S. C. No. _____

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

CITY AND COUNTY OF HONOLULU, COUNTY OF HAWAI'I, COUNTY OF MAUI, COUNTY OF KAUA'I,

Petitioners,

vs.

STATE OF HAWAI'I; SCOTT NAGO, in his capacity as Chief Election Officer; RONALD D. KOUCHI, in his capacity as President of the Hawai'i Senate; SCOTT K. SAIKI, in his capacity as Speaker of the Hawai'i House,

Respondents.

ORIGINAL PROCEEDING
CIVIL NO. 18-1-1326-08 (JPC)
(Declaratory Judgment; Injunctive Relief)

PETITION FOR EXTRAORDINARY WRIT SEEKING PRE-ELECTION RELIEF

PETITION FOR EXTRAORDINARY WRIT SEEKING PRE-ELECTION RELIEF

DECLARATION OF ROBERT M. KOHN

EXHIBITS "1" – "19"

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CITY AND COUNTY OF HONOLULU, COUNTY OF HAWAIʻI, COUNTY OF MAUI, COUNTY OF KAUAʻI, Petitioners, vs. SCOTT NAGO, in his capacity as Chief Election Officer, RONALD D. KOUCHI, in his capacity as President of the Hawaiʻi, in his official capacity, SCOTT K. SAIKI, in his capacity as Speaker of the Hawaiʻi House, Respondents.	ORIGINAL PROCEEDING CIVIL NO. 18-1-1326-08 (JPC) (Declaratory Judgment; Injunctive Relief) PETITION FOR EXTRAORDINARY WRIT SEEKING PRE-ELECTION RELIEF

PETITION FOR EXTRAORDINARY WRIT SEEKING PRE-ELECTION RELIEF

INTRODUCTION

The Hawaiʻi Constitution grants the Petitioner Counties *exclusive* authority over real property taxation (article 8, section 3), and this is the only constitutionally-dedicated source of tax revenues the counties can assess and receive. The legislature has proposed a ballot question for the upcoming general election on November 6, 2018, that would amend the Hawaiʻi Constitution by carving away at the counties' exclusive authority to impose real property taxes by allowing the legislature to impose a tax on certain real property.

But, the ballot question fails to mention that a new "tax" is at stake.

The Petitioner Counties[1] challenge the ballot question because it is unclear and misleading. The ballot question, using the exact language proposed by the legislature in

[1] City and County of Honolulu, County of Hawaiʻi, County of Maui, and County of Kauaʻi (collectively "Counties").

SB 2922,[2] will ask Hawai‘i voters the following question:

> Shall the legislature be authorized to establish, as provided by law, a surcharge on investment real property to be used to support public education?[3]

The standard for reviewing ballot questions is set out in Hawai‘i Revised Statutes ("HRS") § 11-118.5, providing in pertinent part that the "language and meaning of a constitutional amendment shall be clear and it shall be neither misleading nor deceptive." HRS § 11-118.5.

The ballot question is unclear and misleading in multiple ways:

1	"surcharge"	It is misleading to ask voters to amend the constitution to authorize the legislature to impose a new tax without using the word "tax": using the unclear euphemism "surcharge" without referring to "tax" disguises the tax.
2	"investment" real property	The legislature could consider all real property, including personal residences, to be a form of investment, and so the word "investment" is unclear and misleading.
3	"to be used to support public education"	This phrase could mislead voters into thinking that a Yes vote will increase spending for public education when nothing in SB 2922 requires such a result.
4	"as provided by law"	The legislature is not presently authorized to establish a real property tax surcharge and, therefore, "as provided by law" is unclear and misleading.

[2] *See* **Exhibit 1**, SB 2922, S.D.1, H.D.1, 2018 Legislature ("SB 2922").

[3] *See* **Exhibit 2**, ballot specimens for each of the four Counties.

The present writ presents two essential questions for this Court's determination:

(1) Should the unclear and misleading ballot question be invalidated?

(2) Are the Counties entitled to pre-election relief?

The Counties contend that the ballot question is unclear and misleading, in violation of HRS § 11-118.5 and should be invalidated prior to the election.

