IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI`I

ROBERT G. BABSON, JR., ANN C. BABSON, JOY BRANN, PAULA BROCK, and DANIEL GRANTHAM, Plaintiffs, v. KEVIN CRONIN, Chief Elections Office, State of Hawai'i, and STATE OF HAWAI'I, Defendants.	CIVIL NO. 08-1-0378(3) ORDER GRANTING PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; CERTIFICATE OF SERVICE

ORDER GRANTING PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On March 20, 2009, Defendants KEVIN CRONIN and the STATE OF HAWAI'I ("Defendants") filed a motion for summary judgment in the above matter. On April 8, 2009, Plaintiffs ROBERT G. BABSON, JR., ANN C. BABSON, JOY BRANN, PAULA BROCK, and DANIEL GRANTHAM ("Plaintiffs") filed a renewed motion for summary judgment in the above matter. Hearings on said motions were held on May 6 and 20, 2009. Lance D. Collins, Esq., appeared on behalf of Plaintiffs. Robyn B. Chun, Esq, Deputy Attorney General for the State of Hawai'i, appeared on behalf of

Defendants. On May 20, 2009, after carefully consideration of the written and oral arguments of the parties and the record herein, the Court orally granted Plaintiffs' renewed motion for summary judgment and denied Defendants motion for summary judgment.

I. INTRODUCTION

On July 14, 2008, Plaintiffs filed their complaint against Defendants. The Complaint sets forth three counts for declaratory relief alleging unlawful rulemaking and one count for injunctive relief.

As to Count One, the complaint, in part, alleges as follows:

> 10. Defendant Kevin Cronin has adopted the 'U.S. Election Assistance Commission (EAC) 2005 Voluntary Voting System Guidelines' (hereafter the EAC Guidelines) for use in state and county elections.
>
> 11. The EAC Guidelines are rules within the meaning of Chapter 91, Haw. Rev. Stat.
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> 12. The EAC Guidelines were adopted without complying with the procedures in Chapter 91, Haw. Rev. Stat. for promulgating rules.
>
> 13. Plaintiffs seek a declaration invalidating the adoption of the EAC Guidelines for use in state and county elections.

As to Count Two, the Complaint, in part, alleges as follows:

15. Defendant transmits or allows to be transmitted the ballot counts and election results for final tabulation over telephone lines or the internet.

16. The use of telephone lines or the internet for transmitting ballot counts and election results for final tabulation are rules within the meaning of Chapter 91, Haw. Rev. Stat.

17. The rule of using telephone lines or the internet for transmitting ballot counts and election results for final tabulation was adopted without complying with the procedures in Chapter 91, Haw. Rev. Stat. for promulgating rules.

18. Plaintiffs seek a declaration invalidating the use of telephone lines or the internet for transmitting ballot counts and election results for final tabulation.

As to Count Three, the Complaint, in part, alleges as follows:

20. Defendant transmits or allows to be transmitted the ballot counts and elections results for final tabulation over telephone lines or the internet.

21. The use of telephone lines or the internet for transmitting ballot counts and election results for final tabulation are rules within the meaning of Chapter 91, Haw. Rev. Stat.

22. The rule of using telephone lines or the internet for transmitting ballot counts and election results for final tabulation was adopted without complying with the procedures in Chapter 91, Haw. Rev. Stat. for promulgating rules.

23. The use of a rule permitting the transmission over telephone lines or the internet exceeds the statutory authority granted in Chapter 11, Haw. Rev. Stat.

24. Plaintiffs seek a declaration invalidating the use of telephone lines or the internet for transmitting ballot counts and election results exceed statutory authority.

With respect to Count Four, the complaint states:

26. Defendants are engaging in conduct pursuant to unlawfully promulgated rules.

27. Plaintiffs' right to vote and right to due process of law has and will be violated by Defendants conduct.

28. There is no adequate remedy at law for violations of the right to vote and the right to due and fair process of law.

29. Public policy strongly supports the right of the people to vote as the right to vote is the foundation of the legitimacy of all government.

30. Plaintiffs seek a temporary restraining order, a preliminary injunction, and a permanent injunction, enjoining Defendants and their agents and employees, and all persons acting under, in concert with, or for them from any conduct in conformance with the EAC Guidelines or transmitting ballot counts and election results by telephone line or the internet.

In summary, the Complaint seeks a determination that (1) the methodology and process by which the Chief Elections Officer ("CEO") uses electronic voting machines and uses the internet and/or telephone lines are rules within the meaning of HRS § 91-1(4), (2) the particular methodologies the CEO has chosen were not promulgated pursuant to the rulemaking requirements of the Hawai'i Administrative Procedures Act ("HAPA"), (3) the process contemplated by the CEO is invalid insomuch as it is conduct based on a rule not promulgated pursuant to the rulemaking requirements of HAPA, and (4) the CEO and the State of Hawai'i be prohibited from conducting elections with the use of Direct Recording Electronic ("DRE") ballots and

the process associated with same without rules first promulgated pursuant to HAPA.

Defendants filed their motion for summary judgment on March 20, 2009. Plaintiffs filed their renewed motion for summary judgment on April 8, 2009. Both motions involve similar issues and facts not in dispute. Thus, on March 20, 2009, the parties submitted a set of joint exhibits in support of their motions.

II. BACKGROUND

For purposes of both motions for summary judgment, the Court relies upon the facts that are not in dispute as set forth in the joint exhibits submitted by the parties.

The first voting system standards were issued in January 1990 by the Federal Election Commission ("FEC"). The 1990 Standards included performance standards and testing procedures for Punchcard, Marksense, and Direct-Recording Electronic ("DRE")[1] voting systems. Following advances in information and personal computer technologies, the FEC initiated an effort to revise the 1990 Standards to reflect the evolving needs of the election community, resulting in the 2002 Voting

[1] The terms "electronic voting machines" and "DRE" are not interchangeable. Electronic scanners are used to count paper ballots without direct recording of votes by the voting machine the voter uses. "DRE" means direct recording electronic technology that records votes cast on the machine used by the voter to cast a vote.

System Standards. The FEC explained that the 2002 Voting System Standards:

> [W]ill not become part of the Code of Federal Regulations because they are intended only as guidelines for state and voting system vendors. States may mandate the specifications and procedures through their own statutes, regulations, or administrative rules. Voting system vendors may voluntarily adhere to the standards to ensure the reliability, accuracy, and integrity of their products.

One of the purposes of the 2002 Voting System Standards was to provide election officials with guidance for system certification, procurement and acceptance requirements and processes, including additional requirements and adjustments to those requirements included in the Standards.

In 2002, Congress enacted the Help America Vote Act of 2002 ("HAVA"), codified at 42 USC §§ 15301, *et seq.* HAVA authorized funding to help States improve administration of federal elections and to eliminate punchcard and level voting machines. 42 USC § 15301. HAVA established the Election Assistance Commission ("EAC") that would issue "voluntary voting system guidelines." 42 USC § 15322(1). The EAC was mandated to develop and adopt new voluntary voting system guidelines and to provide for testing, certification, and decertification of voting systems. HAVA required that voting systems used in an election for federal office meet certain requirements enumerated at 42 USC § 15481(a). HAVA set forth minimum requirements and did not

prevent a State from establishing election technology and administration requirements that are more strict than the requirements set forth in HAVA. *See*, 42 USC § 15484. "The specific choices on the methods of complying with the requirements . . . shall be left to the discretion of the State." 42 USC § 15485. In order to assist States in meeting HAVA requirements, the EAC was required to "adopt voluntary guidance" by January 1, 2004 and to review and update recommendations at least once every 4 years. 42 USC §§ 15501(a), (b)(1), and (c). The "voluntary guidelines" would be adopted after public notice and opportunity for comment and a public hearing. *See*, 42 USC § 15502.

