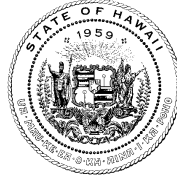


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December \_\_\_\_, 2013

Mr. Scott T. Nago  
Chief Election Officer  
Office of Elections  
Department of Accounting  
and General Services,  
State of Hawai'i  
802 Lehua Avenue  
Pearl City, Hawai'i 96782

Dear Mr. Nago:

Re: Including a Party or Group Name with a  
Presidential Candidate's Name on the  
General Election Presidential Ballot

This letter responds to your request for a formal legal opinion regarding the contents of a State of Hawai'i general election ballot for the office of President of the United States.

Your inquiry arises from a legal challenge filed by the Justice Party regarding its failure to have its candidate for president placed on the 2012 Hawai'i general election ballot. See, Justice Party v. Nago, Civ. No. 12-00403 JMS-BMK (D. Haw.). In the course of the litigation a question arose as to whether the Justice Party was required to be a qualified political party under sections 11-61 and 11-62, Hawaii Revised Statutes (HRS), as a prerequisite to having its party name appear alongside the name of its presidential candidate on Hawai'i's presidential ballot.

I. QUESTION PRESENTED

We have taken the liberty of rephrasing your question as follows: do Hawai'i's election laws allow for the inclusion of

the name of a presidential candidate's affiliated group or party with the candidate's name on the general election ballot, if that affiliated group or party is not qualified as a political party pursuant to sections 11-61 and 11-62, HRS?

## II. SHORT ANSWER

Yes. Regardless of whether the affiliated group or party is qualified as a political party under sections 11-61 and 11-62, HRS, we conclude that the presidential general election ballot needs to include both the candidate's name and the candidate's affiliated group or party, if the other legal requirements for inclusion on the ballot are met. We reach this conclusion by analyzing section 11-113(c)(2), HRS, and related election laws. As noted below, this conclusion is limited to presidential ballots only.

## III. DISCUSSION

### A. Background Regarding Presidential Elections

In analyzing the content of general election presidential ballots, we must first consider the larger context. Most of the candidates who appear on Hawai'i's general election ballot are chosen in our open primary election. The primary election is the only method by which a candidate for political office may appear on the general election ballot. See Haw. Rev. Stat. § 12-1 (2009) ("All candidates for elective office, except as provided in section 14-21, shall be nominated in accordance with this chapter and not otherwise."); Haw. Rev. Stat. § 12-2 (Supp. 2013) ("No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary.").

The one exception to this requirement applies to candidates for presidential office. Under section 14-21, HRS, presidential nominees, electors, and alternates are chosen by caucus, not by primary election.<sup>1</sup> Under section 12-1, HRS, the open primary law

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<sup>1</sup> This provision reads: "In each year when electors of president and vice president of the United States are to be chosen, each of the political parties or parties or groups qualified under section 11-113 shall hold a state party or group convention pursuant to the constitution, bylaws, and rules of the party or group; and nominate as candidates for its party or group as many

(chapter 12) explicitly does not apply to presidential elections. Instead, whomever is chosen by the caucus appears on the general election ballot. This distinction is an important one. While chapter 11, HRS (elections generally), and chapter 12, HRS (primary elections), govern all other candidates for elected office in Hawai'i, presidential candidates are also governed by a distinct set of laws. Your question concerns only the candidates for presidential office; this letter therefore focuses on that alone.

B. The Presidential Ballot

A candidate's qualification to appear on the general election presidential ballot is governed by section 11-113, HRS. Under that section, "[a]ll candidates for president and vice president of the United States shall be qualified for inclusion on the general election ballot" under one of two procedures. The first procedure governs the "candidates of political parties which have been qualified to place candidates on the primary and general election ballots[.]" Haw. Rev. Stat. § 11-113(c)(1) (Supp. 2013). The second procedure governs the "candidates of parties or groups not qualified to place candidates on the primary or general election ballots." Haw. Rev. Stat. § 11-113(c)(2) (Supp. 2013) (emphasis added). It is the second procedure that is at issue here, because the Justice Party is not a "qualified" political party under sections 11-61 and 11-62, HRS.