As for pre-election relief, Respondent Chief Election Officer Nago has made clear that it is no longer practical to change the printed ballots prior to the November 6, 2018, general election ("General Election"), but if a court were to declare the ballot question to be invalid, he could issue a public proclamation stating that the question regarding the constitutional amendment should not have appeared on the ballot and should be considered stricken, and that any votes for or against the measure will not be counted and have no impact.

This is the relief the Counties seek in this writ,[4] and there is ample case law in Hawai'i and other jurisdictions holding that pre-election relief is available.

BACKGROUND

A. FACTUAL BACKGROUND

1. The ballot question language specified by SB 2922.

The 2018 Legislature proposed a constitutional amendment to Articles VIII and X of the Hawai'i Constitution. See Exhibit 1, SB 2922. The legislature specified the exact constitutional ratification question to be printed on the General Election ballot.[5]

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[4] This is a petition for an extraordinary writ for pre-election relief, but it does not turn on legal distinctions between the various forms of writ. The Counties alternatively seek (1) a writ of mandamus or prohibition (HRS § 602-5, considered in light of HRAP Rule 21, gives this Court jurisdiction over all such writs), or (2) a petition to accept original jurisdiction.

[5] *See* Exhibit 1, SB 2922 §4; **Exhibit 3**, Nago Declaration dated Sept. 5, 2018, §§ 7, 9.

2. The Counties' real property tax revenues.

For 40 years, since the 1978 Constitutional Convention, the Hawai'i Constitution has granted the Counties exclusive authority over real property taxation, which is their only constitutionally-dedicated source of tax revenue. The revenues derived from real property taxes for the Counties in fiscal year 2018-2019 total $1.265 billion, or about 85% of the General Funds for City and County of Honolulu, $318 million for Maui, $310 million for Hawai'i County, and $135 million for Kaua'i.[6] This tax revenue is critical to support most county-provided core services, including public safety, sanitation and sewer facilities, parks and recreation, human resources, facility maintenance, planning and permitting, maintenance and repair of highways and streets, and the legislative and administrative governance functions of the Counties. Such tax revenue also helps pay for the Counties' numerous capital improvement projects.

The State of Hawai'i, by contrast, has numerous major sources of tax revenues that are not available to the Counties. For example, 48% of State revenue ($3.2 billion) was derived from the general excise tax in fiscal year 2016-2017, and 32% ($2.1 billion) from individual income tax.[7] The State also derives substantial revenues from the transient accommodations tax, the corporate income tax, the insurance premiums tax, and other taxes, altogether producing over $6 billion in revenue.[8]

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[6] *See* City Reports on the Department of Budget and Fiscal Services Real Property Assessment Division website, available at https://www.realpropertyhonolulu.com/rpa-report/#2018.

The Counties ask the Court to take judicial notice of the matters in official websites cited in the writ and its exhibits pursuant to Rule 201(b) of the Hawai'i Rules of Evidence because they are not subject to reasonable dispute because they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

[7] See State Reports on the Department of Budget and Fiscal Services Real Property Assessment Division website, available at https://www.realpropertyhonolulu.com/rpa-report/#2018.

[8] *Id.*

3. Requested pre-election relief.

Respondent Chief Election Officer Nago has made clear that it is no longer practical to change the ballot prior to the General Election.[9] However, if a court were to find the ballot question to be invalid, he could issue a public proclamation stating that the question regarding the constitutional amendment should not have appeared on the ballot and should be considered stricken, and that any votes for or against the measure will not be counted and have no impact.[10]

B. PROCEDURAL BACKGROUND

The Counties' filed a second amended complaint for declaratory and injunctive relief on August 29, 2018. [11] On August 31, 2018, they filed a motion for preliminary injunction seeking to invalidate the SB 2922 ballot question. The circuit court, with the Honorable Jeffrey P. Crabtree presiding, denied the motion in a written order dated September 20, 2018 (**Exhibit 5**), and certified the question for interlocutory appeal on September 21, 2018.

The Counties intend to file a prompt notice of appeal. However, it will be virtually impossible to present the issue to the Hawai‘i Supreme Court in time to receive relief prior to the General Election. The circuit court clerk will have up to 60 days to assemble, certify, and electronically transmit the record to the appellate clerk (HRAP 11(b)(1)),[12] which might be completed after the General Election. There are also a number of additional procedural hurdles, including required actions by courts and court clerks that must take place before the appeal can

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[9] Exhibit 3, Nago declaration dated Sept. 5, 2018 ¶ 25 *et seq*.