To be eligible to receive funds to improve the administration of elections, HAVA requires each State to develop a long-range plan for implementing HAVA. On October 10, 2004, then CEO Dwayne D. Yoshina issued the State of Hawaii's State Plan (hereinafter, "State Plan"). The State Plan established a framework for the State to continue progress that had already been made in election reform and to achieve compliance with HAVA. The State Plan revealed how the Elections Office, along with county clerks, were working together to comply with HAVA requirements. Once the EAC issues voluntary guidelines as required by 42 USC § 15501, the State then considers that guidance in updating the State Plan and incorporates those

recommendations deemed appropriate into subsequent versions of the State Plan. Hawai'i received approximately $6.3 million in Federal grants to improve the administration of elections and replace punchcard ballots. However, these funds can be recouped by the Federal government if HAVA requirements are not met.

The EAC issued its first set of Voluntary Voting System Guidelines on December 13, 2005 ("2005 VVSG"). The 2005 VVSG defined the minimum requirements for voting systems and the process of testing voting systems. The 2005 VVSG was intended for use by designers and manufacturers of voting systems; test labs performing the analysis and testing of voting systems in support of the EAC national certification process; software repositories designated by the EAC or by a State; elections officials, including ballot designers and officials responsible for the installation, operation, and maintenance of voting machines; and test labs and consultants performing the State certification of voting systems. The voting system vendor implements the requirements. The purpose of the 2005 VVSG was to provide a set of specifications and requirements against which voting systems could be tested to determine if they provide all the basic functionality, accessibility, and security capabilities required of voting systems.

In 2006, the Hawai'i Office of Elections issued a Request for Proposal ("RFP") seeking proposals from qualified

entities to lease a new system (New System) to collect, tabulate and report votes for all Primary, General, and Special Elections held in the State. The term of the contract was to be for the 2008 - 2016 Primary, General and Special Elections. Appendices B through J of the RFP outlined the essential features of, and requirements for the New System. Appendix B incorporated, to the extent specified, the 2005 VVSG. The RFP required that the New System meet or exceed the 2005 VVSG. If a proposed New System does not meet any specific requirement, the Offeror could propose an alternate feature that provides a functional equivalent. The Evaluation Committee is given the sole discretion to determine whether a proposed alternate feature provides a functional equivalent.

In response to the RFP, three entities submitted proposals: Election Systems & Software, Inc., Hart Intercivic, Inc., and Premier Election Systems, Inc. The systems proposed by the three differed considerably and included a multitude of accessories and support services. The contract was awarded to Hart Intercivic, Inc. on January 31, 2008, accepting Hart's offer of $52.8 million for six election cycles beginning with the 2008 elections.

On July 14, 2008, Plaintiffs filed a complaint seeking a declaration that the CEO selected voting systems, administered elections, and transmitted election results by telephone without

formal rulemaking required by the HAPA and asking that the CEO and State be prohibited from conducting elections without rules promulgated pursuant to the HAPA.

On March 20, 2009, Defendants filed a motion for summary judgment arguing that the actions of the CEO (1) did not constitute rulemaking, (2) involved only internal management, (3) would be contrary to the procurement code if rulemaking were to be required, (4) electronic voting systems had already been approved by the legislature so no rulemaking would be required, (5) rulemaking is preempted by HAVA, (6) that the CEO adopted rules for electronic voting machines, and (7) that the Plaintiffs' lacked standing.

On April 8, 2009, Plaintiffs filed their renewed motion for summary judgment arguing that rules must first be promulgated prior to use of the 2005 VVSG or telephone/internet to conduct elections.

III. DISCUSSION

A. Summary Judgment

Summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *GECC Financial Corporation v. Jaffarian*, 79 Haw. 516, 521, 904 P.2d

530, 535 (1995), *citing*, Hawai`i Rules of Civil Procedure ("HRCP") Rule 56(c) (1990). The burden is on the party moving for summary judgment to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law." *Id. citing*, *First Hawaiian Bank v. Weeks*, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989); 6 J. Moore, *Moore's Federal Practice* ¶56.15[3] at 56-249 - 56-250 (2d ed. 1995). [T]he moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. *Id.* (*citations omitted*). Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. *Id.*, *citing*, C. Wright, A. Miller & M. Kane, 10A *Federal Practice and Procedure: Civil 2d* § 2727, at 148 (1983). [T]he moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to

summary judgment as a matter of law. *Id.* (*citations omitted*). The moving party's burden of proof is a stringent one, since the inferences to be drawn from the underlying facts alleged in the relevant materials considered by the court in deciding the motion must be viewed in the light most favorable to the non-moving party, and any doubt concerning the propriety of granting the motion should be resolved in favor of the non-moving party. *Id.* (*citations omitted*). The evidentiary standard required of a moving party in meeting its burden on a summary judgment motion depends on whether the moving party will have the burden of proof on the issue at trial. *Id.* (*citations omitted*).

Finally, [w]hen a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue. Counter-affidavits and declarations need not prove the opposition's case; they suffice if they disclose the existence of a triable issue. *Pioneer Mill Co., Ltd. v. Dow*, 90 Haw. 289, 295-96 (1999) (*citations omitted, emphasis omitted*).

B. Standing

Defendants argue that Plaintiffs lack standing to bring this case because their claims are speculative, theoretical, and lacking in the kind of personal stake that the law requires.

In *Bremner v. City and County of Honolulu*, 96 Haw. 134, 28 P.3d 350 (2001), the Intermediate Court of Appeals stated:

> The crucial inquiry in any analysis of standing is "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his behalf." (*citation omitted*). Whether a plaintiff has the requisite "personal stake" in the outcome of the litigation is measured by a three-part, "injury in fact" test. Under that test, the plaintiff must allege that "(1) he or she has suffered an actual or threatened injury as a result of the defendant's wrongful conduct, (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for the plaintiff's injury." (*citations omitted*).

Bremner, 96 Haw. at 139, 28 P.3d at 355.

Defendants argue that Plaintiffs' allegations are built entirely on abstract, conjectural, and hypothetical circumstances and that there is no evidence that any of them have been deprived of the right to vote or that their votes have ever been mishandled. This argument, however, mischaracterizes the type of injury Plaintiffs allege. Plaintiffs are not arguing that they have been deprived of the right to vote or that their votes have been mishandled. Instead, Plaintiffs are challenging the legality of the process that the CEO and Office of Elections undertook when adopting the 2005 VVSG. Plaintiffs have suffered actual injury in being deprived of the opportunity to participate in the rulemaking process and having administrative "rules" being promulgated, the failure of which Plaintiff assert is in

violation of HRS Chapter 91. Plaintiffs suffer threatened injury in that their right to vote may be infringed due to "rules" promulgated in violation of HRS Chapter 91. This actual and threatened injury is fairly traceable to the Defendants' "action," or, in this instance, non-action in failing to promulgate rules in accordance with HAPA. A favorable decision, namely a declaratory judgment by the Court that the CEO and Office of Elections must review and consider the adoption of the 2005 VVSG under the rulemaking provisions of HRS Chapter 91 would provide relief for Plaintiffs' injury. Consequently, Plaintiffs do not lack standing.

C. 2005 VVSG and the Transmission of Election Information

The central issue raised by the complaint and instant motions is whether the CEO'S adoption of the 2005 VVSG and subsequent adoption of a voting system that transmits election results over telephone lines or the internet are "rules" within the meaning of HRS Chapter 91.

Analysis of the issue begins with a discussion of the term "rule" as defined by law. HRS § 91-1(4), states, in its entirety:

> "Rule" means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the

> public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

In addressing the distinction between rulemaking and adjudication, the Hawai'i Supreme Court stated:

> Rule-making is an agency action governing the future conduct either of groups of persons or of a single individual; it is essentially legislative in nature, not only because it operates in the future, but also because it is concerned largely with considerations of policy. In rule-making, disciplinary or accusatory elements are absent. Typically, the issues relate not to the evidentiary facts, as to which the demeanor of witnesses would often be important, but rather as to the inferences to be drawn from the facts or as to the predictions of future trends to be based upon them.

