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results."

6. In order for a primary election complaint to be legally sufficient, it must "show[] that the specific acts and conduct . . . complain[ed of] would have had the effect of changing the results of the primary election[.]" Elkins v. Ariyoshi, 56 Haw. 47, 49, 527 P.2d 236, 237 (1974); see Funakoshi, 65 Haw. at 314, 651 P.2d at 913 ("'[D]ifference in the election results' in HRS § 11-172 . . . mean[s] 'a difference sufficient to overturn the nomination of any particular candidate or candidates in the primary.'" (Quoting Elkins, 56 Haw. at 49, 527 P.2d at 237)).

7. HRS § 11-173.5 (2009 & Supp. 2021) sets forth, among other matters, the time requirements for primary election contests to be filed in the supreme court, as well as the remedy allowed to be provided in primary election contests.

8. Having the court decide which candidate was nominated or elected is the only remedy that can be given in a primary election contest. Funakoshi, 65 Haw. at 315-16, 651 P.2d at 914. In other words, the "only statutory relief to which plaintiff is entitled under HRS § 11-173.5(b) would be to have this Court declare the name of the candidate to be nominated or elected." Id. at 315, 651 P.2d at 914.

9. HRS § 11-174.5 sets forth, among other matters,

the remedies allowed to be provided in general election contests, which includes "invalidat[ing] the general . . . election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the voter service center officials[.]"

10. HRS § 11-174.5 does not apply here because the 2022 General Election has not happened yet, and thus there are no general election results to invalidate. See Funakoshi, 65 Haw. at 315, 651 P.2d at 914 ("HRS § 11-173.5(b) does not provide for a judgment that would invalidate the primary election and allow a new election. The legislature only provided for this extraordinary remedy in its statutory provisions pertaining to general . . . elections.").

11. Taking Cushnie's allegations as true and viewing the allegations in a light most favorable to him, Cushnie's requested relief of seeking an order halting the certification of the 2022 Primary Election results until a manual recount is performed is not a remedy authorized by HRS § 11-173.5(b) ("[t]he judgment shall decide what candidate was nominated or elected"). See Funakoshi, 65 Haw. at 315-16, 651 P.2d at 914.

12. The complaint thus fails to state a claim upon which relief may be granted.

JUDGMENT

Based upon the foregoing findings of fact and conclusions of law, judgment is entered dismissing the complaint.

DATED: Honolulu, Hawai'i, September 6, 2022.

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

/s/ Todd W. Eddins

/s/ Ronald G. Johnson

ATTACHMENT 1

Signatures of More Than Thirty Voters

12 Pages plus this Cover Sheet

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Ralph Cushnie	Ralph Cushnie	4702 Lae Rd. Kalaheo
Brandon Orsatelli	[illegible]	4075-K Blackstail Rd
Travis Haymea	[illegible]	4940 Puuwai Rd
Waylan Reynolds	[illegible]	5036 Alii Rd Hanapepe
Daylan Vidinha	[illegible]	4813 Puuwai Rd Kalaheo
Lehie Mishihira	[illegible]	4371 Ahopueo Kalaheo
Leanne Hubbard	[illegible]	2497 Texura Tract, Kalaheo
Laura L. Cushnie	Laura L. Cushnie	4702 Lae Rd., Kalaheo
CHAD VALMOTA	Chad Valmota	4702 Lae Rd Kalaheo
KAWIKA LAWRENCE	[illegible]	3676 'Uwao ST Hanapepe
GEORGE ESPINOSA	[illegible]	117 OKUPU ST ELEELE 2285 Puuwai Rd 96741
Chris Soares	[illegible]	3313 Lihue HI 96766
Dawson Bardayo	[illegible]	PO BOX 1061 Waimea HI 96796
Chad Cassel	[illegible]	6087 Olohena Kapaa HI 96746
Kalvin Souza	Kalvin A. Souza	4870 Puu Wai Rd 96741
William Souza	[illegible]	4870 Puuwai Rd 96741

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
George K Kanna		4700 Lae Rd. 96741
Tia Kawamura		2740A Ohana Cuna Kalaheo
Masahiro Satta		3761 Hanapepe Rd.
Keana Kia-Kinzie		4270 UPA Rd. Koloa HI 96756
Sharlyn Kanna		4700 Lae Rd. 96741
Naomi Masaki		4700 Lae Rd. 96741
[illegible]		2736 Ala Kiloki Rd. Koloa 96756
Glenn Koto		4328 Lele Rd Honapepe 96716
Patti Rutt		4710 Maikai, Kalaheo 96741
Malia Allen		5610 Kaapuni Rd. Unit B Kapaa HI 96746
Gale Saguid		8025 Iwipoleno Rd Kekaha
Bryan Maeda		8025 Iwipoleno Rd 96752
Timmy Hirano		3893 Hanapepe 96716
Lisa Hirano		3893 Hanapepe Rd. 96716
Shari Fujiura		5164 Paanau Rd #506 Koloa HI 96756
Allegra Scribner		2233 Ala Kinoiki Koloa HI 96756

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
VINCE FLORES		2-3631 KAUMUALII
DUSTY Paraubrub		3269 Poipu Rd.
Anthony Howland		3833 Omao Road
William Armstrong		4070 Omao Rd Koloa HI
ISAIAH Sims		3269 POIPU RD
Roderick M. Kamoa		8589 Kiowea RD
RUTH KAMOA		8589 KIOWEA ST.
CHRISTIAN PEREZ		8404 HALELIO
JASON K. NEWALL		4458 HOKULELE PL.
Daisy Newall		"
JASON K NEWALL		"
JULIET FLORES		2-3631 KAUMUALII Hwy Lihue
Victoria Zavala		PO Box 826 Lawai 96765

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Ronald T. Valdez	Ronald T. Valdez	593 Lawlea St.
Novena K. Valdez	Novena K. Valdez	593 Lawlea St.
Curtis Brayer	Curtis Brayer	4580 Lea Lane Hanapepe
Albert Fernandez		1981 Peleleu St 96741
ERIC R RITA	E R	P.O. Box 1273 Kalaheo 96741
David Callahan		P.O. Box 131 Lawai 9676
Sharon Callahan	Sharon Callahan	P.O. Box 131 Lawai 96765
Forrest Callahan		RO Box 1271 Kalaheo 96741
Nathan Norton		4434 Papalina Rd Po Box Kalaheo 96741
Rhiff Callahan		3609 Wahe Road 96741
FRANCIS J BRUNSK		4278 A I Road 96741
Aileen BRUN	Aileen Brun	4278 A. Road 96741
Robert R L Young	Robert R L Young	PUU RD 1800
J. Callahan	J. Callahan	3914 Kiami Rd
DARRYL CALLAHAN		3914 Kiami St, Kalaheo

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
ROBERT DENNISON		6166 KIKALA, KOLAHEE HI
LITHO MEDINA		3194 MAMAKI ST KOLOA
Michael Wilson		3269H Poipu Rd
DAVID GALLAGHER		8515 HALELIO KEKAHA 96752
Amy Sugano		3309 Poipu Rd
Donald Ray Dudley		3763 A Waha Rd 96741
Matthew Godbout		4350 Papalina St 96741
HEATHER HOWLAND		3833 OMAO ROAD KOLOA 96756
Myra de la Cruz		543 Leipapa Pl. - Eleele 96705
BRIAN DE LA CRUZ		543 LEIPAPA PL. ELEELE 96705
Mark + Kristi Williamson		1699 Poipu Aina Pl. Koloa 96757
MIKE LINDSEY		3342 HAILIMA RD KOLOA 96756
JULIE SOMMERS		5206 Puuwai Rd, Kalaheo HI 96741
SCOTT SOMMERS		5206 Puuwai Rd Kalaheo, HI 96741
Elma McCracken		4390 Olali St. Eleele, HI. 96705
		4390 olali St. Eleele, HI
	Harold Kilborn	3269 Poipu 96705
Christine Kilborn	Christine Kilborn	3269 Po-pu 96756

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Kathleen Bryant	[signature]	1198 Milia St Kalaheo
Jason Bryant	[signature]	1198 Milia St Kalaheo HI 96741
Jeffrey Bryant	[signature]	1198 Milia St. Kalaheo. HI 96741
Cindy Bryant	[signature]	1198 Milia St Kalaheo. HI 96741
Jennifer Bryant	[signature]	8331 Elepaio Rd Kekaha HI 96752
Rondelle Ayau	[signature]	2270 Haku Hale St, Kalaheo HI 96741
Blaisdell Ayau	[signature]	2270 Haku Hale St. Kalaheo HI 96741
EHREN EDWARDS	[signature]	2320 HAKU HALE ST. KALAHEO 96741
REID TANITA	[signature]	232 ULAULA RD. ELEELE 96705
Kenneth Reese	[signature]	3681-C Waha Rd, Kalaheo HI 96741
Bryan Buckingham	[signature]	4158-D Pai Street Kalaheo HI 96741
Samson Arzamendi	[signature]	5192 KAUNALOA ST UNIB, HANAPEPE, HI 96716
Shandiin Valmoja	[signature]	4704 A LAOrd Kalaheo HI 96741
Timothy Side	[signature]	4945 Kikala Rd

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
ARTHUR MEDINA	A. Medina	Kapaa 96746
Perry Aguiado	Perry Aguiado	Kapaa 96746
Gordon Jacinto	Gordon Jacinto	Kapaa 96746
DAVID NIAU	David Niau	Kaawanui 96752
JEREMIAH SHINTANI	Jeremiah Shintani	Kaawanui 96769
[illegible]	[illegible]	[illegible]
WILLIAM A. COCKMAN	W A Cockman	Kapaa 96746
Shandra Macatu	Shandra Macatu	Kalaheo 96741
David Somers	David Somers	Waimea 96796

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Aurel Domingo	[signature]	3921 Mamaki St, Koloa HI 96756
Ben Silva	[signature]	439 Kaumakani Hi 96747
Clianne Mangayayam	Clianne Mangayayam	Pakala Village Hse A-18 Makaweli, HI 96769
Matthew Capmo	[signature]	Pakala Village Hse B06 Makaweli HI 96769
Jacob Elia Kaohelaulii	[signature]	Kaumanai #1
Lanaine Yang	Lanaine	Makaweli
[signature]	Sawyer Dias	Lihue 96766
Richard Arkeks	[signature]	Koloa 96756
[signature]	[signature]	140 AKALA ELEELE
Kobey Dias	[signature]	[redacted] Kaumakani 96747
Louis Matias	Louis Matias	Pakala Camp House B09 96769
Richard Henderson	Richard L. Henderson	P.O. Box 348 Kaumakani 96747
Marcellino DeFabian	Marcellino DeFabian	P.O. Box 656 Hanapepe Hi 96716
Natividad DeFabian	Natividad DeFabian	PO Box 656 Hanapepe, Hi 96716

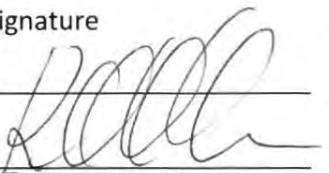
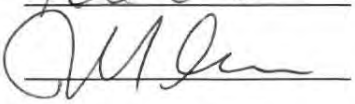
I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Nick Prieto	N Prieto	2760 OHANA AINA PL Kalaheo, HI 96741

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Kalei Rull	Krull	462A Iluna St Eleele HI 96705
Dean Rull	Drull	462 Iluna St Eleele HI 96705
Debra Shimono	Debra Shimono	4736A Elepaio Rd Eleele 96705
Olena Castillo	Olena Castillo	5044 Alii Rd. Hanapepe HI 96705
Chalton Castillo		5044 Alii Rd. Hanapepe HI 96705
Vanessa Udarbe		414 Kaumakani Ave Hi 96744
James Hasenyager	JHasenyager	4010A Pai St Kalaheo HI 96741

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
Kelly Relph-Clemensen		3611 Kua Aina St. Kalaheo HI
Joseph Clemensen		3611 Kua Aina St. Kalaheo HI

I and thirty (30) voters in District 17 from the Island of Kauai are writing to file a complaint under HRS §11-172 and HRS §11-74.5 to stop the certification of the 2022 General Election (per HRS §11-155) until a manual audit of the paper ballots according to HRS16-42 is performed by election officials and official volunteer observers. Every race should be hand counted using the voter verifiable paper audit trail of 2 randomly selected precincts and be compared to the computer-generated tallies posted online in order to certify the 2022 General Election. Election officials failed to perform audits in accordance to HRS §16-42 and therefore, per HRS §11-155 (1), the election results cannot be certified.

Printed Name	Signature	Physical Address
CANDACE CARLSON	Candace Carlson	2764 Milo Hae Loop Kolod 96756
KYLIE CARLSON	KYLIE CARLSON	2764 MILO HAE LOOP KOLOA 96756
KEVIN CARLSON		2764 MILO HAE LOOP KOLOA 96756

Electronically Filed
Supreme Court
SCEC-22-0000703
28-NOV-2022
02:23 PM
Dkt. 10 MD

No. SCEC-22-0000703

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

RALPH CUSHNIE *pro se*, along with more than Thirty Voters, *pro se*, Plaintiff, vs. SCOTT T. NAGO, personally and in his official capacity as Chief Election Officer, for the Office of Elections, STATE OF HAWAII, et al. Defendant.	ORIGINAL PROCEEDING

DEFENDANT SCOTT T. NAGO'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FILED ON NOVEMBER 22, 2022, OR IN THE ALTERNATIVE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MEMORANDUM IN SUPPORT OF MOTION

DECLARATION OF SCOTT T. NAGO; EXHIBITS A-B

CERTIFICATE OF SERVICE

HOLLY T. SHIKADA 4017
Attorney General of Hawai'i

PATRICIA OHARA 3124
REESE R. NAKAMURA 4822
Deputy Attorneys General
425 Queen Street
Honolulu, Hawai'i 96813
Telephone: (808) 586-0618
Facsimile: (808) 586-1372

Attorneys for Defendant
SCOTT T. NAGO, Chief Election Officer,
for the Office of Elections, STATE OF HAWAII

DEFENDANT SCOTT T. NAGO'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FILED ON NOVEMBER 22, 2022, OR IN THE ALTERNATIVE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant SCOTT T. NAGO, by and through his attorneys HOLLY T. SHIKADA, Attorney General of Hawai'i, and Deputy Attorneys General PATRICIA OHARA and REESE R. NAKAMURA, hereby respectfully moves this Honorable Court for an order dismissing with prejudice the Election Complaint filed herein by Plaintiff RALPH CUSHNIE and Thirty Voters on November 22, 2022. Alternatively, should this Honorable Court find that matters outside the pleadings are presented to and not excluded by this Court, Defendants respectfully request this motion be treated as one for summary judgment and disposed of as provided by Rule 56(a) of the Hawai'i Rules of Civil Procedure ("HRCP").

This Motion is brought pursuant to Rules 12(b)(6) and 56(a) of the HRCP, and is based upon the Memorandum in Support of Motion, Declaration of Scott T. Nago and Exhibits A and B, all of which are attached hereto and are incorporated by reference herein.

DATED: Honolulu, Hawai'i, November 28, 2022.

HOLLY T. SHIKADA
Attorney General of Hawai'i

/s/ REESE R. NAKAMURA
PATRICIA OHARA
REESE R. NAKAMURA

Attorneys for Defendant
SCOTT T. NAGO, Chief Election Officer, for the Office of Elections, STATE OF HAWAII

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

I. INTRODUCTION 1

II. BACKGROUND 3

A. ELECTRONIC VOTING AND AUDITING REQUIREMENTS 3

B. PLAINTIFF'S COMPLAINT 5

III. STANDARDS OF REVIEW 7

A. ELECTION CONTESTS UNDER HRS §§ 11-172 AND 11-174.5 7

B. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER HRCP RULE 12(b)(6) 8

IV. ARGUMENT 9

A. PLAINTIFFS HAVE NOT MET THEIR BURDEN TO DEMONSTRATE ANY ACTUAL ERRORS, MISTAKES, OR IRREGULARITIES THAT WOULD CHANGE THE OUTCOME OF THE ELECTION 9

B. DEFENDANT'S AUDIT IS IN COMPLIANCE WITH STATUTORY REQUIREMENTS 10

1. Hawaii's Voting System 11

2. Plaintiffs' position is unsupported 12

V. CONCLUSION 13

TABLE OF AUTHORITIES

Federal Cases

Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC,
151 F.Supp.3d 287 (E.D.N.Y. 2015) 9

State Cases

Akaka v. Yoshina,
84 Hawai‘i 383, 935 P.2d 98 (1997) 8

Andrade v. Cnty. of Hawai‘i,
145 Hawai‘i 265, 451 P.3d 1 (App. 2019) 9

Bank of Hawaii v. Shaw,
83 Hawaii 50, 924 P.2d 544 (1996) 13

Brown v. Iaukea,
18 Haw. 131 (1906) 8

Elkins v. Ariyoshi,
56 Haw. 47, 527 P.2d 236 (1974) 8

Kulike v. Fern,
19 Hawai‘i 278 (1909) 8

Larsen v. Pacesetter Sys. Inc.,
74 Haw. 1, 30-31 (1992) 10

Tataii v. Cronin,
119 Hawai‘i 337, 198 P.3d 124 (2008) 8

Hawaii Revised Statutes (HRS)

HRS §11-106 10
HRS §11-156 1
HRS §11-158 10
HRS § 11-172 ..... 2, 7, 8
HRS § 11-174.5 ..... 1, 5, 7, 11
HRS § 11-174.5(b) 6
HRS § 16-2 10
HRS § 16-42 ..... 3, 4, 5, 6
HRS § 16-42(b) 2, 5, 10, 11, 12
HRS § 16-42(b)(3) 5
HRS § 626-1 2

Hawaii Rules of Civil Procedure (HRCP)

HRCP R. 9(b) 9
HRCP R. 12(b)(6) 8
HRCP R. 56(a) 14

Hawaii Rules of Evidence (HRE)

HRS Rule 1001(d) 12
HRS Rule 1002 12
HRE Rule 1003 ..... 2, 13

Hawaii Administrative Rules (HAR)

HAR § 3-177-706 11
HAR § 3-177-707 11
HAR § 3-177-762 4
HAR § 3-177-762(a) 4
HAR § 3-177-762(b) 4
HAR § 3-177-762(c) 4, 5
HAR § 3-177-762(d) 5

No. SCEC-22-0000703

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

RALPH CUSHNIE *pro se*, along with more than Thirty Voters, *pro se*, Plaintiff, vs. SCOTT T. NAGO, personally and in his official capacity as Chief Election Officer, for the Office of Elections, STATE OF HAWAII, et al. Defendant.	ORIGINAL PROCEEDING MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On November 22, 2022, Plaintiff RALPH CUSHNIE and Thirty Voters (collectively "Plaintiffs") filed an Election Complaint ("Complaint") against Defendant SCOTT T. NAGO ("Defendant" or "Chief Election Officer") with this Honorable Court, less than two weeks before the transition from one state executive administration to its successor, seeking to invalidate the 2022 General Election. This is also the second time Plaintiff CUSHNIE has submitted these same claims to this Honorable Court. Plaintiff's prior action, SCEC 22-0000515, sought to invalidate the results of the 2022 Primary Election and was dismissed by this Honorable Court on September 6, 2022. Inasmuch as Plaintiffs now contest all of the results of the November 8, 2022 General Election, and HRS § 11-156 expressly precludes the delivery of certificates of election and certificates of results when the election results have been contested and a final determination is pending, Defendant respectfully requests that this Court dismiss Plaintiffs' Complaint in a summary manner as provided for in HRS § 11-174.5.

As with his earlier action, Plaintiffs' Complaint here should also be dismissed because the Complaint again fails to set forth any cause or causes that satisfy the requirements of HRS §11-172, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results. In his position as Chief Election Officer, Defendant conducts audits in compliance with state law using scanned digital images of the actual paper ballots.

While this system is often commonly referred to as an electronic voting system, in actual operation it is limited to counting votes. Therefore, it is more properly referred to as an "automatic tabulation system" or "mechanical tabulation system." Consequently, because it is a mechanical tabulation system, HRS §16-42(b) allows the Chief Election Officer to count the paper ballots with the mechanical tabulation system.

Here, Plaintiffs seek to invalidate the recent General Election by arguing that the original paper ballots must be used to perform audits under HRS §16-42(b). Plaintiffs claim that the original paper ballots themselves must be used to conduct the audit, notwithstanding that to do so could potentially involve the review of hundreds of thousands of ballots, and sacrifice the important benefits the State enjoys using the current system; efficiency and accuracy.

