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Supreme Court
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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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KURT FEVELLA, Petitioner,

vs.

SCOTT T. NAGO, Chief Election Officer,
State of Hawai'i, Respondent.

SCPW-26-0000628

ORIGINAL PROCEEDING

SEPTEMBER 16, 2026

DEVENS, C.J., McKENNA, EDDINS, AND GINOZA, JJ., AND
CIRCUIT JUDGE KIMURA, ASSIGNED BY REASON OF VACANCY

OPINION OF THE COURT BY McKENNA, J.

We have considered the petition for writ of mandamus filed on September 9, 2026, by Petitioner Kurt Fevella ("Fevella") arising out of the tie between himself and Bob McDermott ("McDermott") in the August 8, 2026 primary election for the Republican nominee for State Senator, District 20. McDermott was selected the winner at a tie-breaker held on August 15, 2026. See Hawai'i Revised Statutes ("HRS") § 11-157 (Supp.

2019). Fevella seeks to invalidate the result of the tie-breaker through this petition for extraordinary writ. He raises two grounds: (1) the lau hala basket tie-breaker method that was employed required rule-making; and (2) the two vote underage in Senate District 20 could have affected the result of the election.

A petitioner seeking a writ of mandamus from this court has the burden of establishing a clear and indisputable right to the requested relief and a lack of other means to redress adequately the alleged wrong or to obtain the requested action. Womble Bond Dickinson (US) LLP v. Kim, 153 Hawai'i 307, 319, 537 P.3d 1154, 1166 (2023). The arguments in this petition could have been brought in a primary election contest, as plaintiff Kanani Souza ("Souza") did in Souza v. Nago, SCEC-26-0000598.

Questions regarding the tie-breaker process were apparent when it occurred on August 15, 2026. Also, the information regarding the overage/underage appears to have been available to Fevella before the deadline to file an election contest had expired. Therefore, an extraordinary writ of mandamus is not available to him as a remedy. But, as explained below, the law regarding overages and underages needs to be clarified.

We take judicial notice of the docket and September 2, 2026 evidentiary hearing in SCEC-26-0000598.

The docket and evidence in SCEC-26-0000598, Souza v. Nago, indicate that on the primary election date of August 8, 2026, two voters at the Kapolei Service Center, who resided in District 40-03, were mistakenly given ballots for District 43-03. District 43-03 is not a part of Senate District 20 but is a part of Senate District 21.

<https://elections.hawaii.gov/resources/districts-and-precincts>.
[<https://perma.cc/7YLV-ST4B>].

In other words, two District 40-03 voters, who actually reside in Senate District 20, were denied the right to vote for the District 20 Senate position because they were mistakenly issued ballots for District 43-03, which is in Senate District 21. This constituted a two-ballot underage for Senate District 20. And in this tied election between Fevella and McDermott in Senate District 20, one vote could have changed the election result.

As noted, extraordinary writs, such as this writ of mandamus, are not available if there was an alternative remedy. HRS § 11-173.5 (2009 & Supp. 2024) governing primary election contests provides such a remedy. The primary election was held on August 8, 2026. This date triggered the thirteen-day deadline for filing a primary election contest under HRS § 11-173.5. As the thirteenth day, August 21, 2026, fell on a state holiday, the deadline was extended to Monday, August 24, 2026.

HRS § 11-172 (2009 & Supp. 2021) specifically provides that an election challenge can be based on an underage. Granted, Fevella may not have known by August 24, 2026, that two Senate District 20 voters were given incorrect ballots and thus did not vote for that seat. The record in SCEC-26-0000598 indicates that Souza was emailed an overage/underage report on August 20, 2026, because she had requested one, along with other information, on August 17, 2026. The record and evidentiary hearing in SCEC-26-0000598 do not indicate that Chief Election Officer Scott Nago ("Nago") provided the general public with an overage/underage report before August 24, 2026. There is also no evidence that Fevella requested such a report or that a report was provided to him. It is therefore unclear whether the City's answer in SCEC-26-0000598, filed on August 31, 2026, was the first notice to Fevella, of what had actually happened.

