

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Petition of

RALPH S. CUSHNIE and TAMARA McKAY,

Petitioners,

v.

SCOTT T. NAGO, in his official capacity as

Chief Election Officer, State of Hawai'i; and

the OFFICE OF ELECTIONS, State of Hawai'i,

Respondents.

SCPW-26-0000498

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EMERGENCY PETITION FOR ORIGINAL WRIT OF MANDAMUS

PETITIONERS' REPLY TO RESPONDENTS' ANSWER

I. INTRODUCTION

The Court directed Respondents to address two questions: whether the Office of Elections failed or refused to provide staff support requested pursuant to HRS §11-1.5(b), and whether any such failure prevented the Elections Commission from meeting to elect a Chair. The record answers both questions in the affirmative.

The Office of Elections twice declined in writing to provide administrative support for proposed organizational meetings. The requested support consisted of ordinary administrative functions, including meeting technology and distribution of notice to the Commission mailing list. No meeting occurred, and the Commission remained unable to organize and elect a Chair.

Respondents do not dispute those events. Instead, they contend that no duty arose because the Elections Commission had not first acted by majority vote and no sitting Chair requested the support. That interpretation reads into HRS §11-1.5(b) conditions the Legislature did not enact. The statute directs the Office of Elections to provide staff support to the Elections Commission;

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it does not condition that duty upon prior Commission action, a request through a sitting Chair, or prior resolution of governance questions.

More fundamentally, Respondents' interpretation renders the statute incapable of operation under the circumstances presented. Once the Commission lacked a Chair, it could act only by assembling at a lawfully noticed public meeting. Yet it could not complete the notice process without the administrative support and mailing-list access withheld by the Office. Respondents' construction therefore makes prior Commission action a prerequisite to receiving the very support necessary for the Commission to act.

The Court need not resolve the Commission's governance questions to answer the questions presented. The dispositive issue is whether HRS §11-1.5(b) may be construed to require conditions that the Elections Commission cannot satisfy once it lacks a Chair. Respondents' construction would substitute the Chair for the Elections Commission as the statutory beneficiary of the Office's support obligation and permit the Office to determine whether the independent oversight body created by the Legislature may ever assemble.

II. PETITIONERS HAVE STANDING TO SEEK MANDAMUS

Respondents contend that Petitioners lack standing because they did not obtain prior authorization from the Elections Commission and appear without counsel. Neither contention defeats this proceeding.

Petitioners appear as natural persons seeking mandamus to compel performance of the ministerial duty imposed by HRS §11-1.5(b). They seek enforcement of Respondents' own statutory obligation after Respondents refused the administrative support necessary for the Commission to assemble.

Standing in Hawai'i is a prudential inquiry focused on whether the party seeking relief possesses a sufficient personal stake in the controversy. *Tax Found. of Hawai'i v. State*, 144 Hawai'i 175, 191, 439 P.3d 127, 143 (2019). Petitioners possess that stake because Respondents' refusal prevented them from assembling to perform their statutory duties.

Cushnie v. Nago, SCEC-24-0000797, Findings of Fact, Conclusions of Law, and Judgment at 10–11 (Dec. 20, 2024), does not establish otherwise. That election contest was governed by HRS

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§11-172, which expressly authorizes an action by thirty voters. This proceeding is not an election contest and does not depend upon that statutory standing requirement.

Respondents' reliance on *Oahu Plumbing & Sheet Metal, Ltd. v. Kona Construction, Inc.*, 60 Haw. 372, 590 P.2d 570 (1979), is likewise misplaced. *Oahu Plumbing* addresses whether a non-attorney may appear on behalf of an artificial legal entity. Petitioners do not appear on behalf of the Elections Commission. They appear in their individual capacities to prosecute their own cause as permitted by HRS §605-2. Because they do not undertake the representation of another person or entity, HRS §605-14 does not apply.

Nor does the absence of prior Commission authorization create a standing defect. That argument assumes the proposition in dispute. Respondents require formal Commission action before support may be requested while maintaining an interpretation that prevents the Commission from assembling to take that action. The inability to obtain prior Commission authorization is therefore a consequence of the alleged statutory violation, not a basis for avoiding review.

Petitioners accordingly have standing to pursue this petition. The merits turn on the proper construction of HRS §11-1.5(b).

III. RESPONDENTS' INTERPRETATION RENDERS HRS §11-1.5(b) INCAPABLE OF OPERATION

The central issue presented by Respondents' Answer is whether their interpretation of HRS §11-1.5(b) gives effect to the statute the Legislature enacted. It does not.

Respondents acknowledge that HRS §11-1.5(b) requires the Office of Elections to provide staff support to the Elections Commission "as requested by the elections commission." They nevertheless contend that no duty arose because the requests at issue were not first authorized by formal Commission action or made through a sitting Chair. In doing so, Respondents equate "requested by the elections commission" with "requested only after formal Commission action." The statute contains no such limitation.

Respondents' interpretation proceeds as follows:

Only a sitting Chair or a Commission majority may request staff support.
There is no sitting Chair.