Plaintiffs also fail to allege with particularity how the State's current use of digital images constitutes any provable fraud, overages, or underages, that could cause a difference in the election results as required by HRS § 11-172. The Hawaii Rules of Evidence Rule 1003 and case law have long held that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it be unfair to admit the duplicate in lieu of the original." *See* HRS § 626-1, Rule 1003.

For the reasons discussed more fully below, Plaintiffs' Complaint should be dismissed with prejudice because: (1) it fails to state a claim upon which relief can be granted;

(2) Plaintiffs' speculative claims fall short of demonstrating any provable fraud, overages, or underages, that could cause a difference in the election results; and (3) the Chief Election Officer's audit is in compliance with statutory requirements.

II. BACKGROUND

A. ELECTRONIC VOTING AND AUDITING REQUIREMENTS

Hawaii Revised Statutes ("HRS") § 16-42 governs electronic voting requirements and provides:

> (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections, the equipment shall reject all votes for an office when the number of votes therefor exceeds the number that the voter is entitled to cast.
>
> No electronic voting system shall be used in any election unless it generates a paper ballot or voter verifiable paper audit trail that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot or voter verifiable paper audit trail is retained as the definitive record of the vote cast.
>
> (b) The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand **or with a mechanical tabulation system** if:
>
> (1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;
>
> (2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;
>
> (3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots **generated by the system** in those precincts; and
>
> (4) If discrepancies appear in the pre-certification audits in paragraph (3), the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of

misreporting in the system.

HRS § 16-42. (Emphases added).

The applicable administrative rule concerning the auditing of electronic voting systems is HAR § 3-177-762. *See* HAR § 3-177-762. HAR § 3-177-762(a) states that

> [t]he chief election officer or the clerk shall conduct an audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots **generated by the system** in those precincts.
>
> (1) The manual audit may be conducted by election officials or by counting center officials;
> (2) Except for designated election officials, counting center officials, or official observers, no person shall be permitted to witness the audit without the authorization of the chief election officer, clerk, or designated representative. The area in which the audit is conducted shall be kept secure;
> (3) Observers may request to conduct a manual audit;
> (4) Whenever ballots are removed from storage, the handling of the ballots shall be witnessed by not less than two representatives who are not of the same political party or official observers;
> (5) Election officials and counting center officials shall certify the conduct of and results of the manual audit; and
> (6) The manual audit shall not be considered a recount pursuant to the election contest provisions of the law.

Id. § 3-177-762(a). (Emphasis added.) As to the procedure for discrepancies found during an audit, subsection (b) provides that:

> the chief election officer may authorize an expanded audit to determine the extent of misreporting within the system.
>
> (1) The chief election officer may use official observers, election day officials, county or state election employees, or other designated individuals as part of the expanded audit.
> (2) The chief election officer will determine when the expanded audit is concluded.
> (3) The results of the expanded audit will be filed with the office of elections.

Id. § 3-177-762(b). Moreover, § 3-177-762(c) states:.

> [i]n lieu of relying on the initial results from an electronic voting system, the chief election officer may count ballots or voter verifiable paper audit trails by hand **or with a mechanical tabulation system**, or a combination thereof.
>
> (1) Any counting of ballots or voter verifiable paper audit trails, through the use of a mechanical tabulation system, will conform to the marking and vote disposition rules relating to the voting system that the ballot or voter verifiable paper audit trails were associated with.
>
> (A) **As the marksense ballot voting system, is a mechanical tabulation system**, and the ballots were intended to be read by the devices associated with that system, the chief election officer, will to the extent possible, use those voting devices of the system that did not experience misreporting problems; and

Id. § 3-177-762(c). (Emphases added). To the extent possible, the chief election officer will "resolve any misreporting problem, prior to the end of the contest period stated in . . . HRS § 11-174.5, in the case of a general, special general, or special election. Any resolution of a misreporting problem shall be documented and filed with the office of elections." *Id.* § 3-177-762(d).

B. PLAINTIFFS' COMPLAINT

Plaintiffs' primary assertion here relates to HRS § 16-42(b). Among other things, Plaintiffs' Complaint alleges the following claims:

- Plaintiffs respectfully request the court note HRS § 16-42(b)(3) specifies that (b) "The chief election officer may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if: (3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts" (Ref: HRS § 16-42)

- Plaintiffs aver that this affirmative statute requires a post-election pre-certification audit of a random sample, of not less than ten percent of precincts, that compares the hand tallies of the votes on the paper ballots is equal to the electronic tallies generated by the voting system - in order to ensure the accuracy of the
voting system.

- Plaintiffs aver that the Defendant is not following this affirmative statute in determining the electronic tallies created by the electronic voting system accurately reflect the record and is equal to the vote as cast on the paper ballot by the voters.

- Plaintiffs aver that the Defendant has substituted a less restrictive local procedure in place of this affirmative statute and is not in compliance with the statutory by-law.

- Plaintiffs aver that the post-election pre-certification audits as administered by the Defendant fail the requirements specified in HRS § 16-42 in that:

  1) the procedure being used does not verify the voters complete record of ballot selections for all races in the randomly selected precincts, but rather only compares one race in those precincts, and

  2) the procedure being used does not verify the tallies of votes as registered on the paper ballots is equal to the output of the tallies of the electronic voting system, but rather compares the electronic image of the ballot to the output of the electronic voting system.

- Plaintiffs aver that failure to perform an accurate post-election pre-certification audit is an error that could cause a difference in the election results, and that the accuracy of the general election is questionable and indeterminate.

- Plaintiffs aver that the post-election pre-certification audit procedures used by election officials in the counting center do not in any way verify that the votes cast by the voter on the paper ballot are correctly tallied by the electronic voting system, and that without a valid audit, a correct result cannot be ascertained. Without a verifiable audit, there is no way to determine any level of accuracy in the election.

- Plaintiffs respectfully request the court note that pursuant to the Hawaii Revised Statute Chapter 11 that "The judgment may invalidate the general... election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the precinct officials..." Ref HRS § 11-174.5(b)

From what we can gather, Plaintiffs are asserting that when conducting an audit under HRS § 16-42, the Chief Election Officer is required to handle the actual paper ballots when conducting its counting process. Plaintiffs' claims do not, however, allege that the digital image copies of the paper ballots contain any discrepancies or differences in the information or data contained in

those images and the actual paper ballots. Despite the absence of any allegations, much less support, that the digital images may differ in some way from the actual paper ballots, Plaintiffs nevertheless seek to overturn the 2022 General Election.

III. STANDARDS OF REVIEW

A. ELECTION CONTESTS UNDER HRS §§ 11-172 AND 11-174.5

HRS § 11-172 governs election contests and states in pertinent part:

> [w]ith respect to any election, any candidate, or qualified political party directly interested, or any thirty voters of any election district, may file a complaint in the supreme court. The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results.

HRS § 11-172. (Emphasis added.) The legal standard for election contests concerning a general election can be found in HRS § 11-174.5:

> **§11-174.5 Contests for cause in general, special general, special, and runoff elections.** (a) In general, special general, special, or runoff elections, the complaint shall be filed in the office of the clerk of the supreme court not later than 4:30 p.m. on the twentieth day following the general, special general, special, or runoff election and shall be accompanied by a deposit for costs of court as established by rules of the supreme court. The clerk shall issue to the defendants named in the complaint a summons to appear before the supreme court not later than 4:30 p.m. on the tenth day after service thereof.
>
> (b) In cases involving general, special general, special, or runoff elections the complaint shall be heard by the supreme court in which the complaint was filed as soon as it reasonably may be heard. On the return day, the court, upon its motion or otherwise, may direct summons to be issued to any person who may be interested in the result of the proceedings.
>
> At the hearing, the court shall cause the evidence to be reduced to writing and shall give judgment, stating all findings of fact and of law. The judgment may invalidate the general, special general, special, or runoff election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the voter service center officials; or decide that a certain candidate, or certain candidates, received a majority or plurality of votes cast and were elected. If the judgment should be that the general, special general, special, or runoff election was invalid, a certified copy thereof shall be filed with the governor, and the governor shall duly call a new election to be held not later than

> one hundred twenty days after the judgment is filed. If the court shall decide which candidate or candidates have been elected, a copy of that judgment shall be served on the chief election officer or county clerk, who shall sign and deliver to the candidate or candidates certificates of election, and the same shall be conclusive of the right of the candidate or candidates to the offices.

See id. § 11-174.5. (Emphases added).

B. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER HRCP RULE 12(b)(6)

Rule 12(b)(6) of the HRCP addresses the dismissal of a Complaint for failure to state a claim upon which relief can be granted. HRCP R. 12(b)(6). A complaint challenging the results of a general election pursuant to HRS § 11-172 fails to state a claim unless the plaintiff demonstrates errors, mistakes, or irregularities that would change the outcome of the election. *See* HRS § 11-172; *Tataii v. Cronin*, 119 Hawai‘i 337, 339 198 P.3d 124, 126 (2008); *Akaka v. Yoshina*, 84 Hawai‘i 383, 387, 935 P.2d 98, 102 (1997).

This Court has interpreted the phrase “difference in election results” to mean “a difference sufficient to overturn the nomination of any particular candidate or candidates.” *Elkins v. Ariyoshi*, 56 Haw. 47, 49, 527 P.2d 236, 237 (1974). Sufficient evidence requires something more than a “mere fishing expedition undertaken in the hope that in an examination of all the ballots enough might be discovered to change the result.” *Brown v. Iaukea,* 18 Haw. 131, 133 (1906). A plaintiff challenging a general election must show that he or she has actual information of mistakes or errors sufficient to change the result. *Tataii*, 119 Hawai‘i at 339, 198 P.3d at 126; *Akaka*, 84 Hawai‘i at 388, 935 P.2d at 103. The challenge cannot be based on “mere belief or indefinite information.” *Akaka*, 84 Hawai‘i at 388 (citing *Kulike v. Fern,* 19 Hawai‘i 278, 283 (1909)).

Moreover, “[w]hen matters outside the pleadings are presented in connection with an HRCP 12(b)(6) motion to dismiss, the trial court has discretion to either exclude the material or

to convert the motion to dismiss into a motion for summary judgment." *Andrade v. Cnty. of Hawai'i*, 145 Hawai'i 265, 268 n.3, 451 P.3d 1, 4 n.3 (App. 2019) (citing *Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC*, 151 F.Supp.3d 287, 291 (E.D.N.Y. 2015)).

IV. ARGUMENT

A. PLAINTIFFS HAVE NOT MET THEIR BURDEN TO DEMONSTRATE ANY ACTUAL ERRORS, MISTAKES, OR IRREGULARITIES THAT WOULD CHANGE THE OUTCOME OF THE ELECTION

Plaintiffs' conclusory allegation and speculation that an audit conducted in the manner they seek *may* change the outcome of the general election, fails to meet their heavy burden. There are no issues of material fact in dispute in this proceeding and Defendant is entitled to judgment as a matter of law.

Here, Plaintiffs bear the burden of showing that the specific acts of which they complain would have had the effect of changing the results. In their Complaint, Plaintiffs assert that "failure to perform an accurate post-election pre-certification audit is an error that could cause a difference in the election results, and that the accuracy of the general election is questionable and indeterminate." (Emphasis added). Plaintiff**s'** use of the phrase "could cause" is telling because it highlights their speculation that paper ballots and digital images of those same ballots differ with such frequency and to such a degree as to warrant an overturning of the general election.

Plaintiffs' Complaint is also devoid of actual facts of any kind of sufficiency or particularity to support either a claim for fraud or mistake in the auditing of the election actually occurred.[1] Plaintiffs produce no factual support indicating that Defendant's audit produced results that were contrary to the results indicated on the ballots themselves.

[1] When alleging fraud, Hawaii Rules of Civil Procedure Rule 9(b), similarly requires that a pleading a show particular facts for making that claim: "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. . . "Under Rule 9(b) general allegations of "fraud" are insufficient

Plaintiffs' allegations further assume, without any particular factual support, that Defendant has not performed an audit that is sufficient to withstand a potential overturning of the general election. This is not correct. HRS § 16-42(b) relieves the Chief Election Officer from the requirement to verify that a random sample of ten percent of the electronic tallies generated by the system equal hand tallies of the paper ballots when, as was done here, the system used is a mechanical tabulation system.

B. DEFENDANT'S AUDIT IS IN COMPLIANCE WITH STATUTORY REQUIREMENTS

The Chief Election Officer acted pursuant to his authority and completed the audits of the 2022 General Election to assure that the voting systems correctly registered or recorded, and accurately counted all votes cast for any and all persons, and for or against any and all questions. HRS § 16-2.

The Chief Election Officer conducted audits in compliance with state law by using scanned images of the actual paper ballots. This hand tallying of the paper ballots occurred primarily through the use of scanned images of those ballots, in lieu of physically touching the ballots, with the ability to physically retrieve individual ballots if requested.[2] The use of scanned images of the ballots with the present system facilitated the timely, accurate, confirmable, and reproducible auditing of the results.[3] *Declaration of Scott T. Nago ("Nago Dec.")* at para. 20-35.

---

because they serve little or no informative function. *Larsen v. Pacesetter Sys. Inc*., 74 Haw. 1, 30-31 (1992) (citations omitted).

[2] The voting system was certified by the U.S. Election Assistance Commission as having been "evaluated at an accredited voting system testing laboratory for conformance to the Voluntary Voting System Guidelines Version 1.0 (VVSG 1.0)." The Scope of Certification refers to the scanning technology employed by the system and how one of the functions of the system was the "[a]uditing of election results including ballot images and log files." Exhibit 1 at Page 2.

[3] The General Election is followed by a 5 business day period in which voters may cure defective ballots, due to a voter having forgotten to sign their return identification envelope or the signature not matching the signature on file. HRS § 11-106. Additionally, any recounts triggered by HRS § 11-158 needed to be concluded within 72 hours of

1. Hawaii's Voting System

To better see how the audit was done, it is helpful to briefly discuss the voting system used in the 2020 General Election. Although often referred to as an electronic voting system, the system only counts the votes cast and is not a system by which voters can electronically vote or to otherwise electronically cast their vote.

The type of voting system used in the 2022 General Election is the "marksense voting system." *Nago Dec.* at para. 5. The "marksense voting system" is "an automatic tabulation system using ballots and optical scanning for similar technology equipment," and is also referred to as a "mechanical tabulation system." ("A 'mechanical tabulation system' means an automatic tabulation system, including a marksense ballot voting system"). HAR § 3-177-707.

Specifically, voters separately mark paper ballots that are subsequently counted by a mechanical tabulation system using marksense voting technology. As such, it is only a "counting" system as opposed to one in which the voter uses the system to "vote" or otherwise "mark" their paper ballot. HRS § 16-42(b) allows the Chief Election Officer to count the paper ballots with the mechanical tabulation system.[4]

Additionally while not required by law, the Chief Election Officer conducted "a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts"

---

the close of polls on election day. Any election contests need to be filed by the twentieth day following the election. HRS § 11-174.5.

[4] Hawaii recognizes two types of electronic voting systems. The first is the "marksense ballot voting system" and the second is the "direct recording electronic voting system." HAR § 3-177-706.

In contrast to the "marksense ballot voting system" the "direct recording electronic voting system" is both a "voting" and "counting" system in which the voter directly interacts with the voting system to vote and the system counts the votes. *Nago Dec.* at para. 15.

The direct recording electronic voting system was used between 2004 and 2020 in this state. It was not used in 2022 as the State migrated to the use of an accessible ballot marking device to better accommodate disabled voters. The ballot marking device permitted a voter to mark their paper ballot with the device. The voter would then insert the marked paper ballot in the "marksense ballot voting system." *Id.*

to verify that the tallies from the system "equal[led] hand tallies of the paper ballots." *Nago Dec.* at para. 20-35.

2. Plaintiffs' position is unsupported

Here, Plaintiffs seek to invalidate the recent General Election essentially by arguing that the original paper ballots must be touched to perform audits under HRS § 16-42(b). By doing so, Plaintiffs take issue with the federally certified voting system, the scanning technology it employs, and the State's use of archived images of original documents, similar to other governmental entities and private enterprises.

Plaintiffs' general attack and concerns on the use of technology cannot be understood. The law has long accepted the use of copies, having already robustly considered the role of copies produced from original and how they can be used.

As a starting point, Plaintiffs, while not stating it, appears to be of the mindset that an original document is always required regardless of the purpose. Clearly, this is not the case. Rule 1002, Hawaii Rules of Evidence, Chapter 626, Hawaii Rules of Evidence:

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

Specifically, a "duplicate" of an original is defined in Rule 1001(d), Hawaii Rules of Evidence, Chapter 626, Hawaii Rules of Evidence.

> A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

The ballots images were made by a certified voting system using commonly accepted scanning technology with commercial off the shelf scanners. Additionally, this system was tested

in the presence of official observers. *Nago Dec.* at para 30. As such, the scanned images constitute duplicates of the original ballots using accepted techniques to accurately reproduce the original.

The Hawaii Rules of Evidence further provide, "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Rule 1003, Hawaii Rules of Evidence, Chapter 626, Hawaii Rules of Evidence. *See also*, *Bank of Hawaii v. Shaw*, 83 Hawaii 50, 60-61, 924 P.2d 544 (1996) (the trial court did not err in admitting the exhibits where in its discretion, there was no genuine issue of authenticity and acceptance of the evidence was not unfair).

In the present case, Plaintiffs do not question nor raise a genuine issue as to the authenticity of the digital images of the actual paper ballots. They also do not sufficiently assert why it would be improper or unfair to use digital images during the audit of the general election. It is not unfair to use duplicates for auditing purposes such as confirming the tabulations produced by the system. Further, the original ballots were available if anyone sought to view them. *Nago Dec*. at para 32. Therefore, because there is no basis to find that allowing the use of the duplicates to the same extent as the originals is prohibited, the audit of the 2022 General Election was conducted appropriately and in compliance with statutory requirements.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Honorable Court dismiss this Complaint with prejudice. Alternatively, should this Honorable Court find that matters outside the pleadings are presented to and not excluded by this Court, Defendants

respectfully request that this motion be treated as one for summary judgment and disposed of in accordance with Rule 56(a) of the HRCP.

DATED: Honolulu, Hawai‘i, November 28, 2022.

HOLLY T. SHIKADA
Attorney General of Hawai‘i

/s/ REESE R. NAKAMURA
PATRICIA OHARA
REESE R. NAKAMURA
Deputy Attorneys General

Attorneys for Defendant
SCOTT T. NAGO, Chief Election Officer, for the Office of Elections, STATE OF HAWAII

SCEC NO. 22-0000703

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

Ralph S. Cushnie *pro se*, along with more than Thirty Voters *pro se*, *Plaintiff*, v. Scott T. Nago, personally and in his official capacity as Chief Elections Officer; for the Office of Elections; STATE OF HAWAII *et al*, *Defendant*	ORIGINAL PROCEEDING DECLARATION OF SCOTT T. NAGO; EXHIBITS A-B

DECLARATION OF SCOTT T. NAGO

I, SCOTT T. NAGO, do declare under penalty of law that the following is true and correct:

1. I am a resident of the City and County of Honolulu, State of Hawaii, and am the Chief Election Officer for the State of Hawaii.

2. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.

3. As the Chief Election Officer, I am responsible for administering and managing the Office of Elections which provides election services to the citizens of the State of Hawaii including the planning, management, and conduct of all state elections. HRS § 11-2(a).

4. I have been with the Office of Elections since 1998 and I have served in the capacity of Chief Election Officer since January 1, 2010.

VOTE COUNTING SYSTEM

5. The vote counting system, known as Verity 2.7 from national voting system vendor Hart Intercivic based out of Austin, Texas, used for the 2022 General Election involved voters marking paper ballots that were subsequently counted by a mechanical tabulation system using marksense voting technology. This system is also referred to as an "automatic tabulation system," a "marksense ballot voting system," or a "marksense voting system." HAR §§ 3-177-706 and 3-177-707.

6. Attached hereto as Exhibit A is a true and correct copy of the Certificate of Conformance, dated June 7, 2022, by the U.S. Election Assistance Commission certifying Verity 2.7 was "evaluated at an accredited voting system testing laboratory for conformance to the Voluntary Voting System Guidelines Version 1.0 (VVSG 1.0)." This document includes a nineteen-page numbered Scope of Certification.

7. For purposes of our state, the voting system involved three main components.

8. First, the voter service centers, where in-person voting occurred, were provided Verity Scans and Verity Touch Writers.