In re Hawaiian Electric Company, 81 Haw. 459, 466, 918 P.2d 561, 568 (1996). "Rulemaking is the process by which an agency lays down new prescriptions to govern the future conduct of those subject to its authority . . . ." *Shoreline Transportation, Inc.*, 70 Haw. 585, 591, 779 P.2d 868, 872, *quoting*, B. Schwartz, *Administrative Law* § 4.15, at 190 (2d ed. 1984). "Rulemaking 'is essentially legislative in nature, not only because it operates in the future, but also because it is concerned largely with considerations of policy.'" *Shoreline Transportation, Inc.*, 70 Haw. at 591, 779 P.2d at 872, *quoting*, Ginnane, *"Rule Making," "Adjudication" and Exemptions Under the Administrative Procedure Act*, 95 U.Pa.L.Rev. 621, 630 (1947).

Defendants argue that compliance with HAPA is not necessary because the 2005 VVSG are not "rules" within the meaning of HRS § 91-1(4).

In *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 522 P.2d 1255 (1974), the Hawai'i Supreme Court addressed the question of whether the Hawaii Housing Authority (HHA) was required to follow the rule-making procedures of the HAPA in adopting regulations that set forth maximum income limits for continued occupancy by tenants in federally-funded public housing administered by the HHA and which establish a schedule for rents which tenants must pay for that housing. *Id.*, 55 Haw. at 479, 522 P.2d at 1257.

The plaintiffs in *Aguiar* were tenants in federally-funded public housing administered by the HHA. It was the policy of the HHA to estimate the tenant's income for the forthcoming year, based on a statement regarding the income, composition and status of a family, as well as on data assessed by a project administrator at an informal interview with the tenant. If the income estimate exceeded the maximum level allowed by the HHA, the tenant was sent a notice that stated, in substance, (1) because the tenant was "overincome", the tenant's lease would be terminated, effective six months from the date of the notice, and (2) for the period between notification of lease termination and actual termination of the tenancy, the monthly rental would

immediately be increased from the rental provided in the lease to an amount approximating 20% of the tenant's gross income adjusted for dependents as allowed by the HHA.

The plaintiffs were all found by the HHA to be "overincome" and hence ineligible for continued occupancy in public housing. Each received a notice, as described above. Thereafter, the plaintiffs filed an action to enjoin the HHA from evicting them or charging them increased rents. The plaintiffs contended that the heart of the HHA's system for determining overincome status and rental amounts - contained in amendments to the HHA's 'Master Management Resolution For All Projects Administered by the Hawaii Housing Authority' - was invalid because it was not adopted in accordance with the rule-making procedures of the HAPA. The trial court concluded on the basis of a stipulated set of facts that relevant amendments to the HHA's Master Management Resolution were 'rules' within the meaning of HRS § 91-1(4). The trial court concluded that because the amendments were not adopted in compliance with HRS §§ 91-3 to -4, as amended, each and every determination that any income was over the maximum for continued occupancy that was based on the said rules was invalid.

The *Aguiar* court addressed the issue of whether the Amendments to the Master Management Resolution were "rules" within the meaning of HRS § 91-1(4). The HHA argued "that

compliance with HAPA requirements was unnecessary since the amendments were not 'rules' within the meaning of HRS s 91-1(4). After restating HRS § 91-1(4), the *Aguiar* court stated "[t]o evaluate properly the HHA's argument, we must inquire into the nature of the HHA's powers and responsibilities under state and federal law and also the purpose and effect of the Master Management Resolution and its amendments." *Id.* 55 Haw. at 482, 522 P.2d at 1259.

The *Aguiar* court determined that "[t]he HHA is a state agency charged by state law with the responsibility of administering low-income, low-rent public housing projects in Hawaii." *Id.* "[T]he HHA is required to 'establish maximum limits of annual net income for tenant selection in any public housing project . . .' and to 'rent or lease the dwelling accommodations therein only at rentals within financial reach of persons who lack the amount of income which it determines to be necessary in order to obtain . . . dwelling accommodations within the area of operation of the authority and to provide an adequate standard of living.'" *Id.* 55 Haw at 482-83, 522 P.2d at 1259. The *Aguiar* court further determined that "[t]he HHA's Master Management Resolution . . . prescribed income limits for continued occupancy in public housing and established a rental scheme under which a uniform rate of 20% was applied to each tenant's gross income, as adjusted by deductions for dependents,

as the means of determining that tenant's income." *Id.*, 55 Haw. at 484, 522 P.2d at 1260. "In an amendment to the Master Management Resolution . . . the HHA established a 'flat rate' rental scheme, by which qualified public housing tenants paid rent based on the number of rooms they occupied. These rents were, for almost all tenants, substantially below the level of previous rents under the percentage of adjusted gross income system." *Id.* The *Aguiar* court concluded that "this basic change in rental policy, in the form of an amendment . . . to the Master Management Resolution, was not adopted in compliance with the rule-making procedures of HAPA." *Id.* 55 Haw. at 484-85, 522 P.2d at 1260.

The HHA offered several reasons why the amendments were not "rules" within the meaning of HRS s 91-1(4). The *Aguiar* court stated that "[e]ach reason focuses on and parses particular words and phrases in that section, the composite of which constitutes the definition of a rule." *Id.*, 55 Haw. at 485, 522 P.2d at 1260. "First, the HHA argues that the . . . 'flat rate' rental scheme and the various amendments . . . establishing maximum income limits for continued occupancy are not 'agency statement(s) of general or particular applicability and future effect.' . . . [The HHA] suggests that the relevance of these regulations primarily to tenants in public housing belie their 'general or particular applicability.' The HHA would have us

limit this phrase of HRS § 91-1(4) to agency statements touching the affairs of the entire 'public,' and not just those of a limited class of individuals, such as public housing tenants." *Id.* 55 Haw. at 486, 522 P.2d at 1260-61. The *Aguiar* court concluded that "it is clear that agency statements of 'general' applicability include those which delineate the future rights of the entire class of unnamed individuals within the agency's jurisdiction . . . . At least where, as here, the class whose future rights are established by regulations consists of a very large number of individuals - all tenants in public housing administered by the HHA - we hold that the HAPA's requirement of generality of effect is satisfied." *Id.*, 55 Haw. at 486, 522 P.2d at 1261 (*internal citations omitted*).

In *Aguiar*, the HHA also argued that the challenged amendments to the Master Management Resolution did not 'implement, interpret, or prescribe law or policy' within the meaning of HRS § 91-1(4). The HHA pointed to the extensive control over its policies that the federal government exercised by virtue of the contracts of assistance between the HHA and the United States Housing Authority. The HHA argued that the control left it virtually no discretion in the area of rental and occupancy decision making. The *Aguiar* court concluded that "[w]hile the HHA thus has no discretion to raise or lower maximum income limits once maximum rents are established, and while

maximum rents themselves depend in part on a federally imposed formula, the HHA nevertheless retains the important function of assessing the lowest rents at which a 'substantial supply of decent, safe and sanitary' private housing is available. Rent levels and income limits directly turn on this assessment. And the plaintiffs - whose rights the assessment obviously affects - sought to participate in it through the procedures of the HAPA." *Id.* The *Aguiar* court noted that:

> One stated objective of the rule-making provisions of the HAPA is "(t)o provide for public participation in the rule-making process, by allowing any interested person to petition for a change in the rules as well as to participate in a public hearing.". . . While the process is undoubtedly "technical" in many respects, the HAPA does not require the HHA to conduct a full-blown adjudicatory-type hearing on the level of rents in the private sector, but only to "[a]fford all interested persons opportunity to submit data, views, or arguments, orally or in writing." We cannot say that tenants' views on the subject of rents obtainable in the private sector would be of no value to the HHA. In any event, the legislature has already made the judgment through the HAPA that an agency must consider the views of interested persons where it seeks to promulgate a "rule," no matter how complex is the data that goes into the rule's formulation.

