

**Electronically Filed
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SCEC-22-0000707

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

J. NOELANI AHIA, SHAYNE NAMEAAEA HOSHINO, KACI-CHEREE DIZON,
SHAWN-CHRISTIAN DIZON, CODY NEMET, FAY MCFARLANE, NORRIS
MCFARLANE, JADE CHIHARA, KEVIN BLOCK, OLIVIA NGUYEN, TRINETTE
FURTADO, KEISA LIU, CAROL LEE KAMEKONA, EMILIE VINCENT, LAURA
JOHNSON, HARRY JOHNSON, SARA TEKULA, RENA BLUMBERG, MAYA
MARQUEZ, JASON MEDINA, STACEY MONIZ, CHRISTY KAHOOHANOANO,
REAGAN KAHOOHANOANO, ZION EBBERSON, RAUL GOODNESS, TERRILL
JAMES KANE ALII WILLIAMS, LORI SIERRA KNIGHT, GRETCHEN
LEISENRING, JONATH PADILLA, ALENA ORNELLAS, and
SANDRA IMBERI IOAKIMI, Plaintiffs,

vs.

ALICE L. LEE, KATHY L. KAOHU, County Clerk, County of Maui, and
SCOTT T. NAGO, Chief Elections Office, State of Hawai‘i,
Defendants.

ORIGINAL PROCEEDING

DISSENT RE: FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT
(By: Wilson, J.)

I respectfully dissent. The right to vote is
protected by a presumption of validity for all ballots completed
and signed. The procedure established to question the validity

of signed ballots honors the presumption of validity by requiring election officials to take reasonable steps to verify the authenticity of the signature. HRS § 11-108 (2021)¹; HAR 3-

¹ HRS § 11-108 (2021) provides:

(a) Ballot processing for tabulation may begin no sooner than the eighteenth day before the election. In the presence of official observers, counting center employees may open the return identification envelopes and count the ballots; provided that any tabulation of the number of votes cast for a candidate or question appearing on the ballot, including a counting center printout or other disclosure, shall be kept confidential and shall not be disclosed to the public until after the closing hour of voting or after the last person in line at a voter service center desiring to vote at the closing hour of voting has voted, as provided in section 11-131, whichever is later. All handling and counting of ballots shall be conducted in accordance with procedures established by the chief election officer.

(b) The initial tabulation of ballots shall be completed no later than 6:00 a.m. on the day following an election day.

(c) Any ballot the validity of which cannot be established upon receipt shall be retained by the clerk and shall not be commingled with ballots for which validity has been established until the validity of the ballot in question can be verified by the clerk. No ballot shall be included in an initial tabulation until the clerk has determined its validity. The clerk shall make reasonable efforts to determine the validity of ballots within seven days following an election day. No ballot shall be validated beyond the seventh day following an election.

(d) Any initial recount provided by law shall include only ballots verified for the purpose of the initial tabulation. In no event shall a recount of an initial tabulation include ballots the validity of which could not be verified by 6:00 a.m. on the day following an election day.

(e) No election result shall be certified pursuant to section 11-155 unless all ballots verified as valid by the clerk within seven days following an election day have been added to the final tabulation. Recount of a final tabulation shall be as provided by law.

177-652 (2020).² Maui county election officials declined to count 706 ballots they identified as being deficient. Of the

² HAR 3-177-652 (2020) provides:

(a) The clerk will initially compare the signature on a return identification envelope with the reference signature or reference signatures of the voter. The clerk may authorize the use of a signature device, as defined in HAR § 3-177-653, to compare signatures. A signature considered matched by a signature device will be considered valid and not require further verification.

(b) A "reference signature" is any signature provided in connection with the administration of elections or any signature provided to election officials from a governmental entity obtained in the ordinary course of business (e.g. voter signatures on any election issued form or application, correspondence with election officials, signature capture cards sent to and returned by voters, signatures from the Department of Transportation or county licensing examiners, or signatures from any governmental entity shared with election officials).

(c) Any signature not initially validated by the signature device or that was not submitted to a signature device will be visually compared by the election official.