> **Verity Scan** is a digital scan precinct ballot counter (tabulator) that is used in conjunction with an external ballot box. The unit is designed to scan marked paper ballots or Verity Touch Writer Duo printed vote records, interpret and record voter marks on the marked paper ballot or record voter selections on the printed vote records, and deposit the ballots into the secure ballot box.
>
> ***
>
> The **Verity Touch Writer** is a standalone precinct level Ballot Marking Device (BMD) which also includes an Audio Tactile Interface (ATI), which allows voters whocannot [sic] complete a paper ballot to generate a machine-readable and human readable paper ballot, based on vote selections made, using the ATI.

Exhibit 1 at Page 2 of Scope of Certification.

9. Please note that the Verity Touch Writer as a ballot marking device is the means

by which disability access is provided to voters to vote independently (i.e. they use the Verity Touch Writer to mark their ballot and then use the Verity Scan to scan the marked ballot). The ballot marking device does not internally record or count votes.

10. Second, the counting centers, where return identification envelopes associated with those who did not vote in-person are opened and the ballots scanned, were provided Verity Central devices to scan ballots.

> **Verity Central** is a high-speed, central digital ballot scanning system used for high-volume processing of ballots (such as vote by mail). The unit is based on COTS scanning hardware coupled with custom **Hart-**developed ballot processing application software which resides on an attached workstation.

Exhibit 1 at Page 3 of Scope of Certification.

11. The COTS scanning hardware used in Hawaii were Canon brand high-speed scanners, consistent with the Scope of Certification. Exhibit 1 at Page 13 of Scope of Certification.

12. Third, the counting centers were additionally provided Verity Count for purposes of tabulating election results and generating reports.

> **Verity Count** is an application that tabulates election results and generates reports. **Verity Count** can be used to collect and store all election logs from every **Verity** component/device used in the election, allowing for completeelection [sic] audit log reviews.

Exhibit 1 at Page 3 of Scope of Certification.

13. One of the functions of Verity 2.7 was the "[a]uditing of election results including ballot images and log files." Exhibit 1 at Page 2.

14. This was an important feature in our consideration for contracting for the system as it could save significant time in terms of our auditing of an election by mail.

15. Prior to the use of Verity 2.7 for the 2022 election cycle, the State used different versions of a “marksense ballot voting system,” along with a “direct recording electronic voting

system" from 2004 to 2020. The "direct recording electronic voting system" was both a "voting" and "counting" system. In contrast, the "marksense ballot voting system" was solely a "counting system" in that voters would separately mark their ballots by hand and then have it scanned by the system. Before that, from 1998 to 2002, the State only used a "marksense ballot voting system."

MIGRATION TO AN ELECTIONS BY MAIL MODEL

16. In terms of background, our state recently migrated with the 2020 Elections to an elections by mail model. Act 136, SLH 2019. The prior model involved a polling place for each of over 200 precincts. As such, ballots voted in person were structurally segregated on election day by precinct. Additionally, ballots associated with the precinct were scanned and counted by the precinct counter at the polling place. Finally, the ballots associated with the precinct were sealed in voted ballot containers that were marked to idenfity them with the precinct. This facilitated the auditing process.

17. In contrast, elections by mail involves voters returning their ballot to the county clerk in a return identification envelope for validation. This return process begins approximately 18 days before the election. HRS §§ 11-102 & 11-108. Depending on the county or logistical reasons, the transfer to the counting center and its counting could occur on a daily basis or a longer interval.

18. If we were not to take advantage of technology, there would be signfiicant consequences. This would begin with factoring in the time intensive physical segregation of return identification envelopes and similar processing at counting centers so as to facilitate the precinct based counting and storage necessary for the type of auditing envisioned by Plaintiffs.

19. The consequence of such a process would be that election results would be significantly delayed. This would impact the Primary Election, whose results must be resolved in a timely manner to permit subsequent election contests to be filed and for the ballot to be finalized for the fast approaching General Election. Likewise, it would impact the county, state, and federal governments that rely on timely election results of the General Election and the subsequent judicial resolution of election contests for the orderly transition of power in December and January, depending on the office.

AUDITING OF THE 2022 GENERAL ELECTION

20. Similar to the Primary Election, the voting system was subjected to testing before the General Election involving the presence of official observers designated under HRS § 16-45, who served as the eyes and ears of the public.

21. The General Election post-election audit involved hand tallies being taken of the paper ballots in 10% of precincts to compare against the tallies from the mechanical tabulation system. This occurred through the use of scanned images of those ballots, in lieu of physically touching the ballots, with the ability to physically retrieve individual ballots if requested.

22. This was made possible due to the fact that every ballot was accounted for in the voting system and could be tracked to a specific sealed voted ballot container. This was due to the use of a barcode for each individual ballot that contains a "Unique Ballot Identifier." These barcodes were generated by the voting system vendor as part of the proofs that are sent to their ballot printing company.

23. Please note that the "Unique Ballot Identifier" was not associated with an individual voter. For example, the "Unique Ballot Identifier" for each ballot is not shared by the voting system vendor with the mailing house vendor that mails out the ballots to individual

voters. Given this, there is no master list or way to associate a specific "Unique Ballot Identifier" with a specific voter. As such, secrecy of voting is preserved.

24. Ballots were scanned in batches. A batch report was printed out from the system and rubber banded around the batch. When ballots were scanned, every scanned image was associated with a precinct and could be electronically retrieved (i.e. one can retrieve electronically every ballot image associated with a precinct and then allow election officials to hand tally those ballot images against the election results). Additionally, when ballots were scanned, the voting system was annotated manually by the scanner operator with an indication of which voted ballot container a batch of ballots was contained in.

25. This permitted a voted ballot container to contain numerous batches of ballots that together reflect hundreds of ballots from a diverse mix of precincts, while allowing one to centrally know in the voting system where every ballot is located. This feature permitted election officials to have the ability to retrieve a specific voted ballot container to review a physical ballot if there is ever a question during the audit. Additionally, official observers, as provided for in HRS § 16-45, were present during the audit in the counting centers across the state to observe it.

26. Following the 2022 General Election, after mandated recounts for close contests, the standard post-election process began. One of these processes was the ability of voters to cure defective return identification envelope during a five-business day period that could not initially be validated, due to a missing signature or the signature not matching. HRS § 11-106. The other was the post-election audit.

27. For the neighbor islands of Hawaii, Maui, and Kauai, my office conducted the auditing and counting of the cured ballots in a single day for each island. Specifically, the dates

were November 17, 21, and 22, 2022, for Hawaii, Maui, and Kauai, respectively. In terms of the City and County of Honolulu, given the volume of ballots involved, the auditing and the subsequent counting of cured ballots began on November 14, 2022, and was completed on November 16, 2022. Official observers were present in every counting center for the auditing and counting of ballots.

28. The auditing of the mail ballots (i.e. ballots initially returned in return identification envelopes that were validated by the county clerks) associated with Verity Count involved five steps: (1) randomly selecting the precincts to audit and then selecting a contest for each precinct ; (2) identifying the batches that contained the ballots associated with each precinct; (3) reviewing the scanned ballot image at each scanner station with one member operating the scanner station and the other member tallying and completing the Batch Audit Tally form; (4) to physically review a ballot a Ballot Review Log would be completed to permit the ballot to be retrieved from the correct voted ballot container; and (5) after all batches had been reviewed, they would tally the expected results.

29. The scanned ballot images were considered true and correct copies of the original ballots and were treated to the same extent as the original ballots for purposes of the audit. In other words, they were considered duplicates of the original ballots.

30. The scanned ballots images were copied from the original ballots by a certified voting system that specifically references its use for auditing. The voting system used commonly accepted scanning technology with commercial off the shelf scanners. Additionally, the system was subjected to testing by official observers before both the Primary Election and General Election.

31. I understand that the Hawaii Rules of Evidence provide, "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Rule 1003, Hawaii Rules of Evidence, Chapter 626, Hawaii Rules of Evidence.

32. In the present case, there was no question as to the authenticity of the original ballots. Likewise, it was not unfair to use the duplicates for auditing purposes for confirming the tabulations by the system as they were true and correct copies of the originals. Finally, the original ballots were available if anyone sought to view them. Under these circumstances, I understood the use of the scanned ballot images to be appropriate and consistent with the law.

33. The auditing of ballots associated with in-person use of Verity Scan at the voter services centers, which were relatively low in volume, involved physically touching the original ballots.

34. Attached hereto as Exhibit B is a true and correct copy of the "GENERAL ELECTION 2022 – State of Hawaii – Statewide, November 8, 2022, SUMMARY REPORT, FINAL REPORT." Following the audit and counting of cured ballots, the report was printed on November 22, 2022, at 12:39 p.m. and published that day on the Office of Elections' website.

CONCLUSION

35. The use of scanned images of the ballots with the present system facilitated the timely, accurate, confirmable, and reproducible auditing of the 2022 General Election results. I am not aware of any credible issue regarding the scanning technology used. As such, I believe the audit was appropriately conducted.

DATED: Pearl City, Hawaii, November 28, 2022.

SCOTT T. NAGO

EXHIBIT A

EXHIBIT A

United States Election Assistance Commission

Certificate of Conformance

Hart Verity Voting 2.7

VVSG 2005 VER. 1

EAC CERTIFIED

The voting system identified on this certificate has been evaluated at an accredited voting system testing laboratory for conformance to the *Voluntary Voting System Guidelines Version 1.0 (VVSG 1.0)*. Components evaluated for this certification are detailed in the attached Scope of Certification document. This certificate applies only to the specific version and release of the product in its evaluated configuration. The evaluation has been verified by the EAC in accordance with the provisions of the EAC *Voting System Testing and Certification Program Manual* and the conclusions of the testing laboratory in the test report are consistent with the evidence adduced. This certificate is not an endorsement of the product by any agency of the U.S. Government and no warranty of the product is either expressed or implied.

Product Name: Verity Voting

Model or Version: 2.7

Name of VSTL: SLI Compliance

EAC Certification Number: HRT-Verity-2.7

Date Issued: June 7, 2022

Mark A. Robbins

Executive Director

Scope of Certification Attached

Manufacturer:	*Hart InterCivic*	**Laboratory:**	*SLI Compliance*
System Name:	*Verity Voting 2.7*	**Standard:**	*VVSG 1.0*
Certificate:	*HRT-Verity-2.7*	**Date:**	*6/7/2022*

Scope of Certification

This document describes the scope of the validation and certification of the system defined above. Any use, configuration changes, revision changes, additions or subtractions from the described system are not included in this evaluation.

Significance of EAC Certification

An EAC certification is an official recognition that a voting system (in a specific configuration or configurations) has been tested to and has met an identified set of Federal voting system standards. An EAC certification is **not**:

- An endorsement of a Manufacturer, voting system, or any of the system's components.
- A Federal warranty of the voting system or any of its components.
- A determination that a voting system, when fielded, will be operated in a manner that meets all HAVA requirements.
- A substitute for State or local certification and testing.
- A determination that the system is ready for use in an election.
- A determination that any particular component of a certified system is itself certified for use outside the certified configuration.

Representation of EAC Certification

Manufacturers may not represent or imply that a voting system is certified unless it has received a Certificate of Conformance for that system. Statements regarding EAC certification in brochures, on Web sites, on displays, and in advertising/sales literature must be made solely in reference to specific systems. Any action by a Manufacturer to suggest EAC endorsement of its product or organization is strictly prohibited and may result in a Manufacturer's suspension or other action pursuant to Federal civil and criminal law.

System Overview:

The **Verity Voting 2.7** system represents a set of software applications for pre-voting, voting and post-voting election project activities for jurisdictions of various sizes and political division complexities.

Verity Voting 2.7 functions include:

- Defining the political divisions of the jurisdiction and organizing the election with its hierarchical structure, attributes, and associations.

- Defining the election events with their attributes such as the election name, date, and type, as well as contests, candidates, referendum questions, voting locations and their attributes.
- Preparing and producing ballots for polling place and absentee voting or by-mail voting.
- Preparing media for precinct voting devices and central count devices.
- Configuring and programming the **Verity Scan** digital scanners for marked paper ballots and Verity Touch Writer printed vote records.
- Configuring and programming the **Verity Touch Writer** BMD devices.
- Configuring and programming the **Verity Touch Writer Duo Standalone** BMD devices.
- Configuring and programming the **Verity Controller** with **Verity Touch Writer Duo** BMD devices.
- Configuring and programming the **Verity Print** on-demand ballot production device.
- Transmission of the election results via **Verity Relay**.
- Transmission of the election results via **Verity Transmit**.
- Producing the election definition and auditing reports.
- Providing administrative management functions for user, database, networking, and system management.
- Import of the Cast Vote Records from **Verity Scan** devices and **Verity Central**.
- Preview and validation of the election results.
- Producing election results tally according to voting variations and election system rules.
- Producing a variety of reports of the election results in the desired format.
- Publishing of the official election results. Auditing of election results including ballot images and log files.

Verity Scan is a digital scan precinct ballot counter (tabulator) that is used in conjunction with an external ballot box. The unit is designed to scan marked paper ballots or Verity Touch Writer Duo printed vote records, interpret and record voter marks on the marked paper ballot or record voter selections on theprinted vote records, and deposit the ballots into the secure ballot box.

Verity Relay provides remote transmission capability. Utilizing an optional modem with **Verity Scan**, at close of polls, results are transmitted from the polling place device to the **Verity Relay Receiving Station** workstation.

Verity Transmit provides remote transmission capability. Utilizing an optional modem, Wi-Fi, or Ethernet accessory kit. Results from the **Verity Scan** and **Verity Central** are transmitted to the **Verity Transmit Receiving Station** workstation.

The **Verity Touch Writer** is a standalone precinct level Ballot Marking Device (BMD) which also includes an Audio Tactile Interface (ATI), which allows voters whocannot complete a paper ballot to generate a machine-readable and human readable paper ballot, based on vote selections made, using the ATI.

The **Verity Touch Writer Duo** is a daisy chained configuration of a **Verity Controller** device configured with up to twelve **Verity Touch Writer Duo** BMD devices, which allows voters to

utilize the touchscreen or optional Audio Tactile Interface to generate a machine-readable and human readable printed vote record, based on vote selections made.

The **Verity Touch Writer Duo Standalone** is a standalone BMD device, which allows voters to utilize the touchscreen or optional Audio Tactile Interface to generate a machine-readable and human readable printed vote record, based on vote selections made.

Verity Print is an on-demand ballot production device for unmarked paper ballots.

Verity Election Management allows users with the Administrator role to importand manage election definitions. Imported election definitions are availablethrough the Elections chevron in Build. Users can also delete, archive, and manage the election definitions.

Verity User Manager enables users with the correct role and permissions to create and manage user accounts within the **Verity Voting** system for the local workstation in a standalone configuration, or for the network in a networked configuration.

Verity Desktop enables users with the correct roles to set the workstations' date and time, gather **Verity** application hash codes (in order to validate the correctness of the installed applications), and access to Windows desktop.

Verity Data provides the user with controls for entering and proofing data and audio. **Verity Data** also performs validation on the exported information to ensure that it will successfully import into **Verity Build**.

Verity Build opens the election to proof data, view reports, and print ballots, and allows for configuring and programming the **Verity Scan** digital scanners, and **Verity Touch Writer** and **Controller/Touch Writer Duo** BMD devices, **Verity Print**, as well as producing the election definition and auditing reports.

Verity Central is a high-speed, central digital ballot scanning system used for high-volume processing of ballots (such as vote by mail). The unit is based on COTS scanning hardware coupled with custom **Hart**-developed ballot processing application software which resides on an attached workstation.

Verity Count is an application that tabulates election results and generates reports. **Verity Count** can be used to collect and store all election logs from every **Verity** component/device used in the election, allowing for completeelection audit log reviews.

Verity Relay Receiving Station is a remote transmission software application that receives election data transmissions sent by Verity Scan devices equipped with an optional Relay modem accessory.

Verity Transmit Receiving Station is a remote transmission software application that receives election data transmissions sent by Verity Transmit devices.

Certified System before Modification (If applicable):

Verity Voting 2.6

Anomalies and/or Additions addressed in Verity Voting 2.7:

The following anomalies found in previous Verity releases are corrected in the Verity Voting 2.7 modification:

1. Verity Data/Build
   Help screen for: "Shared Device Behaviors" is inaccurate. The help screen states, "Require user to view all choices in each contest" however what is displayed is "Require voters to view all choices in each contest."
2. Verity Scan
   Scanner multi-feed calibration can get stuck on a spinner and not show the results screen, requiring a lock and unlock of the tablet to exit the screen.
3. All Verity Devices
   Physical keyboard input of "Alt-ESC" returns to the user to the Verity launcher splash screen.
4. Verity Count
   If the number of columns in contest are less than or equal to 14 in the Canvass Results Report, then a blank page will follow the contest on the PDF export.

The following additions were made:

Features for all devices and workstations

- When using the System Validation Tool on devices or workstations, the system exports hashes for all Verity-related system files, as well as the files themselves.
- Verity supports adding new languages to devices and workstations via the "Language Pack" functionality.
- Verity supports the following additional languages:
  - Gujarati
  - Hmong
  - Lao
  - Hawaiian
  - Cantonese
  - Punjabi
  - Bengali

COTS updates

- Added support for the Brother HL-L6400DWVS laser printer. This printer now replaces the OKI Data B432 printer for use on Verity Touch Writer, Verity Printer, Verity Build, and for report printing on all Verity workstation software.
- Added the Duracell DR660PSS UPS for battery backup for the new Brother HL-L6400DWVS printer when used with the Verity Touch Writer laser printer.

- Added support for the IntoPrint SP1360 laser printer, which is a brand of the OKI Data C931 printer that it replaces on Verity Build.
- Added additional CFast card vendor.
- Added magnifying devices for use with ballots in the polling place.

Hawaii-specific Features

- Supports General and Open Primary elections only.

Verity Count Reporting

- Now allows users to set a custom order for contests on results reports across all Tasks in an election.
- Includes the following new reports and exports: o Three-Column Summary Results Report
    - Three-Column Precinct Results Report (export only)
    - Statement of Vote Report
    - Precinct Detail Export
    - Summary Export

- Adds support for adding a Run ID to the report header of the following reports:
    - Three-Column Summary Results Report
    - Three-Column Precinct Results Report
- Adds support for identifying the following reports as "zero reports"
    - Three-Column Summary Results Report
    - Three-Column Precinct Results Report
- Added support for calculating ballots cast in a multi-sheet election using the highest recorded sheet count for the following reports:
    - Three-Column Summary Results
    - Three-Column Precinct Results
    - Statement of Vote Report
    - Precincts Reporting
    - Summary Export
    - Precinct Detail Export
- Added an Election Preference to "Enable Hawaii results reports and exports".
- Manual vote recording now allows users to enter sheet counts for each sheet that exists in the ballot for the precinct-split/party being adjusted.

Paper Ballot Features

- Paper ballots support a maximum paper size of 8.5"x22", without stub capability.
- Paper ballot stubs support adding a customizable prefix to the stub number display.
- Verity now supports 80lb Text paper weight for ballots.

- Added targeting landmarks to ballot corners for option box triangulation.

Grid Ballot Features

- Verity now supports grid-based paper ballots, where office contests appear in columns and parties in rows on odd-numbered pages, and propositions appear in a column-based layout on even-numbered pages.
    - Proposition-only ballots can utilize both sides of a sheet.
- Grid-based paper ballots support all paper sizes in a landscape orientation (short edge on left):
- Grid-based paper ballots support the same stub sizes and options as column-based paper ballots.
    - 8.5" x 22" ballots do not support a stub
- Grid-based paper ballots support all paper ballot election definition elements EXCEPT:
    - Party Selector contests
    - Open Primary Party Selector contests
    - "Ranked Choice", "Cumulative", or "Fractional Cumulative" contests
    - Ballot Additional Text
    - Rotation
    - Column or page forcing on Office type contests
        - Column or page forcing is allowed for contests appearing on the Proposition side of the ballot.
    - Contest images
    - Dependent contests
    - Two-line write-ins
    - Uncommitted choices
- Grid-based ballots support candidate cross-filing, where if a voter marks multiple boxes for a cross-filed choice, it will be recorded as a single vote for the choice.
- Added support for Slate Choices, where two choice names can be treated as a single votable option.

Features for all devices

- Updated model for each Verity device
    - A single standardized circuit board replaces baseboard and I/O board combinations found in all Verity devices, with no change to functionality. Electronic components from the existing Tally Tape Thermal Printer are added directly to the baseboard.
    - Tally Tape thermal printer for report printing now uses Hart built plastics and firmware.
    - Rear panel connectors now recessed to increase ruggedness and reduce cable strain if a device is handled while cables are installed.

