CONCURRING OPINION OF ACOBA, J.

We cannot, as a general rule, direct an officer of another branch of government to do an act that is in fact discretionary with that officer. See Barnett v. Broderick, 84 Hawai‘i 109, 111, 929 P.2d 1359, 1361 (1996) ("Mandamus relief is available to compel an official . . . only if . . . the official's duty is ministerial and so plainly prescribed as to be free from doubt[.]"). Because the petition asks us to direct the performance of discretionary acts, we cannot grant it. My concurrence today rests on the same rationale expressed in my dissent in the previous petition. See Cayetano v. Yoshina, No. 25372 (Oct. 7, 2002) (order) (Acoba, J., dissenting). As to both petitions, it is established as a general rule that a writ of mandamus cannot be employed to order a State official to perform a discretionary act.

In the previous petition, I construed the petition as equivalent to an agreed statement of facts, because the election officer joined in the petition, thus giving us jurisdiction over the merits of the petition. See Hawai‘i Rules of Appellate Procedure (HRAP) Rule 18 (2002). Here, however, the election officer has not joined in the petition and, as a result, the petition for mandamus cannot be construed as an agreed statement of facts. Accordingly, the petition must be treated as one for a writ and, thus, the general rule controls. Therefore, I agree

that a writ of mandamus cannot issue as prayed for in the petition.

I.

The Governor of the State of Hawai‘i (Petitioner) makes two requests: that (1) "this [c]ourt direct . . . the State's Chief Election Officer . . . to waive [Hawai‘i Revised Statutes (HRS)] § 11-118(b)'s [forty-day] time limit[] for substitution, and [(2)] allow the Democratic Party to submit the name of another person qualified to serve as Hawaii's U.S. Representative from the Second Congressional District by October 10, 2002." The second request rests on the resolution of the first, since any allowance to submit another name would depend on whether the conditions pertaining to such allowance may be waived.[1] HRS § 11-118 (1993 & Supp. 2001) is applicable, and states in relevant part as follows:

> **Vacancies; new candidates; insertion of names on ballots.** (a) In case of death, withdrawal, or disqualification of any party candidate after filing, the vacancy so caused may be filled by the party. The party shall be notified by the chief election officer or the clerk in the case of a county office immediately after the death, withdrawal, or disqualification.
>
> (b) If the party fills the vacancy, and so notifies the chief election officer or clerk not later than 4:30 p.m. on the third day after the vacancy occurs, but not later than 4:30 p.m. on the fiftieth day prior to a primary or special primary election or not later than 4:30 p.m. on the fortieth day prior to a special, general, or special general election, the name of the replacement shall be printed in an available and appropriate place on the ballot, not necessarily in alphabetical order; provided the replacement candidate fills out an application for nomination papers and signs the proper certifications on the nomination paper and

[1] The viability of the second request is uncertain since the Democratic Party is not a party to this suit, and it is unclear what form any "allowance," if within our jurisdiction to order, would take.

> takes either an oath or affirmation as provided by law. If the party fails to fill the vacancy pursuant to this subsection, no candidate's name shall be printed on the ballot for the party for that race.
>
> . . . .
>
> (d) The parties shall adopt rules to comply with this provision, and those rules shall be submitted to the chief election officer.
>
> (e) The chief election officer or county clerk in county elections may waive any or all of the foregoing requirements in special circumstances as provided in the rules adopted by the chief election officer.

(Boldfaced font in original.) (Emphases added.) As to the first request, Petitioner apparently asks that a writ of mandamus be issued. The purpose of a writ of mandamus is to "compel an officer to perform a duty owed to the individual seeking the writ when the claim is clear and certain, the official's duty is ministerial and so plainly prescribed as to be free from doubt, and no other remedy is available." In re Disciplinary Bd. of the Hawai'i Supreme Court, 91 Hawai'i 363, 371, 984 P.2d 688, 696 (1999) (emphasis added).

II.

The statutory authorization to waive the requirements in HRS § 11-118, however, is not couched in ministerial, but in discretionary terms. As set out, HRS § 11-118(e) states in relevant part that the chief election officer "may waive any or all of the foregoing requirements in special circumstances[.]" (Emphasis added.) This court has construed the word "may" to denote "discretion." State v. Kui Ching, 46 Haw. 135, 138, 376 P.2d 379, 381 (1962) (stating that "[l]egislatively, it is a common practice to use the word 'may' to indicate discretionary

authority"). Subsection (d) of HRS § 11-118, which immediately precedes the waiver provision, provides that the political parties "shall adopt rules" in consonance with the statute. (Emphasis added.) This court has also construed the word "may" to connote discretion, "where the verbs 'shall' and 'may' are used in the same statute," State v. Cornelio, 84 Hawai'i 476, 493, 935 P.2d 1021, 1038 (1997) (quoting Gray v. Administrative Dir. of the Court, 84 Hawai'i 138, 149, 931 P.2d 580, 591 (1997)), as is the case here.

Based on the foregoing, and assuming compliance with the prerequisites for its exercise, see infra note 3, discretion resides in the election officer under HRS § 11-118(e) to waive the preceding requirements in the statute. Thus, it is within his purview to decide whether to do so or not. But because such matters are within his discretion, mandamus will not issue. See State ex rel. Marsland v. Town, 66 Haw. 516, 526, 668 P.2d 25, 31 (1983) (stating that "a decision premised largely on discretionary authority is normally free from recall by mandamus"). Thus, as to waiving the forty-day provision, that act is a discretionary one for which mandamus cannot lie.

