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HAWAII FOUNDATION
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Attorney for Plaintiffs
A. JORIS WATLAND and
ERIC GENE SCHNEIDER

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

A. JORIS WATLAND and ERIC GENE)
SCHNEIDER,)

Plaintiffs,)

vs.)

DWAYNE D. YOSHINA, CHIEF)
ELECTION OFFICER FOR THE STATE)
OF HAWAII, individually and in his official)
capacity; and WENDELL KIMURA,)
ACTING DIRECTOR OF THE STATE OF)
HAWAII LEGISLATIVE REFERENCE)
BUREAU, individually and in his official)
capacity,)

Defendants.)

CIVIL NO.
(Injunction)

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF; EXHIBITS
A-D; SUMMONS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. Nature of the Case

In the general election scheduled for November 5, 2002, Question No. 3 on the ballot (“the question”) will ask the Hawaii electorate to vote on a proposed constitutional amendment authorizing initiation of felony prosecutions by written information (“the amendment”).

As proposed, the amendment affects long-existing constitutional protections. Specifically, the proposed amendment could directly impact rights provided by the United States Constitution’s Fourth Amendment (the probable cause requirement for warrants), the Fifth Amendment (a guarantee of due process), and the Sixth Amendment (an express recognition of importance to accused of opportunity to confront witnesses). The proposed amendment also could directly impact rights provided by the Hawaii State Constitution’s Article I, Section 2 (right to enjoy liberty), Section 5 (due process), Section 7 (probable cause requirement for any warrant), and Section 14 (right to confront witnesses).

Defendant Yoshina, acting under the color of state law, specifically, Hawaii Revised Statutes, Chapter 11, is responsible for supervising state elections, including the November 5, 2002 general election. Acting under the color of state law, specifically Senate Bill No. 996, duly passed by the 2001 Twenty-First Legislature and signed by Governor Cayetano, which proposes amendment to the Hawaii State Constitution Article I, Section 10, defendant Yoshina has placed Question No. 3 on the November 5, 2002, ballot and has disseminated information for voter education prepared by defendant State of Hawaii Legislative Reference Bureau.

The plaintiffs allege that acting under color of state law the defendants have drafted and disseminated false and misleading information about the proposed amendment. Furthermore the plaintiffs allege defendant Yoshina has violated the Hawaii State Constitution, Article XVII,

Sections 2 and 3, which prescribe the procedures for presenting proposed constitutional amendments to the voters.

The plaintiffs are registered voters who allege that the defendants' acts have effectively denied them their federal and state constitutional rights to the voting franchise. The plaintiffs allege that the false and misleading information about the proposed amendment disseminated by the defendants under the color of state law, compounded by improper procedures, has irreparably injured them as voters. The plaintiffs allege the defendants have compromised the plaintiffs' ability to make a deliberate and informed choice on Question No. 3.

The defendants are asking the plaintiffs to "buy a pig in a poke" by misleading them about the proposed amendment. Because the defendants cannot completely cure their errors before November 5, 2002, the plaintiffs seek an injunction, prohibiting the defendants from submitting the proposed amendment to the voters on November 5th and from counting or tabulating any votes cast on Question No. 3. Additionally the plaintiffs seek to enjoin the defendants from continuing dissemination of the misleading information about Question No. 3 and an order directing them to notify the electorate through the most effective methods that the voter information pamphlet was inaccurate and misleading.

1. In this action the plaintiffs make claims under United States Constitution's Fourteenth Amendment, 42 U.S.C. §1983, 42 U.S.C. §1988, Hawaii Revised Statutes, Chapter 11, the Hawaii State Constitution Article XVII, and their rights to vote under Article I, Section 2 of the Hawaii State Constitution and the United States Constitution. The plaintiffs proceed under Hawaii Rule of Civil Procedure 65 and H.R.S. §632-1.