    - Power input connector no longer contains to slide to release cable retention feature.
    - Tamper evident seal now serialized
- All Verity devices now show the first three sections (XX.XX.XX) of the system version number in the user interface, without needing to reboot the device.
- All Verity devices now follow these optional VVSG 1.0 user-interface conventions:
    - If an unrecoverable error occurs on a polling place device, the device suspends voting operations and presents a clear indication to the user of the malfunction.
    - Warnings and alerts issued to a voter on a device shall state the nature of the problem; the set of responses available to the voter;, and whether the voter has performed or attempted an invalid operation, or the voting equipment itself has malfunctioned in some way.
    - When color is used to indicate status in the system, the user interface uses green, white, or blue for normal status; amber or yellow for marginal status; and red for an error status.
    - When color is used to indicate the type of information displayed, the user interface uses green, white, or blue for general information; amber or yellow for warnings; and red to indicate problems that require immediate attention.

Features for Verity Scan

- Added support for Write-in Mark Detection, where Scan can return the ballot for second-chance voting input if a mark is detected in the write-in area, but the option box is not marked.
    - If the ballot is accepted as-is, unmarked write-ins will count only if the Build setting for default counting behavior is enabled, except for ranked-choice or cumulative contests
- Performance improvements that reduce ballot processing time. This change is applicable to all Verity Scan models.

Features for Verity Scan with Relay only

- Device startup reports are now labeled "Verity Scan with Relay," not "Verity Scan."
- Voter-facing screens now do not display the product name "Verity Scan with Relay."

Features for Verity Transmit

- Transmit supports transmitting vDrives written by:
    - Verity Central
    - Verity Scan
    - Verity Scan with Relay
- For Central vDrives, Transmit now displays "Central vDrive" in lieu of the vDrive polling place.

Features for all Workstations

- Secure Boot now enabled on workstations.
- Full Disk Encryption now required for all deployments.

Features for Election Management

- Added new feature "Configuration Control", which supports limiting election variations based on what equipment and ballot types are used by a jurisdiction, eliminating unnecessary work for the user.

Features for Verity Data

- The Contest Title field limit is increased to 250 characters.
- Verity Data now supports entering separate contest instructions for devices and paper ballots.
    - Verity Data proofing reports containing contest instructions display both electronic instructions and paper instructions.
- Added support for defining Candidate Slate choices on grid-based ballots.
- Added additional rich-text formatting options for Ballot Additional Text.
- The Ballot Additional Text field limit increased to 3000 characters.
- Verity Data validates that fold lines do not intersect ballot landmarks, in addition to barcodes and option boxes
- The default PVR paper size changed to 8.5" x 11".

Features for Verity Build

- Verity Build includes a new setting to print single language ballots on Touch Writer.
- Added support for Write-in Mark Detection, including:
    - New options to control second-chance voting behavior for unmarked write-ins on Scan devices.
    - New option to control the default counting behavior for unmarked write-ins on Scan devices.
- Added a note that "Setting the default Voting Method will also apply to Verity Reader".

Features for Verity Central

- Added support for Write-in Mark Detection, including:
    - A new adjudication condition called "Unmarked Write-in".
    - An election Preference to count unmarked write-ins as if they were marked; off by default.
    - An election setting to count unmarked write-ins as if they were marked.
    - An election preference and setting to allow automatic acceptance of unmarked write-ins during scan, or when accepting at the batch, ballot, or page level.

- Allowing the user to filter voter intent issues by "Unmarked Write-ins".

Features for Receiving Stations

- Renamed "Verity Relay" application for clarity; now called "Verity Relay Receiving Station."
- Features for Verity Transmit support added to a new "Verity Transmit Receiving Station" with the following modifications from the "Verity Receiving Station":
    - Application supports receiving vDrives written by:
        - Verity Central
        - Verity Scan
        - Verity Scan with Relay
    - vDrives written from Verity Transmit Receiving Station support at least the same number of ballots as vDrives written from Verity Central, Scan, or Scan with Relay.
    - The Receiving Dashboard displays the status of Central vDrive data separately from the status of device vDrive data.
    - The vDrives Written Report displays, after the "ID of the transfer vDrive" field, the type of device that wrote the CVR data ("Central" or polling place device type) for each child vDrive written to a transfer vDrive.
    - The Received vDrives Report displays, before the "Polling place name" field, the type of device that wrote the CVR data ("Central" or polling place device type) for each received vDrive.

Features for Verity Count

- Count results reports containing contest instructions display electronic instructions only.
- Slate Choices: On results reports, both choice names are displayed next to a single vote counter.
- Count now includes a digital signature for any exported collection of CVRs.
    - The digital signature is user-verifiable using a separate utility.
- Improved Alias functionality:
    - Aliases Groups and Sets (collections of Alias Groups) can be exported or imported to/from removable media.
    - Alias Groups can be imported into any elections containing the same strings.
    - Alias Sets can only be imported into the election with the same Election ID from which they were generated.
    - Alias Sets can be used for reports and results exports, including the Detailed Vote Total export.
- Visually updated the Verity Count dashboard.

Modifications to Verity 2.7.1:

- Change the contest screen on Touch Writer to require voters to select a specific combination of candidate and party when voting for a cross-endorsed candidate.
- Change the review screens on Touch Writer and Reader to reflect only the specific party association(s) selected by the voter.
- Add a device report that includes vote totals for each party association for cross-filed candidates.
- Add a Count report that includes vote totals for each party association for cross-filed candidates.

Mark definition:

System supports marks that cover a minimum of 4% of the rectangular marking area.

Tested Marking Devices:

System supports Black and Blue ballpoint pens; testing was performed with black, blue, dark blue, pink, light green, green, orange, and red pens, as well as #2 pencil lead.

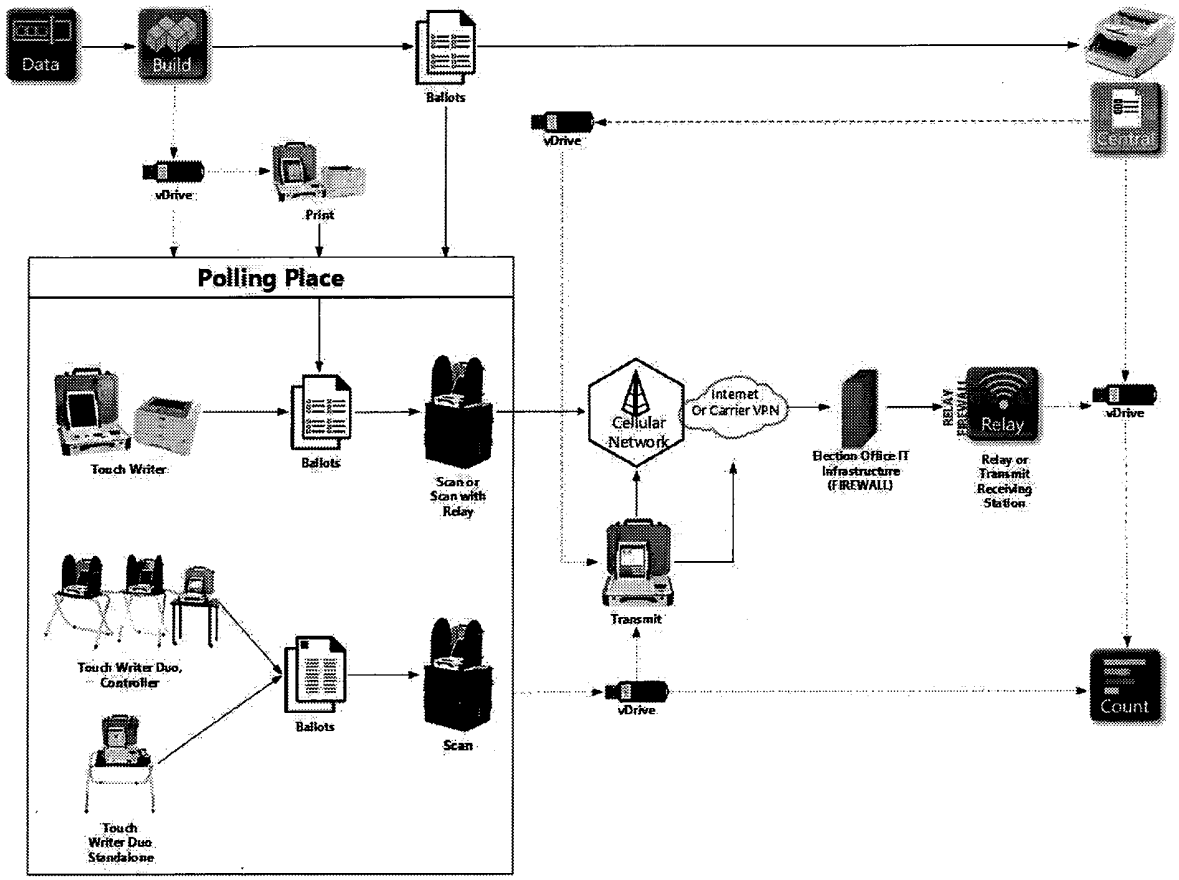
Language capability:

System supports English, Spanish, Chinese, Japanese, Korean, Khmer, Thai, Vietnamese, Tagalog, Ilocano, Hindi, Haitian Creole, Gujarati, Hmong, Lao, Hawaiian, Cantonese, Punjabi, and Bengali.

Components Included:

This section provides information describing the components and revision level of the primary components included in this Certification.

System Diagram



Proprietary Software

System Component	Software or Firmware Version	Comments
Verity Data	2.7.1	Data management software
Verity Build	2.7.1	Election definition software
Verity Central	2.7.1	High speed digital scanning software
Verity Count	2.7.1	Tabulation and reporting software
Verity Relay Receiving Station	2.7.1	Data transmission software (receiving station)
Verity Transmit	2.7.1	Data transmission software
Verity Transmit Receiving Station	2.7.1	Data transmission software (receiving station)
Verity Print	2.7.1	On-demand ballot printing device firmware
Verity Scan	2.7.1	Digital scanning device firmware
Verity Scan with Relay	2.7.1	Digital scanning device firmware with optional Relay functionality
Verity Touch Writer	2.7.1	Ballot marking device
Verity Touch Writer Duo	2.7.1	Ballot marking device, with internal COTS ballot summary printer and optional audio tactile interface
Verity Touch Writer Duo Standalone	2.7.1	Ballot marking device, with internal COTS ballot summary printer and optional audio tactile interface
Verity Controller	2.7.1	Polling place management device

COTS Software and Firmware

Description	Version
Verity Data, Build, Count, Relay Receiving Station, Transmit Receiving Station	
Microsoft Windows 10 Enterprise 2019 LTSC	10.0.17763
Microsoft SQL Server Standard 2019	15.0.4153.1
McAfee Application Control for Devices (McAfee Solidifier)	8.2.1-143
Verity Central – Central Count Paper Ballot Scanner	
Microsoft Windows 10 Enterprise 2019 LTSC	10.0.17763
Microsoft SQL Server Standard 2019	15.0.4153.1
McAfee Application Control for Devices (McAfee Solidifier)	8.2.1-143
Nuance Western OCR, Desktop, OEM	V20
Verity Print, Touch Writer – Electronic BMD Device, Touch Writer Duo – Electronic BMD Device, Touch Writer Duo Standalone – Electronic BMD Device, Controller, Transmit	
Microsoft Windows 10 Enterprise 2019 LTSC	10.0.17763
Microsoft SQLite	3.36.0
McAfee Application Control for Devices (McAfee Solidifier)	8.2.1-143
Verity Scan – Precinct Paper Ballot Scanner	
Microsoft Windows 10 Enterprise 2019 LTSC	10.0.17763
Microsoft SQLite	3.36.0
McAfee Application Control for Devices (McAfee Solidifier)	8.2.1-143
Nuance Western OCR, Desktop, OEM	V20

Hardware

Description	Version
Verity Print – Ballot Printer	3006095 Rev A
Verity Print – Ballot Printer	3005356 Rev E
Verity Print – Ballot Printer	3005856 Rev B
Verity Scan – Paper Ballot Scanner	3006080 Rev A
Verity Scan – Paper Ballot Scanner	3005350 Rev I
Verity Scan – Paper Ballot Scanner	3005800 Rev B
Verity Touch Writer – Electronic BMD Device	3006090 Rev A
Verity Touch Writer – Electronic BMD Device	3005352 Rev H
Verity Touch Writer – Electronic BMD Device	3005852 Rev B
Verity Touch Writer Duo – Electronic BMD Device	3006070 Rev A
Verity Touch Writer Duo – Electronic BMD Device	3005700 Rev B
Verity Touch Writer Duo Standalone – Electronic BMD Device	3006075 Rev A
Verity Touch Writer Duo Standalone – Electronic BMD Device	3005730 Rev A
Verity Controller – Networked Centralized Management Device	3006085 Rev A
Verity Controller – Networked Centralized Management Device	3005825 Rev B

COTS Equipment

Description	Version
Verity Data, Build	
Verity Data and Build Applications and Workstation Kit • HP Z4 G4 Workstation • HP Z240 Workstation supported for existing customers only	A
OKI Data C831dn Color Printer for existing customers only	N35100A
OKI Data C844dn Color Printer	N35301A
OKI Data C911dn color Printer for existing customers only	N36100A
OKI Data C931e Color Printer	N36100A
OKI Data B432dn Mono Report and Ballot Printer	N22500A
OKI Data B431d Mono Report Printer for existing customers only	N22202A

Brother HL-L6400 Series printer	HLL6400DWVS
Into Print SP1360 printer	SP1360
HP 8-port Ethernet Switch	1405-8GV3
Vinpower Digital USB Duplicator 7-targets	USBShark-7T-BK
Vinpower Digital USB Duplicator 23-targets	USBShark-23T-BK
Verity Central	
Verity Central Applications and Workstation Kit • HP Z4 G4 Workstation • HP Z240 Workstation supported for existing customers only	A
Canon DR-G1100 High-Speed Scanner	M111181
Canon DR-G1130 High-Speed Scanner	M111171
Canon DR-G2110 High-Speed Scanner	6130030
Canon DR-G2140 High-Speed Scanner	6130020
OKI Data B432dn Mono Printer Report Printer	N22500A
OKI Data B431d Mono Report Printer for existing customers only	N22202A
Brother HL-L6400 Series printer	HLL6400DWVS
8-port Ethernet Switch	1405-8GV3
Verity Count	
Verity Count Applications and Workstation Kit • HP Z4 G4 Workstation • HP Z240 Workstation supported for existing customers only	A
OKI Data B432dn Mono Printer Report Printer	N22500A
OKI Data B431d Mono Report Printer for existing customers only	N22202A
Brother HL-L6400 Series printer	HLL6400DWVS
HP 8-port Ethernet Switch	1405-8GV3
Verity Relay Receiving Station	
Verity Relay Applications and Workstation Kit • HP Z4 G4 Workstation • HP Z240 Workstation supported for existing customers only	A
OKI Data B432dn Mono Printer Report Printer	N22500A
OKI Data B431d Mono Report Printer for existing customers only	N22202A
Brother HL-L6400 Series printer	HLL6400DWVS
Verity Transmit Receiving Station	
Verity Relay Applications and Workstation Kit • HP Z4 G4 Workstation • HP Z240 Workstation supported for existing customers only	A
OKI Data B432dn Mono Printer Report Printer	N22500A
OKI Data B431d Mono Report Printer for existing customers only	N22202A
Brother HL-L6400 Series printer	HLL6400DWVS
Verity Print	
OKI Data C831dn Color Printer for existing customers only	N35100A
OKI Data B432dn Mono Printer Report Printer	N22500A
OKI Data C844dn Color Printer	N35301A
OKI Data B431d Mono Report Printer for existing customers only	N22202A
Brother HL-L6400 Series printer	HLL6400DWVS
Optional AutoBallot Barcode Scanner Kit Includes the following 2d barcode scanner: • Hart part number: 1003672 • Motorola/Zebra part number: DS4308 or DS4608	C
Verity Scan – Paper Ballot Scanner	
Verity Ballot Box	D

Optional Relay Accessory Kit (4G LTE Cat-M1) Includes the following COTS modem • Hart part number: 1005248 • MultiTech part number: MTD-MNA1-2.0	A
Verity Touch Writer – Electronic BMD Device	
OKI Data B432dn Mono Printer Report Printer	N22500A
OKI Data B431d Mono Report Printer for existing customers only	N22202A
Brother HL-L6400 Series printer	HLL6400DWVS
Duracell UPS	DR660PSS
EATON UPS	5P1500
Accessible Voting Booth	D
Optional AutoBallot Barcode Scanner Kit Includes the following 2d barcode scanner: • Hart part number: 1003672 • Motorola/Zebra part number: DS4308 or DS4608	C
Headphones • Brand: V7, part number HA300-2NP or HA310-2NP	2005230
Verity Touch Writer Duo – Electronic BMD Device	
Brother PJ700 Series Thermal Printer	PJ723
Accessible Voting Booth with ATI Tray	D
Standard Voting Booth	D
Optional Detachable ATI Kit	A
Optional headphones for ATI Kit Brand: V7, part number HA300-2NP or HA310-2NP	C
Verity Touch Writer Duo Standalone– Electronic BMD Device	
Brother PJ700 Series Thermal Printer	PJ723
Accessible Voting Booth with ATI Tray	A
Standard Voting Booth	D
Optional Detachable ATI Kit	A
Optional AutoBallot Barcode Scanner Kit Includes the following 2d barcode scanner: • Hart part number: 1003672 • Motorola/Zebra part number: DS4308 or DS4608	C
Optional headphones for ATI Kit Brand: V7, part number HA300-2NP or HA310-2NP	C
Verity Controller	
Optional AutoBallot Barcode Scanner Kit Includes the following 2d barcode scanner: • Hart part number: 1003672 • Motorola/Zebra part number: DS4308 or DS4608	C
Verity Transmit	
Optional Modem Accessory kit (4G LTE Cat-M1)Includes the following COTS modem: • Hart part number: 1005248 • MultiTech part number: MTD-MNA1-2.0	A
Optional WiFi Accessory kit Includes the following COTS modem: • StarTech part number: USB433ACD1X1	A
Optional RJ-45 Ethernet Accessory kit	A

Includes the following COTS modem: • StarTech part number: USB31000SW	

System Limitations

This table depicts the limits the system has been tested and certified to meet.

Election Data Limits	Testing Limit/Requirement Z240 or Z4 G4 Systems (all supported workstations except Data/Build/Count combined system)	Testing Limit/Requirement Data/Build/Count combined system)
Languages in a single election	19	19
Precincts in an election	3,000	2000
Splits per Precinct	20	20
Total Precincts + Splits in an election	3,000	2000
Districts for voting devices and applications	400	75
Polling places in an election	3,050	1200
Parties in a General Election	24	24
Parties in a Primary Election	10	10
Contests in an election (including propositions)	2,000	200
Contest choices (voting positions) in a single contest	300	75
Total number of Contest Choices in an Election (independent from ballot size)	5,000	600
Unique write-in values per contest (Count)	500	500
Unique write-in values per task (Count)	40,000	40,000
Voting Types in an Election	10	10
Tasks per Election (Central, Count)	15	15
Registered Voters per Precinct (Count)	99,999	99,999
Maximum Sheets per ballot	4	4
Ballot Stubs per ballot	2	2
Ballots per vDrive (Scan, 1 sheet ballot)	25,000*	25,000*
Ballots per vDrive (Controller)	20,000	20,000
Ballots per vDrive (Central)	20,000	20,000
Ballots per *election* (Central & Count)	1,750,000	1,750,000
vDrives per *election* (Count)	3,050	3,050
Ballot Sizes (Build, Central, Print, Touch Writer, Scan)	8.5"x11", 8.5"x14", 8.5"x17", 8.5"x20", 8.5"x22"**	8.5"x11", 8.5"x14", 8.5"x17", 8.5"x20", 8.5"x22"**
Ballot Sizes (Build, Central)	11"x17"	11"x17"

* This is a recommended limit for the number of single-sheet ballots scanned on an individual Verity Scan during a single election. For a two-sheet ballot, divide this number by two; for a four-sheet ballot, divide this number by four.