III.

A.

In Cayetano, decided two days ago, I dissented from the majority. In that case, I reached the merits of the question posed and decided, as opposed to the majority, that the election

officer had the discretion to hold a special election in less than sixty days under the express language of HRS § 17-2. See Cayetano at 7-8 (Acoba, J., dissenting). In my view, the writ of mandamus requested in that case could not issue, because the petition did not ask us to direct that an officer do a ministerial act. See id. at 2. However, as I stated, the petition could be treated as one based on an agreed statement of facts under HRAP Rule 18 rather than as a request for a writ of mandamus.[2] See id. at 3. That was so, because all of the requirements of an agreed statement were met; essentially that both the Petitioner, the Governor, and Respondent, the election officer, joined in the petition and agreed to the essential facts and the question to be decided. See id. at 3 n.1. Thus, I stated that, in the interest of justice and in affirming the substance

---

[2] HRAP Rule 18, pertaining to agreed facts, states as follows:

> **(a) Submission.** As authorized by law, the parties to a dispute that might be the subject of a civil action or proceeding in a Hawai‘i appellate court, circuit court, district court, family court, land court or tax appeal court may, without the action of a trial court or agency, agree to submit a case directly to a Hawai‘i appellate court upon a statement containing the facts upon which the controversy depends, a statement of the question or issues, the contentions of the parties as to each issue, and, the form of judgment that each party requests the appellate court to render.
>
> **(b) Good Faith.** It must be shown by affidavit or declaration that the controversy is real and that the proceedings are a good faith effort to determine the rights of the parties.
>
> **(c) Disposition.** The appellate court may refuse to entertain a case submitted on agreed facts. If the appellate court entertains the case, the judgment rendered thereon shall be entered and may be enforced as in other cases, subject to the right of a party to move for reconsideration.

of the petition over its form, the petition should be decided as if it were an agreed statement. See id. at 3-4.

Treating the petition as one based on an agreed statement, we could have issued a declaratory judgment as to the question raised. See id. at 2-3. A declaratory judgment sets out the rights and obligations of the parties in advance of any proposed action by them. See Pacific Meat Co. v. Otagaki, 47 Haw. 652, 656, 394 P.2d 618, 620 (1964) ("[T]he purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations[.]" (Citation omitted.)). In requesting that this court indicate whether the chief election officer had the discretion under HRS § 17-2 to hold a special election in less than sixty days without asking that we direct he exercise the discretion in that particular way, the petition in effect sounded as one for a declaratory judgment, which we could rule upon. See Cayetano at 2 (Acoba, J., dissenting).

As to that question, in my view, it was self evident that discretion inhered in the election officer, subject to review for abuse, to hold a special election in less than sixty days. See id. at 5. This is because the sixty-day requirement, like all of the other requirements in HRS § 17-2, were to be implemented by the election officer "as far as practicable." HRS § 17-2.

B.

In this case, however, we cannot recharacterize the petition as one sounding in an agreed statement of facts, because the election officer did not join in the petition. Cf. Cayetano at 3 n.1 (Acoba, J., dissenting). Because the election officer did not, the petition cannot be treated as anything other than as one for a writ of mandamus. As mentioned above, it is a general rule[3] that a writ of mandamus cannot be used to direct an officer to take a particular course of action where the decision to take it or not is committed to his or her discretion. Inasmuch as the decision to waive the requirements of HRS § 11-118 is subject to the election officer's discretion (assuming arguendo he can do so in the absence of rules referred to in HRS § 11-118(e)), we cannot issue a writ of mandamus directing him to exercise his

[3] The cases cited in support of the petition do not establish an exception to the general rule. In Holland v. Zarif, 794 A.2d 1254 (Del. Ch. 2002), the court held that a mandamus writ can only be "issued to compel the performance of a legal duty, not to control how that duty is performed." Id. at 1269. In Clark v. City of Hermosa Beach, 56 Cal. Rptr. 2d 223 (1996), the court looked to the governing statute which stated that a "writ of administrative mandate [may be issued] where an agency has (1) acted in excess of its jurisdiction, (2) deprived the petitioner of a fair hearing, or (3) committed a prejudicial abuse of discretion." Id. at 233. The court held that, because the petitioner did not receive a fair hearing by an agency, a writ of mandate could be issued to compel the agency to give a fair hearing. In the foregoing cases, the court ordered the respondent to perform a legal duty. The exercise of discretion was not involved.

In In re Nestle USA -- Beverage Div., 82 S.W.3d 767, 778 (2002), the court held that the respondent "clearly abused her discretion in ordering that the parties' disputes be resolved by litigation, and not by further arbitration." As such, the court "conditionally grant[ed] mandamus relief[,]" but did not issue the writ. Id. (emphasis added). Without deciding the persuasiveness of the analysis in Nestle, that case is distinguishable because here there is no evidence that discretion has been exercised. Furthermore, the question remains as to what standard is applicable were the discretion of the elections officer exercised or whether discretion can be properly exercised in the absence of rules elucidating the "special circumstances" upon which waiver may be premised. See HRS § 11-118.

discretion in any particular way, i.e., to waive the requirements in HRS § 11-118.

For the foregoing reasons, I concur.