II. Parties

2. Plaintiff A. JORIS WATLAND ("Watland") is an adult citizen of the United States, resident of the City & County of Honolulu, and a registered voter in the State of Hawaii who has received materials to vote absentee in the November 5, 2002 general election. Watland is not an attorney and has no knowledge of criminal procedure.

3. Plaintiff ERIC GENE SCHNEIDER ("Schneider") is an adult citizen of the United States, resident of the City & County of Honolulu, and a registered voter in the State of Hawaii who intends to vote in person in the November 5, 2002, general election. Schneider is not an attorney and has no knowledge of criminal procedure.

4. Defendant DWAYNE D. YOSHINA is the duly appointed Chief Election Officer, the administrator of the State of Hawaii Office of Elections. He is sued individually and in his official capacity for constitutional violations done under the color of state law.

5. Defendant WENDELL KIMURA is the Acting Director of the State of Hawaii Legislative Reference Bureau, an administrative unit within the state legislature. He is sued individually and in his official capacity for constitutional violations done under the color of state law.

III. Jurisdiction

6. The First Circuit Court of the State of Hawaii has original jurisdiction for this complaint based on Hawaii Revised Statutes § 632-1 and Hawaii Rule of Civil Procedure Rule 65.

IV. Factual Allegations

7. Proposed bills, S.B. 996 and 997, were introduced into the 2001 Twenty-First Hawaii Legislature and were addressed by legislators and public commentators as companion bills.

8. As proposed and passed by the legislature, S.B. 996 (Ex. A) provides the amendment to be submitted for ratification by the voters in the November 5, 2002, general election.

9. The original S.B. 997 (Ex. B) would have added procedures to Hawaii Revised Statutes, Chapter 806, relating to initiation by written information of any felony prosecution but for first degree murder and attempted murder. S.B. 997 required that the written information demonstrate probable cause as determined by a circuit court judge. If probable cause was found, the court would set bail and cause an arrest warrant to be issued.

10. S.B. 997 further proposed adding to Chapter 806 a procedure whereby a defendant charged by written information would be given the written information that had been filed in circuit court and could move in circuit court to dismiss the charge for lack of probable cause. A defendant charged by written information would be entitled to a hearing at which he could call witnesses and introduce evidence bearing on the existence of probable cause.

11. S.B. 997 also would have amended Hawaii Revised Statutes Chapter 806 to give the circuit court the discretion to allow the State to call witnesses at a probable cause hearing, introduce evidence and supplement written information already filed with hearsay and/or evidence that might be ultimately ruled inadmissible at trial. After such a hearing the circuit court would rule on probable cause.

12. Lastly, S.B. 997 included other proposed additions to the Hawaii Penal Code pertaining to appeals by the State.

13. However, during the Twenty-First Legislature S.B. 997 was revised and replaced entirely with a provision that the judicial council convene a task force to review criminal charging by written information, presumably to gather data from jurisdictions which had had experience with prosecution by written information.

14. The rewritten S.B. 997 passed the legislature but was vetoed by Governor Cayetano.

15. Meanwhile, during Twenty-First Legislature debate S.B. 996 had been revised to limit prosecutions by written information to only Class C felonies. However, that limitation was later removed before passage, and as passed S.B. 996's proposed amendment is applicable to any felony.

16. As passed S.B. 996 prescribed the text of the constitutional amendment and the wording of the ballot question.

17. The constitutional amendment reads in pertinent part ". . . in accordance with procedures the legislature *may* provide . . ." *See* Ex. A, section 2 (emphasis added).

18. The ballot question, however, changes that wording to ". . . in accordance with procedures and conditions *to be* provided by the state legislature." *See* Exhibit A, section 3 (emphasis added).

19. Nowhere does the proposed amendment identify which procedures, if any, that will pertain to information charging.

20. Pursuant to the Fourteenth Amendment of the United States Constitution, the Bill of Rights' fundamental protections are made applicable to the acts of Hawaii state government actors, including the defendants.

21. Moreover, the Preamble of the Hawaii State Constitution adopts the United States Constitution or behalf of Hawaii's citizens, including the plaintiffs.