** Older printer models may not support a 22" ballot.

VVSG 1.0 Supported Functionality Declaration

Feature/Characteristic	Yes/No	Comment
Voter Verified Paper Audit Trails		
VVPAT	No	
Accessibility		
Forward Approach	Yes	
Parallel (Side) Approach	Yes	
Closed Primary		
Primary: Closed	Yes	Supports standard closed primary and modified closed primary
Open Primary		
Primary: Open Standard (provide definition of how supported)	Yes	Open Primary
Primary: Open Blanket (provide definition of how supported)	Yes	General "top two"
Partisan & Non-Partisan:		
Partisan & Non-Partisan: Vote for 1 of N race	Yes	
Partisan & Non-Partisan: Multi-member ("vote for N of M") board races	Yes	
Partisan & Non-Partisan: "vote for 1" race with a single candidate and write-in voting	Yes	
Partisan & Non-Partisan: "vote for 1" race with no declared candidates and write-in voting	Yes	
Write-In Voting:		
Write-in Voting: System default is a voting position identified for write-ins.	No	By default, the number of write-ins available in a contest is zero, users may increment as necessary
Write-in Voting: Without selecting a write in position.	Yes	Support is configurable per election.
Write-in: With No Declared Candidates	Yes	
Write-in: Identification of write-ins for resolution at central count	Yes	
Primary Presidential Delegation Nominations & Slates:		
Primary Presidential Delegation Nominations: Displayed delegate slates for each presidential party	Yes	
Slate & Group Voting: one selection votes the slate.	Yes	
Ballot Rotation:		
Rotation of Names within an Office; define all supported rotation methods for location on the ballot and vote tabulation/reporting	Yes	Rotation by precinct and precinct split
Straight Party Voting:		
Straight Party: A single selection for partisan races in a general election	Yes	
Straight Party: Vote for each candidate individually	Yes	
Straight Party: Modify straight party selections with crossover votes	Yes	

Straight Party: A race without a candidate for one party	Yes	
Straight Party: "N of M race (where "N">1)	Yes	
Straight Party: Excludes a partisan contest from the straight party selection	Yes	
Cross-Party Endorsement:		
Cross party endorsements, multiple parties endorse one candidate.	Yes	
Split Precincts:		
Split Precincts: Multiple ballot styles	Yes	
Split Precincts: P & M system support splits with correct contests and ballot identification of each split	Yes	
Split Precincts: DRE matches voter to all applicable races.	Yes	
Split Precincts: Reporting of voter counts (# of voters) to the precinct split level; Reporting of vote totals is to the precinct level	Yes	
Vote N of M:		
Vote for N of M: Counts each selected candidate if the maximum is not exceeded.	Yes	
Vote for N of M: Invalidates all candidates in an overvote (paper)	Yes	
Recall Issues, with options:		
Recall Issues with Options: Simple Yes/No with separate race/election. (Vote Yes or No Question)	Yes	
Recall Issues with Options: Retain is the first option, Replacement candidate for the second or more options (Vote 1 of M)	Yes	
Recall Issues with Options: Two contests with access to a second contest conditional upon a specific vote in contest one. (Must vote Yes to vote in 2nd contest.)	Yes	
Recall Issues with Options: Two contests with access to a second contest conditional upon any vote in contest one. (Must vote Yes to vote in 2nd contest.)	Yes	
Cumulative Voting		
Cumulative Voting: Voters are permitted to cast, as many votes as there are seats to be filled for one or more candidates. Voters are not limited to giving only one vote to a candidate. Instead, they can put multiple votes on one or more candidate.	Yes	
Ranked Order Voting		
Ranked Order Voting: Voters can write in a ranked vote.	Yes	
Ranked Order Voting: A ballot stops being counting when all ranked choices have been eliminated	N/A	Tabulation rules are unique per jurisdiction
Ranked Order Voting: A ballot with a skipped rank counts the vote for the next rank.	N/A	Tabulation rules are unique per jurisdiction
Ranked Order Voting: Voters rank candidates in a contest in order of choice. A candidate receiving a majority of the first-choice votes wins. If no candidate receives a majority of first choice votes, the last place candidate is deleted, each ballot cast for the deleted candidate counts for the second-choice candidate listed on the ballot. The process of eliminating the last place candidate and recounting the ballots continues until one candidate receives a majority of the vote	N/A	Tabulation rules are unique per jurisdiction

Ranked Order Voting: A ballot with two choices ranked the same, stops being counted at the point of two similarly ranked choices.	Yes	
Ranked Order Voting: The total number of votes for two or more candidates with the least votes is less than the votes of the candidate with the next highest number of votes, the candidates with the least votes are eliminated simultaneously and their votes transferred to the next-ranked continuing candidate.	N/A	Tabulation rules are unique per jurisdiction
Provisional or Challenged Ballots		
Provisional/Challenged Ballots: A voted provisional ballots is identified but not included in the tabulation, but can be added in the central count.	Yes	
Provisional/Challenged Ballots: A voted provisional ballots is included in the tabulation, but is identified and can be subtracted in the central count	Yes	
Provisional/Challenged Ballots: Provisional ballots maintain the secrecy of the ballot.	Yes	
Overvotes (must support for specific type of voting system)		
Overvotes: P & M: Overvote invalidates the vote. Define how overvotes are counted.	Yes	If the system detects more than the valid number of marks in a contest, it is counted as an overvote
Overvotes: DRE: Prevented from or requires correction of overvoting.	Yes	
Overvotes: If a system does not prevent overvotes, it must count them. Define how overvotes are counted.	Yes	If the system detects more than the valid number of marks in a contest, it is counted as an overvote
Overvotes: DRE systems that provide a method to data enter absentee votes must account for overvotes.	Yes	
Undervotes		
Undervotes: System counts undervotes cast for accounting purposes	Yes	
Blank Ballots		
Totally Blank Ballots: Any blank ballot alert is tested.	Yes	
Totally Blank Ballots: If blank ballots are not immediately processed, there must be a provision to recognize and accept them	Yes	
Totally Blank Ballots: If operators can access a blank ballot, there must be a provision for resolution.	Yes	
Networking		
Wide Area Network – Use of Modems	Yes	With optional Verity Scan with Relay and Relay Receiving Station or Verity Transmit and Transmit Receiving Station

Wide Area Network – Use of Wireless	Yes	With optional Verity Scan with Relay and Relay Receiving Station or Verity Transmit and Transmit Receiving Station
Local Area Network – Use of TCP/IP	Yes	
Local Area Network – Use of Infrared	No	
Local Area Network – Use of Wireless	No	
FIPS 140-2 validated cryptographic module	Yes	
Used as (if applicable):		
Precinct counting device	Yes	
Central counting device	Yes	

EXHIBIT B

U.S. Senator

(D) SCHATZ, Brian	290,894	69.4%
(R) MCDERMOTT, Bob	106,358	25.4%
(L) BONOAN, Feena M.	4,915	1.2%
(G) POHLMAN, Emma Jane A.	4,142	1.0%
(A) DECKER, Dan	2,208	0.5%
Blank Votes:	10,215	2.4%
Over Votes:	631	0.2%

U.S. Representative, Dist I

(D) CASE, Ed	143,546	70.9%
(R) KRESS, Conrad	51,217	25.3%
Blank Votes:	7,466	3.7%
Over Votes:	149	0.1%

U.S. Representative, Dist II

(D) TOKUDA, Jill N.	128,407	59.2%
(R) AKANA, Joe	72,874	33.6%
(L) TIPPENS, Michelle Rose	5,130	2.4%
Blank Votes:	10,235	4.7%
Over Votes:	339	0.2%

Governor and Lieutenant Governor

(D) GREEN, Josh For GOVERNOR LUKE, Sylvia For LIEUTENANT GOVERNOR	261,025	62.2%
(R) AIONA, Duke For GOVERNOR TUPAI, Seaula, Jr. For LIEUTENANT GOVERNOR	152,237	36.3%
Blank Votes:	5,522	1.3%
Over Votes:	579	0.1%

State Senator, Dist 1

(D) INOUYE, Lorraine Rodero	12,432	67.4%
(R) TUPAI, Helen C.	5,094	27.6%
Blank Votes:	911	4.9%
Over Votes:	8	0.0%

State Senator, Dist 2

(D) SAN BUENAVENTURA, Joy	9,486	67.2%
(R) OSBORN, Holly L.	3,522	25.0%
(L) FOGEL, Frederick F.	594	4.2%
Blank Votes:	493	3.5%
Over Votes:	15	0.1%

State Senator, Dist 4

(D) RICHARDS, Herbert (Tim)	11,018	66.7%
(R) TANCHEFF, Nicholas M.	4,462	27.0%
Blank Votes:	1,022	6.2%
Over Votes:	21	0.1%

State Senator, Dist 6

(D) MCKELVEY, Angus L.K. (Mac)	9,387	59.1%
(R) WALKER, Sheila	4,634	29.2%
(G) SHISHIDO, Melissah (Mish)	1,056	6.7%
Blank Votes:	782	4.9%
Over Votes:	17	0.1%

State Senator, Dist 7

(D) DECOITE, Lynn Pualani	14,161	71.2%
(R) MCKAY, Tamara	4,545	22.8%
Blank Votes:	1,169	5.9%
Over Votes:	22	0.1%

State Senator, Dist 8

(D) KOUCHI, Ronald	16,234	65.2%
(R) DES, Ana Mo	5,266	21.1%
(A) THRONAS-KAHO'ONEI, Kapana	1,235	5.0%
Blank Votes:	2,148	8.6%
Over Votes:	25	0.1%

State Senator, Dist 9

(D) CHANG, Stanley	14,864	65.7%
(R) PARRISH, Michael L. (Mike)	6,289	27.8%
Blank Votes:	1,460	6.5%
Over Votes:	18	0.1%

State Senator, Dist 10

(D) IHARA, Les S., Jr.	10,264	62.5%
(R) SOON, Leilani M.	5,060	30.8%
Blank Votes:	1,093	6.7%
Over Votes:	17	0.1%

State Senator, Dist 11

(D) FUKUNAGA, Carol	12,831	70.7%
(R) SAKAI, Benjamin	4,207	23.2%
Blank Votes:	1,108	6.1%
Over Votes:	15	0.1%

State Senator, Dist 12

(D) MORIWAKI, Sharon Y.	9,744	67.4%
(R) BOYD, Blake	3,789	26.2%
Blank Votes:	907	6.3%
Over Votes:	15	0.1%

State Senator, Dist 13

(D) RHOADS, Karl	8,810	59.4%
(R) TINAY, Matthew	3,013	20.3%
(N) KWOCK, Michelle	989	6.7%
(G) SOUZA, Kapono Aluli	877	5.9%
Blank Votes:	1,116	7.5%
Over Votes:	20	0.1%

State Senator, Dist 14

(D) KIM, Donna Mercado	8,123	69.4%
(R) RZONCA, Cheryl	2,918	24.9%
Blank Votes:	654	5.6%
Over Votes:	3	0.0%

State Senator, Dist 15

(D) WAKAI, Glenn	7,883	63.9%
(R) GODFREY, Lorene A.	3,763	30.5%
Blank Votes:	689	5.6%
Over Votes:	11	0.1%

State Senator, Dist 16

(D) ELEFANTE, Brandon J.C.	14,478	70.4%
(R) BEEKMAN, Patricia Yuki	5,090	24.7%
Blank Votes:	992	4.8%
Over Votes:	14	0.1%

State Senator, Dist 17

(D) DELA CRUZ, Donovan	11,555	62.1%
(R) HUDSON, Anna Misako	6,168	33.2%
Blank Votes:	868	4.7%
Over Votes:	11	0.1%

State Senator, Dist 18

(D) KIDANI, Michelle N.	11,463	62.7%
(R) SMART, Mary	5,977	32.7%
Blank Votes:	838	4.6%
Over Votes:	13	0.1%

State Senator, Dist 21

(D) GABBARD, Mike	8,164	55.0%
(R) KHAN, Matthew D.	5,698	38.4%
Blank Votes:	961	6.5%
Over Votes:	13	0.1%

State Senator, Dist 22

(D) SHIMABUKURO, Maile S.L.	4,993	49.3%
(R) DECORTE, Samantha	4,953	48.9%
Blank Votes:	180	1.8%
Over Votes:	7	0.1%

State Senator, Dist 23

(R) AWA, Brenton	8,093	49.7%
(D) RIVIERE, Gil	7,688	47.2%
Blank Votes:	476	2.9%
Over Votes:	14	0.1%

State Senator, Dist 24

(D) KEOHOKALOLE, Jarrett	13,669	66.0%
(R) FERNANDEZ, Antionette	5,777	27.9%
Blank Votes:	1,264	6.1%
Over Votes:	16	0.1%

State Senator, Dist 25

(D) LEE, Chris	14,865	65.4%
(R) LAURO, Brian S.	6,280	27.6%
Blank Votes:	1,559	6.9%
Over Votes:	10	0.0%

State Representative, Dist 3

(D) TODD, Christopher L.T.	5,191	72.1%
(A) MCMACKIN, Devinshaw K., Sr.	1,229	17.1%
Blank Votes:	779	10.8%
Over Votes:	5	0.1%

State Representative, Dist 4

(D) ILAGAN, Greggor	4,855	67.2%
(R) HO, Keikilani	1,611	22.3%
(N) LEY, Brian C.	354	4.9%
(L) LINTON, Candace T. (Candy)	155	2.1%
Blank Votes:	243	3.4%
Over Votes:	7	0.1%

State Representative, Dist 5

(D) KAPELA, Jeanne	4,962	65.0%
(R) GOODWIN, Lohi	1,936	25.3%
(L) LAST, Michael L.	250	3.3%
Blank Votes:	478	6.3%
Over Votes:	13	0.2%

State Representative, Dist 6

(D) KAHALOA, Kirstin A.K.	5,410	63.1%
(R) KENNEALY, Jonathan P.	2,644	30.9%
Blank Votes:	509	5.9%
Over Votes:	6	0.1%

EXHIBIT B

State Representative, Dist 8

(D) TARNAS, David A.	5,564	65.7%
(R) PERREIRA, Monique CobbAdams	2,484	29.4%
Blank Votes:	407	4.8%
Over Votes:	8	0.1%

State Representative, Dist 11

(D) AMATO, Terez (T.Amato)	5,263	60.6%
(R) CANTERE, Shekinah P.	2,882	33.2%
Blank Votes:	531	6.1%
Over Votes:	9	0.1%

State Representative, Dist 12

(D) YAMASHITA, Kyle T.	7,085	65.5%
(R) JOHNSON, Dan	2,118	19.6%
(G) STARR, Summer	1,111	10.3%
Blank Votes:	494	4.6%
Over Votes:	12	0.1%

State Representative, Dist 13

(D) POEPOE, Mahina M.	5,827	63.7%
(R) ADAM, Scott	2,084	22.8%
(G) NIKHILANANDA, Nick	639	7.0%
Blank Votes:	578	6.3%
Over Votes:	13	0.1%

State Representative, Dist 14

(D) COCHRAN, Elle	3,759	52.0%
(R) ARMSTRONG, Kelly J.	2,070	28.6%
(A) NAKOA, Leonard K., III	1,037	14.3%
Blank Votes:	352	4.9%
Over Votes:	10	0.1%

State Representative, Dist 15

(D) NAKAMURA, Nadine K.	5,487	67.9%
(R) BENTLEY, Greg	1,937	24.0%
Blank Votes:	659	8.1%
Over Votes:	3	0.0%

State Representative, Dist 16

(D) TOKIOKA, James Kunane	5,529	65.9%
(R) YODER, Steve	2,010	23.9%
Blank Votes:	848	10.1%
Over Votes:	6	0.1%

State Representative, Dist 17

(D) MORIKAWA, Daynette (Dee)	5,459	64.8%
(R) WILSON, Michael D.	1,969	23.4%
Blank Votes:	994	11.8%
Over Votes:	7	0.1%

State Representative, Dist 19

(D) HASHEM, Mark Jun	7,932	64.8%
(R) TEXEIRA, Theresa (Kinsey)	3,326	27.2%
Blank Votes:	979	8.0%
Over Votes:	6	0.0%

State Representative, Dist 20

(D) KOBAYASHI, Bertrand (Bert)	6,660	68.8%
(R) CAIAZZO, Jessica (Priya)	2,254	23.3%
Blank Votes:	751	7.8%
Over Votes:	9	0.1%

State Representative, Dist 21

(D) SAYAMA, Jackson D.	6,571	70.2%
(R) ALLEN, Julia E.	2,311	24.7%
Blank Votes:	465	5.0%
Over Votes:	12	0.1%

State Representative, Dist 22

(D) GARRETT, Andrew Takuya	6,961	72.5%
(R) IMAMURA, Jeffrey H.	1,960	20.4%
Blank Votes:	682	7.1%
Over Votes:	5	0.1%

State Representative, Dist 24

(D) TAM, Adrian	4,681	64.8%
(R) ANDERSON, Jillian T.	2,224	30.8%
Blank Votes:	312	4.3%
Over Votes:	7	0.1%

State Representative, Dist 25

(D) SAIKI, Scott K.	5,473	68.3%
(R) NOVAK, Rob	1,986	24.8%
Blank Votes:	554	6.9%
Over Votes:	5	0.1%

State Representative, Dist 26

(D) BELATTI, Della Au	5,465	66.5%
(R) ROSECRANS, Charlotte	2,146	26.1%
Blank Votes:	601	7.3%
Over Votes:	4	0.0%

State Representative, Dist 27

(D) TAKENOUCHI, Jenna	6,925	67.1%
(R) LIM, Margaret U.	2,746	26.6%
Blank Votes:	649	6.3%
Over Votes:	5	0.0%

State Representative, Dist 28

(D) HOLT, Daniel	3,056	63.6%
(A) CARAVALHO, Ernest	1,057	22.0%
Blank Votes:	689	14.3%
Over Votes:	2	0.0%

State Representative, Dist 29

(D) MIZUNO, John M.	3,258	64.2%
(R) KAAPU, Carole Kauhiwai	1,601	31.5%
Blank Votes:	212	4.2%
Over Votes:	5	0.1%

State Representative, Dist 30

(D) GANADEN, Ernesto (Sonny)	2,688	69.0%
(R) AZINGA, P. M.	1,007	25.9%
Blank Votes:	196	5.0%
Over Votes:	3	0.1%

State Representative, Dist 32

(D) AIU, Micah Pookela Kim	3,780	48.3%
(R) SHIMIZU, Garner M.	3,534	45.2%
Blank Votes:	497	6.4%
Over Votes:	10	0.1%

State Representative, Dist 34

(D) TAKAYAMA, Gregg	6,513	70.3%
(R) ALLEN, Theodene S.	2,348	25.4%
Blank Votes:	398	4.3%
Over Votes:	2	0.0%

State Representative, Dist 35

(D) CHUN, Cory M.	4,114	58.5%
(R) ARAKI, Josiah P.	2,419	34.4%
Blank Votes:	495	7.0%
Over Votes:	8	0.1%

State Representative, Dist 36

(D) LAMOSAO, Rachele Fernandez	3,071	72.0%
(R) LAUTAHA, Veamoniti	977	22.9%
Blank Votes:	212	5.0%
Over Votes:	6	0.1%

State Representative, Dist 37

(D) YAMANE, Ryan I.	7,340	62.6%
(R) DETWILER, Jamie A.	3,833	32.7%
Blank Votes:	542	4.6%
Over Votes:	10	0.1%

State Representative, Dist 38

(R) CHEAPE MATSUMOTO, Lauren	6,975	65.1%
(D) LEE, Marilyn B.	3,432	32.0%
Blank Votes:	301	2.8%
Over Votes:	11	0.1%

State Representative, Dist 39

(R) PIERICK, Elijah	3,793	52.4%
(D) ROSENLEE, Corey	3,089	42.7%
Blank Votes:	352	4.9%
Over Votes:	5	0.1%

State Representative, Dist 40

(D) MARTINEZ, Rose	3,096	49.5%
(R) GUESO, Janie	2,901	46.4%
Blank Votes:	251	4.0%
Over Votes:	5	0.1%

State Representative, Dist 41

(R) ALCOS, David A., III	3,949	56.1%
(D) LOPRESTI, Matthew S. (Matt)	2,784	39.5%
Blank Votes:	301	4.3%
Over Votes:	7	0.1%

State Representative, Dist 42

(R) GARCIA, Diamond	3,350	49.5%
(D) HAR, Sharon E.	2,991	44.2%
Blank Votes:	414	6.1%
Over Votes:	7	0.1%

State Representative, Dist 43

(R) SOUZA, Kanani	4,013	52.9%
(D) ELI, Stacelynn K.M.	3,223	42.5%
Blank Votes:	342	4.5%
Over Votes:	6	0.1%

