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HAWAII REPUBLICAN PARTY

Electronically Filed
FIRST CIRCUIT
1CCV-22-0001499
28-NOV-2022
03:54 PM
Dkt. 1 CMP

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

HAWAII REPUBLICAN PARTY,

Plaintiff,

vs.

SCOTT NAGO, in his official capacity as
Chief Election Officer of the State of Hawai'i;
STATE OF HAWAII OFFICE OF
ELECTIONS,

Defendant.

Case No.

COMPLAINT

COMPLAINT

The Plaintiff, HAWAII REPUBLICAN PARTY (hereinafter the "Plaintiff" or "Plaintiff"),
by and through counsel William Dean of Ohana Law Firm, hereby complains and avers as follows:

PARTIES INVOLVED

1. This is an original action brought forth by the Hawaii Republican Party ("Plaintiff")
against the Defendant, SCOTT NAGO, in his capacity as the Chief Election Officer of the State
of Hawaii ("Defendant"), and the STATE OF HAWAII OFFICE OF ELECTIONS.

2. This Court has jurisdiction over this action pursuant to HRS §661-1.

FACTUAL BACKGROUND

3. On Tuesday, November 8, 2022, a General Election was held in the state of Hawaii (“2022 General Election”).

4. During the election several Official Observers designated by the Plaintiff noted significant and repeated violations of state election law by the Defendant, specifically the failure to properly monitor and audit the electronic voting systems used during the election as required by Hawai‘i Revised Statutes (“HRS”) §16-42.

5. Plaintiff acknowledges that they cannot meet the statutory requirements articulated in HRS §11-172 to request an injunction against the Defendant’s certification of the 2022 General Election, in particular § 11-172’s requirement that Plaintiff’s demonstrate errors “that could cause a difference in the election results.” *See, e.g., Akaka v. Yoshina*, 84 Hawai‘i 383, 387 (1997) “A complaint challenging the results of [a general] election pursuant to HRS §11-172 fails to state a claim unless the plaintiffs demonstrate errors that would change the outcome of the election[.]” (internal citations omitted).

6. Nonetheless, Plaintiff’s believe that Defendant’s failure to properly conduct a complete post-election, pre-certification audit of the electronic voting systems used during the general election, according to the specific procedures the state legislature has mandated under HRS §11-172, represents a serious breach of the election laws of the state of Hawaii and serves to undermine public confidence in the validity of elections.

7. Plaintiff therefore requests that this Court issue a declaratory judgment and injunctive relief that the Chief Election Officer of the state of Hawaii must follow the letter of the law as it relates to the testing and auditing electronic voting machines used during elections.

FIRST CLAIM

8. Plaintiff realleges, reaffirms and incorporates by reference all of the foregoing paragraphs as if fully set forth herein.

9. HRS §16-42 sets forth the requirements for the use of electronic voting systems in Hawaii elections. As an essential safeguard and check against election fraud, the statute requires that the systems either “generate a paper ballot or voter verifiable paper audit trail that may be inspected and corrected by the voter before the vote is cast.” HRS §16-42(a).

10. The statute also contains three requirements that must be met before the state’s Chief Election Officer can rely on the electronic voting system’s electronic tally of votes “in lieu of counting the paper ballots by hand or with a mechanical tabulation system.” HRS §16-42(b).

Those requirements are as follows:

- (1) The electronic voting system is subject to inspection, audit, and experimental testing, by qualified observers, before and after the election, pursuant to administrative rules adopted by the chief election officer under chapter 91;
- (2) No upgrades, patches, fixes, or alterations shall be applied to the system through thirty days after the election;
- (3) The chief election officer conducts a post-election, pre-certification audit of a random sample of not less than ten per cent of the precincts employing the electronic voting system, **to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system** [emphasis added] in those precincts. HRS § 16-42(b)(1)-(3).

11. HRS § 16-42(b)(3) unambiguously therefore requires the Chief Election Officer to compare vote totals **with paper ballots**. Multiple official Election Observers however, noted that the Defendant, and state election officials acting at his direction, used scanned ballots and not the required paper ballots to verify the electronic tallies generated by the electronic voting systems.

12. A notarized affidavit of Election Observer Darlene McCormick, dated November 17, 2022, states “Hand tallies to precinct 01/03, 03/02, 4/03, 06/02 were not done!”

13. A notarized affidavit of Election Observer Terri Schwenzer, dated November 17, 2022, states “[U]sed the scanned in ballots on the machines to do 01/03, 03/02, 04/03 & 06/02.”

14. A signed witness statement from Election Observer Chanara Richmond, dated November 16, 2022, states “I observed images of ballots on a computer monitor being tallied by a government employee.”

15. A signed witness statement from Election Observer Virginia Enos, dated November 25, 2022, states, “Workers ‘audited the ballots’ by watching as an image of each cast ballot was shown across a computer monitor electronically. As each projected images of scanned ballots flashed up on the computer monitor, the State workers marked down counts for what they observed on the image of the ballot on the computer monitor. State workers then compared those computer image counts to the electronic computer printout that they were provided by the State Office of Elections.”

16. A signed witness statement from Election Observer Gail Smith, dated November 25, 2022, states, “An Official Observer randomly selected two cards with Precinct numbers turned over for secrecy, and another observed selected the races/contests to audit, one per precinct. The elections workers then pulled out the printed matching final elections reports for the two precincts. The Hart employee retrieved precincts to be audited, using ballot images, one precinct per monitor.”

17. A notarized affidavit of Election Observer Corrine Solomon, dated November 27, 2022, states, “[T]he post-election pre-certification audit was done with ballot images only for the mail-in ballots.”