Id., 55 Haw. at 487-88, 522 P.2d at 1261-62.

The HHA also attempted to rely on an exception to the definition of a 'rule' contained in HRS § 91-1(4), that '(t)he term does not include regulations concerning only the internal

management of an agency and not affecting private rights of . . . the public'. To this argument, the *Aguiar* court concluded:

> The limited scope intended for this exemption from the HAPA's rule-making requirements is evident from the choice of words used to express it. It is 'only' those regulations concerning the internal management of an agency 'and' not affecting private rights of the public that may be adopted without an opportunity for public participation. One commentator has observed that even in those states where the statutory exemption is broader, covering "all statements concerning matters of internal management, . . . reliance must be placed on the courts to foreclose any tendencies that agencies might exhibit to avoid the rule-making requirements by casting regulations in terms of internal management.

Id., 55 Haw. at 488-89, 522 P.2d at 1262-63 (*citation omitted*).

The court further stated:

> The HHA's 1968 amendment to its Master Management Resolution altered fundamentally the rental structure in public housing - its immediate result was to change the amount of rent paid by nearly every public housing tenant. Similarly, the amendments setting maximum income limits for continued occupancy, based on the HHA's 'gap' demonstrations to the federal government, determined every tenant's eligibility to remain in public housing. Plainly, therefore, these amendments 'affected' in both a practical and a legal sense the 'private rights' not only of those tenants actually living in public housing but also those members of the public at large who were interested in becoming tenants. Given this effect, the degree to which those measures concerned 'only' the 'internal management' of the HHA becomes irrelevant in view of the use of the conjunctive 'and' in the statutory articulation of this exemption from the definition of the rule.
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> * * *

> As we stated in *In re Terminal Transportation, Inc.*, 54 Haw. 134, 138, 504 P.2d 1214, 1216 (1972), within the context of construing the adjudicatory provisions of the HAPA:
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> > '(T)his court, in the absence of clear legislative direction to the contrary, will not interpret provisions of the Hawaii Administrative Procedure Act so as to give government even 'an appearance of being arbitrary or capricious,' *citing*, *In re Western Motor Tariff Bureau, Inc.*, 53 Haw. 14, 19, 486 P.2d 413, 416 (1971).

Id., 55 Haw. at 489, 522 P.2d at 1263. Thus, the *Aguiar* court concluded that "the HHA's amendments to its Master Management Resolution governing the scheme under which plaintiffs paid rent and their right to continued occupancy in public housing were 'rules' within the meaning of HRS s 91-1(4)." *Id.*, 55 Haw. at 490, 522 P.2d at 1263.

The next step in the analysis is an inquiry into the nature of the CEO'S powers and responsibilities under state and federal law and also the purpose and effect of the 2005 VVSG.

The CEO is "the individual appointed by the elections commission pursuant to section 11-1.6 to supervise state elections." HRS § 11-1. The CEO "shall supervise all state elections." HRS § 11-2(a). The CEO "shall adopt rules governing elections in accordance with chapter 91." HRS § 11-2(e). HRS § 11-4 further provides:

> The chief election officer may make, amend, and repeal such rules and regulations governing

> elections held under this title, election procedures, and the selection, establishment, use, and operation of all voting systems now in use or to be adopted in the State, and all other similar maters relating thereto as in the chief election officer's judgment shall be necessary to carry out this title.
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> * * *
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> Such rules and regulations, when adopted in conformity with chapter 91 and upon approval by the governor, shall have the force and effect of law.

HRS § 11-4. Title 2 of the Hawaii Revised Statutes, of which chapter 11 applies throughout, includes chapters 11, 12, 13, 14, 15, 16, 17, 18 and 19.

The 2005 VVSG was issued by the EAC on December 13, 2005. The 2005 VVSG defined the minimum requirements for voting systems and the process of testing voting systems. The 2005 VVSG was intended for use by designers and manufacturers of voting systems; test labs performing the analysis and testing of voting systems in support of the EAC national certification process; software repositories designated by the EAC or by a State; elections officials, including ballot designers and officials responsible for the installation, operation, and maintenance of voting machines; and test labs and consultants performing the state certification of voting systems. The purpose of the 2005 VVSG was to "provide a set of specifications and requirements against which voting systems can be tested to determine if they provide all the basic functionality, accessibility, and security

capabilities required of voting systems."

The RFP issued in 2006 that sought proposals to lease a new voting system incorporated, to the extent specified, the 2005 VVSG. "The New System shall meet or exceed the Voluntary Voting System Guidelines." "[I]f a proposed New System does not meet any specific requirement, the Offeror may propose an alternate feature that provides a functional equivalent. It shall be at the sole discretion of the Evaluation Committee to determine whether a proposed alternate feature provides a functional equivalent."

The CEO is charged by State law to administer all state elections, including making, amending and repealing rules and regulations governing the establishment, use, and operation of all voting systems now in use or to be adopted in the State. *See*, HRS §§ 11-1 and 11-4. In incorporating the 2005 VVSG into the 2006 RFP, and by requiring that the new voting system "shall meet or exceed" the 2005 VVSG, the CEO issued a "statement of general or particular applicability and future effect" that implemented or prescribed the policy of the Office of Elections, namely, that any proposed new voting system would have to meet or exceed the 2005 VVSG, or have a proposed alternate feature that provides a functional equivalent. In effect, the CEO set voting equipment requirements and specifications in the RFP.

Defendants argue that the 2005 VVSG was not intended or

required to be adopted by states as administrative rules. Defendants contend that the 2005 VVSG's purpose was "to provide a set of specifications and requirements against which voting systems can be tested to determine if they provide all the basic functionality, accessibility and security capabilities required to ensure the integrity of voting systems." Even though the 2005 VVSG does not expressly state that it is intended or required to be adopted by states as administrative rules, the CEO and Office of Elections did, in fact, adopt the 2005 VVSG as its own requirements by incorporating the 2005 VVSG into the RFP and stating that any proposed new voting system would have to meet or exceed the 2005 VVSG, or have a proposed alternate feature that provides a functional equivalent. Rather than select the 2005 VVSG, Defendants could have selected a different set of guidelines. Defendants adoption of 2005 VVSG constitutes an exercise of discretion that Chapter 91 requires be done through rulemaking.

Defendants argue that rulemaking was not required because "the RFP is directed to a small number of prospective vendors who manufacture equipment that complies with EAC guidelines. Only members of the industry would have reason to comment on those guidelines . . . ." This is similar to an argument made in *Aguiar*, where the HHA contended that the amendments in question were not of "general or particular

applicability" because the amendments concerned only the limited class of individual public housing tenants and did not concern affairs of the entire "public." The *Aguiar* court rejected this argument, concluding that "it is clear that agency statements of 'general' applicability include those which delineate the future rights of the entire class of unnamed individuals within the agency's jurisdiction." *Aguiar*, 55 Haw. at 486, 522 P.2d at 1261. Here, the vendors offering proposals are a class of unnamed individuals within the election office's jurisdiction, and the requirements set forth in the RFP delineate this class's future rights, particularly what requirements must be fulfilled if the proposal was to be considered by the Office of Elections. Furthermore, "[o]ne stated objective of the rule-making provisions of the HAPA is '[t]o provide for public participation in the rule-making process . . . .'" *Id.* at 487, 522 P.2d at 1261. The *Aguiar* court could not "say that the tenants' views . . . would be of no value to the HHA." *Id.* Similarly, this Court cannot say that the Plaintiffs' views, or the views of any other interested person, would not have been of value to the CEO and Office of Elections. Moreover, the adoption of the 2005 VVSG impacts all voters.

