



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Hawai'i

**BY EMAIL AND
REGISTERED MAIL**

June 29, 2018

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**Re: June 7, 2018, Proclamation Closing Polling Places
in District Precincts 04-03 and 04-04**

Dear Messrs. Nago, Suzuki, Maeda, and Kamelamela:

The ACLU of Hawai'i Foundation ("**ACLU**") is writing because it has come to our attention that some voters affected by the volcanic activity in the County of Hawai'i will not be allowed to register and vote in person on election day, August 11, 2018. Specifically, on June 7, 2018, Chief Election Officer Scott T. Nago and the Hawai'i County Clerk Stewart Maeda issued a proclamation (the "**Proclamation**") stating that pursuant to Hawai'i Revised Statutes ("**HRS**") Sections 11-92.3 and 15-2.5 and due to the volcanic activity in the East Rift Zone of the Kilauea volcano, "the election in District Precincts 04-03 and 04-04 [of the County of Hawai'i] will be conducted by absentee mail ballot." While we understand the need to respond to the

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state of emergency caused by the volcanic activity in the County of Hawai‘i, the Proclamation is both an inadequate and unconstitutional response, because it (1) imposes an undue burden on the right to vote and (2) results in the disparate treatment of voters, in violation of the equal protection clause of the 14th Amendment of the U.S. Constitution and Section 5 of Article I of the Hawai‘i Constitution.

In several ways, the Proclamation will result in the disenfranchisement of hundreds, if not thousands, of voters and thus poses a severe burden on the right to vote.

First, given the state of emergency, the mandatory evacuation orders, and the interruption of mail services, many voters simply will not have adequate notice of the Proclamation.¹ As a result, many will wait both to register and to vote in person on election day, only to find out belatedly that they are unable to do so. Indeed, voters affected by the Proclamation will be denied of the right to register on election day outright, because they will not have a polling place to register in. Even those voters who manage to read the Proclamation and accompanying news release may still believe that they will be able to register and vote in person on election day, because, shockingly, neither the Proclamation nor the news release clearly states that any polling places will be closed or that voters will not be able to vote in person

¹ Shockingly, as of the date of this letter, the Office of the County Clerk homepage does not have any readily accessible information about the Proclamation or the requirement that voters in Precincts 04-03 and 04-04 vote by mail only. See Office of the County Clerk Homepage, available at <http://www.hawaiicounty.gov/lb-clerk-home/>; Office of the County Clerk, *Elections Division – Voter Information*, available at <http://www.hawaiicounty.gov/elections-voter-info/>. Only the “Election News” link on the bottom side panel sends you to a page with a separate link titled “Election Officials Mail Out Absentee Ballots to Voters Affected by Lava.” See Office of the County Clerk, *2018 Hawai‘i County Elections Division -Election News*, available at <http://www.hawaiicounty.gov/elections-news/>. The link is for a June 25, 2018, news release by the Office of Elections. It is only after clicking on both links (the “Election News” link and the “Election Officials...” link) that voters learn in the last sentence of the second paragraph of the news release for the first and only time that their polling place may be closed on election day: “all registered voters are automatically sent a ballot to the mailing address associated with their voter registration instead of the polling place being opened on election day.” Office of Elections, *Election Officials Mail Out Absentee Ballots to Voters Affected by Lava* (June 25, 2018), available at <https://elections.hawaii.gov/news-release/election-officials-mail-out-absentee-ballots-to-voters-affected-by-lava/>. Indeed, this one sentence in the June 25, 2018, news release appears to be the one and only place in both agencies’ websites where this information is available to the public.

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on election day. Indeed, the Proclamation and accompanying news release can easily give the false impression that affected voters will be allowed—as opposed to required—to vote by absentee ballot.

Second, according to the news release accompanying the Proclamation, “[b]allots will be sent to the mailing address indicated in each voter’s record, unless the voter requests that their ballot be mailed to a different address.”² Under these proposed procedures, several voters simply will not receive their absentee ballots, because (1) the voters’ home and address no longer exist,³ (2) they will be subject to mandatory evacuation orders and thus will be unable to receive mail at their normal mailing address, (3) their mail service will be interrupted by the volcanic activity, or (4) believing incorrectly that the Post Office will forward their ballot to their new address, they will not change their voter records. In any case, putting the burden of changing one’s voting address on the person who just lost his or her home to the lava is simply wrong.

Third, even for those fortunate enough to receive their absentee ballots, they might ignore the ballots as spam mail, be confused by the new and unsolicited voting process, or unwittingly decide to vote in person on election day instead.

In imposing these severe burdens, the Proclamation also unfairly and arbitrarily disfavors the residents of Precincts 04-03 and 04-04 as other Hawai‘i voters will not be (1) required to find virtually nonexistent information about the Proclamation; (2) vote by mail, (3) required to changed their voting records, and (4) precluded from voting and registering in person on election day at their designated polling place.

Fortunately, feasible and adequate alternatives to the Proclamation already exist. Pursuant to HRS Section 11-92.3(a), the Office may “consolidate precincts within a representative district.” Thus, on top of voting by mail, the Office of Elections can allow and direct residents of the affected precincts to vote in other

² Office of Elections, *Polling Places 04-03 and 04-04 Declared as Absentee Mail Precincts for the 2018 Primary Election* (June 7, 2018), available at <https://elections.hawaii.gov/news-release/polling-places-04-03-and-04-04-declared-as-absentee-mail-precincts-for-the-2018-primary-election/>.