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Without a Chair, the Commission may act only through a majority.

A majority may act only at a duly noticed public meeting.

The meeting cannot be lawfully noticed without the administrative support and mailing-list distribution controlled by the Office of Elections.

Therefore, no majority action can occur.

Without majority action, no request for staff support is recognized.

Without a recognized request, the Office has no duty to provide staff support.

The Commission therefore cannot assemble to elect a Chair.

The condition Respondents impose cannot be satisfied because its satisfaction depends upon prior performance of the very duty Respondents refuse to perform.

HRS §92-2.5 prohibits obtaining the majority authorization Respondents require through serial communications outside a public meeting. Their implied prerequisite therefore cannot lawfully be satisfied.

Nothing in HRS §11-1.5(b) conditions the Office's mandatory duty upon prior Commission action, action through a sitting Chair, or prior resolution of governance questions. Those conditions appear nowhere in the statutory text. By implying them, Respondents transform a mandatory statutory duty into one that may never arise precisely when the Commission most requires that support.

Respondents' construction is inconsistent with HRS §§1-14 and 1-15. It reads into HRS §11-1.5(b) conditions the Legislature did not enact and produces a construction that cannot operate once the Elections Commission lacks a Chair. The implied prerequisites prevent any valid request for support, which prevents the meeting necessary to elect a Chair. HRS §11-1.5(b) would therefore cease to function precisely when its mandatory support obligation is most needed. The statutes should not be construed to produce that result.

Respondents thus ask the Court to read HRS §11-1.5(b) as requiring a condition precedent that the law itself prevents the Elections Commission from satisfying once it lacks a Chair. That interpretation would leave the Elections Commission without any lawful means of organizing itself and would render the Office's mandatory support obligation incapable of operation.

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IV. RESPONDENTS CONFLATE THE COMMISSION'S AUTHORITY WITH THE OFFICE'S SEPARATE STATUTORY DUTY

Respondents' Answer conditions the Office's statutory duty upon the prior resolution of questions concerning the Commission's authority. HRS §11-1.5(b) contains no such condition.

The question presented by this Petition is narrower and antecedent. Before the Commission may exercise any authority, it must first be able to assemble. HRS §11-1.5(b) assigns the Office of Elections—not the Commissioners—the mandatory duty to provide staff support to the Elections Commission. That administrative duty is separate from the Commission's authority to conduct its affairs and, under the circumstances presented, was necessary for the Commission to convene.

Respondents nevertheless merge these distinct concepts. They contend that uncertainty regarding who could convene or preside over a meeting relieved the Office of its statutory duty to provide the administrative support necessary for that meeting to occur. That construction treats legal uncertainty as administrative discretion, although HRS §11-1.5(b) grants none.

Respondents' own interpretation confirms the error. They describe the Office's support obligation as arising through formal Commission action and, once a Chair is selected, through the Chair, asserting that support to the Chair is "in essence support to the Elections Commission as a whole." (de Vega Decl. ¶¶ 12–14). Respondents thus substitute the Chair for the Elections Commission, although HRS §11-1.5(b) identifies only the Elections Commission as the beneficiary of the Office's mandatory support obligation. The statute contains no such substitution or condition.

Nothing in Chapter 11 authorizes the Office to determine whether governance questions have been sufficiently resolved before performing its statutory duty. The Legislature required the Office to provide staff support; it did not authorize the Office to decide who may exercise Commission authority or suspend performance whenever uncertainty exists concerning the Commission's internal affairs.

Respondents' construction fundamentally alters the statutory relationship established by the Legislature. Rather than serving as the neutral administrative support entity required by HRS §11-1.5(b), the Office acquires the practical authority to determine whether the independent

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Elections Commission may ever assemble. Nothing in Chapter 11 confers such gatekeeping authority upon the Office.

Whether the Commission ultimately possessed authority to conduct a particular meeting is therefore a separate question from whether the Office was required to provide the neutral administrative support necessary for the Commission to assemble. Uncertainty concerning the former does not eliminate the mandatory duty imposed by the latter.

V. ACT 57 CONFIRMS THE LEGISLATURE'S STATUTORY DESIGN

Act 57 fundamentally restructured Hawai'i's election oversight by replacing the Elections Appointment and Review Panel with an independent Elections Commission and assigning it responsibility to perform the oversight duties assigned by HRS §§11-7, 11-7.5, and 11-8.5. Act 57 expressly states that Part II “establishes a commission to oversee the office of elections.”

That structure is complemented by HRS §11-1.5(b), which requires that the Office of Elections “shall provide staff support to the elections commission.” The support obligation enables the Commission to perform the oversight responsibilities the Legislature assigned to it.

Respondents' construction reverses that statutory design. Instead of the Office providing the administrative support necessary for the Commission to exercise its oversight responsibilities, the Office acquires the practical ability to determine whether the Commission may assemble at all. Nothing in Chapter 11 authorizes that result.

