SCWC-15-0000053

IN THE SUPREME COURT OF THE STATE OF HAWAII

LANRIC HYLAND,

Petitioner/Appellant-Appellant,

vs.

RONALD GONZALES and STEWART MAEDA, in his official capacity as County Clerk of Hawaii,

Respondents/Appellees-Appellees.

ON WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS

CAAP-15-0000053
ICA Memorandum Opinion: Feb. 10, 2016
ICA Judgment: Mar. 9, 2016

Case No. BOR-14-01
(Agency Appeal)
County of Hawaii Board of Registration
Findings of Fact, Conclusions of Law, and Decision: Nov. 1, 2014

PETITIONER'S SUPPLEMENTAL BRIEF

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SCWC-15-0000053

IN THE SUPREME COURT OF THE STATE OF HAWAII

LANRIC HYLAND, Petitioner/Appellant-Appellant, vs. RONALD GONZALES and STEWART MAEDA, in his official capacity as County Clerk of Hawaii, Respondents/Appellees-Appellees.	ON WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS CAAP-15-0000053 ICA Memorandum Opinion: Feb. 10, 2016 ICA Judgment: Mar. 9, 2016 Case No. BOR-14-01 (Agency Appeal) County of Hawaii Board of Registration Findings of Fact, Conclusions of Law, and Decision: Nov. 1, 2014

PETITIONER'S SUPPLEMENTAL BRIEF

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SUMMARY OF THE ISSUES

Petitioner, a resident of the island of Hawaii, timely brought his appeal to the Board of Registration by mailing it on Tuesday, October 14, 2014. This brief supplements Petitioner's Application for Writ of Certiorari with three arguments:

1. Personal service, or registered mail. The statute required the Clerk to serve his decision on Petitioner personally or by registered mail. Haw. Rev. Stat. § 11-26(b) ("Service of the decision shall be made personally or by registered mail[.]"). The Clerk mailed his decision to Petitioner on October 2, 2014, but did not do so by *registered* mail. Instead, he chose to send it "by the standard United States Postal Service." ICA Op. at 2 n.2. There is nothing presently in the record to show when Petitioner was personally served. Before dismissing Petitioner's appeal for missing the statute's ten day deadline, the Board and the ICA should have required the Clerk to satisfy his burden to introduce evidence of when the ten day period began (the day he "serv[ed] . . . personally" Petitioner with his decision). In the absence of such evidence, the Board and the ICA could not have concluded Petitioner's appeal was untimely brought or filed.

2. Mailed = brought. Even if the Clerk opened the window by serving his decision on October 2, 2014, Petitioner timely brought his appeal because he mailed it to the Office of Elections on Oahu on Tuesday, October 14, 2014, twelve days later.[1] Section 11-26(b), when read in context of the entire statutory scheme of voter registration demonstrates that an appeal is "brought" and the case perfected, when the appellant mails the notice, even if it tales additional days for delivery. Emphasizing that point, the Office of Elections advised Petitioner that his appeal should be mailed to its Oahu address, and did not inform him he must ensure *delivery* to the Board within the appeal window. If the appeal window began when the Clerk mailed the decision, and not when received by Petitioner it should likewise have ended on the day Petitioner mailed his appeal, not when the Board received it.

3. Equal protection and due process. Finally, if the statute is read as requiring delivery within ten days, it could not be applied to Petitioner because doing so would trigger two constitutional problems: (a) there is no rational basis for Oahu challengers to have the full ten days, but their neighbor island counterparts who rely on the mail less time; and (b) the Clerk

[1] Section 11-26(b) required that an appeal be "brought" within ten days of service, and section 1-29 added two extra days because the tenth day was a Sunday. The following day was Columbus Day, a holiday when post offices were closed and there was no mail delivery.

failed to inform Petitioner that mailing within the ten day limitations period would not perfect his appeal.