(1) As a return identification envelope was issued and transmitted to the voter, the return of the return identification envelope or electronic equivalent will be rebuttably presumed to be from the voter and any signature contained therein as that of the voter;

(2) A voter is permitted to use a variation of their name, to the extent it can be recognized as such by the reviewing election official;

(3) The election official will review the general appearance of the signatures taking into account the above noted rebuttable presumption, permitted name variations, and the following:

(A) type of writing (e.g. cursive versus print);

(B) speed of writing (e.g. harmonious versus slow and deliberate);

(C) overall spacing;

(D) overall size and proportions;

(E) position of the signature (e.g. slanted versus straight); and

(F) spelling and punctuation.

(4) The election official will consider whether any apparent differences can be reasonably explained, by the facts and circumstances surrounding the

continued . . .

706, 463 were ballots with signatures that, after visual inspection, bore signs of invalidity.

. . . continued

signatures. The election official may consider, but not be limited to, the following considerations:

(A) When the signatures were made in comparison to each (e.g. a significant period of time has transpired between signatures);

(B) The age of the writer at the time of the signatures;

(C) How the signatures were made (e.g. driver license offices may use an electronic signature pad to record signatures, including those used for voter registration, while an envelope may be signed in ink); or

(D) Whether household members signed and returned each other's return identification envelope by accident, in which case, if the signatures match each of the correct voter's signature reference image and the voters have not otherwise voted, such that the counting of the impacted ballots would not result in a voter having voted a ballot not associated with their residence or containing questions or contests they are not eligible to vote on, the impacted return identification envelopes may be considered valid.

(d) A voter may make a mark in place of a signature on the affirmation statement on the return identification envelope so long as there is a witness' signature and address on the affirmation statement. In such a situation, the return identification envelope will be considered valid. If no witness' signature and address appear on the affirmation statement, then the return identification envelope will be deemed invalid. However, if a voter is physically unable to sign or to make a mark, they may use the provisions of HRS § 456-19 to have a notary sign on their behalf, and the return identification envelope will be considered valid.

(emphasis added).

It was incumbent on the election officials to act reasonably to verify the signatures about which they had questions. As the Majority acknowledges, the county failed to act reasonably to verify at least 215 of the 706 deficient ballots by providing inadequate notice to the voters whose ballots had been set aside by election officials. All 215 ballots therefore must be counted since the presumption of regularity was not overcome by the county. The margin of victory between the candidates is 513. After subtraction of the 215 votes from 513, the margin of victory becomes 298. Addition of the 463 ballots set aside to investigate mismatched signatures to the 215 wrongly invalidated ballots equals 678 ballots--165 votes above the 513 vote margin.

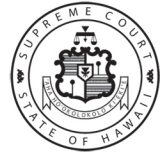
The clerk failed to receive verification from the 463 voters whose signed ballots were set aside in order to obtain signature verification. See HRS § 11-106 (2021). Absent verification from the voters, the county clerk failed to overcome the presumption of the signed ballots' validity. Consequently, the clerk failed to "make reasonable efforts to determine the validity of ballots" in violation of HRS 11-108(c), the presumption of signature validity prevails, and the

463 votes must be counted.³ As a result the vote margin of 513 is exceeded by 165 votes. The election must be set aside and the clerk directed to hold another election in accordance with the presumption of validity that protects the most important right born by the citizens of Hawaii: the right to vote.⁴

DATED: Honolulu, Hawai'i, January 20, 2023.

/s/ Michael D. Wilson

Associate Justice



³ There is no evidence that the 215 ballots the Majority agrees must be counted were deemed deficient due to mismatched signatures. Thus, there is no evidence that the 215 ballots were part of the 463 ballots set aside due to possible mismatched signatures.

⁴ "The right of the people to shape the way in which they are governed through free and fair elections is the basis of our democratic society." City & Cty. of Honolulu v. State, 143 Hawai'i 455, 457, 431 P.3d 1228, 1230 (2018). "Implicit in that right is the right to have one's vote count and the right to have as nearly perfect an election proceeding as can be provided." Akizaki v. Fong, 51 Haw. 354, 356, 461 P.2d 221, 223 (1969).