NO. SCEC-24-0000794

IN THE SUPREME COURT OF THE STATE OF HAWAII

KELLY T. KING, ROBERT KING, DANIEL KALEOALOHA KANAHELE, RACHEL CHRISTOPHER, WENDI CHING, PATRICIA NUCKOLLS, LISA SEIKAI DARCY, ROBIN KNOX, BRANDI CORPUZ, ANN L. PITCAITHLEY, BRIDGET A. MOWAT, KRISSTA CALDWELL, CLARE H. APANA, CALEB S. HARPER, LEONARD NAKOA III, SUSAN CAMPBELL, PHYLLIS ROBINSON, BONNIE NEWMAN, AMY J. CHANG, KYLANNAH SPRADLIN, JOCELYN CRUZ, DANIEL GRANTHAM, ALIKA ATAY, WILLIAM R. GREENLEAF, ASHFORD DELIMA, PAUL DESLAURIERS, CONNIE JO HAMILTON, GARY GREGG SAVAGE, COLLEEN DELIMA, KAREN DORRANCE, and MICHAEL ZARATE,

Plaintiffs-Contestants,

vs.

MOANA M. LUTEY, County Clerk, County of Maui, and TOM COOK,

Defendants-Contestees.

ORIGINAL PROCEEDING

DEFENDANT-CONTESTEE MOANA M. LUTEY'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

DECLARATIONS OF MOANA M. LUTEY, RICHELLE M. THOMSON, MARIELLE RAMOS

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DEFENDANT-CONTESTEE MOANA M. LUTEY'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The law demands that where a signature on a return envelope "does not match a reference signature on file," it must be marked "invalid." HRS § 11-106, HAR §§ 3-177-651(b). The administrative rules set forth the presumption of validity and other guidelines to apply, but where the return envelope signature is rejected by the sorting machine, reviewed and rejected by a tier 1 reviewer, and finally, by the Elections Administrator or her assistant, that presumption has been fundamentally rebutted. After that, the cure process begins.

The burden in this action rests with Plaintiffs to show actual evidence of error or mistake, but they consistently obscure that point by attempting to shift the burden. They demand the Clerk's Office perform the impossible task of establishing the absence of error. Plaintiffs have no evidence that any error was made, let alone any error that would have been sufficient to overturn the results of this validly held election. They rely only on an alleged, slight statistical difference in rejection rates as if that alone can establish *causation* that the Clerk's Office committed error. No statute, rule, or case law supports this. Neither can Plaintiffs' declarants establish error, let alone error sufficient to render the election results invalid or unknowable. Plaintiffs failed to state a claim in this case, and they fail on summary judgment, having presented no evidence to meet their burden.

II. FACTUAL BACKGROUND

The County herein adopts the factual background and evidence provided in the record, in Defendant-Contestee Moana M. Lutey's Motion to Dismiss or Alternatively for Summary Judgment ("Clerk's motion") provided in JEFS Dkt. 28-30. In response to Plaintiffs' motion, the Clerk's Office submits additional factual information for the Court's consideration.

For the 2024 General Election, a total of 939 return envelopes were determined to be deficient and were not cured. JEFS Dkt. 29, Thomson Decl. ¶ 32. 803 return envelopes were marked invalid for mismatched signatures. Ramos 12/20 Decl. ¶4. 133 return envelopes were identified as invalid for failing to provide a signature at all. Id. 3 were invalidated on other grounds. Id. The percentage of return envelopes rejected based on signature comparison deficiencies was 1.39% (803 divided by 57,713).

The in-person voting process does not require signature verification, nor was any employed by election officials. Ramos 12/20 Decl. ¶5. Declarant Ian Martins cast an in-person ballot that was accepted in the 2024 General Election. Lutey 12/20 Decl. ¶ 14.

In July 2024, the Clerk's Office received training by Reed Hayes, CDE. JEFS Dkt. 29, Lutey Decl. ¶¶13-15, Ramos Decl. Decl. ¶26, Joan Decl. ¶7. Each Clerk's Office in the state hires Mr. Hayes to conduct training. Id., Thomson Decl. ¶19. The training familiarizes the Clerk's Office staff with signature comparison analysis. Id., Lutey ¶¶14, 19. The Clerk, Deputy Clerk, and Election Administrator instructed the staff to apply the parameters of HAR § 3-177-652. Id., Ramos Decl. ¶28; Lutey 12/20 Decl. ¶17, Thomson 12/20 Decl. ¶¶10-11. The Election Administrator and her assistant were the last to review challenged return envelopes and make a final validity call. JEFS Dkt. 29, Ramos Decl. ¶29, Joan Decl. ¶26, Lutey Decl. ¶¶22-24. The information provided in the declarations attests to the presumptions, guidelines, and other techniques they applied. Id. Ramos Decl. ¶¶ 27-30, Joan Decl. ¶¶ 9-12.