Defendants argue that there would be "no reason to seek public comments before the elections office acquires voting equipment in accordance with the EAC guidelines" because "the

three proposals and the evaluation of them focused on technical matters that were raised by the RFP." This argument is unpersuasive as the Hawai'i Supreme Court has stated that "the legislature has already made the judgment through the HAPA that an agency must consider the views of interested persons where it seeks to promulgate a 'rule,' no matter how complex is the data that goes into the rule's formation." *Id.*

Defendants also argue that "[t]here is no reason to seek public comment before the elections office acquires voting equipment in accordance with the EAC guidelines" because "plaintiffs had an opportunity to do so," citing 42 USC § 15502, which states that the 2005 VVSG would be adopted after public notice and opportunity for comment and a public hearing. Though Plaintiffs may have had the opportunity to comment and attend the public hearing regarding the 2005 VVSG at the *federal* level, Plaintiffs were denied that opportunity at the *state* level, as the Office of Elections did not conduct any rulemaking prior to incorporating the 2005 VVSG in the 2006 RFP.

Defendants argue that rulemaking is not required because HAVA preempts State rulemaking. As stated by the United States Supreme Court:

> [S]tate law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands

> as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

English v. General Electric Co., 496 U.S. 72, 79 (1990). Defendants argue that "[a]pplication of the rulemaking requirement *per se* would not obstruct the full implementation of HAVA . . . but the elections office could not change HAVA requirements as a result of public comments during the rulemaking process, and rulemaking would thus be pointless if its only purpose was to 'adopt' HAVA requirements."

However, this argument overlooks the fact that HAVA did not "prevent a State from establishing election technology and administration requirements that are more strict than" the requirements set forth in HAVA. *See*, 42 USC § 15484. Further, "[t]he specific choices of the methods of complying with the requirements . . . shall be left to the discretion of the State." 42 USC § 15485. Thus, HAVA would pre-empt any State administrative requirements whose standards were less than that of HAVA, but preemption does not restrict the rulemaking procedure from contemplating requirements stricter than that set forth in HAVA. Preemption also does not restrict the rulemaking procedure from contemplating the methods the State of Hawai'i would adopt to comply with HAVA.

Defendants further argue that rulemaking is not needed when a particular voting system is adopted because adoption of a

particular voting system is left to the discretion of the CEO. To support this argument, Defendants point to HRS § 16-1.[2]

Defendants' argument is similar to the those made by the governmental agency defendants in both *Vega v. National Union Fire Insurance Co. of Pittsburgh, PA, Inc.*, 67 Haw. 148, 682 P.2d 73 (1984) and *Tanaka v. Department of Land and Natural Resources*, 117 Haw. 16, 175 P.3d 126 (App. 2007), where the defendants argued that a prior valid rule or statute authorized the promulgation of the "rule" in question without complying with the formal rulemaking procedures found in HRS Chapter 91.

In *Vega v. National Union Fire Insurance Co. of Pittsburgh, PA, Inc., supra*, a rule issued by the Insurance Commissioner pursuant to the Hawaii Motor Vehicle Accident Reparations Law ("No-Fault Statute") mandated that "[a]ny [no-fault insurance] policy issued . . . shall provide coverage . . .

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[2] HRS §16-1 provides:

> The chief election officer may adopt, experiment with, or abandon any voting system authorized under this chapter or to be authorized by the legislature. These systems shall include, but not be limited to voting machines, paper ballots, and electronic voting systems. All voting systems approved by the chief election officer under this chapter are authorized for use in all elections for voting, registering, and counting votes cast at the election.
>
> Voting systems of different kinds may, at the discretion of the chief election officer, be adopted for different precincts within the same district. The chief election officer may provide for the experimental use at any election, in one or more precincts, of a voting system without formal adoption thereof and its use at the election shall be as valid for all purposes as if it had been permanently adopted; provided that if a voting machine is used experimentally under this paragraph it need not meet the requirements of section 16-12.

in accordance with the endorsement prescribed by the Commissioner . . . ." *Id.*, 67 Haw. at 149, 682 P.2d at 74-75. The Basic No-Fault Endorsement prescribed by the Commissioner contained a specific clause that compelled an injured person eligible for no-fault benefits to "submit to medical examination by physicians selected by, or acceptable to, the . . . [insurer] when, and as often as, the . . . [insurer] may reasonably require." *Id.*, 67 Haw. at 149, 682 P.2d at 75.

Vega was injured in an automobile accident and became eligible for benefits under a no-fault policy of motor vehicle insurance written by National Union Fire Insurance Co. National paid benefits to Vega for nearly a year. In time, Vega's disability was questioned by National's claims adjusting firm, American International Adjustment Co., which ensued inquiries about Vega's medical condition. Vega's physician submitted a report acknowledging that Vega's recovery was not progressing at a satisfactory pace, and that he would be prescribing a more active regimen of physical therapy, anticipated to continue for another 6-9 months. American then "ordered" Vega to appear for a medical examination with a physician of its choosing, invoking an "Independent Medical Examination" clause ("IME") which read "[t]he eligible injured person shall submit to medical examination by a physician selected by, or acceptable to, the Company when, and as often as, the Company may reasonably

require." Vega refused to submit to the examination on the advice of her attorney, taking the position that Vega's physical condition had been substantiated by her doctor and the No-Fault statute did not require the injured person to be subjected to any insurance examination, and any such requirement found in the policy is obviously in contravention of the statute is therefore invalid and unenforceable. American International sent Vega a letter informing her that her benefits were being terminated. Vega's then instituted suit for breach of contract against National. The circuit court ruled in Vega's favor, concluding that the legislature by allowing the compulsory examination in other general insurance policies but excluding it from vehicle insurance intended that such examination should not be allowed under no-fault policies, and ruled that the IME provision was inconsistent with the no fault law. *Id.*, 67 Haw. at 151-52, 682 P.2d at 76.

The Hawai'i Supreme Court concluded that the provision was void, because it had not been adopted as a rule in accord with dictates of the Administrative Procedure Act. *Id.*, 67 Haw. at 149, 682 P.2d at 75. In reaching its conclusion, the Hawai'i Supreme Court reasoned that "[i]n order to carry out the provisions and fulfill the purpose of . . . [the law] the commissioner . . . [was directed to] . . . [m]ake, promulgate, amend, and repeal such regulations, pursuant to chapter 91, as he

deems necessary . . . . HRS § 294-37(2)." *Id.*, 67 Haw. at 153-54, 682 P.2d at 77. "But when the Commissioner prescribed the Basic No-Fault Endorsement for all insurers issuing motor vehicle insurance policies, he did not follow the procedure set forth in the Administrative Procedure Act. In our view HRS Chapter 91 also governed the issuance of the endorsement itself, and the Commissioner's neglect rendered the prescript fatally defective . . . ." *Id.*, 67 Haw. at 154, 682 P.2d at 77.

National Union and the Insurance Commissioner argued that since one of the rules sanctioned the issuance of the basic endorsement nothing more was necessary to lend validity to the endorsement or any of its provisions. The Hawai'i Supreme Court disagreed, stating that "the Administrative Procedure Act demands more of a public administrator when he acts in a quasi-legislative capacity." *Id.*, 67 Haw. at 155, 682 P.2d at 78. The Hawai'i Supreme Court went on to state:

> Although § 16-23-60 of the promulgated rules enabled the Commissioner to prescribe endorsements, it by no means gave him "*carte blanche* . . . [to] sidestep the independent requirements" of HRS Chapter 91. A "rule" for purposes of the chapter includes "each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy." Reading the pertinent part of the Basic No-Fault Endorsement with the foregoing definition in mind, we can only conclude it is a "rule" as defined by HRS § 91-1(4) and it should have been adopted as such in accord with the procedure set forth in HRS § 91-3.

> The Commissioner's prescription of the Basic No-Fault Endorsement caused a specific clause compelling a benefit claimant to submit to medical examinations as directed by the insurer to be included in every no-fault policy written in Hawaii. The provision in the endorsement that brought this about could only be a "statement of general or particular applicability and future effect that implements, interprets, or prescribed law or policy." HRS § 91-1(4). It undoubtedly "touch[es] the affairs of the entire 'public,'" and "delineate[s] the future rights of . . . [an] entire class of unnamed individuals.