18. A signed witness statement from Election Observer Christopher Lynden, dated November 27, 2022, states, “Other unnamed election workers pulled out the ballot totals that had

been sent to Honolulu after tabulations had been completed on Election day (and the following day, when counting was completed). On 11-22-22 these same workers began visually reviewing the ballots that had been previously entered into the computers, making checkmarks on a form for the specific candidates in the two races that had been selected.”

19. The testimony of these multiple Election Observers makes it clear that the Defendant’s practice of comparing ballot images with tallies, not paper ballots with tallies was pervasive and is clearly a violation of HRS §16-42(b)(3).

20. HRS §16-42(b)(3) prescribes auditing procedures are required pre-certification and are a prerequisite for the Chief Election Officer’s reliance “on electronic tallies created directly by electronic voting systems, in lieu of counting the paper ballots by hand or with a mechanical tabulation system.” By failing to comply with HRS §16-42(b)(3), Defendant cannot properly certify the 2022 election, and Plaintiff will suffer harm as a result.

SECOND CLAIM

21. Plaintiff realleges, reaffirms and incorporates by reference all of the foregoing paragraphs as if fully set forth herein.

22. Defendant also failed to comply with HRS §16-42’s requirements regarding the scope of the audit sample to include all races marked on ballots in a precinct.

23. As noted above HRS §16-42(b)(3) requires that “[t]he chief election officer conducts a post-election, pre-certification audit *of a random sample of not less than ten per cent of the precincts employing the electronic voting system* [emphasis added], to verify that the electronic tallies generated by the system in those precincts equal hand tallies of the paper ballots generated by the system in those precincts”.

24. HRS §16-41 defines “Voter verifiable paper audit trail “as “the paper record that constitutes *a complete record of ballot selections that is verified by the voter* [emphasis added]. The record may also be used to assess the accuracy of the voting machine's electronic record and to verify the election results.”

25. Read together, these two statutes clearly require the chief elections officer to count tallies on every race in the precincts which have been randomly sampled for testing.

26. Once again, multiple official election observers noted that this required procedure was not followed by the Defendant or the state election officials acting at his direction.

27. A notarized affidavit of Election Observer Darlene McCormick, dated November 17, 2022, states, “One 1 race for each of these was checked against the computer images. In precinct 07/02 all paper ballot images were reviewed but only for 1 candidate not for the entire ballot.”

28. A notarized affidavit of Election Observer Terri Schwenzer, dated November 17, 2022, states, “[U]sed the scanned in ballots on the machines to do 01/03, 03/02, 04/03 & 06/02 and did only 1 race on each.”

29. A witness statement from Election Observer Chanara Richmond, dated November 16, 2022, states, “I did not conduct a manual tally of every race on the ballots from any Precinct.”

30. A witness statement from Election Observer Timothy Stokesbary, dated November 25, 2022, states, “I arrived at 0900 and the observers just picked the two precincts to be audited. They picked 15-04 for the governors race, and 17-02 for the U.S. Reps race to be audited ... Then Scott Nago started counting the race totals.”

31. A signed witness statement from Election Observer Virginia Enos, dated November 25, 2022, states, “The only portion of the audit that was conducted to verify that the electronic

tallies generated by the system were equal to the hand tallies of the original paper ballots were those ballots that were cast by “walk-in” voters that voted in person in Voter Service Centers. That process was conducted by contracted workers of the State of Hawaii. Walk-in ballots represent an extremely small percentage of the total ballots received.”

32. A signed witness statement from Election Observer Gail Smith, dated November 25, 2022, states, “I then moved on to observe Scott Nago audit the In-Person paper ballots of a single contest each of Precinct 15-4 for Governor /Lieutenant governor and Precinct 17-2 for US representative District 2 ... I also observed the audit of one of the batches from a precinct 15-4 VBC for the Governor/Lieutenant Governor using the paper ballots.”

33. A notarized affidavit of Election Observer Corrine Solomon, dated November 27, 2022, states, “Only one race per randomly chosen precinct was audited.”

34. A signed witness statement from Election Observer Christopher Lynden, dated November 27, 2022, states, “We then began to count the two races – one for the governors race and one for the US Representative ... We reviewed the Laws that applied to this process and spoke with the election officials about counting all races in both the selected precincts. We were informed that they had always only pricked two races for the sake of time and effort, and that the two races complied with the law that required ‘tallies’ in the plural.”

35. By failing to conduct a proper audit in compliance with HRS §16-42(b)(3) and HRS §16-41, Defendant cannot properly certify the 2022 election, and Plaintiff will suffer harm as a result.

RELIEF REQUESTED

1. That process of this Court issue demanding Defendant, and all those claiming by, through, or under them, to appear and answer the allegations set forth herein;

2. That the Court grant judgment for Plaintiff declaring the Defendant has failed to comply with the applicable statutes on auditing and certifying the 2022 General Election;

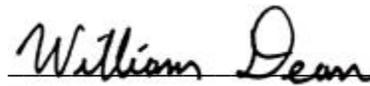
3. That the Court order Defendant to conduct a proper audit of 2022 election results in full compliance with the issues raised herein,

4. That the Court order Defendant to conduct proper audits of future elections in full compliance with the issues raised herein,

5. That Plaintiffs have judgment against Defendant as to all other issues raised herein;

6. That Plaintiffs have judgment for any further relief that the Court deems reasonable, just, and equitable.

DATED: November 28, 2022.



William Dean
Attorney for Plaintiff