State Representative, Dist 44

(D) KILA, Darius K.	3,342	59.8%
(R) KOPETSEG, Kimberly	2,007	35.9%
Blank Votes:	231	4.1%
Over Votes:	8	0.1%

State Representative, Dist 45

(D) GATES, Cedric Asuega	2,678	53.5%
(R) WILBUR, Tiana	2,162	43.2%
Blank Votes:	158	3.2%
Over Votes:	7	0.1%

State Representative, Dist 46

(D) PERRUSO, Amy A.	4,394	59.1%
(R) MILLER, John E.	2,622	35.3%
Blank Votes:	413	5.6%
Over Votes:	7	0.1%

State Representative, Dist 47

(D) QUINLAN, Sean	3,543	54.2%
(R) TALAEAI, Mark	2,698	41.3%
Blank Votes:	282	4.3%
Over Votes:	8	0.1%

State Representative, Dist 48

(D) KITAGAWA, Lisa C.	7,094	67.7%
(R) ELENTO, Wendell A.	2,836	27.1%
Blank Votes:	535	5.1%
Over Votes:	6	0.1%

State Representative, Dist 49

(D) MATAYOSHI, Scot	6,837	70.3%
(R) DANNER, Kilomana	2,400	24.7%
Blank Votes:	482	5.0%
Over Votes:	8	0.1%

State Representative, Dist 50

(D) HUSSEY-BURDICK, Natalia	7,025	59.5%
(R) THURSTON, Kathy	4,106	34.8%
Blank Votes:	657	5.6%
Over Votes:	18	0.2%

State Representative, Dist 51

(D) MARTEN, Lisa	6,009	60.8%
(R) KAMA-TOTH, Kukana K.K.	3,503	35.5%
Blank Votes:	355	3.6%
Over Votes:	10	0.1%

Hawaii Resident Trustee Vacancy

TRASK, Mililani B.	176,648	42.1%
CERMELJ, Hope Alohalani	107,669	25.7%
Blank Votes:	134,806	32.1%
Over Votes:	240	0.1%

At-Large Trustee

Number To Vote For: 3

GALUTERIA, Brickwood	139,611	11.1%
SOUZA, Keoni	135,124	10.7%
WAIHEE, John D., IV	131,033	10.4%
AHU ISA, Lei (Leina'ala)	120,088	9.6%
OWENS, Chad	118,561	9.4%
KING, Sam (Kalanikupua)	103,299	8.2%
Blank Votes:	509,353	40.5%
Over Votes:	340	0.0%

Councilmember, Dist 2, County of Hawaii

KAGIWADA, Jennifer (Jenn)	4,249	48.3%
KUSCH, Matthias	3,979	45.2%
Blank Votes:	563	6.4%
Over Votes:	4	0.0%

HAWAI'I: Board of Ethics

YES	35,215	54.4%
NO	23,982	37.1%
Blank Votes:	5,482	8.5%
Over Votes:	39	0.1%

HAWAI'I: County Auditor

YES	50,869	78.6%
NO	9,243	14.3%
Blank Votes:	4,555	7.0%
Over Votes:	51	0.1%

HAWAI'I: Youth Commission

YES	39,909	61.7%
NO	20,205	31.2%
Blank Votes:	4,560	7.0%
Over Votes:	44	0.1%

Mayor, County of Maui

BISSEN, Richard (Rick)	31,381	59.7%
VICTORINO, Mike	19,724	37.6%
Blank Votes:	1,377	2.6%
Over Votes:	45	0.1%

Councilmember (East Maui)

SINENCI, Shane	25,333	48.2%
CARROLL, Claire Kamalu	19,150	36.5%
Blank Votes:	7,992	15.2%
Over Votes:	52	0.1%

Councilmember (West Maui)

PALTIN, Tamara Akiko Maile	33,805	64.4%
HERRMANN, Justin	9,903	18.9%
Blank Votes:	8,788	16.7%
Over Votes:	31	0.1%

Councilmember (Wailuku-Waihee-Waikapu)

LEE, Alice L.	22,733	43.3%
AHIA, Noelani	22,220	42.3%
Blank Votes:	7,537	14.3%
Over Votes:	37	0.1%

Councilmember (Kahului)

KAMA, Tasha	24,126	45.9%
NOBRIGA, Buddy James M.A.	20,427	38.9%
Blank Votes:	7,929	15.1%
Over Votes:	45	0.1%

Councilmember (South Maui)

COOK, Tom	24,717	47.1%
KNOX, Robin	20,083	38.2%
Blank Votes:	7,688	14.6%
Over Votes:	39	0.1%

Councilmember (Makawao-Haiku-Paia)

UU-HODGINS, Nohe	25,196	48.0%
BOONE, Nara	19,409	37.0%
Blank Votes:	7,876	15.0%
Over Votes:	46	0.1%

Councilmember (Upcountry)

SUGIMURA, Yuki Lei Kashiwa	29,035	55.3%
HOCKER, Jordan	16,432	31.3%
Blank Votes:	7,017	13.4%
Over Votes:	43	0.1%

Councilmember (Lanai)

JOHNSON, Gabe	23,501	44.7%
HOKAMA, Riki	20,714	39.4%
Blank Votes:	8,266	15.7%
Over Votes:	46	0.1%

Councilmember (Molokai)

RAWLINS-FERNANDEZ, Keani	25,448	48.4%
PELE, John	18,797	35.8%
Blank Votes:	8,247	15.7%
Over Votes:	35	0.1%

MAUI: Housing Department

YES	30,871	59.0%
NO	16,960	32.4%
Blank Votes:	4,385	8.4%
Over Votes:	64	0.1%

MAUI: 'Oiwi Resources

YES	29,287	56.0%
NO	18,134	34.7%
Blank Votes:	4,797	9.2%
Over Votes:	62	0.1%

MAUI: Ethics & financial disclosures

YES	42,632	81.5%
NO	5,654	10.8%
Blank Votes:	3,946	7.5%
Over Votes:	48	0.1%

MAUI: Planning Commission

YES	35,335	67.6%
NO	11,097	21.2%
Blank Votes:	5,808	11.1%
Over Votes:	40	0.1%

MAUI: Council organization meeting, remote access, government records

YES	38,425	73.5%
NO	8,219	15.7%
Blank Votes:	5,611	10.7%
Over Votes:	25	0.0%

MAUI: Fines & penalties

YES	26,940	51.5%
NO	18,397	35.2%
Blank Votes:	6,858	13.1%
Over Votes:	85	0.2%

MAUI: Administrative department heads

YES	29,928	57.2%
NO	15,002	28.7%
Blank Votes:	7,288	13.9%
Over Votes:	62	0.1%

MAUI: County Clerk

YES	38,282	73.2%
NO	8,064	15.4%
Blank Votes:	5,890	11.3%
Over Votes:	44	0.1%

MAUI: Police Chief

YES	36,482	69.8%
NO	8,973	17.2%
Blank Votes:	6,713	12.8%
Over Votes:	112	0.2%

MAUI: Police Chief, alternative

YES	34,345	65.7%
NO	9,790	18.7%
Blank Votes:	8,080	15.5%
Over Votes:	65	0.1%

MAUI: Independent Nomination Board

YES	22,051	42.2%
NO	20,791	39.8%
Blank Votes:	9,302	17.8%
Over Votes:	136	0.3%

MAUI: Independent Nomination Board, alternative

YES	18,946	36.2%
NO	22,788	43.6%
Blank Votes:	10,477	20.0%
Over Votes:	69	0.1%

MAUI: Impacts of Charter amendments

YES	37,116	71.0%
NO	6,966	13.3%
Blank Votes:	8,159	15.6%
Over Votes:	39	0.1%

MAUI: Community Water Authorities

YES	33,621	64.3%
NO	11,397	21.8%
Blank Votes:	7,205	13.8%
Over Votes:	57	0.1%

MAUI: Climate Change Adaptation

YES	28,081	53.7%
NO	17,286	33.1%
Blank Votes:	6,856	13.1%
Over Votes:	57	0.1%

Mayor, County of Kauai

KAWAKAMI, Derek S.K.	18,249	73.3%
POAI, Michael Roven	5,267	21.1%
Blank Votes:	1,381	5.5%
Over Votes:	11	0.0%

Councilmember, County of Kauai

Number To Vote For: 7

EVSLIN, Luke A.	13,208	7.6%
CARVALHO, Bernard	12,419	7.1%
BULOSAN, Addison	11,569	6.6%
RAPOZO, Mel	11,207	6.4%
KUALI'I, KipuKai L.P.	10,955	6.3%
COWDEN, Felicia	10,443	6.0%
DECOSTA, Billy	10,143	5.8%
KAGAWA, Ross K.	9,967	5.7%
HOLLAND, Fern Anuenue	8,808	5.1%
METZGER, Lila Balmores	5,075	2.9%
SECRETARIO, Rachel M.	4,379	2.5%
SIMBRE-MEDEIROS, Shirley R.	4,038	2.3%
MUKAI, Nelson H.	2,583	1.5%
SAITO, Roy	2,522	1.4%
Blank Votes:	56,767	32.6%
Over Votes:	39	0.0%

KAUA'I: Prosecutor vacancy

YES	19,551	78.5%
NO	2,099	8.4%
Blank Votes:	3,235	13.0%
Over Votes:	23	0.1%

KAUA'I: Electric power authority

YES	10,785	43.3%
NO	9,211	37.0%
Blank Votes:	4,855	19.5%
Over Votes:	57	0.2%

KAUA'I: Salary Commission

YES	12,520	50.3%
NO	8,011	32.2%
Blank Votes:	4,339	17.4%
Over Votes:	38	0.2%

KAUA'I: Surety bonds

YES	9,079	36.5%
NO	9,702	39.0%
Blank Votes:	6,091	24.5%
Over Votes:	36	0.1%

Councilmember, Dist II, City and County of Honolulu

WEYER, Matt	11,613	50.5%
ROTHMAN, Makuakai	9,268	40.3%
Blank Votes:	2,101	9.1%
Over Votes:	22	0.1%

Councilmember, Dist IV, City and County of Honolulu

WATERS, Tommy	28,512	65.8%
NAKOA, Kaleo	10,203	23.5%
Blank Votes:	4,601	10.6%
Over Votes:	32	0.1%

Councilmember, Dist VI, City and County of Honolulu

DOS SANTOS-TAM, Tyler	13,496	49.0%
TOGUCHI, Traci K.	11,247	40.8%
Blank Votes:	2,808	10.2%
Over Votes:	19	0.1%

Councilmember, Dist VIII, City and County of Honolulu

OKIMOTO, Val Aquino	22,456	53.8%
MENOR, Ron	16,745	40.1%
Blank Votes:	2,544	6.1%
Over Votes:	20	0.0%

HONOLULU: Affordable Housing Fund

YES	121,552	43.9%
NO	129,897	46.9%
Blank Votes:	25,452	9.2%
Over Votes:	293	0.1%

HONOLULU: Planning Commission

YES	191,036	68.9%
NO	61,552	22.2%
Blank Votes:	24,410	8.8%
Over Votes:	196	0.1%

HONOLULU: Clean Water and Natural Lands Fund

YES	187,900	67.8%
NO	61,854	22.3%
Blank Votes:	27,278	9.8%
Over Votes:	162	0.1%

HONOLULU: Office of Council Services

YES	140,874	50.8%
NO	93,754	33.8%
Blank Votes:	42,414	15.3%
Over Votes:	152	0.1%

REGISTRATION AND TURNOUT

***

Ralph S. Cushnie *pro se, in propria persona*
PO Box 864
Kalaheo, Hawaii 96741
Ph. 808 645-0955
Email: ralph@cushniecci.com

Electronically Filed
Supreme Court
SCEC-22-0000703
01-DEC-2022
08:10 AM
Dkt. 12 MEO

IN THE SUPREME COURT OF THE STATE OF HAWAII

Ralph S. Cushnie *pro se,* along with more than Thirty Voters *pro se*

Plaintiff

VS.

Scott T. Nago, personally and in his official capacity as Chief Elections Officer; for the Office of Elections; STATE OF HAWAII *et al*

Defendant

CASE NO. SCEC-22-0000703

OPPOSITION TO MOTION TO DISMISS / SUMMARY JUDGEMENT AND MEMORANDUM IN SUPPORT OF MOTION PURSUANT TO HRCP RULE 7

I, Ralph S. Cushnie pro se, lead Plaintiff hereby bring this Opposition to the Motion to Dismiss / Motion for Summary Judgement and Memorandum in Support of Motion filed by the Defendant(s) on 28 November, 2022 pursuant to the Hawaii Rules of Civil Procedure Rule 7.

Plaintiffs Election Complaint is well pled and Defendants attacks have mis-stated allegations and the relief requested. Defendants' argument has intermingled definitions in an effort to negate and confuse the audit requirements as prescribed by statute. Plaintiff maintains that the sole purpose of the relief requested is that elections be verified as accurate through all audits as intended by the legislature.

Plaintiff maintains that the Defendant is bound by plain language interpretation and application of statutes.

Plaintiff maintains that Hawaii Revised Statute § 16-42 is an affirmative statute which requires a post-election pre-certification audit of a random sample, of not less than ten percent of precincts, that compares the hand tallies of the paper ballots is equal to the electronic tallies generated by the voting system – in order to ensure the accuracy of the electronic voting system.

Specifically, HRS §16-42(b)(3) prescribes that as a condition of using an electronic voting system "The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, to verify that the **electronic tallies** generated by the system in those precincts **equal hand tallies of the paper ballots** generated by the system in those precincts..." [underline and bold for emphasis]

Plaintiff requests the Court note the following definitions by statute:

HRS § 11-1 "Voting system", the use of paper ballots, electronic ballot cards, voting machines, or any system by which votes are cast and counted.

HRS § 16-11 "Voting machine system" means the method of electrically, mechanically, or electronically recording and counting votes upon being cast.

HRS § 16-21 "Paper ballot voting system" means the method of recording votes which are counted manually.

HRS § 16-41 "Electronic voting system" means the method of recording votes which are counted by automatic tabulating equipment.

Plaintiff avers the Defendant is convoluting both the word "system" and "automatic tabulating equipment" other than intended by statute and these words are being interpreted as an overriding factor to justify a less-restrictive audit procedure relying on conflicting definitions in administrative rules of what constitutes an "electronic voting system" and as defined in HRS § 16-41.

Defendant further confuses this interpretation with reliance on several administrative "rules," specifically HAR § 3-177-706 wherein ""electronic voting system" means any method of recording, counting, and tabulating votes via automatic tabulating equipment." And later in HAR § 3-177-707 wherein the term "marksense" further introduced and defined as both an "automatic tabulation system" and a "mechanical tabulation system."

Plaintiff requests the Court note that all of these administrative rules wherein "marksense" is defined are titled as "Electronic voting systems; generally," (HAR § 3-177-706), "Electronic voting systems; marksense voting system" (HAR § 3-177-707), and "Electronic voting system; auditing" (HAR § 3-177-762).

The Defendants argument further claims that post-election, pre-certification audits are "not required by law" (See Def. Memo at pg 11 ln 15&16, and pg 12 ln 1&2) because the Defendant has defined marksense as a "mechanical tabulation system" and is specifically relying on the exception provided in HRS § 16-42(b). Defendant claims this exception "relieves" the Defendant from the requirement to conduct audits because the Defendant prefers the "marksense" definition as a mechanical tabulation system per HAR § 3-177-707, and HAR § 3-177-762(c)(1)(A).

Stated more succinctly, the Defendant appears to claim that audits are not required by law for electronic voting systems if a mechanical tabulation system is used to generate electronic tallies.

Plaintiff request the Court note that the Defendant has conveniently defined the "marksense ballot voting system" through a Hawaii Administrative Rule as a "mechanical tabulation system" in HAR § 3-177-762(c)(1)(A) wherein: "As the marksense ballot voting system, is a mechanical tabulation system…" but has failed to acknowledge that in HAR § 3-177-706 that an ""electronic voting system"…includes, but is not limited to, the "marksense ballot voting system.""

Stated more succinctly, the Defendant is using the "Electronic voting system; auditing" rule HAR § 3-177-762(c)(1)(A) to define "marksense" as a mechanical tabulation system and to support Defendants claim for the exemption for not counting the paper ballots by hand pursuant to HRS § 16-42(b), while failing to acknowledge that "marksense" is defined as an electronic voting system in HAR § 3-177-706 and not subject to this exemption. [underline for emphasis]

Plaintiff maintains that the "marksense" is an "electronic voting system" and subject to the audit requirements of HRS §16-42(b)(3).

Plaintiff requests the Court note that the U.S. Election Assistance Commission also defines "marksense" as an "electronic voting system" and more specifically, an "optical scan system." (See VVSG 1.1 definitions at A-9, A-12, and A-13).

Ref: U.S. Election Assistance Commission VVSG 1.1 which can be found at:

https://www.eac.gov/sites/default/files/document_library/files/VVSG.1.1.VOL.1.FINAL.pdf

Plaintiff requests the court note that pursuant to HRS § 91-1(4) a ""Rule" means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency." And further, "The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public..."

Plaintiff avers the interpretation of the statute and the implementation of an administrative "rule" cannot affect the private rights of the public, and further as stated in HAR § 3-177-706 "Nothing herein is to be used to diminish, take away or otherwise impair the rights of the voter."

Plaintiff maintains that the Defendant is relying on agency statements in Hawaii Administrative Rule(s) that interprets a statute, to circumvent audit

requirements through the intermingling of definitions for the "marksense" electronic voting system.

Defendant further admits "using scanned digital images of the actual paper ballots" (See Def. Memo at pg 2 ln 4&5) in the conduct of audits, and argues that a duplicate is admissible as evidence (See Def. Memo at pg 2 ln 19-21), but fails to acknowledge that these types of copies need to be certified as correct, which would require a comparison of the original with the copy – and as is intended by an audit. (See Hawaii Rules of Evidence Rule 901).

Plaintiff maintains that an audit is intended to be a formal examination of accounting records to ensure compliance with a set of standards, and that those standards have been prescribed through the legislative process in HRS § 16-42.

Plaintiff requests the court note that "When the legislature takes action and enacts a statute, local government cannot adopt or enforce an ordinance that conflicts with the statute." (See Thomas, 614 So.2d at 470; Rinzler v. Carson, 262 So.2d 661 (Fla. 1972); Phantom of Clearwater v. Pinellas Co., 894 So. 2d 1011, 1020 (Fla. Dist. Ct. App. 2005)). Similarly, Plaintiffs aver that the Defendant cannot adopt a local procedure or create an administrative rule that conflicts with the state statute.

Additionally, Plaintiff cites "Moreover, the fact that the legislature has enacted a process for conducting mandatory voting system audits strongly suggests that counties are not authorized to create their own, separate voting system audit laws." (See Browning v. Sarasota, 968 So. 2d 637, 651 (Fla. Dist. Ct. App. 2007)). Similarly, Plaintiff maintains that the Defendant is not authorized to create their own audit procedure when one is specified by the legislature.

Plaintiff cites as well "This Court is bound by the statutory standards established for electronic voting systems. It is not for the courts, under any legal

theory, to amend the General Assembly's lengthy, detailed list of standards by adding new ones." (See Banfield v. Cortes, 922 A.2d 36, 51 (Pa. Cmmw. Ct. 2007)).

Plaintiff avers that Court is bound by plain language interpretation of statutes.

Plaintiff maintains that all races on the ballot must be counted in an audit, and that "tallies" refers to the counting of all races on the ballot in performance of the audit and as specified in HRS § 16-25.

Defendant also argues extensively that there is much difficulty and sacrifice in conducting the post-election, pre-certification audit requirements, and seems to prioritize convenience over accuracy in justifying their interpretation of less restrictive procedures.

Last, Defendant attests that "Attached hereto as Exhibit A is a true and correct copy of the Certificate of Conformance, dated June 7, 2022, by the U.S. Election Assistance Commission certifying Verity 2.7 was "evaluated at an accredited voting system testing laboratory for conformance to the Voluntary Voting System Guidelines Version 1.0 (VVSG 1.0)."" And as if to circumvent some requirement as presented by statute. (See Def. Declr. Para 6).

Plaintiffs requests the court note that the Defendant claims compliance with "VVSG 1.0" published in 2005, when in fact, the Voluntary Voting System Guidelines Version 2.0 of February 10, 2021 is the most current version for this set of compliance standards. Ref: U.S. Election Assistance Commission VVSG 2.0 which can be found at:

https://www.eac.gov/sites/default/files/TestingCertification/Voluntary_Voting_System_Guidelines_Version_2_0.pdf

Plaintiff avers that the Defendants claim to conformance with outdated voting system guidelines is further concerning to the gravity of this Election Complaint,

and to the necessity for the conformance to audits as prescribed by the legislature, and pursuant to correct interpretation of the statute.

