

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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;

the OFFICE OF ELECTIONS, State of Hawai‘i;

and ELECTIONS COMMISSION, State of Hawai‘i,

Respondents.

SCPW-26-0000498

**Electronically Filed
Supreme Court
SCPW-26-0000498
14-OCT-2026
11:53 AM
Dkt. 71 RACB**

EMERGENCY PETITION FOR ORIGINAL WRIT OF MANDAMUS

**PETITIONERS’ RESPONSE TO AMICUS CURIAE BRIEF OF
PUBLIC INTEREST LEGAL FOUNDATION**

Petitioners Ralph S. Cushnie and Tamara McKay, appearing pro se, respectfully submit this Response to the Amicus Curiae Brief of Public Interest Legal Foundation (“PILF”), Dkt. 57, pursuant to this Court’s October 9, 2026 Order, Dkt. 59.

INTRODUCTION

Petitioners substantially agree with PILF’s central statutory analysis. Act 57 created an integrated institutional structure. It increased the operational autonomy of the Office of Elections (“OE”), established the Elections Commission (“Commission”) to oversee OE, assigned substantive responsibilities to the Commission, and required OE to “provide staff support to the elections commission, as requested by the elections commission.” 2004 Haw. Sess. Laws Act 57, §§ 1–2, 6, 8.

PILF identifies the structural significance of that arrangement: the Commission’s administrative dependence upon OE cannot reasonably be construed to give OE institutional control over whether the Commission can assemble and perform the functions the Legislature assigned to it.

RESPONSE TO PUBLIC INTEREST LEGAL FOUNDATION AMICUS

PILF correctly distinguishes the administrative process necessary for Commission assembly from the substantive authority the Commission exercises collectively. Dkt. 57 at 5–7.

The existing record demonstrates why that distinction matters. Respondents maintain that OE provides Commission support in response to actions passed by majority vote and assists a duly selected Chair in convening and agendizing meetings. They further maintain that, absent Commission authorization, the only individual Commissioner authorized to convene a meeting is the Chair. Dkt. 16 at 5–6. But after the prior Chair’s term expired, Respondents’ administration of that construction left the Commission unable to reach the meeting at which it could exercise the collective authority Respondents insist is required.

That is the circularity presented by this case.

Respondents’ October 13 supplemental memorandum narrows that dispute. Respondents now state that, when no Chair has been selected, OE would convene a meeting and provide §11-1.5(b) staff support upon a written request by at least five Commissioners. Dkt. 69 at 5–6. Respondents derive that threshold from §11-7(d)’s majority-vote requirement. *Id.*

That refinement does not eliminate the antecedent statutory question. Petitioners do not contend that an individual Commissioner may exercise the Commission’s substantive authority. The issue is whether HRS §11-7(d)’s majority-vote requirement for Commission action may be imported backward so that concurrence by at least five Commissioners becomes a condition precedent to the §11-1.5(b) staff support necessary for the Commission to assemble and exercise that collective authority.

Read in the context of Act 57 as a whole, it should not.

I. PILF CORRECTLY IDENTIFIES ACT 57’S INTERDEPENDENT STATUTORY DESIGN

PILF properly begins with the statutory structure rather than considering HRS § 11-1.5(b) in isolation.

Hawai‘i courts read statutory language “in the context of the entire statute” and construe it “in a manner consistent with its purpose.” *Kanahele v. Maui Cnty. Council*, 130 Hawai‘i 228, 244 (2013). PILF invokes that principle because Act 57 established an interdependent institutional arrangement. Dkt. 57 at 6.

RESPONSE TO PUBLIC INTEREST LEGAL FOUNDATION AMICUS

Act 57 deliberately created complementary institutional functions. It increased OE's operational autonomy while separately establishing the Commission "to oversee the office of elections." 2004 Haw. Sess. Laws Act 57, § 1.

Act 57 also assigned substantive responsibilities to the Commission. Those responsibilities now include, among other things, holding public hearings, investigating violations and complaints, employing and evaluating the Chief Election Officer, advising the Chief Election Officer on election matters, and conducting the elections review program prescribed by HRS § 11-8.5. See HRS §§ 11-7.5, 11-8.5; 2004 Haw. Sess. Laws Act 57, § 6.

The Legislature then supplied the administrative relationship necessary to support that institution: "[t]he office of elections shall provide staff support to the elections commission, as requested by the elections commission." HRS § 11-1.5(b); 2004 Haw. Sess. Laws Act 57, § 8.

Those provisions must operate together.

The Commission's dependence upon OE for staff support does not diminish the statutory responsibilities assigned to the Commission. Nor should that administrative dependence be construed to give OE practical control over whether the Commission can assemble and perform those responsibilities.

Act 57 created both an autonomous Office of Elections and a functioning Elections Commission; the statutory scheme should be construed to preserve both.

Administrative dependence is not institutional control.