Marielle Ramos stated:

> 28. I instructed staff conducting signature verification to assume the signature present on the return envelope is that of the voter; however, when the envelope signature is compared to the voter's reference signatures and do[es] not match, the signature should be marked as "non-matching."

> 29. If staff are not able to confirm the signature as valid or matching with a reference signature during visual review, my assistant Ashley Joan or I would conduct a final review to make a validity determination, using the same criteria. The deficient return identification envelopes are segregated and placed in the Clerk's Office vault pending notification and cure by affected voters in accordance with the law, as described further below.
>
> 30. I would not identify a signature as deficient unless it exhibited identifiable differences from the reference signatures we had, keeping in mind any apparent differences that can be reasonably explained, such as changes with age, in accordance with the parameters outlined in HAR § 3-177-652.

Ramos Decl. ¶¶ 28-30.

Ashley Joan stated,

> 9. When conducting signature verifications, I would begin my review with the belief that the voter signed the return envelope. If I noted differences between signatures on the return envelope and reference signatures, I would consider multiple factors in compliance with Hawaii Administrative Rule 3-177-652, my training, and experience.
>
> 10. If I could see similarities between the signature on the return envelope and reference signatures, I would consider the signatures matching and the return envelope would be processed as valid.
>
> 11. Voter files typically contain multiple reference signatures. While comparing return envelope signatures with reference signatures, I would review all reference signatures on file before making a determination on validity.
>
> 12. If the comparison between a return envelope signature and reference signature were similar in any way, I would consider the signatures matching and process the return envelope as valid.

Joan Decl. ¶¶9-12.

III. LEGAL STANDARD

The standard of review for a Motion for Summary Judgment is set forth as follows:

> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

> matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. ***In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion***.

Coon v. City and County of Honolulu, 98 Hawai'i 233, 244–45, 47 P.3d 348, 359–360 (2002) (internal citations omitted). "Before summary judgment may be granted, the record must be such that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Association of Apartment Owners of Park Towers v. Child*, 1 Haw.App. 130, 131-132, 615 P.2d 756, 757 (1980).

IV. ARGUMENT

A. PLAINTIFFS PROVIDE NO EVIDENCE OF ERROR, MISTAKE, FRAUD OR NEGLECT

Plaintiffs do not establish the evidence required for summary judgment herein. They only further support the Clerk's motion for dismissal. Plaintiffs claim to have three evidentiary grounds to overturn the election. First, they argue the analysis of Dr. Richardson establishes a statistically significant deviation in Maui's rejection rate for deficient signatures and with no further basis, assume it is due to the Clerk's Office's misapplication of rules; second, declarants aver they signed their "ordinary signature" to their return envelopes and they were rejected; and third, the Clerk's Office's own admissions. JEFS Dkt. 38, pp. 6-7. None of these "grounds" establish any evidence or actual information of error or mistake. The motion must be denied, and the Clerk's motion for summary judgment and dismissal must be granted accordingly.

1. <u>Statistical Significance is Not Grounds to Establish Error</u>

Statistical significance is not the standard, and neither is a general concept of irregularity utilized by other jurisdictions. JEFS Dkt. 38, pp. 8-9 *citing Nugent v. Phelps*, 816 So. 2d 349, 357

(La. App. 2d Cir. 2002) (a challenge brought by incarcerated individuals claiming extreme fraud, bribery, and vote buying on the part of supporters of a police chief candidate). The standard to survive dismissal is to present the Court with "actual information of mistake or errors sufficient to change the result" or "mistake or fraud" that render it unascertainable. *Funakoshi v. King*, 65 Haw. 312, 316-317, 651 P.2d 912, 915 (1982). To prevail at summary judgment, Plaintiffs must establish actual error or mistake rendering the election invalid or unknowable. They fail at both.