Id. at 155-56, 682 P.2d at 78. (citations omitted).

The *Vega* court concluded:

> "[W]here [an administrative agency] seeks to promulgate a 'rule,'" it "must consider the views of interested persons," for the "powers . . . of government should not be used in manner giving an appearance of being arbitrary." And since the Commissioner neither afforded interested persons an opportunity to be heard nor considered their views with respect to a proposed rule as required by the Administrative Procedure Act, the purported promulgation of the "rule" relating to compulsory medical examinations was a nullity.

Id. (citations omitted).

In *Tanaka v. Department of Land and Natural Resources*, 117 Haw. 16, 175 P.3d 126 (App. 2007), appellants were avid game-bird hunters and resided on the island of Hawai`i. The Department of Land and Natural Resources ("DLNR") was a state agency responsible for managing and administering wildlife, game management areas, and public hunting areas, regulating hunting activities on state lands, and enforcing state hunting laws. Pursuant to HRS § 183D-2(12) (1993 & Supp.2006), DLNR was charged

with the duty to preserve, protect, and promote public hunting. HRS § 183D-4(a) (Supp.2006) provided that for the purposes of preserving, protecting, conserving, and propagating wildlife, DLNR was to establish, maintain, manage, and operate game management areas, wildlife sanctuaries, and public hunting areas on land under its control.

As authorized by HRS § 183D-3, DLNR promulgated administrative rules that regulated game-bird hunting. Pursuant to HAR 13-122-4 (1999), DLNR: (a) established 'Saturdays, Sundays, and State Holidays' as 'Open Hunting Days' for game birds on the island of Hawai`i; and (b) provided that '[t]he [B]oard or its authorized representative may lengthen hunting seasons; and open special hunting seasons; whenever, after study by the division, the action is deemed to be in the public interest. DLNR complied with the HAPA rulemaking requirements when it initially designated Saturdays, Sundays, and state holidays as days for game-bird hunting on the island of Hawai`i. Without revising any of its rules, DLNR published a notice, which in effect also allowed game-bird hunting in certain areas of the County of Hawai`i on Wednesdays and Thursdays. DLNR also adopted rules that required certain fees. The DLNR did not amend its rules pursuant to HRS chapter 91 before requiring these fees be paid.

The *Tanaka* plaintiffs filed their lawsuit, seeking

injunctive and declarative relief to prohibit the hunting of game birds on any weekday except a holiday. Plaintiffs alleged that (1) DLNR's decision to allow Game Bird Hunting on Wednesdays and Thursdays was contrary to HAR Chapter 122 without following the requirements of HRS Chapter 91; and (2) DLNR's requirement that hunters annually purchase a stamp in order to obtain a hunting license was in violation of HRS § 91-3.

The issue before the *Tanaka* court was "whether DLNR was required to comply with the rulemaking requirements when it added two hunting days to each week of the 2004-2005 hunting season and required hunters to pay two stamp fees in order to hunt." *Id.*, 117 Haw. at 22, 175 P.3d at 132.

The *Tanaka* court began its analysis of the validity of DLNR's addition of two extra days per week for game-bird hunting by stating "[w]hen construing a statue, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statue and construe it in a manner consistent with its purpose." *Id.*, 117 Haw. at 22, 175 P.3d at 132, *citing*, *Ka Pa`akai O Ka `Aina v. Land Use Comm'n*, 94 Haw. 31, 41, 7 P.3d 1068, 1078 (2000). The court went on to state:

[T]he general principles of construction which

> apply to statutes also apply to administrative rules. As in statutory construction, courts look first at an administrative rule's language. If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning.

Id., 117 Haw. 22-23, 175 P.3d at 132-33, *citing*, *Allstate Ins. Co. v. Ponce*, 105 Haw. 445, 454, 99 P.3d 96, 103 (2004) (*quoting*, *In re Doe Children*, 105 Haw. 38, 53, 93 P.3d 1145, 1160 (2004)).

Based on the foregoing standard of review, the *Tanaka* court next analyzed DLNR's administrative rules. "DLNR's current rule, HAR § 13-122-4(a) (1999), states, in pertinent part, that '[b]ag limits, open seasons, *hunting days*, and game birds that may be hunted *are listed in Exhibits 1, 3, 5, 7, 9, and 11*, located at the end of this chapter *and by reference made a part hereof*. (Emphases added.) Exhibit 1 lists the permissible days for game-bird hunting as 'Saturdays, Sundays, and State Holidays.' Since HAR § 13-122-4(a) specifically incorporates Exhibit 1 by reference, the hunting days listed in Exhibit 1 are a part of the rule." *Id.*, 117 Haw. at 23, 175 P.3d at 133. "HRS § 183D-3 explicitly and unambiguously requires DLNR to amend its rules affecting public-hunting areas in accordance with HRS chapter 91." *Id.*

The *Tanaka* court then reviewed Hawai'i case law, including the *Aguiar* and *Vega* cases, and stated that "Hawai`i

case law supports the conclusion that DLNR's failure to follow the procedures outlined in HRS § 91-3 voids the addition of Wednesdays and Thursdays as permissible days for game-bird hunting." *Id.* "In accordance with *Vega* and *Aguiar*, we conclude that DLNR was required to amend its rules pursuant to HRS chapter 91 before it could add two extra days per week for hunting game birds on the island of Hawai`i during the 2004-2005 hunting season. Since it did not, its addition of hunting days cannot be given effect." *Id.*, 117 Haw. at 24, 175 P.3d at 134.

The Tanaka court then turned its analysis to the issue of whether the stamp fees were validly adopted. The issue was "whether DLNR must establish the fees for the stamps through the rulemaking procedures of HRS chapter 91." *Id.*, 117 Haw. at 24, 175 P.3d at 134. The *Tanaka* court concluded that "[a]ppellants are correct that the stamp fees must be established through the rulemaking procedures set forth in HRS chapter 91. HRS § 183D-3 states that '*[s]ubject to chapter 91*, [DLNR] *shall adopt*, amend, and repeal *rules . . . [s]etting fees for activities permitted under this chapter*, unless otherwise provided for by law.' (Emphases added.) Since hunting, specifically game-bird hunting, is an activity permitted under HRS chapter 183D, DLNR is required to adopt a rule pursuant to HRS § 91-3 when setting the stamp fees for hunting." *Id.* 117 Haw. at 24-25, 175 P.3d at 134-35.

The DLNR argued that the Board validly promulgated HAR § 13-122-5.1(a) (1999), which implements the statutory authority to require and charge a stamp fee. The *Tanaka* court noted that in *Vega*, the defendants and the Insurance Commissioner made a similar argument, arguing that since the "statutory requisites were met when the Rules and Regulations to the Hawaii Motor Vehicle Reparations Act were adopted," and "since one of the rules sanctioned the issuance of the basic endorsement, . . . nothing more was necessary to lend validity to the endorsement or any of its provisions." The *Tanaka* court noted the Hawai`i Supreme Court disagreement with this argument, and stated that "[a]lthough [HAR] § 16-23-60 of the promulgated rules enabled the Commissioner to prescribe endorsements, it by no means gave him '*carte blanche* to sidestep the independent requirements' of HRS Chapter 91." *See, Id.* Thus, the *Tanaka* court concluded that:

> Here, HRS § 183D-3 expressly requires any amendments to DLNR rules to be made pursuant to HRS chapter 91. Therefore, DLNR was not allowed to sidestep the rulemaking procedures set forth in HRS chapter 91 by administratively requiring that stamps be purchased as a condition for obtaining a hunting license and setting the fees for the stamps. 'Rules are necessary to ensure fairness and to minimize unbridled use of discretion of an agency.' *Aluli v. Lewin*, 73 Haw. 56, 62, 828 P.2d 802, 805 (1992). The rulemaking procedures set forth in HRS chapter 91 require public notice to provide input on a proposed rule, and consideration by the agency of any public comments before implementing, interpreting, or prescribing law or policy regarding game-bird hunting.