Under section 11-113(c)(2)(A) and (B), the second procedure for presidential candidates to appear on the general election ballot requires the candidate's sworn application and a petition signed by registered voters. The petition must include the

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electors, and a first and second alternate for each elector, of president and vice president of the United States as the State is then entitled. The electors and alternates shall be registered voters of the State. The names and addresses of the nominees shall be certified by the chairperson and secretary of the convention of the respective parties or groups and submitted to the chief election officer not later than 4:30 p.m. on the sixtieth day prior to the general election of the same year. The chief election officer upon receipt thereof, shall immediately notify each of the nominees for elector and alternate elector of the nomination." Haw. Rev. Stat. § 14-21 (2009) (emphases added).

signatures of "not less than one per cent of the votes cast in the State at the last presidential election." Haw. Rev. Stat. § 11-113(c)(2)(B) (Supp. 2013).<sup>2</sup> If the requirements of Hawai'i law are met, a candidate from a party group that is not qualified under chapter 11 may appear on the general election presidential ballot.<sup>3</sup>

C. Conclusion as to Including Party  
Names on Presidential Ballots

Section 11-113(c) provides a mechanism for candidates from non-qualified parties or groups to appear on the presidential ballot. This section does not govern the contents or arrangement of the presidential ballot; it governs how candidates for president and vice president are "qualified for inclusion on the general election ballot[.]" Id. The content of the ballot (that is, what text appears on the ballot) and its arrangement are governed by other provisions of chapter 11, HRS. See Haw. Rev. Stat. §§ 11-112 and 11-115 (2009).

Section 11-113 does not itself address the contents of the presidential ballot. But section 11-112 does: "[t]he ballot shall contain the names of the candidates, their party affiliation or nonpartisanship in partisan election contests, the offices for which they are running, and the district in which the election is being held." Haw. Rev. Stat. § 11-112(a) (2009) (emphasis added). As a general matter, therefore, party affiliation is included with the candidate's name on the ballot.

Chapter 11 also provides that "political party" or "party" means "a political party qualified under part V of this chapter." Haw. Rev. Stat. § 11-1 (2009). Section 11-112 uses

<sup>2</sup> This requirement was upheld as constitutional in Nader v. Cronin, 620 F.3d 1214 (9th Cir. 2010). In that case, the individual seeking access to the presidential ballot was an independent candidate. Id. at 1215. We note that the statute is not limited to presidential candidates unaffiliated with any party. It governs presidential "candidates of parties or groups not qualified to place candidates on the primary or general election ballots." Haw. Rev. Stat. § 11-113(c)(2).

<sup>3</sup> This is not a complete list of the requirements. See Haw. Rev. Stat. § 11-113(c)(2) (further details regarding petition and statement); Hawaii Administrative Rules §§ 3-172-110 to 3-172-113 (governing presidential petitions).

the phrase "party affiliation" to list what is included on the ballot. Read literally, these two provisions together might be interpreted to mean that only qualified political parties would be included with the candidates' names on the ballot under section 11-112.

We reject this reading as hypertechnical. A closer analysis indicates that the "party affiliation" listed on the ballot under section 11-112, must, for purposes of the presidential election, include the names of non-qualified parties and groups that otherwise meet the requirements to appear on the presidential ballot. This means, as we have indicated above, that presidential candidates from non-qualified parties can also have their party or group affiliation listed on the presidential ballot.

We reach this conclusion for three reasons. Each is based on statutory interpretation, the larger context of our election laws, and logic.

First, to read "party affiliation" literally to mean only qualified political parties in the context of the presidential election would make section 11-113(c)(2) internally inconsistent and ineffective at accomplishing its apparent purpose. As discussed above, that provision governs the process by which non-qualified parties or groups may place a candidate for president on the general election ballot. Importantly, it uses the word "party" in describing a non-qualified party or group. See Haw. Rev. Stat. § 11-113(c)(2) ("[i]n the case of parties or groups not qualified to place candidates on the primary or general election ballots . . . ."). If "party" meant only qualified parties, this provision would be rendered entirely ineffective. As a matter of statutory interpretation, statutes are never read to be rendered superfluous or ineffective. "It is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can legitimately be found which will give force to and preserve all the words of the statute." Dines v. Pac. Ins. Co., Ltd., 78 Haw. 325, 331, 893 P.2d 176, 182 (1995).