Further, Nago testified at the evidentiary hearing in SCEC-26-0000598, held on September 2, 2026, that he was unaware of whether two District 40-03 voters, who actually reside in Senate District 20, were denied the right to vote for the District 20 Senate position because they were mistakenly issued ballots for District 43-03.

But here, Fevella could also have proactively requested information after learning of the tie and could have brought a

timely primary election challenge, like Souza did. Therefore, the extraordinary writ of mandamus is not available to him.

The law regarding overage and underage reports is confusing and ambiguous and needs to be clarified in order to avoid similar situations in future elections.

As noted, HRS § 11-172 allows for election contests based on underages. Especially when overages and underages could change an election result, as here, the results need to be made available to the public and candidates to effectuate the legislative intent to allow election challenges by an election contest deadline.

But the statutes governing reporting of underages, HRS §§ 11-153 (2009 & Supp. 2021) and 11-155 (2009 & Supp. 2022), do not clearly require that the information be provided to the public and to the candidates on a timely basis, even if the information could change elections results. These statutes provide as follows:

§11-153 More or fewer ballots than recorded. (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. In an election using the paper ballot voting system, the chief election officer or the chief election officer's designee shall proceed to

count the votes cast for each candidate or on a question after recording the overage or underage.

(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 (emphasis added).

§11-155 Certification of results of election. On receipt of certified tabulations from the election officials concerned, the chief election officer in a state election, 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 candidates to be elected who receive the most votes in any election district shall be declared to be elected; provided that candidates for offices elected by ranked-choice voting shall be declared to be elected pursuant to section 11-100. 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.

HRS § 11-155 (emphasis added).

As can be seen, HRS § 11-153(c) specifically required Nago to "make a list of all precincts in which an overage or underage

occurred and the amount of the overage or underage." That section also required that the list be "filed and kept as a public record." HRS § 11-153(c) (emphasis added). But it did not require that the information be publicly posted or that the public or candidates involved be timely notified. In fact, the evidentiary hearing in SCEC-26-0000598 suggested that this overage/underage information was not readily available to the public or to the candidates.

The evidentiary hearing also indicated that the overage/underage report for all precincts was compiled on August 20, 2026. This may be because HRS § 11-155 required Nago to attach such a report to a certification of election results to be issued "after the expiration of the time for bringing an election contest." HRS § 11-155. But nothing in the law required that the information be provided or posted before the certification of election results to occur after the election contest deadline.

According to the evidentiary hearing, it took elections staff about four hours to compile the overage/underage report. The report therefore could have been and should have been publicly posted and made available to candidates long before election contest deadlines. It appears the report could have been compiled and publicly posted soon after the August 14, 2026

deadline for curing of ballots. We respectfully suggest that statutory amendments should be considered.

Fevella did not file a primary election contest by the August 24, 2026 deadline. Because Fevella had alternate means to obtain the relief sought in this petition and failed to take timely steps to do so, Fevella has not satisfied the extraordinary writ standard. See Womble, 153 Hawai'i at 319, 537 P.3d at 1166; Naipo v. Border, 125 Hawai'i 31, 34, 251 P.3d 594, 597 (2011) (stating that a writ of mandamus is not intended to be used in lieu of normal review procedures); Barnett v. Broderick, 84 Hawai'i 109, 111, 929 P.2d 1359, 1361 (1996).

We also decline to accept Fevella's petition for writ of mandamus as a matter of extraordinary public importance because this court is not provided with enough time to entertain petitions for extraordinary writs beyond the deadlines mandated by HRS § 11-173.5 (2009 & Supp. 2024). The HRS § 11-173.5 deadlines require this court to issue a decision quickly because the general election ballots must be transmitted to military and overseas voters by Friday, September 18, 2026. See Haw. Const. Art. II, § 8 ("General elections shall be held on the first Tuesday after the first Monday in November in all even-numbered

years."); HRS § 15D-9(a) (Supp. 2012). The ballots must be prepared and printed prior to transmission.

The petition is therefore denied.

Kurt Fevella
self-represented petitioner

/s/ Vladimir P. Devens

/s/ Sabrina S. McKenna

/s/ Todd W. Eddins

/s/ Lisa M. Ginoza

/s/ Jordon J. Kimura

