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SCEC-26-0000598

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

KRISTEN K. SOUZA, also known as KANANI SOUZA,
Plaintiff,

vs.

SCOTT T. NAGO, in his official capacity as Chief Election
Officer, Office of Elections, State of Hawai'i; STATE OF HAWAI'I
OFFICE OF ELECTIONS; CHADD KADOTA, in his official capacity as
Acting City Clerk, City and County of Honolulu;
REX QUIDILLA, in his official capacity as the Elections
Administrator, City and County of Honolulu; and SHEILA MEDEIROS,
Defendants.

ORIGINAL PROCEEDING

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT,
WITH A SEPARATE OPINION BY EDDINS, J.,
IN WHICH MCKENNA, ACTING, C.J., JOINS

(By: Ginoza, J.,
and Intermediate Court of Appeals Associate Judge McCullen,
in place of Devens, C.J., recused, and Intermediate Court of
Appeals Associate Judge Guidry, assigned by reason of vacancy)

As this court has explained, "[t]he right to vote is
perhaps the most basic and fundamental of all the rights
guaranteed by our democratic form of government. 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, 222-23 (1969). We acknowledge the immense responsibility placed upon the State of Hawai'i and its counties in executing this fundamental right. We also acknowledge that human error can inadvertently result in overages and/or underages in the vote count.

This primary election challenge arises from a race for State Representative District 43 between Plaintiff Kristen K. (Kanani) Souza and Defendant Sheila Medeiros in which each candidate received 842 votes, but there was a two-ballot overage.

In accordance with Hawai'i Revised Statutes (HRS) §§ 11-173.5 (Supp. 2024) and 11-175 (2009), we enter the following findings of fact, conclusions of law, and judgment.

FINDINGS OF FACT

1. On August 24, 2026, Souza filed an election contest against Scott T. Nago, Chief Election Officer, and the State of Hawai'i Office of Elections (together, "Office of Elections"), and against Chadd Kadota, Acting City Clerk, and Rex Quidilla, Elections Administrator, City and County of Honolulu. Nago, Kadota, and Quidilla are sued in their official capacities. We will detail the claims below.

2. On August 26, 2026, this court joined Medeiros as a defendant. Medeiros answered seeking to uphold the drawing.

3. On August 31, 2026, the Office of Elections filed a motion to dismiss or for summary judgment, supported by Nago's declaration and three exhibits. Kadota and Quidilla filed their answer on this same date, supported by Quidilla's declaration and an exhibit.

4. On September 2, 2026, this court held an evidentiary hearing. Nago, Kadota, and Quidilla testified. Oral argument followed. The evidentiary hearing was re-opened after oral argument for further testimony by Nago.

The Election Results and Tie-Breaker Drawing

5. At the close of the candidate filing deadline for State Representative District 43, the Republican candidates were Souza and Medeiros. There were no candidates running from any of the other parties, nor any non-partisan candidates.

6. The Final Summary Report for the August 8, 2026 primary election, issued on August 14, 2026, shows that Souza and Medeiros each received 842 votes in the Republican contest for State Representative District 43.

7. On August 15, 2026, Nago held a tie breaker under HRS § 11-157 (Supp. 2019), at the State Capitol. This proceeding was open to the public and was conducted by Nago and a second election official. The candidates attended. They watched as

their names, printed on small pieces of paper, were placed in separate ball-shaped containers. Next, the balls were placed in a larger container made of dried woven lau hala.¹ An election official sealed the lau hala container and then shook it. After some shaking by the election official, the container was opened and placed in front of Nago who proceeded to select and open a ball that contained the name of Medeiros. Thereafter, the Office of Elections declared that Medeiros will be selected as the State Representative for District 43.

8. The Office of Elections' Over/Under Report, created on August 20, 2026, and authenticated by Nago, shows a discrepancy among District 43's four precincts: a two-ballot overage in Precinct 43-03, and no offsetting underage in any of District 43's four precincts.

9. No party has at any time alleged that this discrepancy was due to fraud.

10. Quidilla's declaration attested the City identified the source of the two-ballot overage through its daily voter service center reconciliation. Quidilla confirmed that two voters registered in Precinct 40-03 were mistakenly issued ballots for Precinct 43-03 at the Kapolei Hale Voter Service

¹ "Lau hala" is the Hawaiian language term for "a pandanus leaf, especially as used in plaiting," Mary Kawena Pukui, New Pocket Hawaiian Dictionary 77 (1992), and here it is a reference to a type of woven basket made from the pandanus leaf.

Center on August 8, 2026, and the two-ballot overage represents two physical in-person ballots cast using the wrong district-precinct ballot. Quidilla attested that the two ballots were scanned at the voter service center, secured in the scanner's box, and transferred to the State for tabulation, and that the City's records do not reveal how either voter marked the District 43 contest.

