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COMPLAINT FOR ELECTION CONTEST

Plaintiffs 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 KAHOOHANO HANO, REAGAN KAHOOHANO HANO, ZION EBBERSON, RAUL GOODNESS, TERRILL JAMES KANE ALII WILLIAMS, LORI SIERRA KNIGHT, GRETCHEN LEISENRING, JONATH PADILLA, ALENA ORNELLAS, and SANDRA IMBERI IOAKIMI, are registered voters of the County of Maui, State of Hawai'i, (collectively "Plaintiffs") respectfully submit this complaint for election contest pursuant to Hawai'i Revised Statutes (HRS) §11-172 and Article II, § 8 of the Hawai'i Constitution, which confers original jurisdiction on this Court. This complaint is in response to irregularities and mistakes arising from the November 8, 2022 election for the office of the member of the Council of the County of Maui from the Wailuku-Waihe'e-Waikapū residency area (Wailuku election). Plaintiffs complain and allege the following:

1. Plaintiff J. NOELANI AHIA (Ahia) was a candidate for office of member of the Maui County Council, Wailuku-Waihe'e-Waikapū residency area.
2. Plaintiffs 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 KAHOOHANO HANO, REAGAN KAHOOHANO HANO, ZION EBBERSON, RAUL GOODNESS, TERRILL JAMES KANE ALII WILLIAMS, LORI SIERRA KNIGHT, GRETCHEN LEISENRING, JONATH PADILLA, ALENA ORNELLAS, and SANDRA IMBERI IOAKIMI are qualified voters who reside in the County of Maui, are registered to vote and did vote in the Wailuku election and who have been and are being harmed by the County Clerk's failure to take reasonable, appropriate and lawful steps to determine which candidate in the Wailuku election received the majority of lawfully cast votes in the November 8, 2022 election.
3. Defendant ALICE L. LEE was a candidate for office of member of the Maui County Council, Wailuku-Waihe'e-Waikapū residency area. She is also the direct and immediate

supervisor of Defendant KATHY L. KAOHU as the present Chair of the Maui County Council although she is named as a party only in her private capacity as a candidate – because the relief sought seeks to invalidate the election results of an election to which she stood as a candidate.

4. Defendant KATHY L. KAOHU is the duly appointed County Clerk of the County of Maui (County Clerk) and is empowered to, among other things, conduct all elections held within the County of Maui as provided by law, including the Wailuku election. Allegations contained herein that involve actions taken by her deputies exercising her powers in their official capacities as her deputies are described as being taken by the County Clerk.

5. Defendant SCOTT T. NAGO is the duly appointed Chief Elections Officer of the State of Hawai'i and is empowered to supervise all state elections, including the Wailuku election.

6. During relevant times up to election day on November 8, 2022, when the County Clerk determined the return identification envelopes of legally cast ballots were deficient, she would regularly notify those voters with one or two days of receipt of their ballot.

7. When in receipt of return identification envelopes she deems deficient, the County Clerk is required to make an attempt to notify the voter by first class mail, telephone, or electronic mail to inform the voter of the procedure to correct the deficiency. HRS §11-106. A voter has five business days after the election to cure the deficiency. *Id.*

8. On November 8, 2022, the County Clerk received legally cast ballots in return identification envelopes, including 812 such ballots that the County Clerk determined had return identification envelopes that were deficient. The County Clerk set aside those 812 legally cast ballots, did not count the votes contained in those ballots and did not act until four days later.

9. In the latest unofficial printout of November 9, 2022 at 12:50 pm, Plaintiff Ahia received 22,178 votes and Defendant Lee received 22,682 votes, with a difference of 504 votes.

10. A judicial determination concerning Defendants' improper implementation of procedures for handling the 812 ballots, including the irregularities and illegalities complained of herein, could cause a difference in Wailuku election results or the correct outcome of the Wailuku Election cannot be ascertained otherwise.

11. On Wednesday, November 8, 2022, the County Clerk had deemed the return identification envelopes of the 812 legally-cast ballots deficient, had set them aside and had not tabulated the votes on those ballots.

12. On Saturday November 12, 2022, four days after the election, the County Clerk began sending notices to voters with allegedly-deficient return identification envelopes by sending form letters by U.S. first-class mail.

13. It is well known in Maui County that mailing a first class letter via the U.S. Postal Service typically takes at least two business days to be delivered to an address in a different zip code than where the mail was deposited.

14. When mail in Maui County is sent between different zip codes, it is sent first to Honolulu for sorting and processing before it is sent back to Maui County to be delivered.

15. Voters with allegedly-deficient return identification envelopes did not begin receiving the mailed notices until Tuesday, November 15, 2022, or seven-days after the election.

16. On November 13, 2022, five days after election day, the County Clerk notified local press that 812 uncounted ballots were being held due to deficient return identification envelopes.

17. Voters who saw the press accounts contacted the County Clerk via email to receive instructions on how to cure the deficiency in their return identification envelopes. When they received no response, they telephoned on November 15, 2022 and the County Clerk declined to cure their return identification envelopes and instead instructed them to send their questions via email.