There is no provision in state statute, administrative rule, or case law that supports Plaintiffs' assertion that a statistical difference between the overall rejection rate between Maui County in 2024, and the state or national average in 2022, can demonstrate that a Clerk made a "mistake" or perpetuated "fraud." Plaintiffs' statistical analysis is simply not relevant herein.

The Clerk's Office's critique of Dr. Richardson's original declaration was addressed in the Clerk's motion, and Dr. Richardson's December 15, 2024 declaration and exhibit do little to shed light on his analysis.[1] First, Dr. Richardson did not consistently identify his sources, and only generally references sources in his new declaration, without page numbers. *See* Id. ¶ 6. He is in fact under a duty to provide his methodology and the foundation of his analysis to be qualified as an expert, so that both the Clerk and this Court can question its content. HRS § 626, Haw. R. Evid. 602, 702, 802; *Neilsen v. American Honda Motor Co., Inc.*, 92 Hawai'i 180, 184, 989 P.2d 264, 268 (1999) (affidavits that are "speculative and conclusory," with "nebulous descriptions of the requisite [data]" are generally inadmissible on summary judgment, or otherwise must be "scrutinized.") This is especially important because when Dr. Richardson *does* provide his source, it demonstrates that his analysis is unreliable.

[1] Plaintiffs' motion for summary judgment does not attach Dr. Richardson's December 15, 2024, declaration to their motion, but they do rely on and cite to it. *See e.g.* JEFS Dkt. 38, p. 4. Since Plaintiffs rely upon it in their motion, the County responds to it herein.

In his new declaration, Dr. Richardson provides the basis for his calculations for the 2022 national average of rejected ballots for signature verification, stating nationally, "26.9%, or roughly a third, were due to signature issues." Richardson 12/15 Decl. ¶6. He states he got this number from the 2022 EAVS survey (U.S. Election Assistance Commission, Election Administration and Voting Survey). Id. He uses this number to calculate the national rejection rate for all ballots due to signature issues as 0.40%. Id. But this is vastly misleading. Consultation of the 2022 EAVS survey reveals that the 26.9% figure represents only a percentage of the "most common reasons that states ***reported*** for rejecting mail ballots" based on a 16-point specified survey. 2022 EAVS, pp. 13-14, Table 1. However, the "most common reason for mail ballot rejection was 'Other' at 32.7% of responses. Id. The table providing that 26.9% number, specifically states it does not take into account "the most common reason for rejecting mail ballots was for reasons not listed in the survey question." Id. p. 14.

> The most common "other" reasons reported were "undeliverable/void/final not counted" (comprising approximately half of mail ballots rejected for other reasons) ***and "All signature issues" (comprising approximately one-quarter of mail ballots rejected for other reasons***).

2022 EAVS, p. 14 (emphasis added).

Dr. Richardson's assumption that he can calculate the national average of signature-rejected ballots based on this 26.9% calculation is therefore fundamentally inaccurate, incomplete, and unreliable. As to his Hawaii numbers, Dr. Richardson states he generated his information regarding signature-related deficiencies from a "compilation of EAVA data sets for Hawaii Counties for 2018, 2020, and 2022." Richardson 12/15 Decl. ¶10. However, the 2022 EAVS report or supporting data does not demonstrate the grounds for rejection by County or State with

any specificity; it is noted generally, as indicated and referenced above, and counsel cannot find them reported therein, nor have they been effectively provided to this Court.[2]

Further, Dr. Richardson does not explain his use of 2018 election data as comparative when the rules promulgating the presumption and guidelines did not come into effect until 2020, and Hawaii was not an entirely (or almost entirely) vote-by-mail state until 2020. HRS § 11-101, Act 136 (2019); *see gen.* HAR Title 3 Section 177. Also, as to the national average comparison, only ten states have an almost entirely vote-by-mail process; why would any non-vote-by-mail state be considered comparable? How many of those states allow very little absentee or vote-by-mail, thus skewing the national rejection rate downward?[3] A state with very little vote-by-mail volume would have a much smaller percentage of rejected ballots for signature verification if the bulk of ballots did not require any signature comparison.

There are far more questions raised from Dr. Richardson's analysis than answered. Where a proffered expert's affidavits or declaration are "speculative and conclusory, and as lacking specific facts required for summary judgment," they should be excluded. *Neilsen*, *supra*, 92 Hawai'i at 184. "Expert testimony must be more than conclusionary statements." *Id.* ("nebulous descriptions of the requisite [data]…. were grossly insufficient" against the plaintiff's contention.) Even if they are accepted as admissible opinion, "such affidavits should be scrutinized." *Id*.