[10] *Id*. ¶ 63, 64; **Exhibit 4**, Nago declaration dated Aug. 31, 2018, ¶ 61.

[11] *City and County of Honolulu, et al. v. Ige, et al.*, Civ. No. 18-1-1326-08 JPC.

[12] See, e.g., *Radcliffe v. State*, No. CAAP-17-0000594 (notice of appeal filed on Aug. 9, 2017, dkt. no. 1, and record on appeal filed six weeks later on Sept. 26, 2017, dkt. no. 15.)

be brought before this Court.[13]

In light of the foregoing, the present extraordinary writ is the only practical way that the Counties can obtain pre-election relief.

LEGAL STANDARDS

A. A Ballot Question Must Be Clear and Not Misleading.

HRS § 11–118.5 ("Constitutional amendments, proposed") sets the standard for constitutional amendments, including ballot questions: "The language and meaning of a constitutional amendment shall be clear and it shall be neither misleading nor deceptive." This expresses three separate requirements—clear, not misleading, and not deceptive—such that a ballot measure that violates any one of them is invalid.

"Clear" means "free from doubt; sure" or "unambiguous." BLACK'S LAW DICTIONARY 287 (9th ed. 2009). On the other hand, no legislative definition is provided sufficient to distinguish between "misleading" and "deceptive"[14] and, therefore, this petition will focus on the "clear" and "not misleading" requirements.

A ballot question can be misleading in different ways. *Roberts v. Priest*, 20 S.W.3d 376,

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[13] Statements of jurisdiction (and opposition) are filed within ten days after record on appeal is filed. HRAP 12.1. An application for transfer to the supreme court may be filed no earlier than ten days after the filing of the record on appeal (HRAP 40.2(a)(2)). Any response is due five days later. HRAP 40.2(d), 27(a). Transfer will be mandatory under HRS § 602-58(1) because the validity of the ballot question is a "question of imperative or fundamental public importance." The supreme court would then have thirty days to grant the mandatory application. HRAP 40.2(f). The Counties could then move under FRAP 27(a) for an expedited briefing schedule and oral argument set prior to the election to obtain the pre-election relief they are requesting, but it is highly unlikely this could take place prior to the General Election.

[14] Dictionary definitions of "deceptive" can be circular or reference "misleading." *See, e.g.*, the authoritative WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 585 (1986), defining "deceptive' as "tending to deceive: having power to mislead."); *United States v. Bongiorno*, 2006 U.S. Dist. LEXIS 24830, at *20 (S.D.N.Y. May 1, 2006) (quoting previous Webster's definition).

380 (Ark. 2000) (A ballot question "must be free from any misleading tendency, whether of amplification, of omission, or of fallacy…." The central question for a court is "whether, in the voting booth, the voter is able to reach an intelligent and informed decision for or against the proposal and to understand the consequences of his or her vote…." *Id*.)

B. The Average Voter Is the Touchstone for Construing Ballot Questions.

The "average voter" is the "touchstone" for construing ballot questions. *Parents Involved in Community Schools Schs v. Seattle School Dist. No. 1*, 72 P.3d 151, 154 (Wash. 2003) (quoting Ninth Circuit order).[15]

C. Pre-Election Challenges Are Preferable to Post-Election Challenges.

"[E]fficient use of public resources demand that we not allow persons to gamble on the outcome of the election contest then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process." *State ex rel. Bronster v. Yoshina*, 84 Hawai'i 179, 185, 932 P.2d 316, 322 (1997). The "better practice" is "to expedite legal action prior to the election." *Id*.; accord, *Watland v. Lingle*, 104 Hawai'i 128, 137, 85 P.3d 1079, 1088 (2004).

Extraordinary writs are expressly authorized by FRAP 21(e).

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[15] *See also* Cal Elec Code § 9087(b) ("information the **average voter** needs to adequately understand the measure"); Utah Code Ann. § 20A-7-703(2)(b) ("clear and concise language that will easily be understood by the **average voter**"); *Kendoll v. Rosenblum*, 364 P.3d 678, 682 (Ore. 2015) ("in a manner that is understandable to the average voter"); *Stop Slots Md 2008 v. State Bd. of Elections*, 34 A.3d 1164, 1179 (Md. 2012) ("to permit an **average voter**…to exercise an intelligent choice.") (Emphases added to all quotations.)

