



**STATE OF HAWAII
OFFICE OF ELECTIONS**

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**TESTIMONY OF THE
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS
TO THE HOUSE COMMITTEE ON JUDICIARY
ON SENATE BILL NO. 364, SD 2
RELATING TO ELECTIONS**

March 20, 2015

Chair Rhoads and members of the House Committee on Judiciary, thank you for the opportunity to provide comments on Senate Bill No. 364, SD 2. The purpose of this bill is to require the Office of Elections to conduct recounts for elections decided by less than one thousand votes or one-half of one percent of all votes cast for the office, whichever is less.

We believe the bill should clarify that the utilization of the recount provision should not result in the delay of a final decision regarding the results of the election. Such a delay, in the context of a Primary Election, would compromise our ballot production deadlines associated with ensuring under state and federal law that overseas and military voters are mailed their ballots at least forty-five days prior to the General Election. 42 USC § 1973ff-1 & HRS § 15D-9.

Unstated in the bill is whether a candidate's choice to utilize the recount provision, will impact the ability of the same candidate or another candidate in the same contest to file an election contest under HRS §§ 11-173.5 or 11-174.5. Related to that, it is not clear if the resolution of the recount can serve as a basis to delay the deadline to file an election contest under HRS §§ 11-173.5 or 11-174.5.

While we take no position on the policy issue of whether a candidate can petition for a recount and file a subsequent election contest, or how the two should interact, we do believe such proceedings should not be permitted to extend the current timeline between the Primary Election and the resolution of a election contest by the Supreme Court. It is a very tight time frame, for which we

cannot afford additional delays, unless the date of the Primary Election were to be moved back to accommodate for those delays.

The current bill as drafted would result in a petition for recount being able to be filed on the third day after the Primary Election, which would be a Tuesday deadline. The Office of Elections would then provide an estimated cost for the recount to the candidate by Wednesday. The candidate then has two business days to make a deposit for the costs of the recount. As the Friday of that week is Statehood Day, the deadline is moved to Monday. That day is also the deadline to file an election contest under HRS § 11-173.5 (i.e. the sixth day after the election, after factoring in the state holiday).

At this point, election officials would arrange for the recount with the vote system vendor, and official observers. These preparations may take a few days. After those arrangements are made, the actual machine recount of all ballots could take up to three days, if it is a statewide contest.

Given that the deadline to file a traditional election contest under HRS § 11-174.5 is the same deadline as it is to pay the deposit for a recount, it is not clear if a candidate could contend that the deadline for the election contest should be extended to six calendar days after the recount, similar to the language of the statute that refers to six calendar days after the election. The argument would be that they do not know if they should challenge if they don't know the results of the recount. Similarly, a candidate who initially won the election but then loses the recount may want some recourse to file a traditional election contest, hence a demand for an additional six calendar days to determine if such a contest should be filed.

Additionally, as a point of clarification, we would note that the recount trigger of "less than one thousand votes or one-half of one per cent of all votes cast for the office, whichever is less," could be considered ambiguous in the context of a Primary Election challenge. Specifically, a single office such as state representative could have multiple political party contests in the Primary Election to determine the political party nominees for the General Election. As such, a person in a close political party contest may argue that the trigger is only one-half of one percent of all votes cast in that political party contest, while an opponent could argue that the correct trigger is one-half of one percent of all votes cast for the office (i.e. the votes cast in all of the political party contests for that office). With that in mind, we would recommend that the term "contest" instead of "office" be used in reference to the recount trigger or that some similar clarification be provided.

Further, while it may be understood that the bill's reference to state and county elections, includes federal elections, consistent with HRS § 11-99 that generally makes state election laws applicable to congressional elections, we would recommend that the bill explicitly mention federal elections.