II. THE EXISTING RECORD DEMONSTRATES THE CIRCULARITY PILF IDENTIFIES

The circularity identified by PILF is not hypothetical. It is demonstrated by the controversy already before this Court.

The Court's July 17 Order directed Respondents to address two questions: whether OE "failed or refused to provide staff support to the Elections Commission as requested pursuant to" HRS § 11-1.5(b), and whether any such failure prevented the Commission "from meeting to elect a chairperson." Dkt. 14 at 1–2.

RESPONSE TO PUBLIC INTEREST LEGAL FOUNDATION AMICUS

Respondents' Answer supplied the asserted basis for withholding the requested support.

Respondents characterized Petitioners' request as an attempt to "unilaterally call a meeting of the Elections Commission, without being the chairperson of that body or in accordance with any act of the body passed by a majority vote." Dkt. 16 at 2. They relied upon HRS § 11-7(d), under which the Commission "shall act by majority vote of its membership," and represented that OE provides support "in response to actions passed by the Commission by a majority vote." Id. at 3, 5. Respondents further asserted that OE assists the Chair with convening and agendizing meetings, and that "[t]he only single commissioner who is authorized to convene a meeting on the Elections Commission's behalf is the chairperson selected by the Commission." Id. at 5–6.

The resulting problem is structural.

Once there was no sitting Chair, Respondents' position required either prior collective Commission authorization or action through a Chair before OE would recognize the administrative basis for supporting a meeting. Yet the Commission could not exercise that collective authority without assembling: no sitting Chair, no recognized individual initiation; no prior Commission authorization without assembly; OE did not provide the requested administrative support; and the Commission did not assemble to take the collective action Respondents required as a condition of support.

Respondents' supplemental memorandum now offers a prospective means of initiating that process: OE states that it would provide staff support upon a written request by at least five Commissioners stating their availability for a specified meeting date. Dkt. 69 at 5–6. OIP concludes that Commissioners may communicate concerning availability and comparable meeting logistics without discussing "board business," regardless of the number participating. Dkt. 67 at 2–3.

But permission to coordinate does not establish a statutory prerequisite. OIP expressly declines to determine whether such communications constitute a request "by the elections commission" under HRS §11-1.5(b), and explains that Chapter 92 does not determine who may convene a meeting, establish its agenda, or request staff support. Id. at 3–5. Its administrative/"board business" distinction instead reinforces the narrower point here: administrative steps necessary to reach a meeting need not themselves constitute the collective Commission action exercised at that meeting.

RESPONSE TO PUBLIC INTEREST LEGAL FOUNDATION AMICUS

Petitioners accept that the Commission “shall act by majority vote of its membership.” But the administrative steps necessary to bring the Commission into a public meeting are distinct from the collective Commission action governed by §11-7(d). Those steps enable collective action; they do not exercise it. Section 11-7(d) therefore should not be extended backward to treat the administrative process necessary to reach assembly as though it were itself Commission action. Initiative is not authority.

The Court’s October 5 Order confirms that this antecedent question is before it, directing supplemental briefing on how the Commission may lawfully convene and request §11-1.5(b) support when no Chair has been selected. Dkt. 49 at 3–4. The questions identified by the Court converge on the issue presented here: how the Commission may lawfully reach the public meeting at which §11-7(d)’s collective-action requirement can operate.

III. RESPONDENTS’ CONSTRUCTION WOULD DISABLE THE OVERSIGHT MECHANISM ACT 57 CREATED

PILF’s analysis demonstrates why the consequence extends beyond a missed meeting or an unfilled Chair position.

Act 57 created the Commission to oversee OE. 2004 Haw. Sess. Laws Act 57, § 1. The Legislature then assigned the Commission affirmative statutory duties and responsibilities under HRS §§ 11-7.5 and 11-8.5. Those responsibilities include public hearings and investigations, evaluation of the Chief Election Officer, election-review and observer-program responsibilities, biennial evaluation, and reporting to the Legislature. They belong to the Commission collectively.

But collective authority cannot be exercised by a body that cannot assemble.

The institutional sequence is therefore straightforward:

Initiation → §11-1.5(b) administrative support → lawful public assembly → quorum → collective Commission action → statutory oversight.

Quorum and majority requirements operate at the collective-action stage of that sequence. On the record before the Court, Respondents’ administration of the support process produced the opposite institutional result: no recognized initiation, no OE staff support, no Commission assembly, no collective action, and therefore no statutory oversight.

RESPONSE TO PUBLIC INTEREST LEGAL FOUNDATION AMICUS

The consequence was therefore not confined to the inability to select a Chair; it disabled the Commission's ability to exercise its collective statutory responsibilities.

The resulting statutory imbalance is clear: OE's operational functions continue while the Commission cannot perform the oversight functions Act 57 assigned to it.