* * *

> While HAR § 13-122-5.1(a) authorizes DLNR to establish 'fees for wildlife stamps' and sets a cap for such fees, such authorization does not, and could not, exempt DLNR from complying with the rulemaking procedures set forth in HRS chapter 91 when DLNR: (1) requires members of the public to purchase wildlife-conservation and bird-hunting stamps in order to obtain a hunting license; or (2) sets the fees for these stamps at $10, the maximum cap imposed by HAR § 13-122-5.1(a).

Id., 117 Haw. at 26, 175 P.3d at 136.

Thus, the *Tanaka* court concluded that "DLNR exceeded its authority when it allowed game-bird hunting on Wednesdays and Thursdays during the 2004-2005 hunting season and exacted stamp fees from Appellants without going through the rulemaking procedures set forth in HRS chapter 91." *Id.* Therefore, the *Vega* and *Tanaka* courts rejected the argument that rulemaking is not needed when adoption is left to an administrative agency reasoning that a separate rule or statute required that the defendants adopt, amend, or repeal rules pursuant or subject to Chapter 91.[3]

Here, although HRS § 16-1 enabled the CEO to "adopt, experiment with, or abandon any voting system," it did not give

[3] In *Vega*, the court cited HRS § 294-37(2) which required the commissioner to promulgate regulations pursuant to chapter 91. *See*, *Vega*, 67 Haw. at 154, 682 P.2d at 77. In *Tanaka*, the court cited HRS § 183D-3 which expressly required that any amendments to DLNR rules were to be made pursuant to HRS Chapter 92. *See*, *Tanaka*, 117 Haw. at 26, 175 P.3d at 136.

the CEO "*carte blanche*" to sidestep the independent requirements of HRS Chapter 91, as mandated by HRS § 11-2(e)[4] and § 11-4.

Defendants argue that Hawai'i law does not require administrative rules, contending that the express and unambiguous language of HRS § 11-4 demonstrate that the CEO is authorized to adopt rules as, in his judgment, are needed. Defendants cite to HRS § 11-4 as follows:

> The chief election officer may make, amend, and repeal such rules and regulations governing elections held under this title, election procedures, and the selection, establishment, use, and operation of all voting systems now in use or to be adopted in the State, and all other similar maters relating thereto as in the chief election officer's judgment shall be necessary to carry out this title.

HRS § 11-4. However, HRS § 11-4 provides: "Such rules and regulations, *when adopted in conformity with chapter 91* and upon approval by the governor, shall have the force and effect of law." (*emphasis added*). Thus, HRS § 11-4 is appropriately interpreted as allowing the CEO to make rules as in the CEO's judgment are necessary, but if any rules are made, the same must be made in conformity with Chapter 91. In this case, the CEO, in his judgment, promulgated requirements for a new voting system in the RFP, but not in conformity with HRS Chapter 91.

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[4] "The chief election officer shall adopt rules governing elections in accordance with chapter 91." HRS §11-2(e).

Additionally, in *Aluli v. Lewin*, 73 Haw. 56, 828 P.2d 802 (1992) the appellants filed a complaint seeking declaratory and injunctive relief. They sought cessation of construction and operation of geothermal wells. A complaint was brought against the developer of the wells and against the State Department of Health (DOH) which issued an air pollution permit authorizing the construction and operation of the wells. Appellants contended that DOH erred in issuing the permit when there were no rules promulgated in accordance with the Hawaii Administrative Procedures Act governing the issuance of such permits.

In *Aluli*, it was undisputed that geothermal wells emit hydrogen sulfide (H_2S) into the air. Pursuant to HRS § 342B-32, the developer submitted an application to DOH for issuance of an air pollution permit in conjunction with the construction and operation of wells. An Authority to Construct (ATC) permit was issued to the developer by DOH. At that time, DOH had no rules governing the emission of H_2S into the air nor had the federal government adopted state ambient air quality standards for H_2S. DOH had been in the process of developing proposed rules governing H_2S emissions but none had been adopted.

DOH's response to the developer's application was to issue a permit subject to 26 special conditions. Six of these conditions regulated the emission of H_2S. The *Aluli* court determined that "[i]n essence, [the six conditions] were the

'rules' and ambient air quality standards for H_2S. Such 'rulemaking' is clearly not in compliance with the Hawaii Administrative Procedures Act." *Id.*, at 59, 828 P.2d at 804.

In *Aluli*, DOH argued that rulemaking requirements are not applicable because the conditions only apply to the developer's permit, and did not affect any future applications for air pollution permits. In response, the *Aluli* court stated:

> [W]here the subject matter of a quasi-judicial adjudication encompasses concerns that transcend those of individual litigants and implicates matters of administrative policy, rulemaking procedures should be followed. [ ] These procedural requirements ensure fairness by providing public notice, an opportunity for all interested parties to be heard, full factual development and the opportunity for continuing comment on the proposed action before a final determination is made.

Id., citing, 613 Corp. v. New Jersey Div. of State Lottery, 210 N.J.Super. 485, 498-499, 510 A.2d 103, 110 (1986). The *Aluli* court determined that "[s]etting emission standards for air pollution does not involve merely a scientific assessment, but a balancing of interests." *Id., citing, Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 594 (D.C.Cir. 1971). The *Aluli* court further determined that "[a]ir quality is an integral part of the quality of life and the public should have input in the matter." *Id.*

The *Aluli* court concluded that "[i]ssuance of the permit which allowed the developer to emit certain amounts of H_2S

into the air had 'a prospective and public impact that transcend[ed] the immediate interests of the actual parties whose rights were purportedly adjudicated in [the permit] proceedings.'" *Id.*, 73 Haw. at 60, 828 P.2d at 804, *citing*, *Crema v. New Jersey Dep't of Envtl. Protection*, 94 N.J. 286, 301-02, 463 A.2d 910, 918 (1983). The *Aluli* court concluded that:

> When an agency is accorded unbridled discretion in issuing permits as here,
>
> > the affected public cannot fairly anticipate or address the procedure as there is no specific provision in the statute or regulations which describe the determination process. The public and interested parties are without any firm knowledge of the factors that the agency would deem relevant and influential in its ultimate decision. The public has been afforded no meaningful opportunity to shape these criteria which affect their interest.
>
> *613 Corp.*, 210 N.J.Super. at 503, 510 A.2d at 112; *see also Crema*, 94 N.J. at 302, 463 A.2d at 918.
>
> * * *
>
> The fact that the appellants in this case had an opportunity to present their views before the circuit court at trial is clearly not an adequate substitute for the rulemaking process required under HRS § 342B-32. The appellants comprise a small portion of the public. Others may have been interested in providing input in the matter but may not have been able to intervene in this lawsuit due to a lack of notice or resources. Moreover, fairness to the public and potential applicants for air pollution permits dictates that the rules adopted by DOH be known beforehand.

* * *

> Future applicants will have no official source to turn to for guidance. There will be no avenue to predict DOH's actions in permit application procedures. Without established written standards by rules, no one can know whether permit applications will be reviewed fairly and consistently and whether considerations to grant or deny a permit will serve the purpose of the statue or are unlawful . . . .
>
> '[W]here . . . there are no standards governing the exercise of discretion granted . . . the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.'
>
> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

Id., 73 Haw. at 60-61, 828 P.2d at 804-805 (*certain citations omitted*).

Defendants also contend that rulemaking here would be contrary to the procurement code, and that pre-selecting goods or services by tailoring an RFP to the one offered by a particular vendor would frustrate the objectives of according entities fair and equal treatment and having a rational relationship with agency needs, not be unduly restrictive, and written in as non-restrictive a manner as possible in order to enhance competition and invite innovation. Defendants argue that the specifications for a specific voting machine could not be adopted by rule because that would defeat the purpose of open competition in State procurement. The 2005 VVSG, however, does not create specifications for a specific machine. Though the 2005 VVSG does

contain detailed technical requirements regarding electrical supply, electrical power disturbance, environmental controls, and broader functional requirements, entities are still free to compete and innovate within the parameters set by the 2005 VVSG.

