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TESTIMONY OF THE

CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS

TO THE HOUSE COMMITTEE ON FINANCE

ON SENATE BILL NO. 364, SD 2, HD 1

RELATING TO ELECTIONS

April 7, 2015

Chair Luke and members of the House Committee on Finance, thank you for the opportunity to provide comments on Senate Bill No. 364, SD 2, HD 1. The purpose of this bill is to allow for recounts of elections decided by less than five hundred votes or one-quarter of one percent of all votes cast for the contest, whichever is less.

The Office of Elections asks that the bill clarify that a petition for a recount of a ballot question can only be filed by an authorized representative; and that appropriate language be provided stating who is an authorized representative.

We also believe the bill should clarify that all votes or a portion of votes cast in other contests will be recounted and recertified, as the vote counting system counts all contests on the ballot. For example, if there is a recount for any non-statewide contest, such as state representative or county council, then the other contests on the impacted ballots will also be recounted and recertified based on the partial recount of those contests.

Thank you for the opportunity to testify on Senate Bill No. 364, SD 2, HD 1.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015

ON THE FOLLOWING MEASURE:
S.B. NO. 364, S.D. 2, H.D. 1, RELATING TO ELECTIONS.

LATE

BEFORE THE:
HOUSE COMMITTEE ON FINANCE

DATE: Tuesday, April 7, 2015 **TIME:** 2:30 p.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): WRITTEN COMMENTS ONLY. For more information, call Deputy Attorney General Valri Lei Kunimoto, 586-1274

Chair Luke and Members of the Committee:

The Department of the Attorney General has serious concerns regarding this bill, and because the bill's apparent objective may be contrary to the State Constitution, we recommend that the bill be amended or held.

The new section being added to chapter 11, Hawaii Revised Statutes (HRS), by section 1 of the bill allows an unsuccessful candidate to petition the appropriate elections officer to recount the ballots of the candidate's unsuccessful federal, state, or county elections when the difference in votes between the successful and unsuccessful candidate is less than five hundred votes or one-quarter of one percent of all votes cast, whichever is less. 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, provides 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. While it is possible that a recount of ballots cast may be distinguished from a "contested" election, the history of this constitutional provision appears to indicate otherwise. See 1 *Proceedings of the Constitutional Convention of Hawaii* (1950) at 64 (in response to a question about the meaning of "contested election": "[A] contested election will be an election in which there is a reasonable basis for claiming that the count was wrong or that some other thing was not done properly and that if done properly the result would have been affected.") (Statement of Delegate Tavares). 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.

Even if the responsibility for the recount of ballots were placed in a court and not the various election officers, the Department also has specific concerns about subsections (d), (e), (f) and (h) of the new HRS section in section 1 of this bill. These subsections require the certification of recount results no later than the sixth day after the election; this is contrary to the requirements of section 11-155, HRS, which mandates the certification and release of election results only *after the expiration of the time for bringing an election contest*. The deadline to file a complaint for an election contest for a primary, special primary election, and county elections held concurrently with a regularly scheduled primary or special primary election is the *sixth* day after an election (section 11-173.5, HRS), but the deadline to file a complaint for a contest in a general election is the *twentieth* day after the election (section 11-174.5, HRS). Under this bill, the recount results are required to be certified and released prior to the end of the contest periods, and so is contrary to existing law. This conflict will create confusion and possibly lead to litigation as to the interpretation of the various conflicting provisions. The Department recommends that the bill either be amended by deleting the reference to "certification" of the recount results or by clarifying that the certification of *recount* results is different from the certification of the *election* results.

The Department is also concerned that subsection (g) of the new section being added by section 1 of this bill bars a *candidate* who files a petition for recount from filing an election contest complaint, but does not similarly bar the affected qualified political party or group of thirty voters of an election district, who are also permitted to file an election contest pursuant to section 11-172, HRS, from filing an election contest complaint after a recount. We believe such a disparity would cause the purpose and necessity of the prohibition against a candidate's filing both a recount petition and an election contest complaint to come into question, as the prohibition appears to be illusory and will not bar an election contest complaint from being filed after a recount.

In section 2, the bill amends section 11-172, 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. For example, "force majeure" is defined as: An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars.) Black's Law Dictionary 718 (9th ed. 2009). If the Legislature intends only acts of nature to be a cause of an election contest, section 11-92.3, HRS, refers to the postponement of the elections in the event of natural disasters, and includes flood, tsunami, earthquake, volcanic eruption, or high wind. The Department recommends that the terms be clarified to avoid confusion and mitigate unnecessary litigation.

Lastly, the Department has serious concerns regarding the contests for cause amendments because the bill appears to change the legal standard recognized by the courts in election contests. 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 specific causes are set forth by statute but are such that "*could cause a difference in the election results.*" The bill proposes to amend the foregoing with shall "contain 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 explaining 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), which establishes a well-understood standard. Tataii v. Cronin, 119 Haw. 337, 339, 198 P.3d 124, 126 (2008); Akaka v. Yoshina, 84 Haw. 383, 387, 935 P.2d 98, 102 (1997); Funakoshi v. King, 65 Haw. 312, 317, 651 P.2d 912, 915 (1982); Elkins v. Ariyoshi, 56 Haw. 47, 48, 527 P.2d 2236, 237 (1974); Waters v. Nago, No. SCEC-14-0001317, 2014 WL 7334915, at *6 (Haw. Dec. 24, 2014); Cermelj v. Kawauchi, No. SCEC-12-0000722, 2012 WL 3711449, at *1 (Haw. Aug. 28, 2012). This present standard 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. See, e.g., Office of Hawaiian Affairs v. Cayetano, 94 Haw. 1, 6, 6 P.3d 799, 804 (2000) ("Voiding an election and ordering a new one represents one of the more extreme remedies available to a court sitting in equity[;]" describing invalidating the result of an election

a "drastic, if not staggering" form of relief). For these reasons the Department recommends that the present section 11-172, HRS, be retained without amendment, to preclude confusion as to the provision's meanings and mitigate litigation and delay in certifying election results.

The constitutional concern raised above about article II, section 10, 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.

Thank you for the opportunity to testify on this matter.