Even if the Court finds Dr. Richardson's declaration admissible, it is entirely speculative for Plaintiffs to use Dr. Richardson's work in the conclusory manner they have. They argue he

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[2] *See* https://www.eac.gov/research-and-data/studies-and-reports for data review.

[3] *See* https://ballotpedia.org/Election_results,_2024:_Analysis_of_rejected_ballots . The organization's website demonstrates that other vote-by-mail states had the following rejection rate in 2022: California 2.5%, Colorado 1%, Nevada 2%, New Jersey 1%, Oregon 1.4%, Utah 1.5%, Vermont 0.1%, Washington 1.2%, and Washington D.C 1.9%. For comparison, Maui County's average is 1.63%, for any reason.

establishes that the cause of any statistical deviation is due to the Clerk's Office's misapplication of the presumption and signature verification guidelines. But Dr. Richardson specifically does not proffer such an opinion. If he did, he would have had to expressly take into account other external factors, like demographics, education, new voters, etc., and at the very least explain why they can be excluded.[4] His "simple" calculations do not do that. Richardson Decl. ¶17. An election contest "cannot be based upon mere belief or indefinite information," and that is exactly what this is. *Akaka v. Yoshina*, 84 Hawaii 383, 387, 935 P.2d 92, 102 (1997). Plaintiffs have made sweeping conclusions from, respectfully, unreliable and unsupported statistical analysis, asking this Court for the extreme remedy of disenfranchising the voters of Maui County.

Plaintiffs have never had any legal basis to mount an election challenge based on a "statistical outlier" and even by their own math, this argument is essentially defeated. Maui's rejection rate for any reason was 1.63%, and signature verification-based reasons was 1.39%. Dr. Richardson's declaration and the conclusions Plaintiffs draw from it, must be disregarded.

2. Declarants' Attestation They Signed with Their Ordinary Signature

Next, Plaintiffs point to six declarants that "attested their signatures on return identification envelopes had no reason to be different from their ordinary signatures." JEFS Dkt. 38, p. 7. However, Declarants Katherin Wissner, Ferdinand Ballesteros, Joshua Kamalo and Kailee Kamalo are the only declarants who stated they signed their ordinary signatures to their own return envelope and received a notice to cure. JEFS Dkt. 2, Wissner Decl. ¶6, Ballesteros Decl. ¶7, J. Kamalo Decl. ¶5, and K. Kamalo Decl. ¶5. Christopher Salem did not state he properly signed his

[4] For one example, Dr. Richardson states he cannot understand how traumatic societal disrupters like the 2023 Lahaina fire could have had any influence on signatures. Richardson 12/15 Decl. ¶22. However, the Clerk's Office had to make specific, significant strides to properly register the thousands of displaced Lahaina community. Lutey Decl. ¶¶4-7.

own return envelope, but rather admits he signed his wife's. Id., Salem Decl. ¶4. Patricia Carol Mybeck only states she received a notice to cure after affixing her "ordinary" signature in the August 2024 *primary* election, not the 2024 General Election. JEFS Dkt. 2, Mybeck Decl. ¶¶ 3-6. These individuals provide no other evidence to suggest their signatures were consistent, and did not review and compare the signatures themselves, as they do not have access to the return envelopes or reference signatures on file. Lutey 12/20 Decl. ¶22.

Even so, Plaintiffs argue this denial of four "valid" return envelopes constitutes an "irregularity" and that the County "did not rebut these facts." JEFS Dkt. 38, p. 7. First, the County did rebut these facts, it provided declarations from the Election Administrator and her assistant as to how they properly applied presumption and other guidelines. JEFS Dkt. 29, Ramos Decl. ¶¶ 27-30, Joan Decl. ¶¶ 9-12. Second, attached to this opposition is a declaration from Moana Lutey attesting specifically that she has personally reviewed images of the declarants' return envelopes against the reference signatures, and can "definitively confirm that the signatures on the return envelopes bear no resemblance to the reference signatures on file." Lutey 12/20 Decl. ¶¶14-15.