ARGUMENT

I. The Ballot Question Should Be Invalidated Because It Is Unclear and Misleading.

A. It is misleading to ask voters to authorize a tax without using the word "tax."

All voters know what a "tax" is.[16] On the other hand, voters are unlikely to know what a "surcharge" means and that it can be a tax,[17] or that a Yes vote on the ballot question could authorize a new tax imposed by the legislature on their real property.

The voter turnout for the last non-presidential general election in 2014 was 369,642, or 52.3% of all registered voters[18] and, of those 369,642 voters, as many as 40% (147,993) could have been homeowners who held their property in fee.[19]

It is impermissible to make "no reference whatsoever to a tax, even though the sole purpose of the measure was to raise revenue for government." *Kromko v. Superior Court*, 811 P.2d 12, 20 (Ariz. 1991), discussing *Boyd v. Jordan*, 35 P.2d 533, 534 (Cal. 1934). Nor is it permissible to "describe[] everything that could induce electors to sign but omit[] the one aspect that would cause hesitation—the imposition of new taxes." *Id*. at 21, citing *Boyd* at 459.

The California Supreme Court granted a writ in *Boyd* to compel the secretary of state to refrain from placing on the ballot a proposed initiative regarding a constitutional amendment

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[16] **See Exhibit 6**, sample "Real Property **Tax** Bill" that is mailed to real property taxpayers yearly by the City & County of Honolulu, Division of Treasury; *see also* **Exhibit 7**, "Real Property **Tax** Electronic Payment Site" allowing taxpayers to pay online, available at: https://www.honolulu.gov/cms-bfs-menu/site-bfs-sitearticles/6418-property-tax-payments.html.

[17] See six definitions of the noun "surcharge" in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2299 (1986), attached as **Exhibit 8**.

[18] See **Exhibit 9**, Final Summary Report by Office of Elections, p.2, available at: http://files.hawaii.gov/elections/files/results/2014/general/histatewide.pdf.

[19] See **Exhibit 10**, indicating 147,993 exemptions for fiscal year 2014-2015 for "Homes – Fee – (Basic), available at: https://www.realpropertyhonolulu.com/media/1084/14_Exhibitpdf.

containing the words "Initiative Measure Providing for Adoption of Gross Receipts Act." The court held that while "the amendment has for its sole purpose the raising of revenue for the support of the state government," it makes "no reference to a tax or to the fact that the proposed amendment is a revenue measure." 35 P.2d at 533–34. It "did not bring to his mind any idea or suggestion whatever that the amendment proposed related to taxation in any form whatever." *Id*. at 534. Another supreme court disapproving a ballot that did not mention a tax stated: "Everyone knows the general operation of a sales tax. The undisclosed fact is that such a law will be put in operation." *Walton v. McDonald*, 97 S.W. 2d 81, 83 (1936).

Voters are clearly reluctant to approve of new taxes being imposed on them. The omission of the word "tax" from the ballot question therefore renders it unclear and misleading.

B. "Investment real property" is misleading because "investment" is not defined.

All types of real property—including personal residences—can be considered as a form of investment because they can be bought at one price and sold at another.[20] There is nothing in SB 2922 that would prevent the legislature from taxing *all* real property—including personal residences with home exemptions—as a form of investment. Earlier versions of SB 2922 contained definitions that expressly excluded property with a home exemption.[21]

Surely voters who pay real property taxes on their homes would want clear and sufficient information to understand such an implication of a Yes vote. The voters should be informed that the legislature is seeking to grant itself a new, additional power of taxation that it has not had for 40 years, since 1978.

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[20] See **Exhibit 11**, available at: https://loans.usnews.com/how-your-home-stacks-up-as-an-investment.

[21] See **Exhibit 12**, § 1, original version of SB 2922 (Jan. 24, 2018), defining "Residential investment property" as excluding property "for which the owner does not qualify for a homeowner's exemption"; and SB 2922 S.D.1 § 2 containing the same exclusion.

Therefore, the phrase "investment real property" as used in the ballot—with neither definition nor limitation—is unclear and misleading.

C. It is misleading to tell voters the ballot measure is to "support public education" when the proposed constitutional amendment does not require the legislature to increase spending for public education.

