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SCPW NO. 18-0000733

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,

v.

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 PROCEEDINGS

DECLARATION OF SCOTT T. NAGO

DECLARATION OF SCOTT T. NAGO

I, SCOTT T. NAGO, hereby 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 elections.

4. I have been with the Office of Elections since 1998 and I have served in this capacity since January 1, 2010.

5. The Declaration of Robert M. Kohn at paragraph 28 makes reference to prior practice of the Office of Elections to disseminate pamphlets regarding proposed constitutional amendments.

6. In order to give the proper context for those comments, I am taking this opportunity to provide some history on who would prepare those materials and why they are no longer prepared or distributed.

7. As a starting point, Act 173, Session Laws of Hawaii 1996, made various changes to our election laws. This included the enactment of a new statute, now codified as HRS § 11-118.5, relating to the form of proposed constitutional amendment questions. It also removed language regarding constitutional amendments from HRS § 11-112(b). Additionally, the same act amended HRS § 11-2(d) and created a new subsection (e), relating to the distribution of

materials created by the Legislative Reference Bureau concerning questions to be voted upon by the electorate.

8. Specifically, HRS § 11-2(d) originally said “[t]he chief election officer shall be responsible for public education with respect to voter registration and information.” This was changed to “voter materials” along with a reference to the Voting Rights Language Assistance Act of 1992. A corresponding requirement, was also made, in HRS § 11-2(e) to disseminate “voter education materials” created by the Legislative Reference Bureau concerning any bill setting “forth a question for vote by the electorate.” Below is the text of the changes to HRS § 11-2.

**"§11-2 Chief election officer; duties.** (a) The chief election officer shall supervise all state elections. The chief election officer may delegate responsibilities in state elections within a county to the clerk of that county or to other specified persons.

(b) The chief election officer shall be responsible for the maximization of registration of eligible electors throughout the State. In maximizing registration, the chief election officer shall make an effort to equalize registration between districts, with particular effort in those districts in which the chief election officer determines registration is lower than desirable. The chief election officer, in carrying out this function, may make surveys, carry on house-to-house canvassing, and assist or direct the clerk in any other area of registration.

(c) The chief election officer shall maintain data concerning registered voters, elections, apportionment, and districting. The chief election officer shall use this data to assist the reapportionment commission provided for under Article IV of the Constitution.

(d) The chief election officer shall be responsible for public education with respect to voter [registration and information.] materials, including the publication and dissemination of voting materials in the language of a language minority group as required by the Voting Rights Language Assistance Act of 1992, P.L. 102-344.

(e) Upon the certification of any bill that sets forth a question for vote by the electorate, the chief election officer shall coordinate the preparation of appropriate voter education materials with the legislative reference bureau. The legislative reference bureau shall be responsible for the interpretation of the bill and shall submit to the chief election officer, not later than ninety days prior to the general election, the following items in final form:

(1) A summary, factsheet, and digest of the proposed constitutional amendment, which includes the purpose and intent of the proposed

constitutional amendment, and ramifications of the proposed constitutional amendment if ratified by the electorate; and

(2) Arguments for and against ratification of the proposed constitutional amendment.

[e] (f) The chief election officer shall adopt rules governing elections in accordance with chapter 91."

Act 173, Session Laws of Hawaii 1996 (Section 2).

9. Section 3 of the Act provided for a similar change to HRS § 11-2 in Section 4 of Act 27, Special Session Laws of Hawaii 1995. Act 27, Special Session Laws of Hawaii 1995 involved the transfer of election duties from the Lieutenant Governor a legislatively established an Office of Elections and a panel appointed the Chief Election Officer. The Act had a sunset provision which apparently necessitated the language of HRS § 11-2 to be amended to reflect the language of Act 173, Session Laws of Hawaii 1996.

10. Section 8 of the Act provided as follows:

SECTION 8. This Act shall take effect upon its approval; provided that Section 1 shall take effect on July 1, 1999; Section 2 shall be repealed on June 20, 1999; and Section 6 shall take effect on July 1, 1996.