22. The United States Constitution's Fourth Amendment protects the plaintiffs from warrants not based on probable cause. The proposed amendment does not extend that protection.

23. The United States Constitution's Fifth Amendment guarantees the plaintiffs due process. The amendment offers no such guarantee.

24. The United States Constitution's Sixth Amendment includes the right to confront witnesses as a component of just prosecutions. The proposed amendment does not recognize that principle of just prosecutions.

25. Hawaii's own constitution Article I, Sections 2, 5, 7, and 14 reiterates the United States Constitution's basic protections. The proposed amendment is silent as to how and to what extent those basic protections will be saved or will be lost.

26. Plaintiff A. Joris Watland requested and has received an absentee ballot voting package. Plaintiff Watland received and upon belief every other absentee voter has received or will receive a ballot voting package that contained a voter information pamphlet ("the pamphlet") prepared by defendant Kimura and the Legislative Reference Bureau and disseminated by defendant Yoshina and the Office of Elections (Ex. C).

27. Plaintiff Eric Schneider received a voter information pamphlet in the mail from defendant Yoshina. Plaintiff Schneider sought to inspect the text of the proposed amendment at

the Kaimuki Public Library, but defendant Yoshina had not provided that library with the proposed amendment's text.

28. Hawaii State Constitution, Article XVII, Section 2, requires that the text of any proposed constitutional amendments be available for inspection at all public libraries. Upon information defendant Yoshina has not provided every public library with the text of the proposed amendment.

29. The plaintiffs have seen the publication in the October 13, 2002, and the October 20, 2002, *Honolulu Advertiser*, of the same information printed in the pamphlet (one such publication attached as Ex. D). The Hawaii State Constitution, Article XVII, Section 3 requires the text of the proposed amendment to be published in a newspaper of general circulation in each senatorial district for four weeks before the election. With less than two weeks before the general election, the text of the proposed amendment has not been published in any senatorial district.

30. The wording of defendants' various voter education efforts about the amendment are identical in pertinent part, differing only in format. None of defendants' voter education efforts provides the text of the proposed amendment.

31. Under the "Background" portion the pamphlet states in the first paragraph, second sentence, "[h]earsay testimony is not allowed [to grand juries or at preliminary hearings] . . .". That statement is factually incorrect. Hearsay is admissible before grand juries unless the prosecutor is using hearsay when "better evidence was readily available." *See, e.g., State v. Layton*, 53 Hawaii 513, 516, 497 P. 2d 559 (1972); *State v. Murphy*, 59 Hawaii 1, 575 P. 2d 448 (1978); *State v. O'Daniel*, 62 Hawaii 518, 616 P. 2d 1383 (1980); *State v. Corpuz*, 67 Haw. 438, 690 P. 2d 282 (1984); *State v. Ganal*, 81 Hawaii 358, 917 P. 2d 370 (1996); *State v. Chong*, 86

Hawaii 282, 949 P.2d 122 (1997). Hearsay is also admissible in preliminary hearings when it is demonstrably inconvenient to summon witnesses. *See* Hawaii Rule of Penal Procedure 5(c)(6); *see generally*, Hawaii Rule of Evidence 1101(d).

32. In the "Background" portion, second paragraph, third sentence, the pamphlet states in pertinent part, ". . . that is supported by affidavits and other documentary evidence." That statement is factually incorrect. The amendment does not require that the written information be supported by anything, let alone sworn statements. *See* Exhibit A, section 2.

33. The first clause of the next sentence in the "Background" portion of the pamphlet refers to a judge finding probable cause. That crucial statement is patently false. That fundamental safeguard against the State's abuse of power is conspicuously absent from the amendment. *Id.* The defendants' presentation of the proposed amendment in this way expressly misstates the truth and misleads the plaintiffs and the electorate. Presenting this falsehood as an objective, neutral fact is a fraud on the plaintiffs and the electorate.