That institutional consequence is particularly significant here because the period during which the Commission could not assemble extended into an active election cycle, while OE continued exercising the election-administration responsibilities that Act 57 placed within the Commission's statutory oversight structure.

PILF's analysis therefore presents the dispositive institutional question:

Can Act 57 reasonably be construed to allow the Office of Elections, through its administration of the staff-support obligation imposed by §11-1.5(b), to disable the oversight mechanism the Legislature created to oversee that Office?

Petitioners submit that, read as a whole, the statutory scheme does not permit that result.

IV. PETITIONERS' CONSTRUCTION PRESERVES BOTH SIDES OF ACT 57'S LEGISLATIVE DESIGN

Commission authority remains collective. PILF recognizes that an individual Commissioner may not "unilaterally exercise the Elections Commission's substantive authority." Dkt. 57 at 6.

Petitioners agree.

Petitioners' construction preserves the Commission's collective decision-making requirements. Administrative steps necessary for the Commission to assemble are distinct from the collective exercise of Commission authority governed by HRS §11-7(d).

Thus:

Initiation → §11-1.5(b) administrative support → properly noticed public meeting → assembly → quorum → collective Commission action → Chair election / statutory oversight.

That is the statutory system functioning rather than being rewritten.

The Court need not prescribe a comprehensive procedure for future Commission meetings or determine whether every individual communication constitutes a request "by the elections commission" under §11-1.5(b). Respondents now state that, absent a permanent Chair, OE would

RESPONSE TO PUBLIC INTEREST LEGAL FOUNDATION AMICUS

provide staff support upon a written request by at least five Commissioners, deriving that threshold from §11-7(d)'s majority-vote provision. Dkt. 69 at 5–6. The narrower question is whether that collective-action requirement may be imported backward as a condition precedent to §11-1.5(b) staff support.

Section 11-1.5(b) directs that OE “shall provide staff support to the elections commission, as requested by the elections commission.” That phrase must be given effect, but it does not itself establish a five-Commissioner threshold. Respondents derive that threshold from §11-7(d), which provides that the Commission “shall act by majority vote of its membership.” Dkt. 69 at 5. The provisions address different stages: §11-1.5(b) governs staff support; §11-7(d) governs collective Commission action. Reading them together does not require importing §11-7(d)'s majority requirement backward as a condition precedent to the support through which the Commission reaches assembly.

Nor does §11-7(d) itself assign OE authority to establish that pre-assembly threshold. That provision governs how the Commission acts and provides that the Commission “shall establish its own procedures, except as may be provided by law.”

Respondents' characterization of OE's role as providing “ministerial support” does not supply the missing condition. Dkt. 69 at 5–6. That characterization reinforces the distinction between administrative support and collective Commission action; it does not identify a provision of Chapter 11 authorizing OE to require five-Commissioner concurrence before providing that support.

Reading the statutes together preserves both sides of Act 57's design: OE retains its operational autonomy, the Commission retains its collective authority, and the statutory support relationship remains capable of moving the Commission to assembly. That does not displace collective governance; it preserves the process through which collective governance becomes possible.

CONCLUSION

PILF correctly identifies Act 57's integrated design of OE operational autonomy, Commission oversight, and mandatory staff support. Those provisions should operate together.

The existing record demonstrates why that design matters. Section 11-7(d)'s collective-action requirement governs Commission action after assembly; converting that requirement into a

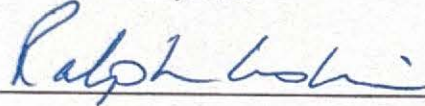
RESPONSE TO PUBLIC INTEREST LEGAL FOUNDATION AMICUS

condition precedent to §11-1.5(b) staff support imposes a pre-assembly threshold on the administrative process through which the Commission becomes capable of collective action and statutory oversight.

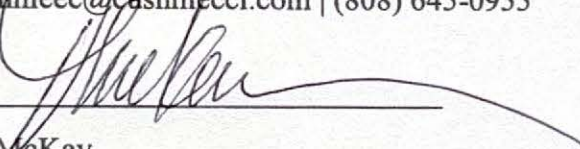
Petitioners therefore respectfully request that the Court construe HRS §11-1.5(b) so that the Commission's collective-action requirement is not itself a condition precedent to obtaining the staff support necessary for the Commission to assemble and exercise that collective authority, and compel OE to perform its §11-1.5(b) obligation consistent with that construction.

Respectfully submitted.

Dated: October 14, 2026

By: 

Ralph S. Cushnie
Petitioner, Pro Se
Commissioner, Hawai'i Elections Commission
PO Box 864, Kalaheo, Hawaii 96741
ralphcushnieec@cushniecci.com | (808) 645-0955

By: 

Tamara McKay
Petitioner, Pro Se
Commissioner, Hawai'i Elections Commission
2710 Olinda Road, Maui, Hawaii 96768
RootedHeartLife@proton.me | (808) 280-0928