DISSENTING OPINION OF ACOBA, J.

The election process has already begun. A substantial number of voters have apparently already voted by absentee ballot. However, inasmuch as Plaintiffs have raised substantial grounds which may invalidate the results of the vote, I believe preservation of the status quo, (which is the objective of injunctive relief,) may best be accomplished by enjoining the tabulation and certification of the results, pending the ultimate decision in this case. As much as our view of the proposed amendment must be content neutral, we must also insure that the process by which the amendment is presented to the voters is procedurally correct.

I.

I believe we have jurisdiction in this case. We have supervisory jurisdiction of the trial courts under Hawai‘i Revised Statutes (HRS) § 602-4 (1993), when it is necessary "'to prevent and correct errors and abuses therein where no other remedy is expressly provided for by law[.]'" State v. Kealaiki, 95 Hawai‘i 309, 317, 22 P.3d 588, 596 (2001) (quoting State v. Ui, 66 Haw. 366, 367, 663 P.2d 630, 631 (1983)). In order to prevent such an error or abuse, I would vacate the circuit court's order denying Plaintiffs' request for a temporary restraining order (TRO) insofar as it does not enjoin the Defendant election officer (Defendant) "from tabulating or

certifying the votes cast in the November 5, 2002, on question 3" as requested by Plaintiffs. Accordingly, I would issue a TRO as to that aspect of the case.

II.

In determining whether to sustain a request for a TRO, this court must balance: 1) whether a plaintiff is likely to succeed on the merits; 2) whether the balance of irreparable harm favors the temporary injunctive relief; and 3) whether the public interest supports granting the temporary injunctive relief. See Life of the Land v. Ariyoshi, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978). On balance, as viewed at this point, I believe the circumstances indicate a TRO should be issued with respect to tabulation and certification by the Defendant. Such a TRO would not stay the election, but direct that the votes not be tabulated or certified until Plaintiffs' claim is decided.

A.

In line with their request for a restraining order, Plaintiffs have shown a likelihood for success. The Hawai‘i State Constitution plainly establishes the necessary procedures for a constitutional amendment:

> Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

> At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

Hawai‘i Const. Art. XVII, § 3 (emphasis added). This court has construed the constitutional provisions to be mandatory and not merely directory. See Blair v. Cayetano, 73 Haw. 536, 543, 836 P.2d 1066, 1070 ("[T]he provisions of a constitution which regulate its own amendment are not merely directory, but mandatory."), reconsideration denied, 73 Haw. 536, 836 P.2d 1066 (1992). Furthermore, this court has adopted a "strict observance" standard for procedural requirements relating to the ratification of an amendment. See id. ("[S]trict observance of every substantial requirement is essential to the validity of the proposed amendment." (Internal quotation marks and citations omitted.)). The constitution sets forth a single, straight-forward, procedure for submission of a proposed amendment, as to which no ambiguity exists or dispute can reasonably arise. See Bronster v. Yoshina, 84 Hawai‘i 179, 187, 932 P.2d 316, 324 (1997) ("We read the language of article XVII, section 3 as expressing a series of related, straightforward requirements pursuant to which the legislature may propose amendments to the Hawai‘i Constitution.").

Even if substantial compliance rather than strict compliance were considered the test, the actions Defendant took do not appear to be substantially compliant. Defendant failed to publish the full text of the proposed amendment in a newspaper of general circulation in each senatorial district for four

successive weeks in the two months prior to the election. Defendant admits to this. Instead, Defendant undertook to publish the text only six days before the election, after a significant portion of the population may have already voted.

B.

It is arguable whether Plaintiffs would suffer irreparable harm if the amendment should be adopted. However, it would be contrary to the public interest to tabulate and certify the results when there is a substantial likelihood that Plaintiffs may ultimately prevail. To do so would only increase the frustration and confusion of the voters, pending the final determination of this case. The preservation of the status quo can practically and conceptually be maintained in this case if tabulation and official certification of the results are postponed. See Bush v. Gore, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring) ("Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires."). Tabulation[1] and certification, absent a final determination in this case, will be clouded by the suit now pending. It makes little sense under such circumstances to tabulate and certify the votes. While it is arguable that if the proposal is rejected, those who oppose it cannot claim injury, the likely invalidity of the

[1] The facts do not indicate how tabulation is done. Tabulation should be enjoined only to the extent it does not prevent other election results from being counted.

amendment process itself subverts the legitimacy of whatever outcome may result. Thus, the public interest factor weighs heavily in favor of determining the question of the procedural validity raised by Plaintiffs. The answer to that question will decide whether tabulation and certification are necessary or warranted.

III.

Accordingly, I would issue a restraining order against tabulation and certification, pending the disposition of the merits of the suit.