VI. THE RECORD ANSWERS THE COURT'S QUESTIONS

The Court directed Respondents to address two factual questions: (1) whether the Office of Elections failed or refused to provide staff support requested pursuant to HRS §11-1.5(b); and (2) whether any such refusal prevented the Elections Commission from meeting to elect a Chair. Respondents' own exhibits substantially answer both questions.

A. First Question — Whether the Office Refused Requested Staff Support

Respondents' exhibits establish the sequence of events.

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Respondents' Exhibit 2 reflects that, before adjournment of the June 10, 2026 meeting, the Commissioners agreed to reconvene on June 24 after requesting a written legal opinion concerning the Chair vacancy.

Respondents' Exhibit 3 establishes that Chair Curtis subsequently canceled the June 24 meeting, explaining that the Commission's composition made election of a successor unlikely before his term expired.

Following the expiration of the Chair's term, Petitioners requested the administrative assistance required by HRS §11-1.5(b) to convene an organizational meeting. The Office twice responded in writing that it "will not be providing administrative support" for the proposed meetings. Petition Ex. 5; First Supplemental, Attachment 1.

Accordingly, the record demonstrates that requested staff support was expressly declined.

B. Second Question — Whether the Refusal Prevented the Commission From Meeting

The record likewise answers the Court's second question.

Respondents acknowledge that the Office ordinarily provides administrative support to the Elections Commission and that Mr. de Vega serves as the employee responsible for that function.

After the Office declined to provide support, no meeting notice was distributed by the Office, no meeting occurred, no Chair was elected, and the Commission remained unable to organize.

Respondents' Exhibit 4 further confirms that Sunshine Law compliance required notice to persons on the Commission's mailing list, while expressly declining to determine whether the Office had fulfilled its independent obligations under HRS §11-1.5(b). The letter therefore neither excuses nor resolves the Office's separate statutory duty to provide staff support.

The undisputed sequence reflected in the record is therefore:

June 10: The Commission agreed to reconvene on June 24.

June 15: Chair Curtis canceled that meeting before expiration of his term.

July 1–27: Petitioners repeatedly requested the administrative support necessary to convene an organizational meeting, including notice distribution or the Commission mailing list.

July 2–27: The Office of Elections repeatedly declined or failed to provide the requested

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support.

Result: No organizational meeting occurred. No Chair was elected.

That sequence directly answers the questions presented in the Court's Order. Resolution of the broader governance issues advanced by Respondents is unnecessary to determine whether requested staff support was refused and whether, following that refusal, the Elections Commission did not meet to elect a Chair.

VII. RESPONDENTS' REMAINING ARGUMENTS DO NOT ALTER THE STATUTORY QUESTION PRESENTED

Respondents' mootness argument fails because the challenged interpretation remains unchanged. Respondents continue to maintain that the Office's duty under HRS §11-1.5(b) arises only after prior Commission authorization or action through a sitting Chair. That continuing interpretation governs the Commission's present ability to organize and leaves the controversy live.

Respondents' references to ethics concerns likewise do not alter the statutory analysis. No provision of Chapter 11 authorizes the Office to suspend performance of HRS §11-1.5(b) based upon ethical uncertainty. Such concerns cannot alter the duty imposed by HRS §11-1.5(b).

The Court likewise need not resolve the governance questions identified by Respondents—including who may convene or preside over an organizational meeting, the number of votes required to elect a Chair, the possible role of the Chief Justice, or questions of parliamentary procedure. Those issues concern how the Commission may exercise its authority once assembled. They do not determine whether the Office was required to provide the neutral administrative support necessary for the Commission to assemble.

None of Respondents' remaining arguments alters the statutory question presented by the Court or the undisputed facts answering it.

VIII. CONCLUSION

The record answers the questions presented by the Court. Requested staff support under HRS §11-1.5(b) was refused, and the Elections Commission did not assemble to elect a Chair. Instead, Respondents ask the Court to construe HRS §11-1.5(b) as imposing conditions that the Legislature did not enact.

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That construction should be rejected. It conditions the Office's mandatory duty upon prior Commission action that cannot occur until the Office first performs the very administrative support the statute requires. It further substitutes the Chair for the Elections Commission as the statutory beneficiary of HRS §11-1.5(b), even though the statute imposes no such limitation.

Nothing in Chapter 11 authorizes the Office of Elections to determine whether the independent Elections Commission may assemble before performing its mandatory administrative support obligation. Respondents' construction would permit precisely that result.

Respondents ask the Court to read HRS §11-1.5(b) as requiring a condition precedent that the law itself prevents the Elections Commission from satisfying once it lacks a Chair. That interpretation would leave the Elections Commission permanently unable to organize and would allow the Office of Elections to determine whether the independent oversight body created by the Legislature may ever assemble. The statutes should not be construed to produce a result that defeats the Legislature's creation of an independent Elections Commission and allows the entity subject to its oversight to prevent the Commission from ever organizing.

Accordingly, Petitioners respectfully request that the Court grant the requested writ and direct Respondents to perform the ministerial duty imposed by HRS §11-1.5(b) according to its terms.

Respectfully submitted,

Dated: July 28, 2026

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