

S.C. NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

A. JORIS WATLAND; ERIC GENE) COMPLAINT
SCHNEIDER; et. al.,)
)
vs.)
)
BENJAMIN J. CAYETANO,)
GOVERNOR OF THE STATE OF)
HAWAII, in his official capacity;)
DWAYNE D. YOSHINA, CHIEF)
ELECTION OFFICER FOR THE)
STATE OF HAWAII, in his official)
capacity; and WENDELL KIMURA,)
ACTING DIRECTOR OF THE STATE)
OF HAWAII LEGISLATIVE)
REFERENCE BUREAU, in his official)
capacity,)
_____)

COMPLAINT

I. Nature of the Case

In the general election held on November 5, 2002, Question No. 3 on the ballot (“the question”) asked the Hawaii electorate to vote on a proposed constitutional amendment authorizing initiation of felony prosecutions by written information (“the amendment”). Across the State, 217,163 voters, or 60%, voted “yes” to the amendment, while “no” and blank votes totalled 161,411, or 40%.

The amendment affects long-existing constitutional protections. Specifically, the amendment eliminates the right of Hawaii citizens to be charged with “infamous crimes” only after those charges are first aired before a grand jury or judge to ensure that there is a sufficient basis for the charges.

Article XVII, Sections 2 and 3 of the Hawaii State Constitution set forth several unambiguous procedural requirements for ratification of amendments to the Constitution. Article XVII, Section 2 requires that the text of any proposed constitutional amendment be available in every public library for public inspection. Article XVII, Section 3 requires that the text of legislatively initiated constitutional amendments be published in a newspaper of general circulation in each legislative senatorial district for four successive weeks during the two months preceding the election.

Defendant Yoshina, pursuant to Hawaii Revised Statutes, Chapter 11, is responsible for supervising state elections, including the November 5, 2002 general election. However, Defendant Yoshina, by his own admission, failed to observe the unambiguous procedural requirements set forth in Article XVII, Section 2 and 3 of the Hawaii State Constitution when presenting the amendment to voters. Defendant Yoshina admits that the text of the amendment was not provided to public libraries, and therefore voters were unable to inspect the text of the amendment at the library before voting on its ratification. Defendant Yoshina also admits that the amendment's text was not published in the newspaper until he was sued in circuit court and after absentee voting had begun.

Failing to follow Article XVII's constitutionally mandated requirements regarding public disclosure of the text of the proposed amendment prior to the election invalidates ratification of the amendment.

In addition, Defendants Yoshina and Kimura did not properly discharge their responsibilities under Hawaii Revised Statutes, Chapter 11 to draft an objective, accurate, informative, and balanced presentation of Question No. 3. Specifically, the Voter Information

Pamphlet prepared and disseminated by Defendants to every registered voter misrepresented the content of the amendment and wrongly presented future possibilities, as to how information charging might work, as present fact. While disseminating this misinformation, Defendants also deprived voters of an opportunity to review the text of the proposed amendment. The defendants' actions compromised the citizen's constitutional entitlement to make a deliberate and informed choice on the amendment and, under the totality of the November 5, 2002 general election's circumstances, undermined the fundamental fairness of the election.

II. Jurisdiction

1. The Supreme Court of the State of Hawaii has original jurisdiction over this complaint based on Hawaii Revised Statutes § 602-5(7) and controlling precedent. See *Kahalekai v. Doi*, 60 Haw. 324, 590 P.2d 543 (1979) and *Blair v. Cayetano*, 73 Haw. 536, 836 P.2d 1066 (1992).

III. Parties

2. Plaintiffs A. JORIS WATLAND, ERIC GENE SCHNEIDER, DAVID ATKIN, GEORGE ATKINS, SHERRIE AUSTIN, NORMAN VERNON BODE, GENE BRIDGES, RICHARD BURNHAM, HEATHER CONAHAN, MIMI DESJARDINS, MARK EWALD, TOM FAUGHT, JANINE HEARNE, JOHN HEARNE, MEL R. HERTZ, HOLLY HUBER, WENDY HUDSON, ROBERT W. JACKSON, MITCH KAHLE, MICHELLE LAU, PAMELA LICHTY, PHILLIP LOWENTHAL, ANDREA HAKSOON LOW, LEILANI V. LUJAN, LYNN LUNDQUIST, GRAHAM MOTTOLA, KATE MURPHEY, PAULA F. MYERS, SUSAN NAKAMA, EMANUEL B. OCHA, WILFRED MITSUJI OKA, DANIEL W. PETERSEN, BARRY PORTER, CATHERINE E. PRUETT, ELENOR C. QUEMADO,