18. Amongst the 812 ballots that were set aside for alleged deficiencies in the return identification envelope were ballots in return envelopes signed by spouses living in the same household, which is not a legal deficiency under the administrative rules.

19. On November 14, 2022, the County Clerk contacted some voters who returned deficient return identification envelopes by telephone.

20. On November 14, 2022, Plaintiff Ahia orally requested a copy of the list of voters whose ballots had not been counted because their return identification envelopes had been deemed deficient. However, the County Clerk denied Ahia's request citing "confidentiality." On the same day, Plaintiff Ahia re-submitted her request in writing. The County Clerk then denied Plaintiff Ahia's request on the grounds that the information was not public, but between the voters on the list and her office and refused to permit inspection and copying.

21. Had Plaintiff Ahia been provided with the list of voters whose ballots had not been counted because their return identification envelopes had been deemed deficient, she would have made efforts to ensure voters were notified and provided with instructions on how to cure their return identification envelopes.

22. On November 16, 2022, six business days after the election at the close of the cure period, the County Clerk stated that only 106 allegedly-deficient ballots had been cured.

23. Defendants' errors, mistakes, and mishandling in failing to reasonably notify 812 voters of their allegedly-deficient ballots changed the outcome of the Wailuku election or makes it impossible to ascertain the correct result of the election. Such errors, mistakes, and mishandling

sustain Plaintiffs' election contest. *Akaka v. Yoshina*, 84 Hawai'i 383, 387, 935 P.2d 98, 102 (1997).

24. In this situation, Plaintiffs are entitled to an order from this Court invalidating the Wailuku election. *Akizaki v. Fong*, 51 Haw. 354, 360, 461 P.2d 221, 224 (1969).

COUNT ONE – ERROR AND MISTAKE REGARDING DUTY TO NOTIFY VOTERS

25. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in preceding paragraphs of this Complaint.

26. The County Clerk had a duty to attempt to notify every voter whose return identification envelope she deemed deficient that she had made such a determination and that they had an opportunity to cure the deficiency.

27. The County Clerk had the ability to notify every voter whose return identification envelope had been deemed deficient that such a determination had been made and that they had an opportunity to cure the deficiency via first class mail, telephone, or electronic mail.

28. The County Clerk notified voters whose return identification envelope had been deemed deficient that such a determination had been made and that they had an opportunity to cure the deficiency within one or two days during the election period prior to November 8, 2022.

29. The County Clerk, however, waited four days after the November 8, 2022 election to attempt to notify voters of alleged deficiencies in their return identification envelopes and instructions on how to cure them.

30. Voters have only five business days to cure their allegedly deficient return identification envelopes.

31. Under the circumstances, the County Clerk's delay in attempting to notify voters of her deficiency determinations constitutes error that changed the Wailuku election result or a mistake that makes it impossible to ascertain the correct result of the Wailuku election.

32. The County Clerk's irregular, unreasonable, neglectful conduct and mistake of judgment constitutes "cause" under HRS §11-172 and as a result, the correct outcome of the Wailuku Election cannot be ascertained.

COUNT TWO – ERROR AND MISTAKE IN DETERMINING DEFICIENT ENVELOPES

33. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in preceding paragraphs of this Complaint.

34. The County Clerk may deem a return identification envelope deficient if such an envelope is returned unsigned, the affirmation signature does not match the reference signature image or the envelope contains other conditions that would not allow the counting of the ballot.

HRS §11-106

35. The County Clerk is required to compare the signature on the return identification envelope with the reference signature or signatures of the vote and may use a “signature device” to automate this task. Signature device validated signatures are considered valid by HAR §3-177-652(a).

36. If a signature device does not validate the signature or a signature device is not used, the County Clerk is required to compare the signature visually by HAR §3-177-652(c).

37. 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. HAR §3-177-652(c)(1)

38. The County Clerk is required to follow the standards at HAR §3-177-652(c)(1)-(4) in determining whether the signature on the return identification envelope matches the signature(s) on file.

39. In multiple instances, the County Clerk did not comply with the standards set out in the administrative rule for comparing signatures and such a pattern supports the reasonable inference that the County Clerk did not substantially comply with the standards in deeming return identification envelopes deficient. The return identification envelopes and the reference signatures are not available to Plaintiffs.

40. Under the circumstances, the County Clerk’s failure to substantially comply with the standards for comparing signatures on return identification envelopes and arbitrarily deeming certain envelopes containing ballots as deficient constitutes error that changed the Wailuku election result or a mistake that makes it impossible to ascertain the correct result of the Wailuku election.

41. The County Clerk's irregular, unreasonable, neglectful conduct and mistake of judgment constitutes “cause” under HRS §11-172 and as a result, the correct outcome of the Wailuku Election cannot be ascertained.

COUNT THREE – UNLAWFUL WITHHOLDING OF VOTER INFORMATION

42. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in preceding paragraphs of this Complaint.