Finally, we wish to note that if there is recount for a statewide office, such as President, Governor, U.S. Senator, or Office of Hawaiian Affairs Trustee, then all ballots will be run through the voting system. Given the nature of the vote counting system, all contests on those ballots will be recounted. This will result in the existence of recount totals for all of those counts. A similar situation would occur for a county wide contest or any recount in which there are other contests on the ballots being recounted. Given that the bill presently states in subsection (i) of the proposed section that "[t]he chief election officer shall certify the result of an election based on the outcome of a recount made in accordance with this section," we would seek clarification as to whether the results of contests other than the one of the candidate who filed the original petition can be certified.

Thank you for the opportunity to testify on Senate Bill No. 364, SD 2.



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**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
NINETY-EIGHTH LEGISLATURE, 2015**

ON THE FOLLOWING MEASURE:

S.B. NO. 364, S.D. 2, RELATING TO ELECTIONS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, March 20, 2015

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Russell A. Suzuki, First Deputy Attorney General or
Valri Lei Kunimoto, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General has serious concerns regarding this bill, which allows unsuccessful candidates to petition the appropriate elections officer to conduct a recount of ballots, and amends the provisions regarding election contests.

Section 1 of the bill allows an unsuccessful candidate to petition the appropriate elections officer to recount the ballots of the candidate's unsuccessful state or county election when the difference in votes between the successful and unsuccessful candidates is less than one thousand votes or one-half of one percent of the votes cast, whichever is less, upon the payment of the costs for the recount. The Department is concerned this recount can be viewed as an election contest and challenged as being contrary to article II, section 10, of the State Constitution. Article II, section 10, requires that all "[c]ontested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law," whereas section 1 of this bill specifies an election officer to make that determination. This constitutional concern may preclude the bill's apparent objective of setting up a method for selective recounts assigned to the elections officers. Unless that responsibility can be reassigned to a court of competent jurisdiction, as envisioned under article II, section 10, the Department recommends that the bill be held or deferred indefinitely.

The Department is also concerned the bill lacks deadlines by which the elections officer must conduct the recount and certify the election results. Such specific deadlines are essential given the specific deadlines prescribed by the federal Uniformed and Overseas Citizens Absentee Voting Act (ballot requirements for uniformed and overseas voters).

Section 2 of the bill amends section 11-172, Hawaii Revised Statutes (HRS), regarding contests for cause, by deleting overages and underages as causes for a contest and by adding "unlawful activity" and "force majeure" as causes for a contest. The terms "unlawful activity" and "force majeure" are both extremely broad and vague, and the Department recommends they be further defined. For example, section 11-92.3(a), HRS, provides the level of appropriate detail regarding the postponement of elections by authorizing postponement specifically in the event of natural disasters, including "flood, tsunami, earthquake, volcanic eruption, high wind." Black's Law Dictionary (9th Edition, 2009) defines "force majeure" generally as an event or effect that can be neither anticipated nor controlled, and can include both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).

The Department is further concerned about other amendments to the contests for cause provision that appear to change the legal standard already recognized by the courts. Presently, section 11-172, HRS, provides that a candidate, a political party, or any thirty voters may file a complaint in the Supreme Court setting forth the causes for a contest. The current statute requires the complainant to set forth a cause that "*could cause a difference in the election results*," but then goes on to identify specific examples of such causes. This bill proposes to amend the foregoing by requiring a "statement why the alleged cause or causes might create a difference in the election success of one or more candidates." It is not clear why this amendment would be beneficial, for there is nothing in the bill or in the legislative reports to explain the meaning of the provision or the reason for the change.

There is already a body of decisions by the Hawai'i Supreme Court based on the present standard of causing a difference in election results, establishing a well-understood standard and strikes the right balance between allowing for review when the result of any election are truly in doubt, while simultaneously protecting the results of democratic elections from being challenged unnecessarily. The Department recommends that the present section 11-172, HRS, be retained without amendment, to preclude confusion as to the provision's meaning and mitigate litigation and delay in certifying election results.

Thank you for the opportunity to testify on this matter.