Therefore, section 11-113 itself indicates that for purposes of the presidential election, the "party affiliation" listed on the general election ballot should include non-

qualified parties. We reach this conclusion by reading section 11-112 (contents of the ballot), and section 11-113 together. "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." Haw. Rev. Stat. § 1-16 (2009).<sup>4</sup>

We also note that the general definition limiting "political party" and "party" to qualified parties only in section 11-1, HRS, includes the following disclaimer: "[w]henever used in this title, the words and phrases in this title shall, unless the same is inconsistent with the context, be construed as follows[.]" Id. (emphasis added). Section 11-113 specifically contemplates non-qualified parties' participation in the presidential election. Thus reading "party" to include only qualified parties would be "inconsistent with the context" of the law governing the presidential elections.<sup>5</sup>

Second, the unique system applicable to the presidential election indicates that party affiliation should be included with the candidates' names on the ballot, regardless of whether the party is considered "qualified." The President and Vice-President of the United States are chosen by the electoral college, not by popular vote. U.S. Const. art. II, § 1. As Hawai'i law acknowledges, the process of choosing electors is heavily tied to the political parties themselves (both qualified

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<sup>4</sup> Section 11-115, HRS, is also relevant in this regard. This section governs the arrangement of names on the ballot. It specifically uses "political party" to designate how presidential and vice-presidential candidates are organized on the ballot. The candidates for president, vice-president, governor, and lieutenant governor "of the same political party" are grouped together "within the same pair of horizontal lines." Haw. Rev. Stat. § 11-115(b) (2009) (emphasis added). Section 11-113, HRS, provides methods for both qualified and non-qualified parties to place presidential candidates on the general election ballot. Read together, these two statutes indicate that the names of presidential candidates from non-qualified parties should be accompanied by their party affiliation on the general election ballot.

<sup>5</sup> This conclusion is limited to presidential elections, which, as explained above, carry specific statutory requirements that differ from those that govern the elections for other offices.

and non-qualified). Under section 14-21, HRS, qualified political parties and "parties or groups qualified under section 11-113" shall each hold their own caucus. These caucuses are governed by each party's own rules. Id. We view the cross-reference to section 11-113 as significant. The names of the candidates chosen from these party-run caucuses will appear on the ballot under section 11-113. Given that section 11-113(a) substitutes the name of the presidential candidate for that of the elector on the ballot itself, it would be difficult to implement this process fully (and consistently with other related statutes) if the candidate's political affiliation was omitted from the ballot.

This conclusion is further magnified by the unmistakable indication in section 11-113 that non-qualified parties have a method of access to the presidential ballot (subject to applicable conditions). Once those requirements are met, however, we see no basis for treating presidential candidates of affiliated groups or parties that are not qualified as a political party differently from presidential candidates of qualified parties. It is well-established that "even in the absence of statutory ambiguity, departure from literal construction is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act." G.J. Hawaii, Ltd. v. Waipouli Development Co., 57 Haw. 557, 561, 560 P.2d 490, 493 (1977) (citation and internal quotation marks omitted). We believe this doctrine of statutory interpretation is well-applied here.

Third, we note that our conclusion here is consistent with the Office of Elections' longstanding practice. As you have reported to us, you interpret chapter 11, HRS, to read that a presidential candidate's party affiliation is included on the presidential ballot with that candidate's name, regardless of whether the party is "qualified" under sections 11-61 and 11-62. As the agency tasked with implementing chapter 11, the Office of Elections' interpretation is entitled to deference as a matter of law. It is well-settled that, when faced with the task of interpreting ambiguous statutory language, courts should "accord persuasive weight to the construction given words of broad and indefinite meaning by the agency charged with the responsibility of carrying out the mandate of the statute in question, unless the construction is palpably erroneous." Nihi Lewa, Inc. v. Dep't of Budget and Fiscal Servs., 103 Haw. 163, 166-67, 80 P.3d



Mr. Scott T. Nago

[date]

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984, 987-88 (2003) (citations and internal quotation marks omitted).

IV. CONCLUSION

Based on this analysis, we conclude that general election presidential ballots shall contain the candidate's party or group affiliation along with the candidate's name, regardless of whether the party is qualified under sections 11-61 and 11-62, HRS.

We reiterate in closing that this letter addresses only the current statutes governing the general election presidential ballots. The content of other ballots should be determined under applicable law.

Very truly yours,

[NAME]

Deputy Attorney General

APPROVED:

David M. Louie  
Attorney General