43. The County Clerk had a duty to make the list of voters whose return identification envelopes were deemed deficient available for inspection and copying during regular business hours. HRS §92F-11.

44. HRS §11-97 provides in relevant part: “A voter's full name, district/precinct designation and voter status shall be public[.]”

45. The County Clerk’s determination that a voter's return identification envelope as “deficient” and not counted in the tabulation of votes is not personal information on the voter

registration affidavit.

46. A determination that a voter's return identification envelope is deemed “deficient” is not “voted materials”.

47. The County Clerk's refusal to make available for inspection and copying during regular business hours was unlawful under HRS §92F-11. The County Clerk had no authority to withhold voter information requested, including the list of the 812 voters whose return identification envelopes had been deemed deficient.

48. The County Clerk's exceedance of her authority and unlawful act of withholding the list of voter names from Plaintiff Ahia compounded the unreasonably delayed notification of voters with return identification envelopes deemed deficient.

49. The County Clerk's unlawful withholding of public voter information was error, irregular, unreasonable, neglectful, and was a mistake of judgment. This act constitutes “cause” under HRS §11-172 and as a result, a correct outcome of the Wailuku election cannot be ascertained.

COUNT FOUR – UNLAWFUL RULEMAKING CAUSED ELECTION MISTAKES

50. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in preceding paragraphs of this Complaint.

51. The procedure by which the County Clerk attempts to notify a voter that their return identification envelope has been deemed deficient constitutes an “agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency.” HRS §91-1.

52. The procedure to notify a voter that their return identification envelope has been deemed deficient does not “concern[] only the internal management of an agency and not affecting private rights of or procedures available to the public.” HRS §91-1.

53. The County Clerk notified the voters whose return identification envelopes were deemed deficient within one or two days of determining that their return identification envelope was deficient for those received prior to election day, but waited four days to do so for ballots received and determined deficient on November 8, 2022.

54. No rule for notifying voters of a determination of deficiency of a return identification envelope has been adopted pursuant to HRS §91-3, promulgating such agency statement as an administrative rule according to law.

55. The shifting procedure by which voters whose return identification envelopes had been deemed deficient amounted to unbridled discretion that is prohibited by the Hawai'i

Administrative Procedure Act, HRS chapter 91 and the Hawai'i constitution.

56. The procedures used to attempt to notify voters whose return identification envelopes had been deemed deficient constitutes unlawful rule-making impacting the right to vote.

57. The County Clerk's unlawful rule-making impacting the right to vote of every voter with respect to the timing and other procedures associated with notifying voters whose return identification envelopes had been deemed deficient was error and a mistake, constituting "cause" under HRS §11-172 and as a result, a correct outcome of the Wailuku election cannot be ascertained.

COUNT FIVE – VIOLATION OF EQUAL PROTECTION

58. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in preceding paragraphs of this Complaint.

59. The County Clerk's unreasonable delay in attempting to notify voters who had returned their ballots but whose return identification envelopes were deemed deficient on election day constituted treatment different from voters who returned their ballots but whose return identification envelopes were deemed deficient before election day.

60. The County Clerk's different treatment of voters who had returned their ballots but whose return identification envelopes were deemed deficient on election day from voters who returned their ballots but whose return identification envelopes before election day constitutes arbitrary and disparate treatment, valuing one person's vote over that of another.

61. The County Clerk's different treatment of voters in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, § 5 of the Hawai'i Constitution was error and a mistake, each constituting "cause" under HRS §11-172 and as a result, a correct outcome of the Wailuku election cannot be ascertained.

COUNT SIX – VIOLATION OF DUE PROCESS

62. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in preceding paragraphs of this Complaint.

63. The right to vote, the right to have one's vote counted, the right to have all lawful votes counted are individual entitlements grounded in the state constitution and the election code and cannot be abridged without due process of law.

64. The County Clerk's failure to attempt to reasonably notify voters pursuant to HRS §11-106 constitutes a violation of the right to due process of law.

65. The County Clerk's failure to attempt to reasonably notify voters pursuant to statute

and in violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, § 5 of the Hawai'i Constitution was error and mistake, and constitutes "cause" under HRS §11-172 and as a result, a correct outcome of the Wailuku election cannot be ascertained.

Wherefore Plaintiffs-Contestants pray this Honorable Court

- (1) Upon hearing, sustain the Election Contest;
- (2) Invalidate the election for the office of member of the Maui County Council, Wailuku-Waihe'e-Waikapū residency area;
- (3) Order a new election to be held according to law;
- (4) Enter judgment directly,
- (5) File a certified copy of the judgment with the Governor of the State of Hawai'i;
- (6) Award costs to Plaintiffs, and
- (7) Award such other relief as may be just and proper.

DATED: Makawao, Maui, Hawai'i November 25, 2022

/s/ Lance D. Collins
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Honolulu, Hawai'i November 25, 2022

/s/ Bianca Isaki
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