SUMMARY

Plaintiff maintains that the requirement for an accurate audit as intended by HRS § 16-42 is to verify that the **electronic tallies** are **equal** to the **hand tallies of the paper ballots** when using an electronic voting system.

Plaintiff maintains that the post-election pre-certification audits as administered by the Defendant do not meet the requirements as specified in HRS § 16-42 and will never discover any errors or fraud.

Without an audit as the legislature intended, Plaintiff maintains that the voting system cannot be assured to accurately count all votes cast, for or against any and all questions, and that the accuracy of the general election is questionable and indeterminate.

Plaintiffs calls to question remain, and Plaintiff avers that declaratory judgment without relief will resolve this controversy.

Plaintiffs reserve all rights, without prejudice, and pursuant to UCC § 1-308.

Date: 1 December, 2022 City: Kauai, Hawaii

1. By: Ralph S. Cushnie Signature:

Electronically Filed
Supreme Court
SCEC-22-0000703
02-DEC-2022
03:07 PM
Dkt. 14 MER

No. SCEC-22-0000703

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

RALPH CUSHNIE *pro se*, along with more than Thirty Voters, *pro se*, Plaintiff, vs. SCOTT T. NAGO, personally and in his official capacity as Chief Election Officer, for the Office of Elections, STATE OF HAWAII, et al. Defendant.	ORIGINAL PROCEEDING

DEFENDANT SCOTT T. NAGO'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS/SUMMARYJUDGEMENT [SIC] AND MEMORANDUM IN SUPPORT OF MOTION FILED DECEMBER 1, 2022

CERTIFICATE OF SERVICE

HOLLY T. SHIKADA 4017
Attorney General of Hawai'i

PATRICIA OHARA 3124
REESE R. NAKAMURA 4822
Deputy Attorneys General
425 Queen Street
Honolulu, Hawai'i 96813
Telephone: (808) 586-0618
Facsimile: (808) 586-1372

Attorneys for Defendant
SCOTT T. NAGO, Chief Election Officer,
for the Office of Elections, STATE OF HAWAII

DEFENDANT SCOTT T. NAGO'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS/SUMMARYJUDGEMENT [SIC] AND MEMORANDUM IN SUPPORT OF MOTION FILED DECEMBER 1, 2022

Plaintiffs' opposition memorandum filed on December 1, 2022 still fails to support Plaintiffs' arguments that the audits of the election results are invalid. Plaintiffs continue to misconstrue the applicable law and their Complaint must be dismissed.

I. ARGUMENT

In their opposition memorandum, Plaintiffs misinterpret HRS § 16-42 and also decline to defer to the administrative agency responsible for interpreting and implementing the statute.

> When the legislative intent is less than clear, however, this court will observe the well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous.

In re Water Use Permit Applications, 105 Haw. 1, 9, 93 P.3d 643, 651, (Haw. 2004) (internal citations omitted).

Plaintiffs contend that the administrative rules cited by Defendant somehow thwart the statute, but just the opposite is true. The nature of voting systems and changing technology make the words of the statute broad and indefinite and in need of clarification through administrative rules and interpretation.

The starting point is the very term "electronic voting system" referenced in HRS § 16-42 and broadly defined in HRS § 16-41 as "the method of recording votes which are counted by automatic tabulating equipment." Plaintiffs appear to object to the acknowledgment in the rules that there are presently two types of electronic voting systems. One is the marksense ballot voting system and the other is the direct electronic voting system. HAR § 3-177-706.

The statute by its own terms acknowledges that the paper ballots may be counted with a "mechanical tabulation system." Plaintiffs essentially dispute that the Defendant, as chief election officer of the administrative agency responsible for elections, may reasonably construe what constitutes a "mechanical tabulation system" or that it is reasonable to construe a "marksense ballot voting system" to be a "mechanical tabulation system." There is nothing palpably erroneous regarding Defendant's construction of the administrative rules and Plaintiffs provide no clear alternative to this construction.

In fact, Plaintiff acknowledges in its filing that there are three categories of systems (i.e. a voting machine system, a paper ballot voting system, and an electronic voting system). HRS §§ 16-11, 16-21, and 16-41. With this in mind, a "mechanical tabulation system" must be defined as fitting within one of these categories.

Defendant through the administrative rule process has reasonably interpreted the "mechanical tabulation system" to be a form of an "electronic voting system," specifically a "marksense ballot voting system," as opposed to a "direct recording electronic voting system" that has no such designation. HAR §§ 3-177-706 & 3-177-707.

What follows then is a straightforward interpretation of the statute. The statute applies to electronic voting systems and indicates that if the paper ballots can be counted by a "mechanical tabulation system" form of an electronic voting system then the statute is satisfied. All other electronic voting systems, such as the "direct recording electronic voting system" or other electronic voting systems that may be created in the future that do not involve mechanical tabulation are required to go through (b)(1) to (b)(4) of the statute.

Plaintiffs separately attempt to argue that Defendant is inappropriately using a voting system that meets the Voluntary Voting System Guidelines, Version 1.0, as opposed to Version

2.0 that was adopted in 2021. However, this statement is again an empty statement with no support. Plaintiffs point to no statute or rule that supports their position.

In fact, the administrative rule on this point, HAR § 3-177-700(a), reflects that Defendant has reasonably addressed the matter by clearly laying out the requirements of the voting system and indicating that it could be addressed through one or a combination of federal standards or voluntary guidelines. Among these, as noted in HAR § 3-177-700(a)(3), are the 2005 Voluntary Voting System Guidelines Version 1.0 that Exhibit A to the Declaration of Nago to Defendant's Motion established had been satisfied in the form of a certification by the U.S. Election Assistance Commission for Verity 2.7 issued on June 7, 2022 as follows:

> §3-177-700 Voting system requirements. (a) In addition to, and not in lieu of, any other election processes contained in Title 2 of the Hawaii Revised Statutes, the chief election officer, or the clerk in the case of a county only election, may use a voting system or voting systems that comply with one, or a combination of the following:
>
> * * *
>
> **(3) The federal voluntary voting system guidelines as printed in the United States Election Assistance Commission publication: 2005 Voluntary Voting System Guidelines Version 1.0, Volumes I & II (2005), and subsequently published in the Federal Register, Vol. 71, No. 70 (April 12, 2006) . . .**

Emphasis added.

Ultimately, HRS § 16-42 by its own terms was satisfied through the use of the "mechanical tabulation system." Defendant conducted an audit to satisfy the requirements under HRS § 16-2(3) to ensure that the voting system did "correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions." Plaintiffs did not, however, present any evidence to dispute that Defendant's use of scanned images of the ballots with the present system facilitated the timely, accurate, confirmable, and reproducible

auditing of the 2022 General Election results. Furthermore, Plaintiffs have failed to produce evidence of any discrepancies arising from the use of the scanned ballot images and also failed to produce evidence of any provable fraud, overages, or underages, that could cause a difference in the election results as they are required to do under HRS § 11-172.

For the foregoing reasons, Defendants respectfully request that this Honorable Court dismiss this Complaint with prejudice. Alternatively, should this Honorable Court find that matters outside the pleadings are presented to and not excluded by this Court, Defendants respectfully request that this motion be treated as one for summary judgment and disposed of in accordance with Rule 56(a) of the HRCP.

DATED: Honolulu, Hawai‘i, December 2, 2022.

HOLLY T. SHIKADA
Attorney General of Hawai‘i

/s/ REESE R. NAKAMURA
PATRICIA OHARA
REESE R. NAKAMURA
Deputy Attorneys General

Attorneys for Defendant
SCOTT T. NAGO, Chief Election Officer, for the
Office of Elections, STATE OF HAWAII

Ralph S. Cushnie *pro se, in propria persona*
PO Box 864
Kalaheo, Hawaii 96741
Ph. 808 645-0955
Email: ralph@cushniecci.com

Electronically Filed
Supreme Court
SCEC-22-0000703
04-DEC-2022
01:40 PM
Dkt. 16 MEO

IN THE SUPREME COURT OF THE STATE OF HAWAII

Ralph S. Cushnie *pro se,* along with more than Thirty Voters *pro se*

Plaintiff

VS.

Scott T. Nago, personally and in his official capacity as Chief Elections Officer; for the Office of Elections; STATE OF HAWAII *et al*

Defendant

CASE NO. SCEC-22-0000703

OPPOSITION TO DEFENDANTS REPLY TO PLAINTIFFS OPOSITION TO MOTION TO DISMISS / SUMMARY JUDGEMENT AND MEMORANDUM IN SUPPORT OF MOTION PURSUANT TO HRCP RULE 7

I, Ralph S. Cushnie pro se, lead Plaintiff hereby bring this Opposition to the Defendants Reply to the Plaintiffs Opposition to the Motion to Dismiss / Motion for Summary Judgement and Memorandum in Support of Motion filed by the Defendant(s) on 28 November, 2022 pursuant to the Hawaii Rules of Civil Procedure Rule 7.

Plaintiff maintains that the Defendants arguments continue to be based on several faulty conclusory presumptions and which the question posed to the court in the request for declaratory judgement will resolve. Specifically, the Defendant:

1) Does not recognize HRS § 16-42 as an affirmative statute.

2) Emphasizes local administrative procedures over statutory procedures.

I do hereby certify that the foregoing is a full, true and correct copy of the official court record of the Courts of the State of Hawai`i.
Dated at: Honolulu, Hawai`i 04-DEC-2022, /s/ Evelyn Rimando, Clerk of the Supreme Court, State of Hawai`i

3) Does not recognize "marksense" as an "electronic voting system" and as is defined and recognized by the U.S. Election Assistance Commission.

4) Uses the phrase "mechanical tabulation system" to construe a connection between "electronic voting system" and "marksense" where there is no statutory connection or definitions.

5) Now in most recent reply, uses the misapplication of "mechanical tabulation system" to argue the exemption for the auditing requirements for "electronic voting systems" entirely.

Plaintiff maintains that due to Defendants conclusory presumptions, repeated misinterpretation of an affirmative statute, misconstruing the connection between systems, the variety of arguments used to defend procedures, and now to suggest that no audits are required at all - only adds further question as to the accuracy of the electronic voting system.

Plaintiff maintains that "defer[ring] to an administrative agency responsible for interpreting and implementing the statute" (See Reply at 2) is not lawful when the requirements for audit as specified through the legislative process are clear, and when the administrative agency has demonstrated repeated misinterpretation of an affirmative statute.

Plaintiff respectfully requests the court note HRS § 1-15 "Where the words of a law are ambiguous:

(1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

(2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.

(3) Every construction which leads to an absurdity shall be rejected."

Plaintiff maintains that the post-election, pre-certification audit requirements specified in HRS § 16-42 are absolutely clear in the requirement for an audit of a

random sample, of not less than ten percent of precincts, that compares the hand tallies of the paper ballots is equal to the electronic tallies generated by the voting system – in order to ensure the accuracy of the voting system.

The U.S. Election Assistance Commission, which the Defendant cites at length in justifying other departmental audit procedures, defines "marksense" as an "electronic voting system" and more specifically as an "optical scanning system" which is not equivalent in any way to a mechanical device. Specifically, VVSG 1.1 defines "marksense" as follows:

"Marksense: System by which votes are recorded by means of marks made in voting response fields designated on one or both faces of a ballot card or series of cards. Marksense systems may use an optical scanner or similar sensor to read the ballots. Also known as optical scan." (See VVSG 1.1 A-12)

"Optical scan, optical scan system: System by which votes are recorded by means of marks made in voting response fields designated on one or both faces of a ballot card or series of cards. An optical scan system reads and tabulates ballots, usually paper ballots, by scanning the ballot and interpreting the contents. Also known as marksense." (See VVSG 1.1 A-13)

"Electronic voting system: An electronic voting system is one or more integrated devices that utilize an electronic component for one or more of the following functions: ballot presentation, vote capture, vote recording, and tabulation...[a]n optical scan (also known as marksense) system..." (See VVSG 1.1 A-9)

There is no definition for a "mechanical tabulation system."

Defendant states that "through the administrative rule process [he] has reasonably interpreted the "mechanical tabulation system" to be a form of an "electronic voting system..."" and is relying on the electronic tallies created directly by this electronic voting system. (See Reply at 3). [underline for emphasis]

Defendant also suggests that the "administrative agency responsible for elections, may reasonably construe what constitutes a "mechanical tabulation

system" or that it is reasonable to construe a "marksense ballot voting system" to be a "mechanical tabulation system."" (See Reply at 3). [underline for emphasis]

Construe. To put together; to arrange or marshal the words of an instrument. To ascertain the meaning of language by a process of arrangement and inference. Blacks law 4th Edition.

Defendants' connection between words electronic and mechanical, to now negate an audit is absurd, and should be rejected. (Ref: HRS § 1-15).

Plaintiff maintains that the Defendant is using presumption, faulty premises, inferences and syllogism to "construe" a definition that justifies an action that is not in compliance with the affirmative statute, and that has grave consequences in determining the accuracy of elections.

Plaintiff maintains that the "marksense" is an "electronic voting system" and with a "straightforward interpretation of the statute" (See Reply at 3) the electronic voting system is subject to the audit requirements as specified in HRS §16-42(b)(3).

Plaintiff maintains that if the "electronic voting system" is not audited pursuant to HRS § 16-42(b)(3), the Defendant cannot rely on the electronic tallies pursuant to HRS § 16-42(b) and this system does not satisfy the requirements of HRS § 16-2 to "correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions."

Last, Defendant attests and admits to the public the audit requirements for certification of the election in their own agency newsletter, which incidentally was published seven days after the initiation of this Election Complaint. (See EXHIBIT A at #3).

Plaintiffs maintains this Election Complaint is well pled and the Defendants attacks continue to "misconstrue" the meaning of words and in misinterpretation of an affirmative statute that is critical to the accuracy of elections.

Plaintiff requests the court note that the counting of ballots in Hawaii is done through contract with a vendor called Hart Inter-civic, using "marksense" devices

and that the counting of the vote through their electronic voting system is proprietary, and that the only thing the people are allowed to see is the output.

Plaintiff maintains that by authorizing the use of electronic voting systems, the legislature recognized that the counting of paper ballots that was previously done by the citizens of Hawaii, is now being done through a contract with a voting system vendor. The intent of the legislature specified the requirement for an audit of this process that is clear in the statute, and which is a requirement to compare the vote cast on the paper ballot is equal to the output of the electronic voting system.

The Defendant, through their motions and replies is now claiming that no audit or further review is necessary to validate the accuracy of the election process.

Plaintiff maintains that without an audit as the legislature intended, the voting system cannot be assured to accurately count all votes cast, for or against any and all questions.

Plaintiffs "calls to question" in the Election Complaint remain unanswered.

Plaintiff moves this Court for Oral Argument as requested in previous motion.

Plaintiff maintains that declaratory judgment without relief will resolve this controversy.

Plaintiffs reserve all rights, without prejudice, and pursuant to UCC § 1-308.

Date: 4 December, 2022 City: Kauai, Hawaii

1. By: Ralph S. Cushnie Signature: Ralph Cushnie

Electronically Filed
Supreme Court
SCEC-22-0000703
07-DEC-2022
01:35 PM
Dkt. 22 CR

SCEC-22-0000703

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

RALPH S. CUSHNIE, along with more than Thirty (30) Voters, Plaintiffs,

vs.

SCOTT T. NAGO, personally and in his official capacity as Chief Elections Officer, Office of Elections, State of Hawaiʻi, Defendant.

ORIGINAL PROCEEDING

CERTIFICATE OF RECUSAL
(By: Recktenwald, C.J.)

The undersigned Chief Justice hereby recuses himself from sitting as a member of the Supreme Court of the State of Hawaiʻi in the above-entitled proceeding, except to the extent necessary for him to assign a substitute justice or justices.

DATED: Honolulu, Hawaiʻi, December 7, 2022.

/s/ Mark E. Recktenwald

Chief Justice

Electronically Filed
Supreme Court
SCEC-22-0000703
15-DEC-2022
08:44 AM
Dkt. 26 FFCL

SCEC-22-0000703

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

RALPH S. CUSHNIE, along with more than Thirty Voters, Plaintiffs,

vs.

SCOTT T. NAGO, personally and in his official capacity as Chief Election Officer, Office of Elections, State of Hawaiʻi, Defendant.

ORIGINAL PROCEEDING

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT
(By: Nakayama, Acting C.J., McKenna, Wilson, Eddins JJ., and Circuit Judge Remigio, in place of Recktenwald, C.J., recused)

On November 22, 2022, Plaintiffs Ralph S. Cushnie, along with more than Thirty Voters filed a complaint in this court entitled "Election Complaint pursuant to HRS § 11-172 and HRS § 11-174.5 and request for declaratory judgement pursuant to HRCP Rule 57" (complaint). The named party Defendant is Scott T. Nago, personally and in his official capacity as Chief

Election Officer, Office of Elections, State of Hawai‘i. On November 28, 2022, Defendant Scott T. Nago in his official capacity as the Chief Election Officer for the Office of Elections, State of Hawai‘i (Office of Elections) filed a motion to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment. Subsequently, Plaintiffs and the Office of Elections filed further briefing and documents on the motion.

Upon consideration of the complaint and the documents attached, the motion to dismiss, and having heard this matter without oral argument, we enter the following findings of fact, conclusions of law, and enter judgment dismissing the complaint.

FINDINGS OF FACT

1. Plaintiffs are over thirty voters who reside in the representative district number 17 on the island of Kaua‘i.

2. On November 22, 2022, Plaintiffs timely filed a complaint challenging the statewide elections results based on purported deficiencies in the audit practices of the Office of Elections.

3. The relief requested by the complaint is two-fold. First, Plaintiffs request a declaratory judgment that interprets HRS § 16-42 (2009). Second, in the alternative, Plaintiffs request the court invalidate the general election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the precinct officials.

4. The complaint is devoid of any specific allegations as to how the audit procedure advocated by Plaintiffs would make any difference in the outcome of the election.

5. In addition to the claims outlined above, the complaint includes a claim for declaratory judgment against Defendant Scott T. Nago in his personal capacity.

6. On November 22, 2022, the return of service was filed to establish proof of service of the complaint and summons on "Scott T. Nago, in his official capacity only." To date, the Plaintiffs have not filed any return of service as to Defendant Scott Nago in his personal capacity.

7. The Office of Elections moved to dismiss the complaint for failure to state a claim upon which relief can be granted, in pertinent part, because the complaint lacks any specific allegations of errors, mistakes, or fraud that would change the outcome of the election result.

CONCLUSIONS OF LAW

1. Pursuant to Hawai‘i Rules of Evidence Rule 202(b) (2016), the request for judicial notice of the Hawai‘i laws cited in the complaint is granted.

2. The issuance of a declaratory judgment on the interpretation of HRS § 16-42 is not within the original jurisdiction of the supreme court. See HRS § 602-5 (2016). Therefore, this court is without original jurisdiction to consider the Plaintiffs' claim for declaratory judgment.

3. An election contest is instituted by filing a complaint in the supreme court setting forth "any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results." HRS § 11-172 (Supp. 2021). "The complaint shall also set forth any reason for reversing, correcting, or changing the decisions of the voter service center officials or the officials at the counting center in an election using the electronic voting system." Id.

4. This court has held that a complaint challenging the results of an election pursuant to HRS § 11-172 fails to state a claim unless: (1) the plaintiffs demonstrate errors that would change the outcome of the election, Tataii v. Cronin, 119 Hawaiʻi 337, 339, 198 P.3d 124, 126 (2008) (citing Akaka v. Yoshina, 84 Hawaiʻi 383, 387, 935 P.2d 98, 102 (1997)), or (2) the plaintiffs demonstrate that the correct result cannot be ascertained because of a mistake or fraud on the part of the precinct officials. Akaka, 84 Hawaiʻi at 387, 935 P.2d at 102; see HRS § 11-174.5(b) (2009 & Supp. 2021).

5. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Bank of Am., N.A. v. Reyes-Toledo, 143 Hawaiʻi 249, 258, 428 P.3d 761, 770 (2018) (citation omitted).

6. "Our review is strictly limited to the allegations of the complaint, which we view in the light most favorable to the

plaintiff and deem to be true." Civ. Beat L. Ctr. for the Pub. Int., Inc. v. City & Cnty. of Honolulu, 144 Hawai‘i 466, 474, 445 P.3d 47, 55 (2019) (citation and internal quotations omitted). However, "the court is not required to accept conclusory allegations on the legal effect of the events alleged." Id. (citation omitted).