Third, the burden is not on the Clerk's Office to establish the absence of error herein: it is on Plaintiffs to establish an error occurred, and this attempt to shift the burden on the Clerk's Office is inappropriate, *see infra* Section IV(B). Fourth, while they argued in their Complaint that "a significant number" of voters "claimed no observable difference" in their signatures, when put to their proof, they found four, each of whom received a notice to cure, 3 of whom cured their envelopes, and only 1 did not do so. JEFS Dkt. 29, Ramos Decl. ¶16, Lutey Decl. ¶50. Even if the Court found that each declarant's return envelope should not have been challenged in the first place, only one of those votes went uncounted. This is fundamentally inadequate to have changed Candidate Cook's 97-vote lead and would not have altered the results of the election. *See Akaka*,

supra, 84 Hawai'i 383 (two declarations filed attempting to overturn a 72-vote lead was insufficient to state a claim); *see also Funakoshi*, *supra*, 65 Haw. at 312 (an 80-vote margin could not be overturned by 2 affidavits).

Fifthly, and finally, the return envelopes and signatures thereon are "voted materials," and protected pursuant to HRS § 11-97 through the end of an election contest, unless this Court orders release. Lutey 12/20 Decl. ¶16. Should the Court order production and review – either *in camera* or otherwise – the Clerk's Office will produce images of the declarants' return envelope signatures and the reference signatures. Id.

3. <u>The Clerk's Office's Never Stated it Applied an Erroneous Standard</u>

Rather than rely on the thorough, sworn declarations provided by the Clerk's Office, *see* JEFS Dkt. 29, Plaintiffs mischaracterize a press release, and then argue it is an admission of the Clerk that an incorrect standard was applied. JEFS Dkt. 38, pp. 7, 11.[5] Plaintiffs specifically cite to the press release's language which states, "if upon election officials further review, the signature is unable to be validated, the voter is immediately mailed a letter with detailed instructions on how to address the deficiency." JEFS Dkt. 38, p. 7. They argue that the envelopes should have been deemed "valid" until they were "unvalidated" through review, and any language, anywhere, that does not explicitly word things as they believe appropriate, demonstrates error. Id. pp. 7, 8. This argument is specious and cannot be given any weight.

The press release in Plaintiffs' Exhibit 16 was issued after Plaintiff Kelly King issued a press release accusing the Clerk's Office of "defeating the will of the voters," and Plaintiffs' lead counsel made statements to the press that "[d]espite Supreme Court admonition to the Maui

[5] Plaintiffs' motion for summary judgment does not attach Exhibit 16, but they do rely on it. *See e.g.* JEFS Dkt. 38, pp. 7, 11.

County Clerk two years ago regarding election shortcomings, it is deeply troubling to see Maui County with even larger numbers of voters being deprived of their constitutional right to vote in this election." Thomson 12/20 Decl. ¶¶6-7. Both are inflammatory statements, lacking any foundation, and when approached for comment, the Clerk's Office issued the referenced press release to inform the public of its process, and provide accurate information. [6]

The Clerk's word choice reveals nothing about any error in process. The County Clerk is required to determine the validity of return identification envelopes. As cited even by Plaintiffs, the language utilized in the press release comports with state law, which states in relevant part:

> Any ballot ***the validity of which cannot be established upon receipt*** shall be retained by the clerk and shall not be commingled with ballots ***for which validity has been established*** until the validity of the ballot in question can be verified by the clerk. No ballot shall be included in an initial tabulation until the clerk has determined its validity.

HRS § 11-108(c) (emphasis added); *See* JEFS Dkt. 38, p. 3.

HAR §3-177-652 itself is entitled "Return identification envelopes; ***signature validation***," which is precisely the term used in the Clerk's November 25 press release that Plaintiffs argue creates an admission. Id. (emphasis added).

The language of the press release is completely accurate and in accord with statute, rule, and Plaintiffs' own writing. *see e.g.* JEFS Dkt. 38, p. 3 ("Signatures not validated by a signature device…" followed by "[i]f a signature device does not validate a return envelope…"). This Court

[6] Any statement that the Clerk's Office failed to follow this Court's ruling in *Ahia* is materially false. The Clerk's Office internalized the instruction provided by this Court, and diligently took action to notify voters of their need to cure their return envelopes within one business day on a rolling basis, and within 24 hours of the polls closing, the Clerk's Office mailed notices to cure. JEFS Dkt. 29, Thomson Decl. ¶28 (notices were mailed by 5:00pm the day following the election). All voters enrolled in Ballottrax would were sent an email notification, with Clerk's Office follow up, and the office attempted to contact every voter with a phone number on file, all by November 7, 2024. Id., Lutey Decl. ¶¶40-43, Ramos Decl. ¶¶32-34.

has utilized this same language when discussing the Clerk's responsibility to determine validity of return envelopes. *See Ahia v. Lee*, No. SCEC-22-0000707, 2023 WL 334610, at *2 (Haw. Jan. 20, 2023), *recon. denied* 2023 WL 1814979 (Haw. Feb. 8, 2023) ("On November 16, 2022 there remained 706 uncured and deficient return identification envelopes. For these 706 ballots, ***the Clerk was not able to establish their validity*** and, thus, none of them were counted") (emphasis added).