11. Given that Section 2 related to the changes to HRS § 11-2 and apparently provided that it would last for only three years, it needed to be changed the following year.

12. Specifically, Act 2, Session Laws of Hawaii 1997 (Section 17) amended Act 173, Session Laws of Hawaii to read as follows:

SECTION 17. Act 173, Session Laws of Hawaii 1996, is amended by amendment section 8 to read as follows:

“SECTION 8. This Act shall take effect upon its approval; provided that Section [1] 2 shall take effect on July 1, 1999; Section [2] 3 shall be repealed on June 30, 1999; and Section 6 shall take effect on July 1, 1996.”

13. In 2002, the Office of Elections distributed materials prepared by the Legislative Reference Bureau concerning a proposed constitutional amendment.

14. Litigation was subsequently filed that year taking issue with the accuracy of the materials and also contending that the proposed constitutional amendment had not been properly published and disclosed in accordance with the Hawaii State Constitution. Ultimately, the Hawaii State Supreme Court ruled on the plaintiffs' behalf on the issue of not properly publishing and disclosing the proposed amendment. As such, it did not need to address the question of whether the materials were accurate. Watland v. Lingle, et al., 104 Hawaii 128, 85 P.3d 1079 (2004).

15. The Legislature after the initiation of the litigation in 2002, chose to essentially repeal the prior law regarding disseminating voter education materials related to proposed constitutional amendments. It also provided in statute for the Legislature to publish the text of the proposed constitutional amendments, in accordance with Article XVII, Section 3.

16. Below is the text of Act 8, Session Laws of Hawaii 2003.

SECTION 1. Chapter 22, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

**"§22- Notice of proposed constitutional amendments.** Upon the adoption of any bill that proposes a constitutional amendment, the clerks of each house of the legislature shall publish the text of the proposed constitutional amendment in accordance with article XVII, section 3 of the Constitution of the State of Hawaii."

SECTION 2. Section 11-2, Hawaii Revised Statutes, is amended to read as follows:

**"§11-2 Chief election officer; duties.** (a) The chief election officer shall supervise all state elections. The chief election officer may delegate responsibilities in state elections within a county to the clerk of that county or to other specified persons.

(b) The chief election officer shall be responsible for the maximization of registration of eligible electors throughout the State. In maximizing registration, the chief election officer shall make an effort to equalize registration between districts, with particular effort in those districts in which the chief election officer determines registration is lower than desirable. The chief election officer, in

carrying out this function, may make surveys, carry on house-to-house canvassing, and assist or direct the clerk in any other area of registration.

(c) The chief election officer shall maintain data concerning registered voters, elections, apportionment, and districting. The chief election officer shall use this data to assist the reapportionment commission provided for under Article IV of the Constitution.

(d) The chief election officer shall be responsible for public education with respect to voter ~~[materials, including the publication and dissemination of voting materials in the language of a language minority group as required by the Voting Rights Language Assistance Act of 1992, P.L. 102-344.~~

~~(e) Upon the certification of any bill that sets forth a question for vote by the electorate, the chief election officer shall coordinate the preparation of appropriate voter education materials with the legislative reference bureau. The legislative reference bureau shall be responsible for the interpretation of the bill and shall submit to the chief election officer, not later than ninety days prior to the general election, the following items in final form:~~

~~(1) A summary, factsheet, and digest of the proposed constitutional amendment, which includes the purpose and intent of the proposed constitutional amendment, and ramifications of the proposed constitutional amendment if ratified by the electorate; and~~

~~(2) Arguments for and against ratification of the proposed constitutional amendment.] registration and information.~~

~~[(f)] (e) The chief election officer shall adopt rules governing elections in accordance with chapter 91."~~

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.

17. As a result of the passage of Act 8, Session Laws of Hawaii 2003, the Legislative Reference Bureau no longer prepares voter education materials regarding proposed constitutional amendments for the Office of Elections to disseminate.

DATED: Pearl City, Hawaii, October 8, 2018.

  
SCOTT T. NAGO