ROBERT REES, LOUIS ROSOF, JERRY ROTHSTEIN, STEPHEN SAWYER, MARY ANNE SCHEELE, RAYMOND L. SCHEELE, PATRICK Y. TAOMAE, MARY LEE TSUFFIS, CHRISTOPHER A. VERLEYE, DAVID S. WILTSE, and BRENDA WHITMARSH are adult citizens of the United States and are residents and registered voters in the State of Hawaii who cast “no” votes in the general election of November 5, 2002 on Ballot Question Number 3, pertaining to the proposed amendment to the State Constitution allowing prosecution of felonies by written information.

3. Defendant BENJAMIN J. CAYETANO, is the duly elected governor of the State of Hawaii. As such, he is charged with the responsibility for the faithful execution of the laws of Hawaii. This action is brought against the Governor of the State of Hawaii in the Governor’s official capacity, including any successor to such official position.

4. Defendant DWAYNE D. YOSHINA is the duly appointed Chief Election Officer and the administrator of the State of Hawaii Office of Elections. 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 placed Question No. 3 on the November 5, 2002, ballot and disseminated information for voter education prepared by the State of Hawaii Legislative Reference Bureau. This action is brought against the Chief Election Officer of the State of Hawaii in his official capacity, including any successor to such official position.

5. Defendant WENDELL KIMURA is the Acting Director of the State of Hawaii Legislative Reference Bureau, an administrative unit within the state legislature. This action is

brought against Defendant Kimura in his official capacity, including any successor to such official position.

IV. Facts

6. Senate Bill No. 996 (S.B. 996), proposing amendment of Article I, Section 10 of the State Constitution, to permit the initiation of felony prosecutions by written information ("the amendment"), was introduced in the 2001 Hawaii State Legislative session. Attached hereto as Exhibit 1 is a true and correct copy of Senate Bill No. 996.

7. Senate Bill No. 997 (S.B. 997), proposing additions and revisions of the Hawaii penal Code to establish procedures and conditions pertaining to the initiation of felony prosecutions by written information, was also introduced in the 2001 Hawaii State Legislative session. Attached hereto as Exhibit 2 is a true and correct copy of Senate Bill No. 997.

8. Proposed bills, S.B. 996 and 997, were addressed by legislators and public commentators as companion bills.

9. The original S.B. 997 (Ex. 2) 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 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.

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

12. 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 that had experience with prosecution by written information.

13. The rewritten S.B. 997 passed the legislature, but was vetoed by Governor Cayetano. Attached hereto as Exhibit 3 is a true and correct copy of a revised version of Senate Bill No. 997, as passed by the legislature but unsigned by the Governor.

14. S.B. 996 was enacted, triggering the ratification process and a ratification vote in the November 5, 2002 general election. Attached hereto as Exhibit 4 is a true and correct copy of Senate Bill No. 996 as enacted.

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

16. The text of the proposed constitutional amendment provides in its entirety that a person may be held to answer for a capital or otherwise infamous crime "upon written information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide." *See Ex. 4.*

17. The ballot question asked:

Shall Hawaii's constitutional provision regarding the initiation of criminal charges be amended to permit criminal charges for felonies to be initiated by a legal prosecuting officer through the filing of a signed, written information setting forth the charge in accordance with procedures and condition to be provided by the legislature? *See Id.*

18. The Hawaii Legislative Reference Bureau, under the direction of Wendell Kimura, drafted voter information about the amendment and submitted it to the State of Hawaii Office of Elections.

19. Defendant Yoshina published the information submitted by Defendant Kimura in a voter information pamphlet. Attached hereto as Ex. 5 is a true and correct copy of the Voter Information Pamphlet.

20. Office of Elections Administrative rule § 2-51-11(g) confers the authority on the Chief Election Officer to decide not to include in the voter information pamphlet deceptive or misleading arguments. Attached hereto as Ex. 6 is a true and correct copy of administrative rule § 2-51-11(g).

21. Defendant Yoshina did not make any changes to the information submitted by Defendant Kimura of the Hawaii Legislative Reference Bureau, and published it verbatim in the information pamphlet.

22. Defendant Yoshina mailed, or caused to be mailed, the voter information pamphlet to every registered voter.

23. Defendant Yoshina included, or caused to be included, the voter information pamphlet in every absentee voting package.