34. If "this method" in the final sentence of the "Background" portion means the method being proposed in the amendment, it is factually incorrect because no other states have systems permitting information charging without procedural safeguards for constitutional protections. Or if "this method" refers to the system described in the "Background" portion, the final sentence is misleading because the procedures described therein have not been and may never be established.

35. In the "Pros" portion of the pamphlet statements are presented as fact that are in truth unproven and unsupported propositions. "Cumbersomeness" and "expense" in criminal justice are relative terms interpreted differently by different persons. However, defendant

Kimura fails to provide any reference point to enable the plaintiffs and the electorate to make deliberate, informed choices.

36. In the second sentence of the "Pros" portion, reference is made to "cost savings." However, defendant Kimura provides no facts to inform the plaintiffs and the electorate as to what savings might result. Without facts about the amount of expected savings the plaintiffs cannot make an informed and deliberate choice whether the gain justifies the loss.

37. The "Pros" portion, third sentence is untrue. Contrary to that statement, no one knows if or when protections or safeguards will be provided. Moreover no one knows which conditions or procedures, if any, may be implemented. Therefore no one, including the plaintiffs, can make a deliberate, informed decision about whether the conditions and procedures which may eventually be established will provide all the necessary safeguards.

38. The third sentence of the "Pros" portion also makes the incorrect and misleading assertion that the amendment will require a finding of probable cause. That statement is false. The proposed amendment does not require that the information charging document(s) demonstrate probable cause. This falsehood misleads voters into believing an untruth about probable cause that may influence their decisions.

39. Likewise, the second independent clause of the third sentence of the "Pros" position is factually incorrect. The pamphlet implies misleadingly that a challenge to the adequacy of probable cause by a hearing that considers credibility of witnesses is an existing safeguard. There is now no such procedural safeguard.

40. The "Pros" portion, fifth sentence presents as fact the vigorously disputed contention that cases will proceed more quickly to trials. However, if information charging results in fewer pleas because of defendants' inability to assess the strength of the State's case

and consequently results in more trials, the courts will backlog. Then all trials will be delayed. Accordingly, without misleading the voters, the pamphlet's prediction of time savings can be stated only as a possibility not a certainty.

41. The final sentence of the "Pros" portion again refers to "[t]his measure." Presumably that reference is to the proposed amendment, and if it is, the subsequent statement about a balance between the affected rights of an accused and an efficient criminal justice system is factually incorrect. "This measure" is completely bereft of any constitutional protections for basic civil liberties. "This measure" is one-sided. The truth is "this measure" does not strike a balance between the accused and the State. To state "this measure" does is misleading and deceptive.

42. In the fourth sentence of the "Cons" portion the pamphlet states that the amendment shifts the burden of proof to a defendant to disprove probable cause. That statement is factually incorrect. The proposed amendment does not enable defendants to contest probable cause wherever the burden lies. By its terms the amendment simply adds a third way for the State to charge felonies. The proposed amendment does not provide basic due process. The incorrect "burden of proof" statement misleads voters about the existence of a probable cause requirement in the information charging process.

43. The final two sentences of the pamphlet's "Cons" portion refer to motions to dismiss and the presumed consequences of such motions. These statements are factually incorrect, misleading, and deceptive. The pamphlet again uses the term "this measure," but the amendment does not create any identified procedures, including motions, by which to challenge the adequacy of probable cause.

IV. Legal Claims

(United States Constitution 14th Amendment, 42 U.S.C. § 1983, 42 U.S.C. § 1988)

44. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations set forth above.

45. The defendants' failure to follow prescribed procedures and their breach of duty to present ballot issues with objectivity, neutrality, and accuracy undermined the plaintiffs' right to vote. The defendants' procedures and presentation relating to the proposed amendment is fundamentally unfair. The defendants' misconduct is patent and beyond mere negligence, and the election is infected with pervasive unfairness in violation of due process rights.

**(Hawaii State Constitution; Article I, Sections 2, 5, 7 and 14,
Article II, Section I, Article XVII; and Hawaii Revised Statutes Chapter 11)**

46. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations set forth above.