11. At the evidentiary hearing on this matter, Nago testified that it was not possible for the Office of Elections to ascertain the correct result for the District 43 election by removing the two invalid ballots from the vote count. He acknowledged, however, that the two-ballot overage could have caused a difference in the race.

12. Kadota and Quidilla also testified that based on their knowledge it was not possible for the Office of Elections to ascertain the correct vote count given the two-ballot overage. In short, based on their testimony, there is no way to ascertain what the vote count would have been if the two ineligible ballots had not been counted. Quidilla testified that there was no means by which to retrieve the two ineligible ballots that had been deposited into the ballot box.

13. Nago testified that he developed and adopted the tie-breaker method prior to determining there was a tie in two Republican primary races, and that the method was not tested to

determine whether it favored certain outcomes. Souza first learned of the process on August 15, 2026, while it was underway.

CONCLUSIONS OF LAW

1. Election contests are governed by part XI of chapter 11 of the HRS. See HRS § 11-171 (2009).

With respect to any election, any candidate . . . 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.

HRS § 11-172 (Supp. 2021) (emphasis added).

2. The legislature has expressly established that overages and underages are valid grounds for an election contest. HRS § 11-172.

3. HRS § 11-153, "More or fewer ballots than recorded," provides:

(a) If there are more ballots than documented usage indicates, this shall be an overage and if fewer ballots, it shall be an underage. The election officials or counting center employees responsible for the tabulation of ballots shall make a note of this fact on a form to be provided by the chief election officer. The form recording the overage or underage shall be sent directly to the chief election officer or the clerk in county elections separate and apart from the other election records.

(b) If the electronic voting system is being used in an election, the overage or underage shall be recorded after the tabulation of the ballots. . . .

(c) **The chief election officer or the clerk shall make a list of all precincts in which an overage or underage occurred and the amount of the overage or underage. This list shall be filed and kept as a public**

record in the office of the chief election officer or the clerk in county elections.

An election contest may be brought under part XI, if the overage or underage in any precinct could affect the outcome of an election.

HRS § 11-153 (Supp. 2021) (emphasis added).

4. To prevail on an election challenge, the plaintiff must establish "either 1) errors, mistakes or irregularities that could change the outcome of the election" or "2) that the correct result cannot be ascertained because of a mistake or fraud on the part of the precinct officials." See Waters v. Nago, 148 Hawai'i 46, 60, 468 P.3d 60, 74 (2019) (citations omitted).

5. The process and remedy for an election contest challenging a primary election result is set forth in HRS § 11-173.5(b) (2009) which provides:

(b) 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.

HRS § 11-173.5(b) (emphasis added).

Count I, Overages

6. In Count I, Souza alleges that the two-ballot overage reported by the Office of Elections was a mistake or irregularity that could cause a difference in the election results because it exceeds the zero-vote margin in the tied race.

7. An overage occurs where more ballots were counted than election officials documented as having been used by voters; an underage is the reverse. See HRS § 11-153(a).

8. The Over/Under Report shows a two-ballot overage in District 43 with no offsetting underage in any of its precincts. Nago confirmed the report's authenticity. Based on this, we conclude that the Office of Elections' Report on the two-ballot overage is prima facie evidence that the Office of Elections counted two ballots in the official results for Precinct 43-03 from voters who were not accounted for in that precinct. See HRS §§ 11-96 (2009),² 11-153.

9. A two-ballot overage exceeds the zero-vote margin between the candidates. In this circumstance, Souza established an overage that could cause a difference in the election result. HRS § 11-172.

² The legislative history for HRS § 11-96 confirms that the term "precinct officials" was meant to include an "election official" or "election clerk." H. Stand. Comm. Rep. No. 572, in 1973 House Journal, at 1012.

10. The evidence from Quidilla, Kadota, and Nago supports that the two-ballot overage could cause a difference in the election results. Quidilla testified that two voters registered in Precinct 40-03 were mistakenly issued ballots for Precinct 43-03, and in his declaration attested that those ballots were scanned at the voter service center and transferred to the State for tabulation and inclusion in the official results. Kadota testified that, to his knowledge, the Office of Elections could not ascertain the correct vote count because of the two-ballot overage. Nago acknowledged that there was no way for him to ascertain the correct result for the District 43 election by removing the two invalid ballots from the vote count, and further that the two-ballot overage could have caused a difference in the race.

11. Although these two voters may not have voted in the Republican primary at all, it is equally possible that they cast invalid votes in the Republican primary for District 43 State Representative.

12. Souza was required to show that an error by election officials could cause a difference in the election results, and she did. See HRS § 11-172.

13. We rule in favor of Souza and against Defendants on Count I.

Count III

14. HRS § 11-157 (Supp. 2025) states,

In case of the failure of an election by reason of the equality of vote between two or more candidates, the tie shall be decided by the chief election officer or clerk in the case of county elections **by lot**.