Citing Ah Ho v. Cobb, 62 Haw. 546, 617 P. 2d 1208 (1980) Defendants argue that the purchase or lease of equipment used to transmit election results is a matter of internal management not subject to rulemaking. The method of transmission [of election results] is purely internal management of election results that has nothing to do with 'procedures available to the public.' HRS § 91-1(4) provides an exception to the rulemaking requirement by stating a "rule" "does not include regulations concerning only the internal management of an agency *and* not affecting the private rights of or procedures available to the public." (*Emphasis added*).

In *Ah Ho*, the Hawai'i Supreme Court concluded that an agreement between a private party and the Board of Land and Natural Resources that allowed the private party to transfer its own water through a public irrigation system was not a "rule" within the meaning of HRS § 91-1(4). *Id.*, 62 Haw. at 550, 617 P.2d at 1211. However, the *Ah Ho* case is distinguishable from the instant case in that in *Ah Ho*, the contract was between a private party and the government agency, regarding a matter that

solely concerned the private party, namely the transportation of the private party's own water through a public system.

In *Ah Ho*, the agreement had nothing to do with "procedures available to the public" and did not affect the rights of the public. The agreement in *Ah Ho* only set forth the contractual rights and obligations of the private party and the government agency. In the instant case, what is at issue is not an agreement that allows a private party to transmit its own property through a state system; it is an agreement that allows a private party to provide a system to transmit the public's vote. It cannot be reasonably be said that what is at issue here has nothing to do with procedures available to the public or does not affect the rights of the public. The entering into of an agreement for a new voting system, subject to the conditions imposed by the 2005 VVSG, has a prospective and public impact, particularly the public's right to vote, and to have that vote be secure and accounted for in a proper manner.

Defendants further argue that HRS § 16-42(b) imposes specific rulemaking requirements where the CEO relies on electronic tallies created directly by electronic voting systems, and that the CEO has adopted rules that satisfy these specific rulemaking requirements. Defendants further argue that under the

doctrine of *expressio unius est exclusio alterius*[5], by enumerating such cases where rulemaking was required, the legislature did not intend to impose specific rulemaking requirements upon the CEO's discretion to adopt a voting system. However, Plaintiffs are arguing that rulemaking is required for the adoption of DRE voting systems. The terms "electronic voting machines" and "DRE" are not interchangeable. Electronic scanners are used to count paper ballots without direct recording of votes by the voting machine the voter uses. "DRE" means direct recording electronic technology that records votes cast on the machine used by the voter to cast a vote.

The Hawai'i Administrative Rules are replete with rules governing voting procedures and vote disposition. *See*, HAR §§ 2-50-80, *et seq.*, §§ 2-51-90, *et seq.* These sections of the HAR contain detailed rules pertaining to, among other issues, how to correctly mark a paper ballot (HAR § 2-5-1-80), how to correctly administer punchcard ballots (HAR § 2-51-83), how to properly handle spoiled ballots (HAR §§ 2-51-81, 2-51-84, 2-51-85, 2-51-

[5] *See, In re Water Use Permit Applications*, 94 Haw. 97, 151, 9 P.3d 409, 463 (2000) ("[R]ule of construction that '[w]here [the legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion); *Roxas v. Marcos*, 89 Haw. 91, 129, 969 P.2d 1209, 1247 (1998) ("Pursuant to the rule of statutory construction denominated *expressio unius est exclusio alterius* - the express inclusion of a provision implies the exclusion of another…); *Fought & Company, Inc. v. Steel Engineering and Erection, Inc.*, 87 Haw. 37, 55, 951 P.2d 487, 505 (1998) ("This court has consistently applied the rule of *expressio unius est exclusio alterius* - the express inclusion of a provision in a statute implies the exclusion of another - in interpreting statutes.").

85.2), how to correctly mark a marksense ballot (HAR § 2-51-85.1), how to collect and transport ballots (HAR § 2-51-86), counting and tallying paper ballots (HAR §§ 2-51-90, 2-51-91), counting center procedures and centralized counting regarding electronic voting systems (HAR §§ 2-51-92, 2-51-93, 2-51-94, 2-51-95, 2-51-96, 2-51-96.1, 2-51-96.2), and auditing (HAR § 2-51-96.3). Section 2-51-99 of the Hawai'i Administrative Rules is reserved for rules regarding "Direct recording electronic." The necessity for rules regarding DRE voting systems has been clearly anticipated.

Based on the foregoing, the Court concludes that there are no genuine issues of material fact and that Plaintiffs are entitled to judgment as a matter of law on their first three claims.

D. Injunctive Relief

The appropriate test for determining whether a permanent injunction is proper is: (1) whether the plaintiff has prevailed on the merits; (2) whether the balance of irreparable damage favors the issuance of a permanent injunction; and (3) whether the public interest supports granting such an injunction. *Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii*, 117 Haw. 174, 212, 177 P.3d 884, 922 (2008).

The first element of "whether the plaintiff has prevailed on the merits" has been answered in the affirmative.

Plaintiff has prevailed on the merits. As to the second element, since the next election is over a year away, there is little or harm in requiring Defendants to undergo proper rulemaking procedures when adopting new DRE voting systems. If Defendants commit themselves to conducting rulemaking as required by law, this can be completed within a reasonable period of time. On the other hand, Plaintiffs rights would continue to be harmed if Defendants do not undergo proper rulemaking procedures in this case. Finally, the public interest supports the granting of injunctive relief in that it is in the public interest for the CEO and Office of Elections to adopt rules and regulations pursuant to the rulemaking procedures set forth in the Hawai'i Administrative Procedure Act. Therefore, Plaintiffs have established the three elements required for injunctive relief and are entitled to a permanent injunction.

III. CONCLUSION

Based on the foregoing discussion, Plaintiffs have established that they are entitled to judgment as a matter of law on all of their claims, and Defendants have failed to demonstrate that they are entitled to judgment as a matter of law.

NOW, THEREFORE, IT HEREBY ORDERED as follows:

1. Plaintiffs' Renewed Motion for Summary Judgment is granted.

2. Defendants' Motion for Summary Judgment is denied.

IT IS HEREBY FURTHER ORDERED as follows:

1. Plaintiffs' request for a declaration invalidating the adoption of the EAC Guidelines for use in state and county elections is granted.

2. Plaintiffs' request for a declaration invalidating the use of telephone lines or the internet for transmitting ballot counts and election results for final tabulation is granted.

3. If Defendants seek to adopt the 2005 VVSG, the same must be done pursuant to the rulemaking provisions of HRS Chapter 91.

4. If Defendants seek to adopt a methodology by which Defendants transmit election results over telephone and/or internet lines, the same must be done pursuant to the rulemaking provisions of HRS Chapter 91.

5. A permanent injunction enjoining Defendants and their agents and employees, and all persons acting under, in concert with, or for them from any conduct in conformance with the EAC Guidelines or transmitting ballot counts and election results by telephone line or the internet until rules have been promulgated pursuant to HRS Chapter 91 shall issue in favor of Plaintiffs and against Defendants. This permanent injunction shall have no effect on any rules promulgated pursuant to HRS

Chapter 91. Defendants will not be required to return to this Court seeking a lifting of this injunction if rules are adopted pursuant to HRS Chapter 91.

DATED: Wailuku, Hawai'i, September 10, 2009.

Judge of the Above Entitled Court

I hereby certify that a copy
of the within was served this
10th day of September, 2009, on:

Lance D. Collins, Esq. ✓
Robyn B. Chun, Esq., DAG

sgd/ C. Casil

Clerk