24. Defendant Yoshina published the voter information pamphlet in the *Honolulu Advertiser* Sunday editions for several weeks preceding the November 5, 2002, general election.

25. The “Background” portion of the voter information pamphlet states:

Article I, section 10, of the State Constitution requires that felony prosecutions be initiated in two ways: (1) by grand jury indictment or (2) upon the filing of a compliant following a preliminary hearing. Hearsay testimony is not allowed and probable cause must be established through the testimony of witnesses.

This measure proposes to amend the Constitution to allow a third method of initiating a felony prosecution. This third method will allow the initiation of felony prosecutions by written information. This involves the submission to the court of a document, also known as a “written information,” that is similar to a complaint and that is supported by affidavits and other documentary evidence. If a judge finds probable cause based upon the written information, a warrant is issued and the case proceeds to trial. This method of initiating a felony prosecution is used in ten other states.

26. This background information is factually incorrect and misleading.

27. 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).

28. 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).

29. The text of the amendment does not require that the written information be supported by anything let alone affidavits.

30. The text of the amendment also does not require that a judge find probable cause before a warrant is issued and the case proceeds to trial.

31. No other states have systems permitting information charging without procedural safeguards for constitutional protections.

32. Nowhere does the text of the proposed amendment itself identify which procedures will pertain to information charging.

33. The Defendants' voter information pamphlet did not contain the text of the proposed amendment.

34. The procedures described in "Background" portion of the Voter Information Pamphlet were actually contained in the version of S.B. 997 that was not passed by the legislature.

35. The "Pros" portion of the Voter Information Pamphlet states:

The present law that requires all felony prosecutions to be initiated by grand jury indictment or complaint following preliminary hearing is very cumbersome and is very expensive to the State and counties. If we allow felony prosecutions to be initiated by written information, it will result in cost savings to the State and counties. We will still have necessary safeguards for the accused because probable cause will still be required to support the issuance of a warrant, and a finding of probable cause will be subject to challenge in a hearing. Crime victims will not be required to testify at both preliminary proceedings as well as at trial. Because prosecutions will be initiated in a more timely fashion, cases will proceed more quickly to trial. This measure balances between protection of the rights of the accused and efficiency of the criminal justice system by continuing to ensure a defendant's constitutional rights while preserving scarce state resources.

36. Many of the statements in the "Pros" portion of the pamphlet that are presented as objective fact are, in truth, unproven assertions.

37. For example, contrary to the statement in sentence three of the "Pros" section that "we will still have necessary safeguards for the accused," no one knows what conditions or procedures, if any, may be implemented by the legislature. Therefore, no one knows whether the conditions and procedures that may eventually be established will provide the necessary safeguards.

38. Likewise, 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.

39. The final sentence of the "Pros" portion states: "This measure balances between protection of the rights of the accused and efficiency of the criminal justice system by continuing to ensure a defendant's constitutional rights while preserving scarce state resources." "This measure" is apparently referring to the amendment. However, the amendment is completely bereft of any constitutional protections for the accused. By its terms the amendment simply adds a third way for the State to charge felonies that lacks the protections of a grand jury or preliminary hearing.

40. As early as October 4, 2002, Attorney Brook Hart personally contacted Defendant Yoshina and protested the above inaccuracies in the voter information pamphlet.

41. Defendant Yoshina declined to make any changes to the voter information pamphlet as a result of his conversations with Mr. Hart.

42. On October 14, 2002, the Hawaii Attorney General's Office, through the deputy attorney general assigned to the Office of Elections, indicated that the State intended to defend the voter information pamphlet in court if necessary.

43. On October 23, 2002, Joris Watland and Eric Schneider, two registered voters, brought an injunctive and declaratory action against Defendants Yoshina and Kimura in the State of Hawaii First Circuit Court, Civil No. 02-1-2485-10, making the same basic claims presented herein. A true and correct copy of this complaint, without exhibits, is attached hereto as Exhibit 7.

44. On October 25, 2002, Plaintiffs Watland and Schneider also filed a motion a temporary restraining order before the election to preserve the status quo pending adjudication of

their claims. A true and correct copy of this motion, without exhibits, is attached hereto as Exhibit 8.

45. On October 29, 2002, Defendants Yoshina and Kimura filed their Memorandum in Opposition to the Motion for Temporary Restraining Order, a true and correct copy of which, without exhibits, is attached hereto as Exhibit 9.