The ballot question gives the misleading impression that revenues received from the legislature's proposed new real property tax will increase funding for public education when, in fact, there is nothing in SB 2922 that requires such a result.[22] The state operating budget for education is $1.99 billion,[23] nearly identical to the revenues derived from real property taxes for all four Counties combined in fiscal year 2018-2019.[24] So, unless the legislature more than doubles the current tax burden on real property taxpayers throughout the state, the legislature could merely substitute the revenues derived from its new real property tax for revenues derived from other funding sources, with no net increase for public education.

The ballot question's main selling point is that it will "be used to support public education." Voters may well assume this means an increase in funding for public education. This lulling of the voters is reminiscent of *Walton*, 97 S.W. 2d at 82 (1936), in which the ballot indicated its purpose as being "to provide for the assistance of aged and/or blind persons." The court noted the "appeal to all humane instincts. Few would object to some provision being made

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[22] This disconnect has not gone unnoticed. See **Exhibit 13**, available at: http://www.staradvertiser.com/2018/09/02/hawaii-news/volcanic-ash/volcanic-ash-be-honest-about-schools-tax-before-it-goes-on-ballot/; **Exhibit 14**, available at: https://www.bizjournals.com/pacific/news/2018/08/29/counties-join-honolulu-lawsuit-seeking-to-cut.html.

[23] **Exhibit 15**, also available at: http://www.hawaiipublicschools.org/ConnectWithUs/Organization/Budget/Pages/home.aspx.

[24] The total for the four Counties is approximately $2 billion: $1.265 billion for City and County of Honolulu, $318 million for Maui, $310 million for Hawai'i County, and $135 million for Kaua'i. Data available at https://www.realpropertyhonolulu.com/rpa-report/#2018.

for the support of the aged and blind…." *Id* at 83. But the court disapproved of the wording because it failed to mention that a tax was at stake. *Id.*

Supporting public education is likewise an "appeal to all human instincts," but there is no requirement that funding for this purpose be increased. The ballot question is therefore unclear and misleading for this reason as well.

D. The phrase "as provided by law" misleads voters into thinking that current law already allows the state legislature to impose a real property tax when in fact it does not.

Nothing in current Hawai‘i law provides for the legislature to impose a real property tax "surcharge" on "investment real property." In fact, Article VIII, section 3 of the constitution gives to the Counties the exclusive power to tax real property. The ballot question gives a misleading impression to the contrary. The reference to "as provided by law" could make voters think that a Yes vote is a necessary form of housekeeping to bring current law into compliance or the implementation of a current law that already authorizes the legislature to impose a new tax. Similarly, in *Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972), the supreme court found that inclusion of the unauthorized prefatory language "As required by the Constitution" was "inherently misleading." *Id*. at 78, 81.

Therefore, the phrase "as required by law" is unclear and misleading.

II. An Extraordinary Writ Is the Only Way for the Counties to Obtain the Pre-Election Relief They Are Seeking.

For over a century the Hawai‘i Supreme Court has authorized pre-election challenges seeking to enforce the state's election laws.

> [T]the following may be stated as the approved rule: All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose[.]

Lane v. Fern, 20 Haw. 290, 302 (1910); see also *Helton v. Jacobs*, 57 S.W.3d 180, 186 (Ark.

2001) ("This court has consistently drawn a clear distinction between causes of action that accrue pre-election and those that accrue post-election after the voters have spoken.").

This Court has indicated a strong preference for pre-election challenges when possible. See *State ex rel. Bronster*, 84 Hawai'i, at 185, 932 P.2d at 322. (stating that the "better practice" is "to expedite legal action prior to the election.")

For example, this Court affirmed the availability of pre-election relief on September 17, 1992. Exercising original jurisdiction, it enjoined the lieutenant governor in his capacity as chief election officer from placing two constitutional amendments on the ballot for the 1992 general election. *Blair v. Cayetano*, 73 Haw. 536, 538, 551, 836 P.2d 1066, 1068, 1074 (1972).