7. Here, the complaint fails to allege any specific facts that the audit procedures requested would change the outcome of the election. And, Plaintiffs' belief and indefinite assertions that the requested audit could change the outcome of all statewide elections, by itself, is insufficient to state a claim under HRS §§ 11-172 and 11-174.5(b). See Hawai‘i Rules of Civil Procedure Rule 9(b) (2000) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

8. Accordingly, Plaintiffs' claim that the general election results statewide should be invalidated fails to state a claim upon which relief can be granted. See Tataii, 119 Hawai‘i at 339-40, 198 P.3d at 126-27 ("In the absence of facts showing that irregularities exceed the reported margin between the candidates, the complaint is legally insufficient because, even if its truth were assumed, the result of the election would not be affected.").

JUDGMENT

Based upon the foregoing findings of fact and conclusions of law, judgment is entered granting the motion to dismiss and dismissing the complaint as to all claims and parties.

Dated: Honolulu, Hawai‘i, December 15, 2022.

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

/s/ Todd W. Eddins

/s/ Catherine H. Remigio

Ralph S. Cushnie *pro se, in propria persona*
PO Box 864
Kalaheo, Hawaii 96741
Ph. 808 645-0955
Email: ralph@cushniecci.com

Electronically Filed
Supreme Court
SCEC-22-0000703
19-DEC-2022
08:09 AM
Dkt. 30 MOT

IN THE SUPREME COURT OF THE STATE OF HAWAII

Ralph S. Cushnie *pro se,* along with more than Thirty Voters *pro se*

Plaintiff

VS.

Scott T. Nago, personally and in his official capacity as Chief Elections Officer; for the Office of Elections; STATE OF HAWAII *et al*

Defendant

CASE NO. SCEC-22-0000703

MOTION TO RECONSIDER
OR IN THE ALTERNATIVE
MOTION TO LEAVE TO AMEND

I, Ralph S. Cushnie pro se, along with more than Thirty Voters pro se (Plaintiffs) hereby bring this Motion to Reconsider, or in the alternative Motion to Leave to Amend pursuant to the Hawaii Rules of Civil Procedure 7(b).

On 15 December 2022, the Hawaii Supreme Court (the Court) issued their findings of fact, conclusions of law, and judgement "granting the motion to dismiss and dismissing the complaint as to all claims and parties." The Court elected to adjudicate the Plaintiffs complaint and multiple motions, along with three motions for oral argument, without a hearing. (See Jdge at 2 and 6)

The Plaintiffs election complaint and oppositions are well pled and present a verifiable controversy to the Court that is fundamental to the application of statutory law and to the accuracy of elections.

Plaintiffs respectfully request the Court acknowledge the Plaintiffs writings in the election complaint, opposition to motion to dismiss, and opposition to Defendant's reply as articulated and in their correct context. (See Cmplt, Docket 1, Docket 12, and Docket 16).

The Plaintiffs pleading is consistent in request for relief and remedy, and is of the utmost simplicity, in appealing the Court to provide declaratory judgment without relief in determining that HRS § 16-42 is an affirmative statute, and to assist in directing compliance with this statute in order to ensure that the post-election pre-certification audits are conducted as intended by the legislature, and to ensure the accuracy of the election against any and all questions.

Through multiple pleadings, the Plaintiffs maintain that without an audit as the legislature intended, the voting system cannot be assured to accurately count all votes cast, for or against any and all questions, and that the accuracy of the general election is questionable and indeterminate.

JURISDICTION

Plaintiffs aver the Court has original jurisdiction for issuance of a declaratory judgement in determining that HRS § 16-42 is an affirmative statute and in directing compliance with statutory audit requirements pursuant to the following:

1) Constitution for the State of Hawaii Article II Section 10 wherein "Contested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law." Ref: Constitution for the State of Hawaii.

2) Hawaii Revised Statute Chapter 11 wherein "This part shall apply whenever a contested election is subject to determination by a court of competent jurisdiction in the manner provided by law." Ref: HRS §11-171.

3) Hawaii Revised Statute Chapter 11 wherein "With respect to any election... any thirty voters of any election district, may file a complaint in the supreme court." Ref: HRS § 11-172.

4) Hawaii Revised Statute Chapter 602-5 wherein "the supreme court shall have jurisdiction and powers as follows: (3)…and such other original jurisdiction as may be expressly conferred by law;"

5) Hawaii Revised Statute Chapter 602-5 that "the supreme court shall have jurisdiction and powers as follows: (6) To make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it."

Due to the Defendant's non-compliance with HRS § 16-42, Plaintiffs have filed this election complaint to resolve a legitimate controversy with a contested election. The Plaintiffs respectfully request the Court recognize it has original jurisdiction to adjudicate the controversy and provide declaratory judgement as requested.

OBJECTIONS

Plaintiffs OBJECT to the Courts finding of fact as to the relief requested. (See Jdge at 2 para 3). The requested relief is NOT for 'interpretation' of HRS § 16-42. The Plaintiffs relief requested was specifically for:

1) determining HRS § 16-42 as an affirmative statute;
2) directing the Defendant to comply with HRS § 16-42 in the conduct of post-election pre-certification audits;
3) directing the Defendant to ensure local procedures comply with the

requirements of HRS § 16-42;

4) define any terms that are in question by the Defendant and not defined by statute or common legal and English language references; and

5) define any procedures that are not clearly understood by their English language interpretation and aligned with sound audit principles.

Plaintiffs requested relief is specific in attempting to ensure the correct application of the law and the accuracy of elections. This oversimplification of the requested relief by the Court is misadministration of the record and shows the Court is acting in bad faith in their dismissal of the gravity of the controversy as presented.

Plaintiffs OBJECT to the Courts finding of fact that there is an "…audit procedure advocated by the Plaintiffs…" (See Jdge at 3 para 4). And Plaintiffs OBJECT to the Courts conclusions of law wherein they state that "the complaint fails to allege any specific facts that the audit procedures requested would change the outcome of the election." (See Jdge at 5 para 7).

This complaint is NOT a request, and Plaintiffs are NOT advocating for an "audit procedure."

Plaintiffs, along with other interested parties and more than 250 petitioners are advocating for the correct application of the statutory law whereby a post-election pre-certification audit of actual paper ballots is required when using electronic voting systems. (See Compl Ex D & Attch 1, and Docket 20 & 24).

The Plaintiffs complaint is simply appealing the Court through declaratory judgement to aid in directing compliance with HRS § 16-42 and ensuring that the accuracy of elections can be verified through audit, as intended by the legislature, and as required by law, against any and all questions. The Courts misinterpretation of the pleading is at very least concerning and dangerously misleading as to the scope of the controversy.

RELIEF

Plaintiffs move the Court in this Motion to Reconsider to provide declaratory judgement for relief as specified in the complaint, and to resolve the controversy. (See Compl at 8 & 9). Plaintiff maintains the Court has original jurisdiction and that the Plaintiffs are entitled to the relief sought.

If the Court is unable to provide declaratory relief, Plaintiffs move this Court with a Motion for Leave to Amend and for the Plaintiffs to introduce new evidence not available at the filing, plus other facts, that demonstrate that the Defendant is engaged in provable election fraud.

SUMMARY

Plaintiffs' complaint is a good faith effort to resolve a controversy and ensure the accuracy of elections, against any and all questions, and for the benefit of the people fore which our public officials are elected and represent.

Plaintiffs maintain that through this motion to reconsider, and review of the judgment, that the Court has ignored the simple appeal for declaratory judgement to resolve a legitimate controversy that has been identified by the people during their observation of the administration of our elections. Plaintiffs appeal is that post-election pre-certification audits be conducted pursuant to HRS § 16-42, whereby the votes cast on the actual paper ballot are compared to the tallies of the electronic voting system.

The Defendant claims that comparing ballot images created by the electronic voting system meets the audit requirement, or that re-labeling an electronic voting system as a mechanical tabulation system negates the audit requirement in its entirety. These deceptive statements and material misrepresentation demonstrate a deliberate attempt to avoid election audits and evade compliance with the law.

Plaintiff avers the Court is not arguing in good faith. The Court has taken all measures to mischaracterize the pleading, confuse the question with irrelevant statutory citations, misinterpret the intent, and now present absurd legal arguments to distract the legal audience from the statutory requirement – which is simply an audit comparison of the paper ballots to the output tallies of the electronic voting system.

Without an audit as the legislature intended, Plaintiffs maintain that the voting system cannot be assured to accurately count all votes cast, for or against any and all questions, and that the accuracy of the general election remains indeterminate, and the presumed result is unverifiable.

Plaintiffs intend to appeal.

Plaintiffs reserve all rights, without prejudice.

Date: 18 December , 2022 City: Kauai, Hawaii

1. By: Ralph S. Cushnie Signature: Ralph Cushnie

Electronically Filed
Supreme Court
SCEC-22-0000703
27-DEC-2022
08:05 AM
Dkt. 33 ODMR

SCEC-22-0000703

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

RALPH S. CUSHNIE, along with more than Thirty Voters, Plaintiffs,

vs.

SCOTT T. NAGO, personally and in his official capacity as Chief Election Officer, Office of Elections, State of Hawaiʻi, Defendant.

ORIGINAL PROCEEDING

ORDER DENYING MOTION FOR RECONSIDERATION

(By: Nakayama, Acting C.J., McKenna, Wilson, Eddins JJ., and Circuit Judge Remigio, in place of Recktenwald, C.J., recused)

Upon review of the Plaintiffs' motion for reconsideration, or in the alternative for leave to amend, filed December 19, 2022, the documents submitted in support thereof, and the record, this court has not overlooked or misapprehended points of law or fact. See Hawaiʻi Rules of Appellate Procedure, Rule 40. As to the motion for leave to amend, because the judgment dismissing the case operates to terminate the proceeding, there is no complaint left to amend and the motion for leave to amend is denied.

Plaintiffs' motion for reconsideration, or in the alternative for leave to amend, is denied.

Dated: Honolulu, Hawai'i, December 27, 2022.

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

/s/ Todd W. Eddins

/s/ Catherine H. Remigio

EXHIBIT F

HOUSE BILL 132

HOUSE OF REPRESENTATIVES
THIRTY-SECOND LEGISLATURE, 2023
STATE OF HAWAII

H.B. NO. 172

A BILL FOR AN ACT

RELATING TO ELECTIONS.

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

SECTION 1. Section 16-41, Hawaii Revised Statutes, is amended to read as follows:

"**§16-41 Definitions.** Whenever used in this title, unless the context otherwise requires:

"Counting center" means the computer facilities and surrounding premises designated by the chief election officer or the clerk in county elections where electronic voting system ballots are counted.

"Defective ballot" means any ballot delivered to the counting center in accordance with section 11-152 that cannot be read by the ballot reading device.

"Direct recording electronic voting system" means a system that generates a voter verifiable paper audit trail and utilizes electronic components, which are logically and physically integrated into a single unit, for the functions of ballot presentation, vote capture, vote recording, and tabulation.

"Electronic voting system" means the method of recording votes which are counted by automatic tabulating equipment. The term includes, but is not limited to, the mechanical tabulation system, including a marksense ballot voting system, that involves the tabulation of paper ballots, and the direct recording electronic voting system that generates a voter verifiable paper audit trail.

"Marksense ballot voting system" means a mechanical tabulation system using paper ballots and optical scanning, digital scanning, or similar technology equipment, for which:

(1) The voter manually records votes by marking the appropriate voting position on the ballot, with a prescribed marking device, in the manner instructed by the chief election officer; and

(2) The marks on the ballots are subsequently read by the optical scan, digital scan, or similar technology device, in conformance with the specifications of the voting system selected by the chief election officer.

"Mechanical tabulation system" means an automatic tabulation system, including a marksense ballot voting system,

that tabulates paper ballots. The term does not include a direct recording electronic voting system.

"Voter verifiable paper audit trail" means the paper record that constitutes a complete record of ballot selections that is verified by the voter. The record may also be used to assess the accuracy of the voting machine's electronic record and to verify the election results."

SECTION 2. Section 16-42, Hawaii Revised Statutes, is amended to read as follows:

"**§16-42 Electronic voting requirements.** (a) When used at primary or special primary elections, the automatic tabulating equipment of the electronic voting system shall count only votes for the candidates of one party, or nonpartisans. In all elections, the equipment shall reject all votes for an office when the number of votes therefor exceeds the number that the voter is entitled to cast.

No electronic voting system shall be used in any election unless it [~~generates~~] involves a paper ballot or voter verifiable paper audit trail [~~that may be inspected and corrected by the voter before the vote is cast, and unless every paper ballot or voter verifiable paper audit trail is retained~~

~~as the definitive record of the vote cast~~]. The chief election officer shall prescribe the method of marking the ballot and associated instructions for voting associated with the electronic voting system.

(b) The chief election officer [~~may rely on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system if:~~], in using an electronic voting system, shall ensure that:

(1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;

(2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;

(3) The chief election officer conducts a post-election, pre-certification audit of [~~a random sample of~~] not less than ten per cent of the precincts [~~employing the electronic voting system~~], to verify that the

[~~electronic tallies generated by~~] results from the system [~~in those precincts~~] with respect to a selected contest or ballot question equal [~~hand tallies~~] a tally of the [~~paper~~] ballots [~~generated by the system in those precincts; and~~] or voter verifiable paper audit trails;

(4) The audit may be conducted with scanned images of the ballots or voter verifiable paper audit trails and involve a contest or ballot question. To the extent technology permits other forms of duplication or reproduction, the technology likewise may be used in lieu of the physical paper ballots or voter verifiable paper audit trails;

(5) Any counting of ballots or voter verifiable paper audit trails for purposes of the audit shall be conducted in accordance with any marking and vote disposition rules relating to the electronic voting system that the ballots or voter verifiable paper audit trails were associated with;

(6) A discrepancy or difference in results shall not be considered to reflect misreporting if the discrepancy is not related to misreporting a proper mark;

[~~(4)~~] (7) If [~~discrepancies appear~~] misreporting appears in the pre-certification audits [~~in paragraph (3)~~], the chief election officer, pursuant to administrative rules, shall immediately conduct an expanded audit to determine the extent of misreporting in the system[~~.~~];

(8) Any counting of ballots to correct misreporting for isolated devices shall involve the specific type of mechanical tabulation system, such as the marksense ballot voting system, that was originally associated with the ballot after appropriate steps are taken to use devices that did not experience misreporting, or the misreporting devices have been repaired to the satisfaction of the chief election officer. All contests and ballot questions on the impacted ballots shall be counted by the voting system and those results shall replace the prior contests and ballot question results; and

(9) To the extent that misreporting occurs with a direct recording electronic voting system, the voter verifiable paper audit trails or reproductions associated with the isolated misreporting devices shall be counted in their entirety and those results shall replace the prior misreported results.

(c) In the event of a county only election not held in conjunction with a regularly scheduled federal or state election, all references to the chief election officer shall be understood to refer to the clerk."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval.

INTRODUCED BY: _____

By Request

JAN 17 2023

H.B. NO. 132

Report Title:
Office of Elections Package; Electronic Voting System; Definitions; Electronic Voting Requirements

Description:
Defines "direct recording electronic voting system", "marksense ballot voting system", and "mechanical tabulation system". Amends the definition of "electronic voting system" to include the mechanical tabulation system and marksense ballot voting system. Specifies additional requirements and procedures with which the Chief Election Officer must comply when using an electronic voting system, including procedures for conducting the post-election, pre-certification audit.

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

ATTACHMENT 1

Signatures of More Than Thirty Voters

Petition for Election Audit Pursuant to Statute

I am one of more than thirty voters who are filing this petition pursuant to the Constitution for the State of Hawaii Article I Section 4 for redress of a grievance regarding the audit of elections. We the people are petitioning the State of Hawaii legislature for determination of Hawaii Revised Statute HRS § 16-42 as an affirmative statute, and assisting in directing compliance with audit procedures as specified in the statute, and as necessary to ensure the accuracy of elections against any and all questions, pursuant to HRS §16-2, and the Constitution for the State of Hawaii.

NAME	COUNTY, STATE	SIGNATURE
Danford M Kaeo	Kauai Hi	[illegible]
Harley Kaeo	Kauai, HI	[illegible]
CHANEL PIILANI KAEO	KAUAI, HI	[illegible]
Suzanne Caberdo	Kauai Hi	[illegible]
Pamela M. Holloway	Kauai, HI	Pamela M Holloway
Kira Rapozo	Kauai, Hi	[illegible]
Bernadette Kaeo	Kauai, Hi	Bernadette Kaeo
Jaevon Sategna	Kauai, Hi	[illegible]
John Adams	Kauai, Hi	John Adams
Waianuhea Cordeiro	Kauai, HI	[illegible]
Jazzlynn-Grace Pascua	Kauai, HI	Jazzlynn Pascua
Jeslyn A. Kaluahine	Kauai, Hi	[illegible]
LARRY J. ARRUDA	KAUAI, Hi	[illegible]
DARCELL HORNER	KAUAI, Hi	Darcell Horner
Nadine Horner	Kauai Hi	Nadine Horner
Bryan Aiwohi	Kauai HI	[illegible]
LIAKALA AIWOHI	KAUA'I, HI	[illegible]
Berna Arruda	Kauai, HI	[illegible]
EDWARD TAYLOR	KAUAI, Hi	[illegible]
Kenny Alapa	Kauai Hi	[illegible]
Irene S. Yoshioka	Kauai Hi	Irene S. Yoshioka
Kaui Kitashima	Kauai, HI	[illegible]
Caroline M. Franklin	Kauai, Hi	Caroline M. Franklin

Petition for Election Audit Pursuant to Statute

I am one of more than thirty voters who are filing this petition pursuant to the Constitution for the State of Hawaii Article I Section 4 for redress of a grievance regarding the audit of elections. We the people are petitioning the State of Hawaii legislature for determination of Hawaii Revised Statute HRS § 16-42 as an affirmative statute, and assisting in directing compliance with audit procedures as specified in the statute, and as necessary to ensure the accuracy of elections against any and all questions, pursuant to HRS §16-2, and the Constitution for the State of Hawaii.

NAME	COUNTY, STATE	SIGNATURE
DAN CONLEE	KALAHEO HI	
Lorrie Swartz	Kalaheo HI	
DONALD SWARTZ	Kalaheo, HI	
TONY GONZALES	Kalaheo HI	
Lillie Gonzales	Kalheo Kauai HI	
Crystal Galina	Kalaheo Kauai HI	
Peggy Roberts	Kauai, HI	
Cathy Togioka	Waimea, Kauai HI	
Keala Huffman	Kauai HI	
Lilia Quackenbush	Kalaheo HI	
Kellie McEvoy	Kalaheo HI	
Chantal Rubaw	Kauai, HI	
Arianna Gonzales	Kalaheo, HI	
Cindy Conger	Kauai HI	

Petition for Election Audit Pursuant to Statute

I am one of more than thirty voters who are filing this petition pursuant to the Constitution for the State of Hawaii Article I Section 4 for redress of a grievance regarding the audit of elections. We the people are petitioning the State of Hawaii legislature for determination of Hawaii Revised Statute HRS § 16-42 as an affirmative statute, and assisting in directing compliance with audit procedures as specified in the statute, and as necessary to ensure the accuracy of elections against any and all questions, pursuant to HRS §16-2, and the Constitution for the State of Hawaii.

NAME	COUNTY, STATE	SIGNATURE
Kalvin Souza	Kauai, Hi	Kalvin A. Souza
William Souza	Kauai, HI	
CHAD VALMOJA	Kauai HI	
David Nawai	Kauai, HI	
JEFF GRIFFIN	KAUAI, HI	
Laura Cushnie	Kauai, HI	

Petition for Election Audit Pursuant to Statute

I am one of more than thirty voters who are filing this petition pursuant to the Constitution for the State of Hawaii Article I Section 4 for redress of a grievance regarding the audit of elections. We the people are petitioning the State of Hawaii legislature for determination of Hawaii Revised Statute HRS § 16-42 as an affirmative statute, and assisting in directing compliance with audit procedures as specified in the statute, and as necessary to ensure the accuracy of elections against any and all questions, pursuant to HRS §16-2, and the Constitution for the State of Hawaii.

NAME	COUNTY, STATE	SIGNATURE
Naomi Masaki	Kauai, HI	Naomi Masaki
George Kanna	Kauai	George Kanna
Sharlyn Kanna	Kauai	Sharlyn Kanna
Ralph Cushnie	Kauai	Ralph Cushnie