These arguments must be disregarded and dismissed. Plaintiffs are determined to find error where none exists. Plaintiffs never present actual evidence or information which, if true, would change the results of the election, or render the results unascertainable. Their motion must fail.

B. INSTEAD OF MEETING THEIR BURDEN, PLAINTIFFS TRY TO SHIFT IT ONTO THE CLERK

In an election contest, the burden rests with Plaintiffs to establish a mistake that would change the result of the election. *Akaka*, 84 Hawai'i 383, 388, *Elkins*, 56 Haw. 47, 49, 527 P.2d 236 (1974) *see also Ahia v. Lee*, 2023 WL 334610, *4 (COL 9). They state in their motion, that "the burden is on the clerk to have evidence invalidating envelopes as opposed to the burden on the voter to validate their envelope. The Clerk produces no evidence of considering reasonable explanations." JEFS Dkt. 38, p. 8. However, in their opposition to the Clerk's motion, Plaintiffs essentially admit that the Clerk's Office articulated, under oath, that its staff applied an accurate standard. Specifically:

> The Clerk asserts she applied presumptions of signature validity because the envelopes had to be rejected by the sorting machine, then by an office staffer, and finally the Election Administrator or her assistant before they were considered unverifiable. Yet the Clerk does not provide evidence that rebutted the presumption. Argument is not evidence.

JEFS Dkt. 37, p. 14.

Putting aside that declarations are absolutely evidence, *see* HRCP 56 ("supporting and opposing affidavits or declarations shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence…), and that the Elections Administrator and her assistant attested that they properly applied the presumptions and guidelines, *see* JEFS Dkt. 29, Ramos Decl. ¶¶ 27-30, Joan Decl. ¶¶ 9-12, it remains Plaintiffs' burden to establish there was any error.

The heavy burden outlined by HRS Chapter 11, Part 11, and the case law pursuant thereto, makes the threshold to overturn an election quite high. To survive *dismissal* an election contest "cannot be based upon mere belief or indefinite information." *Akaka*, *supra*, 84 Hawaii at 388. A "petitioner must show that he [or she] had actual information of mistake or errors sufficient to change the result." *Funakoshi v. King*, 65 Haw. 312, 316-317, 651 P.2d 912, 915 (1982). Further, as stated many times by Plaintiffs, "there is also a presumption in favor of the regularity and validity of official acts." *State by Kobayashi v. Midkiff*, 49 Haw. 456, 482, 451 P.2d 550, 565 (1996).

Plaintiffs' filings facially fail to meet their burden to state a claim, let alone achieve summary judgment. This Court should not allow them to shift the burden on the Clerk's Office. Even so, the Clerk's Office has provided direct evidence that the presumption and guidelines were followed, most importantly by the final two arbiters of review.

C. PLAINTIFFS' EQUAL PROTECTION AND DUE PROCESS CLAIMS FAIL

Plaintiffs' equal protection can only survive if they establish the Clerk failed to follow proscribed procedures, which they have not. It therefore fails on summary judgment, and to state a claim, and the Court need not review their lengthy analysis. However, all of Plaintiffs' cited cases support a finding that this election was sound.

Plaintiffs spend much time outlining the *Anderson-Burdick* balancing test for laws that impact the fundamental right to vote. JEFS Dkt. 38, pp. 9-11. However, the *Anderson-Burdick* balancing test applies to challenges to an election statute, not whether an election official properly applied the law. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983) (challenge to constitutionality of Ohio statue regarding early filing deadline for independent candidates); *Burdick v. Takushi*, 504 U.S. 428 (1992) (challenge to Hawaii's statutory prohibition on write-in voting the court noted "a challenge to state election law" must weigh the given factors); *Democratic Exec. Comm. of Fla. v. Lee* 915 F.3d 1312 (11th Cir. 2019) ("we evaluate the constitutionality of a challenged election law by applying *Anderson-Burick* test"), *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012) (challenging Ohio statute regarding nonmilitary in-person voting); *League of Women Voters v. La Rose*, 489 F.Supp.3d 719 (S.D. Ohio 2020) (challenging Ohio law that required signature matching without adequate time to cure); *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179 (9th Cir. 2021) (challenging law creating election day deadline to cure ballots).