(Emphasis added.)

15. Nago implemented a tie-breaking method based on a similar method used to determine the order of political parties listed on a ballot. This tie-breaking method was applied here.

16. This tie-breaking method was tantamount to a “rule” under the Hawai‘i Administrative Procedure Act (HAPA), HRS § 91-1 (Supp. 2017); see Green Party of Haw. v. Nago, 138 Hawai‘i 228, 237, 239, 378 P.3d 944, 953, 955 (2016), and the Office of Elections erred by using it without complying with HAPA’s rulemaking requirements.

17. Had the Office of Elections complied with HAPA’s rulemaking requirements, it would have been required to hold a public hearing, and the public would have had the right to “submit data, views, or arguments, orally or in writing.” Hawai‘i Administrative Rules (HAR) § 3-177-4 (eff. 2020). Moreover, the candidates and public would have been on notice as to the tie-breaking method to be used.

18. The State asks us to dismiss this case based on laches. “The general rule is that if there has been opportunity to correct any irregularities in the election process or in the

ballot prior to the election itself, plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterward." Lewis v. Cayetano, 72 Haw. 499, 502-03, 823 P.2d 738, 741 (1992) (citation omitted).

19. Laches does not apply. Souza did not sit on her rights; Souza learned of the process as it was underway and filed this contest nine days later. See Lewis, 72 Haw. at 502-03, 823 P.2d at 741.

20. We hold that Nago's failure to comply with the rulemaking process required by HAPA was error.

21. We rule in favor of Souza and against Defendants as to Count III.

Counts II, IV, and V of the Complaint Are Moot

22. Counts II, IV, and V challenged the tie-breaker method as noncompliant with the lot requirement in HRS § 11-157, and as constitutionally infirm on various grounds. Having ruled in favor of Souza on Counts I and III, Counts II, IV, and V are moot.

Remedy

23. The legislature intended the sections in part XI of chapter 11 of the HRS to be construed harmoniously with each other. See HRS § 11-171 ("This part shall apply whenever a contested election is subject to determination by a court of competent jurisdiction in the manner provided by law."). Unable

to envision every possible scenario, the legislature empowered this court to "do whatsoever else may be necessary fully to determine the proceedings, and enforce its decrees therein" so that, as here, this court may address any unique and unforeseen circumstances that could arise. HRS § 11-175. Read with HRS § 11-173.5(b), and consistent with Elkins v. Ariyoshi, 56 Haw. 47, 49 n.3, 527 P.2d 236, 238 n.3 (1974) (per curiam), that authority allows this court to return to the voters a primary that yielded no nominee. Cf. Funakoshi v. King, 65 Haw. 312, 316, 651 P.2d 912, 914 (1982) (per curiam) (refusing to invalidate an election and allow a new one where the plaintiff failed to show that the irregularities complained of could have caused a difference in the election results).

24. Only two candidates appeared on the Republican Primary Ballot for District 43: Medeiros and Souza. These same two candidates are entitled to a new election. Because there were no candidates running from any of the other parties, nor any non-partisan candidates, the winner of the Republican party primary between Medeiros and Souza would be declared elected pursuant to article III, section 4 of the Hawai'i Constitution.

JUDGMENT

Based on the foregoing, judgment is entered in favor of Souza and against Defendants as to Counts I and III of the Complaint. Counts II, IV, and V are dismissed as moot. In

accordance with HRS § 11-173.5, we determine that neither candidate was nominated nor elected.

The motions filed at Dockets 40, 59, and 63 are denied.

In accordance with the power of this court under HRS § 11-175 to do whatsoever else may be necessary to enforce its decree and to fully determine the proceeding, it is ordered:

A. Nago shall conduct an election between Medeiros and Souza, to be held concurrently with the 2026 general election. The ballot for State Representative District 43 shall plainly identify for that race: "Republican Party Voters Only." In accordance with article II, section 4 of the Hawai'i Constitution, no voter shall be required to declare a party preference as a condition of voting in District 43.

B. Pursuant to article III, section 4 of the Hawai'i Constitution, Nago shall declare the winner of the election between Medeiros and Souza as being elected to the office of State Representative District 43.

C. Nago is ordered to expeditiously promulgate rules to implement the tie-breaker statute, HRS § 11-157. Nago shall initiate the process to implement rules with due regard to giving public notice of the proposed rules, and in compliance with the procedures required by law. See, e.g., HAR § 3-177-1 (eff. 2020), et seq.

D. This judgment is effective forthwith.

E. The court retains jurisdiction over this matter in the event it may be necessary for the court to take further post-judgment action to enforce its decree and fully determine the proceeding.

DATED: Honolulu, Hawai'i, September 4, 2026.

/s/ Lisa M. Ginoza

/s/ Sonja M.P. McCullen

/s/ Kimberly T. Guidry