Other jurisdictions also permit pre-election relief. See, e.g., *Let Miami Beach Decide v. City of Miami Beach*, 120 So. 3d 1282, 1284, 1286, 1292, 1293 (Fla. App. 2013) (removing question relating to city charter provision from Nov. 5, 2013, election on Sept. 20, 2013, because its "true effect is different from its apparent effect" and it was confusing and violated the requirement of ballot clarity); *State ex rel. Voters First v. Ohio Ballot Bd.*, 978 N.E.2d 119, 120, 122, 130 (Ohio 2012) (granting pre-election writ of mandamus on September 12, 2012, prior to the general election on Nov. 6, 2012, general election, because the "factual inaccuracy and the material omissions deprive voters of the right to know what it is they are being asked to vote upon, and the factual inaccuracy concerning the funding… is in the nature of a persuasive argument against the proposed amendment."); *Florida Dept. of State v. Fla. State Conference of NAACP Branches*, 43 So. 3d 662, 664, 669 (Fla. 2010) (striking legislatively proposed constitutional amendment from Nov. 2010 general election ballot on Aug. 31, 2010, because it was misleading and the ballot language did not "inform the voter of the true purpose and effect of the amendment"); *City of McAllen v. McAllen Police Officers Union*, 221 S.W.3d 885 (Tex.

App. 2007) (issuing injunction prohibiting city from using misleading and confusing ballot language in an upcoming election); *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) (issuing order on Oct. 21, 1982, striking constitutional amendment from Nov. 1992 general election ballot because language misleading concerning material changes to an existing constitutional provision and lacked "a clear and unambiguous explanation of the measure's chief purpose").

Less than a month ago, another supreme court considered an expedited election matter seeking to enjoin a ballot measure. The court issued an order on August 29, 2018, in *Molera v. Reagan*, [25] because the 100-word description of a proposition "did not accurately represent the increased tax burden on the affected classes of taxpayers," creating "a significant danger of confusion or unfairness."

HRAP Rule 21(e) expressly authorizes application for extraordinary writs. The case law based on Rule 21(e) is sparse and does not address the scope of extraordinary writs. See *Office of Disciplinary Counsel v. Au*, Nos. 26517, 28323, 2007 Haw. LEXIS 18, 2007 WL 624157 (Jan. 19, 2007). The meaning of "extraordinary writ" as defined by BLACK'S LAW DICTIONARY 1748 (9th ed. 2009) is "a writ issued by a court exercising unusual or discretionary power." Another definition is: "Extraordinary writ is a writ issued by a court exercising unusual or discretionary power. It can also be a judicial order generally issued by an appellate court to make available the remedies not regularly within the powers of lower courts. Extraordinary writs are also termed as prerogative writs."[26]

A pre-election challenge to a ballot question would appear to fall within the ambit of

[25] See **Exhibit 16**, available on the Arizona Supreme Court's official website at: https://www.azcourts.gov/Portals/21/Elections/CV-18-0218-APEL.pdf?ver=2018-08-30-082417-400. The order indicated that a written opinion would follow.

[26] See https://definitions.uslegal.com/e/extraordinary-writ/.

these definitions of an extraordinary writ. See *Gallivan v. Walker*, 54 P.3d 1069, 1067–68,1100 (Utah 2002) (granting extraordinary writ on August, 22, 2002, and issuing order on August 26, 2002, prior to the November 5, 2002, general election and stating, "Our cases demonstrate the practical utility of the flexibility of extraordinary writs in various circumstances," and "this court has…considered the exigencies dictated by timing in an election-related case to permit the determination of a constitutional question in an extraordinary writ proceeding."); *Lopez v. Kase*, 975 P.2d 346, 349 (N.M. 1999) (stating that "a post-election petition for an extraordinary writ is generally less likely to present a compelling need for immediate relief in this Court than a pre-election petition). Furthermore, there is a "rule that one cannot pass up a preelection remedy in favor of a postelection challenge." *McKinney v. Superior Court*, 21 Cal. Rptr. 3d 773, 776–77 (App. 2004) (stating that a pre-election writ of mandate is an appropriate remedy).

Granting an extraordinary writ is the only practical way the Counties can obtain pre-election relief prior to November 6, 2018.

CONCLUSION

The Counties respectfully request that (1) the petition be granted, (2) the Court set an expedited schedule for briefing and oral argument, and (3) the Court issue an order granting the Counties their requested relief prior to the November 6, 2018, general election.

DATED: Honolulu, Hawai‘i, September 26, 2018.

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