Plaintiffs state they are not seeking to invalidate any law, they are attempting to invalidate an election itself due to alleged actions by the Clerk. JEFS Dkt. 38, p. 11 (this action is "not the constitutionality of the rules themselves" but rather they challenge the Clerk's actions). Since the challenge is not to the statutory structure, the *Anderson-Burdick* balancing test is inapplicable here.

Plaintiffs also argue that "voters are improperly burdened by rejected signatures requiring them to race to cure their deficient envelope within five days" arguing this is disparate treatment. JEFS Dkt. 38, p. 11. However, the cases cited by Plaintiffs (as well as many others) have upheld the same vote-by-mail signature verification laws and notice-to-cure period employed by the State of Hawaii as valid. The Ninth Circuit in *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179 (9th

Cir. 2021), upheld Arizona's five-day deadline to cure after election day generally, and election-day deadline for absentee ballots. The Court noted:

> Thirty-one states rely primarily on signature verification [for mail-in or absentee ballots]. Fifteen of those states—nearly half—do not require election officials to contact voters when they encounter a missing signature, effectively disallowing correction of a missing signature on any date. Four states, including Arizona, require officials to contact voters and permit correction through election day. The remaining twelve states require officials to contact voters and permit correction for varying durations beyond election day.

Arizona Democratic Party v. Hobbs, *supra*, 18 F.4th at 1184-1185.

Similarly, an Ohio law in the *League of Women Voters*, *supra*, 489 F. Supp.3d at 727, provided a 7-day cure period after the election which the Court found sufficient on motion for preliminary injunction. *Id*. at 737. In *Lee*, *supra*, 915 F.3d at 1319-1321, the Eleventh Circuit confirmed it believed a cure period was required to balance the burden placed on voters whose signatures could not be verified. *Id*. at 1320. However, it found Florida's cure period ended the "day *before* the election" when the law did not require canvassing of rejected ballots until "noon on the day *after* the election" and a stay was appropriate to enable a cure period. *Id*. at 1320 (emphasis in original).

Plaintiffs cite to no case that found the signature verification process employed in Hawaii as unlawful or a five-business-day cure period too short. "Reasonable regulation of elections does not require voters to espouse positions that they do not support; it does require them to act in a timely fashion if they wish to express their views in the voting booth." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

Plaintiffs also argue that "the County Clerk's imposition of different standards for notifying voters of their deficient return envelopes is one means of valuing one person's vote over another." JEFS Dkt. 38, p. 13. This is simply absurd. The law requires an attempt to contact voters with a

notice to cure. HRS § 11-106. Within one day, a first class mail notice was sent by the Clerk to the address that the voter's ballot packet was sent to. JEFS Dkt. 29, Ramos Decl. ¶32, Lutey Decl. ¶36. If the voter's record contained an email address or phone number, voters were contacted in that manner too. Id., Ramos Decl. ¶¶32-34, Lutey Decl. ¶¶30-37, 42-44. The Clerk's Office used every option at its disposal to notify individuals, and for this, Plaintiffs complain of "disparate treatment." If voters do not provide an email or phone number, that is their choice, but they cannot complain they were not reached by phone or email if they fail to do so. Similarly, if they refused to check their mail, that cannot be imputed to the Clerk. Voters actually do bear *some* responsibility to ensure they voted correctly. *Burdick*, *supra*, 504 U.S. at 433 ("election laws will invariably impose some burden upon individual voters.")

Finally, Plaintiffs spend considerable time, and without any foundation or evidence, arguing that the Clerk's Office made up their own "policies, techniques, and standards" in violation of rulemaking requirements of HRS § 91-3, demonstrating a violation of equal protection. JEFS Dkt. 38, pp. 11-14. Literally nothing in the record supports this.