47. Because the proposed amendment does not indicate if, when, or to what extent basic constitutional rights will be protected, a vote on the amendment cannot reflect "a knowing and deliberate expression of voter choice."

48. The proposed amendment's indefiniteness prevents the plaintiffs from casting an informed vote. The amendment's failure to assure even the most fundamental safeguards such as judicial review or probable cause confounds a voter wondering if the amendment has any limits.

49. The proposed amendment provides neither "fair notice" of the scope of information charging, nor any "fixed standards" by which it will be conducted. Therefore the voters cannot know the substance of the question being voted upon.

50. The proposed amendment contains "definitional uncertainty." The amendment does not comport with the specificity evident in other constitutional provisions. *See, e.g.*, Hawaii State Constitution Article I, Sections 5, 7, and 14. Accordingly, ratification of the amendment would be invalid because any ratification cannot be a reflection of informed voter choice.

51. Further, the pamphlet drafted and distributed by the defendants under the color of state law is certain to mislead the plaintiffs and any of the electorate who are not experts in criminal procedure. Replete with material misstatements such as an ensured judicial review and the existence of a requirement for probable cause, the pamphlet wrongly presents future possibilities as present fact. The defendants' deception will improperly influence the voters' choice by creating false impressions about the information charging process.

52. The defendants' pamphlet also falsely claims other jurisdictions already use "this method," deceiving the voters about the risk to their constitutional protections posed by an undefined, limitless amendment.

53. Lastly, the defendants' failure to follow prescribed procedures undermines the integrity of the voting process essential to ratification of the proposed amendment.

54. The defendants' constitutional continuing violations were done under the color of state law and are continuing to irreparably injure them as voters in a way legal relief in the form of monetary damages are ineffective.

THEREFORE THE PLAINTIFFS REQUEST THE FOLLOWING RELIEF:

A. A declaratory judgment that the defendants' voter education about the amendment is factually incorrect;

B. A declaratory judgment that the defendants' voter education about the amendment is misleading;

C. A declaratory judgment that the defendants' voter education about the amendment prevents an informed and deliberate vote by the plaintiffs and the electorate;

D. A declaratory judgment that the defendants have undermined the integrity of the voting process by not following the procedures prescribed in the state constitution and statutory law;

E. A declaratory judgment that the defendants, acting under the color of state law, have irreparably injured the plaintiffs by violating their constitutional rights;

F. An injunction prohibiting defendant Yoshina from submitting the proposed amendment to the voters in the November 5, 2002 general election by public notices informing the electorate to not cast votes on Question No. 3;

G. An injunction prohibiting defendant Yoshina from counting or tabulating any votes cast on Question No. 3;

H. An injunction prohibiting defendant Yoshina from further dissemination of the voter information pamphlet and an order directing him to notify the electorate through the most effective methods that the voter information pamphlet was inaccurate and misleading.

I. An award to the plaintiffs of costs of suit and reasonable attorney's fees in an amount to be determined on subsequent motion; and

J. Such other relief as the court deems justified, warranted, appropriate, and

necessary in the interests of justice.

DATED: Honolulu, Hawaii, October 23, 2002.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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Plaintiffs,)	SUMMONS
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HAWAII LEGISLATIVE REFERENCE)	
BUREAU,)	
)	
Defendants.)	
)	
)	

SUMMONS

STATE OF HAWAII

To the above-named defendant(s):

You are hereby summoned and required to serve upon plaintiffs' attorneys, whose address is stated above, an answer to the COMPLAINT which is attached hereto. This action must be taken within 20 days after service of this summons upon you, exclusive of the date of service.

If you fail to make your written answer within the 20-day time limit, judgment by default will be taken against you for the relief demanded in the COMPLAINT.

DATED: Honolulu, Hawaii, _____.

Clerk of the Above-Entitled Court

THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.

FAILURE TO OBEY THE SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE PERSON SUMMONED.