
CONCURRING OPINION BY ACOBA, J.

Inasmuch as the matters set forth herein were largely raised in S.Ct. No. 25410 in November 2002, see majority opinion at 7 and at n.5, and I believed that at that time (1) this court had jurisdiction to hear the appeal in No. 25410, (2) there was a substantial likelihood that Plaintiffs¹ would prevail because of Defendant Yoshina's violation of Hawai'i Constitution article XVII, section 3 and therefore, (3) a temporary restraining order (TRO) should issue to enjoin the tabulation and certification of the voting results pending a decision of the merits (see dissenting opinion in S.Ct. 25410), I concur in the majority's ultimate holding that the amendment was not validly ratified. Majority opinion at 30.

I write separately on two points. First, based on our precedent referred to in the discussion herein, this court should construe the publication and disclosure requirements of article XVII, sections 2 and 3 to be "substantial requirement[s]" dictating "strict observance." Blair v. Cayetano, 73 Haw. 536, 543, 836 P.2d 1066, 1070, reconsideration denied, 73 Haw. 536, 836 P.2d 1066 (1992). Thus, I do not feel "a question . . . appears to remain[,]" majority opinion at 28, surrounding these sections of article XVII. As much as our view of the proposed amendment must be content neutral, we must also ensure that the

¹ Plaintiffs A. Joris Watland and Eric Gene Schneider in the present case were the plaintiffs in S.Ct. No 25410.

process by which an amendment is presented to the voters is procedurally correct.

Second, as mentioned, a TRO should have earlier issued against the tabulation and certification of this amendment, thereby avoiding the subsequent uncertainty generated by this litigation. Plaintiffs had raised substantial grounds to support a TRO, which grounds have ultimately, in the present case, led to invalidation of the voting results. It was important for the integrity of the voting process to ensure that the procedure by which the amendment was presented to the voters was correct, prior to tabulation and certification of the vote. Accordingly, for the reasons set forth below, preservation of the status quo (which had been the objective of the injunctive relief requested by Plaintiffs) pending an ultimate decision on the merits, would have been the better course.

I.

As noted by the majority, on "November 4, 2002, this court denied the emergency motion [for a TRO,²] based upon lack of appellate jurisdiction." Majority opinion at 7. I believe this court had jurisdiction to grant the motion for a TRO, for we have supervisory jurisdiction of the trial courts under Hawai'i Revised Statutes § 602-4 (1993), when it is necessary "to

² As noted by the majority, S.Ct. No. 25410 included both a notice of appeal from the circuit court's November 1, 2002 order and the emergency motion for a temporary restraining order. Majority opinion at 7.

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)). Hence, in order to prevent such an error, a jurisdictional basis upon which to rely was available to this court.

II.

In deciding whether to sustain a request for a TRO like the one filed, this court must balance the following considerations: 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. Life of the Land v. Ariyoshi, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978). In that light, I reiterate the relevant considerations.

A.

In line with their prior request for a restraining order, Plaintiffs had 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. Blair, 73 Haw. at 543, 836 P.2d at 1070 (“[T]he provisions of a constitution which regulate its own amendment are not merely directory, but mandatory.”).

Furthermore, this court has adopted a “strict observance” standard for procedural requirements relating to the ratification of an amendment. 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.”).

Defendant Yoshina had 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. Instead, Defendant undertook to publish the text only six days before the election, after a significant portion of the population may have already voted.

Even if substantial compliance rather than strict compliance were considered the test, the actions Defendant took do not appear to be substantially compliant. Thus, at the time Plaintiffs applied for the TRO, it was evident that the "procedural mandate of article XVII, section 2 and 3" had been disregarded. Majority opinion at 28.

B.

Although it may have been arguable whether adoption of the amendment would cause irreparable harm to Plaintiffs, it was contrary to the public interest to tabulate and certify the results when there was a substantial likelihood that Plaintiffs would ultimately prevail. The preservation of the status quo pending a decision on the merits could have been practicably and conceptually maintained in this case if tabulation³ and official certification of the results were 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."). Because the status quo was not maintained, announcement of the vote count was clouded by the outstanding litigation. There was little reason, under such circumstances, to tabulate and certify the votes.

³ The facts did not indicate how tabulation was done. Tabulation should be enjoined only to the extent it would not prevent other election results from being counted.

C.

It may have been questionable whether Plaintiffs could have claimed injury if the proposal had been rejected. Nonetheless, the likely invalidity of the amendment process itself subverted the legitimacy of whatever outcome may have resulted. Thus, the public interest factor weighed heavily in favor of determining beforehand the question of procedural validity raised by Plaintiffs. The answer to that question would have determined whether tabulation and certification were necessary or warranted.

III.

On balance, as viewed when Plaintiffs applied for it, the circumstances indicated a TRO should have issued with respect to tabulation and certification by Defendants. With all due respect, the public interest would have been best served by avoiding the uncertainty and the potential for voter frustration and confusion flowing from denial of the TRO.