Plaintiffs cite to *Green Party of Hawaii v. Nago*, 138 Hawai'i 228, 378 P.3d 994 (2016), but this action was not an election challenge; it was an action for declaratory relief, and the remedy was to undergo rulemaking. In that case, the chief election officer was found to have created rules outside of HRS Ch. 91. In creating a calculation for ordering ballots, his office made a decision that was forward-looking, would operate into the future, and since it effected the public's right to vote, it did not qualify for "internal management" exception. *Id*. at 240. Here, detailed administrative rules are firmly in place, which were meticulously followed. Plaintiffs point to nothing that could be construed as rulemaking.

Finally, Plaintiffs' due process argument similarly fails for all the reasons already stated above and in the Clerk's motion. They can cite to no case that the signature verification or notice-to-cure period as adopted by the State of Hawaii is deficient in any manner. They cannot show the Clerk's office failed to apply the letter of the law. It too must be disregarded.

D. LACHES IS APPROPRIATE WHERE PLAINTIFFS CHALLENGE THE CLERK'S OFFICE PROCEDURES

Plaintiffs' complaint is about the processing of return envelopes and signature verification employed by the Clerk's Office. A process that was used since at least the 2024 August primary election. Marielle Ramos was the Elections Administrator in that election, as well as in 2022 and 2020. JEFS Dkt. 29, Ramos Decl. ¶¶3, 6.

Plaintiffs attempt to distort the point, stating they could not know the Clerk's Office would "mishandle the 2024 Maui General Election." JEFS Dkt. 38, p. 12. However, their whole argument is premised on policy, procedure, and laws that have been in place for at least 2 previous election cycles. The same procedures were in place during the 2024 Primary Election, when the race was for the South Maui seat was equally tight. JEFS Dkt. 30, Exh. 5. Plaintiffs decided to see how the race played out, and have now sought to fight their way back in by attacking the County Clerk. One of Plaintiffs' own declarants complains solely of the primary process. JEFS Dkt. 2, Mybeck ¶¶ 3-7. They have provided no evidence or declaration they were not on notice of these procedures, and their complaint must be barred by laches. "[I]f there has been opportunity to correct any irregularities in the election process… 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, 502-503, 823 P. 2d 738, 741 (1992).

E. PLAINTIFFS' UIPA REQUESTS ARE IRRELEVANT IN THIS MATTER

Plaintiffs' motion restates the broad records requests made primarily by Michelle Del Rosario, a non-Plaintiff. JEFS Dkt. 38, p. 5. Raising these requests are merely a distraction in this action, and moreover, they demonstrate a "fishing expedition." *Akaka*, *supra*, 84 Hawai'i at 389. An election challenge is not the forum to litigate UIPA matters. UIPA requests do not create or discount votes, and the means for redress thereof is established in a specific manner under the law, and the Clerk's Office has timely responded. *See* HRS Ch. 92F.

All of the UIPA requests, while not relevant herein, are clearly raised to suggest the Clerk is hiding something, evidenced by the amount of pre-payment requested. Nothing could be further from the truth. The sheer magnitude and volume of the requests would require extensive time to search for, segregate, review, and release documents responsive. Taking just *one* example, Ms. Del Rosario asked for:

> all communications to include text, email, or phone calls, between Maui County Councilmembers and any member of the Maui County Clerk's office for the period of time from 05/01/2024 through 11/15/2024, to include all County of Maui cell phones and personal phones used by such individuals.

See JEFS Dkt. 2, Exh. 6.

Unless Ms. Del Rosario narrows her request, the amount of hours estimated to search each and every communication between the nine Councilmembers' work-issued cellular phones, emails, and phone records, for communications to any one of the Clerk's Office 20 full-time and temporary employees, without limitation to subject matter or otherwise, was estimated to take 450 hours of search time and 25 hours for legal counsel to review for privilege or other protections. Thomson 12/20 Decl. ¶¶18-19.

Councilmembers and the Clerk's Office are in constant communication due to their charter-defined roles. *See* Maui County Charter, Art. 5 (the County Clerk is "the clerk of the council," maintain and keep "all bills, ordinances, resolutions and rules," and "perform other functions as prescribed by the council or law," which includes managing all transmitted legislation intended for Council). It strains credulity that Plaintiff King, formerly a County Councilmember and Council Chair, would struggle to understand the magnitude of this request. The requests are simply not relevant to the election challenge, and should be disregarded.

V. CONCLUSION

For all the reasons stated herein, and those raised in the Clerk's motion, this summary judgment motion must be denied, with judgment entering in favor of the Clerk.

DATED: Wailuku, Maui, Hawaii, December 20, 2024.

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MOANA M. LUTEY, in her official capacity as
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