46. In the Memorandum in Opposition of October 29, 2002, Defendant Yoshina indicated that he intended to cause the voter information pamphlet to be provided at all polling places on November 5, 2002.

47. In the same memorandum in opposition of October 29, 2002, he also stated that, "To date, the State has not published the full text versions of the constitutional amendments in the manner, with the frequency, and at the time intervals specified in Article XVII, Section 3 of the State Constitution." Ex. 9, page 13.

48. Defendant Yoshina also never provided the full text of the proposed amendment to public libraries as required by Article XVII, Section 2 of the State Constitution.

49. Defendant Yoshina first published the full text of the proposed amendment in the Honolulu Star-Bulletin on October 30, 2002.

50. Walk-in absentee voting in all counties in the State of Hawaii began on October 22, 2002, eight days before the text of the amendment was first published in the newspaper.

51. Mail-in absentee ballots were mailed to absentee voters during the second week of October, two weeks before the text of the amendment was first published in the newspaper.

52. Over 100,000 voters cast ballots by absentee ballot in the November 5, 2002 general election.

53. Nevertheless, on November 1, 2002, the circuit court entered a formal order denying Watland and Schneider's motion for a temporary restraining order enjoining tabulation or certification of votes.

54. Mr. Watland and Mr. Schneider filed an emergency motion for a temporary restraining order in this Court on November 1, 2002.

55. On November 4, 2002, this Court denied Plaintiffs Watland and Schneider's emergency motion for a temporary restraining order.

56. Including all ballots cast in the November 5, 2002 general election, including both those cast on November 5, 2002 and those cast by absentee ballot, 60% of voters, or 217,163, voted "yes" to Ballot Question 3, while "no" and blank votes totalled 161,411, or 40% of ballots cast.

57. On November 11, 2002, the Attorney General's Office expressed interest in filing a joint submission regarding the validity of the ratification vote before this Court upon Agreed Statement of Facts.

58. Plaintiffs agreed to this suggestion and prepared a draft submission that was faxed to the Attorney General's Office on November 15, 2002.

59. On November 20, 2002, after several phone calls between counsel, Deputy Attorney General Charleen Aina, attorney for Defendants Yoshina and Kiumra, faxed a letter stating that she had yet to prepare a counter-proposal and would likely be unable to do so in a timely manner.

IV. Legal Claims

Count I

Hawaii State Constitution, Article XVII, Section 2 and 3

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

61. The provisions of Article XVII, Section 2 and 3 of the Hawaii State Constitution are not merely directory but are mandatory.

62. The provisions of Article XVII, Section 2 and 3 of the Hawaii State Constitution relating to publication in newspapers and provision to public libraries of the text of the amendment are unambiguous.

63. Strict observance of every substantial requirement of the amendment procedure is essential to the validity of the proposed amendment.

64. The defendants' failed to follow, strictly or substantially, prescribed procedures unambiguously set forth in the Article XVII, Sections 2 and 3.

65. The defendants' failure to follow Article XVII's prescribed procedures invalidates ratification of the amendment.

Count II

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

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

67. 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.

68. The defendants' procedures and presentation relating to the amendment was fundamentally unfair by denying the voters, including the plaintiffs, with information essential making "a knowing and deliberate expression of voter choice."

69. The defendants' misconduct was patent and beyond mere negligence, and the election was infected with pervasive unfairness in violation of due process rights in violation of the United States Constitution's Fourteenth Amendment, 42 U.S.C. §1983, 42 U.S.C. §1988.

THEREFORE THE PLAINTIFFS REQUEST THE FOLLOWING RELIEF:

A. A declaratory judgment that the defendants' failure to follow the procedures prescribed in Article XVII invalidates the ratification of the amendment;

B. A declaratory judgment that the defendants' presentation of the amendment was inaccurate, misleading, and fundamentally unfair and that ratification of the amendment is therefore invalid;

C. An injunction prohibiting defendant Yoshina from certifying votes cast on Question No. 3;

D. An injunction prohibiting Defendant Cayetano from allowing the amendment to be printed or published as part of the State Constitution;

E. An award of plaintiffs' of costs of suit and reasonable attorneys' fees; and

F. Such other relief as the court deems justified, appropriate, and necessary in the interests of justice.

DATED: Honolulu, Hawaii, November 22, 2002.

BRENT T. WHITE
LUNSFORD DOLE PHILLIPS
Attorneys for Plaintiffs