³ Star-Advertiser staff, *At least 657 homes destroyed by lava as flow approaches Ahalanui ponds*, Star-Advertiser (June 25, 2018), available at <http://www.staradvertiser.com/2018/06/25/breaking-news/at-least-637-homes-destroyed-by-lava-as-flow-approaches-ahalanui-ponds/>.

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polling places within the same district. For example, it has been reported that there is a “Hub” of “pop-up tents and shipping containers that’s grown up on a vacant lot across from the Pahoia Intermediate and High School complex.”⁴ The Hub is “a place where lava refugees can come for nearly all their needs besides housing: hot meals, groceries, personal hygiene products, clothing, blankets, mattresses, even a hot shower and a massage — as well as health care, information, shoulders to cry on and a sense of community.”⁵ According to the Proclamation, Pahoia High and Intermediate School—which is adjacent to the Hub—is the polling place for District Precinct 04-04 and could be used as a convenient, consolidated polling place for both affected precincts (as we understand has been done in the past). Notice about any changes to the voting procedures could and should also be provided at the Hub. Alternatively, with adequate notice and proper signage, District Precincts 04-03 and 04-04 could be consolidated with a third polling place within the district.

We appreciate that the emergency situation is still in flux and plans made today might not work out on election day. This uncertainty is not, however, a valid reason to institute a patently deficient registration and voting process. A refusal to allow in-person registration and voting on election day would not only be arbitrary and unnecessary but would also not survive constitutional muster.⁶ Moreover, such refusal will result in the complete disenfranchisement of hundreds, if not thousands, of voters. That sort of categorical denial of the right to vote—even for a single voter⁷—plainly amounts to a severe burden on the right to vote that is subject to strict scrutiny by the courts.⁸ Given the likelihood of total

⁴ Alan D. McNarie, *Big Island: Puna Residents Set Up This Awesome Center for Volcano Refugees*, Civil Beat (June 27, 2018), available at <https://www.civilbeat.org/2018/06/big-island-puna-residents-set-up-this-awesome-center-for-volcano-refugees/>.

⁵ *Id.*

⁶ See *Bullock v. Carter*, 405 U.S. 134, 141 (1972) (in regulating elections, state’s “power must be exercised in a manner consistent with the Equal Protection Clause.”)

⁷ See *League of Women Voters of N.C. v. N. Carolina*, 769 F.3d 224, 244 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015) (“[T]he basic truth [is] that even one disenfranchised voter—let alone several thousand—is too many[.]”).

⁸ See *Norman v. Reed*, 502 U.S. 279, 280 (1992) (When a regulation subjects the right to vote to a “severe” restriction, the restriction “must be narrowly drawn to advance a state interest of compelling importance.”); see also, *Ayers-Schaffner v. DiStefano*, 860 F. Supp. 918, 921 (D.R.I. 1994), *aff’d*, 37 F.3d 726 (1st Cir. 1994) (“A complete denial of the right to vote is a restriction of the severest kind.”); *Northeastern Ohio Coalition for the Homeless v. Husted*, 696 F.3d 580, at 585-87 (6th Cir. 2012) (“summary” and “automatic” nature of disqualification of right-place, wrong precinct ballots suggests burden on right to vote is “substantial”).

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disenfranchisement for thousands of voters, we cannot imagine a valid reason for the Office of Elections to arbitrarily refuse to allow voters in the affected precincts to register and vote in person at a polling place on election day.⁹

If your office fails to announce that voters affected by the volcano will be allowed to register and vote in person on election day, the ACLU is prepared to take legal action as early as next week to ensure that the Constitution is followed and that no Hawai'i voters will be arbitrarily denied their fundamental right to vote in the upcoming election.¹⁰ Given that election day is fast approaching and that legal action may be necessary, **we demand that by no later than Friday, July 6, 2018,¹¹ the Office of Elections announce¹² a policy allowing voters in District Precincts 04-03 and 04-04 to register and vote in person on election day.**

We would appreciate you acknowledging receipt of this letter as soon as possible. Thank you in advance for your time and attention to this matter. If you have any questions or comments in the interim, please feel free to contact me at 522-5908 or mcaballero@acluhawaii.org.

Sincerely yours,



Mateo Caballero
Legal Director

⁹ While early-walk in voting might help some of the affected voters, many voters might not know about this option or might not be able to take advantage of it. In any event, such voters are entitled to both register and vote on election day in person—just like any other voter in the State of Hawai'i.

¹⁰ If the ACLU is forced to file a legal action, it would seek reasonable attorney fees, including litigation expenses, and costs. 42 U.S.C. § 1988.

¹¹ Given the urgency of this matter, the ACLU and its partners plan to alert the public about the situation before the expiration of the deadline.

¹² We would understand if the details of the process implementing of such policy will not be fully fledged out by July 6, 2018. At this point, we only demand that the announcement be made and adequate notice (at the Hub, newspapers, online, and elsewhere) be provided.