The ICA, however—interpreting the term "filed" in the Office of Elections' regulations (and not the term "brought" in the statute itself)—concluded that mailing within the statute's time limit wasn't sufficient, because timeliness is measured from the date of *delivery* to the Board.[2] The ICA held that Monday, October 13, 2014 was the deadline for receipt. But that rationale deprived Petitioner of the full statutory appeal period, because Monday was Columbus Day and the postal service did not deliver mail. This means the ICA's actual deadline for receipt was Friday, October 10, 2014. To ensure the Board received his appeal by that date, Petitioner needed to have mailed it by Wednesday, October 8, 2014.

The ICA's opinion and judgment should be vacated, and this case remanded to the Board for a decision on the merits of Petitioner's appeal.

ARGUMENT

The starting point, as always, is the text of the statute governing the deadline to appeal to the Board. Section 11-26(b) gives a person challenging the Clerk's decision to uphold another's voter registration ten days to "bring" her appeal, measured from the time the Clerk deposits the decision in the mail if the Clerk chooses to use registered mail, or from the date the Clerk accomplishes service "personally." The Office of Elections rule implementing the statute contains the same time limitation, although it uses the term "filing," not "brought."[3]

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[2] ICA Op. at 5-6 ("Thus, in order for Appellants' appeal to be timely, Appellants were required to *deliver* their Appeal Letter to the Board within ten days of when the County Clerk properly mailed his adverse decision to them.") (emphasis added) (footnote omitted).

[3] *Compare* Haw. Rev. Stat. § 11-26(b) ("In cases where the clerk rules on a challenge, prior to election day . . . the person ruled against may appeal from the ruling to the board of registration of the person's county. The appeal shall be *brought* within ten days of service of the adverse decision. Service of the decision shall be made personally or by registered mail, which shall be deemed complete upon deposit in the mails, postage prepaid, and addressed to the aggrieved person's last known address.") (emphasis added) *with* Haw. Admin. R. § 3-172-43 (2010) ("Any appeal of the clerk's ruling shall be made in writing by *filing* a notice of appeal with the chairperson of the board of registration within ten days of service of the clerk's decision.") (emphasis added).

"Brought" and "filed" are not necessarily the same. *General v. E. Roseman Co.*, 336 A.2d 287, 288-89 (Pa. 1975) ("file" may mean received, but "brought" means mailed; in that case, the

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I. BECAUSE THE CLERK DID NOT SERVE BY REGISTERED MAIL, PETITIONER'S APPEAL WINDOW ONLY OPENED UPON PERSONAL SERVICE

The Clerk mailed his decision upholding Gonzales' registration to Petitioner on Thursday, October 2, 2014. But critically, did so only by "standard"—not registered—mail. ICA Op. at 2 n.2; ICA Dkt 36 (RA) at pdf 18. Thus, Petitioner's appeal window opened only when he was "serv[ed] . . . personally." Haw. Rev. Stat. § 11-26(b). "Personal service" means a physical copy in Petitioner's hands. *See Personal service*, Black's Law Dictionary (10th ed. 2014) ("[a]ctual delivery of the notice or process to the person to whom it is directed"). The Clerk did not submit evidence showing when Petitioner was "serv[ed] . . . personally." *See Wei v. State of Hawaii*, 763 F.2d 370 (9th Cir. 1985) ("the burden of showing good cause for failure to meet the [] deadline [for service] upon the party on whose behalf service was required"). Consequently, on this record, we don't know exactly when Petitioner's ten day appeal window opened. The Clerk's choice of standard mail, and the lack of evidence in the record of when the Clerk personally served Petitioner, should have resolved the question of timeliness in Petitioner's favor. But the Board and the ICA both wrongly assumed the Clerk's standard mailing constituted "service" under section 11-26(b) which opened the statutory appeal window, overlooking the fact the statute states that only if the service is accomplished by "registered mail" will posting it be deemed completion. In the absence of proof of the date of personal service on Petitioner, the Board and the ICA could not have concluded Petitioner's appeal was untimely brought or filed, because there is no evidence in the record of the date the appeal window opened.[4]

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statute "says nothing about *filing* an appeal. Rather, it speaks of an appeal being *brought* and the time for taking an appeal") (emphasis original). Because these terms are different, the language in section 11-26 controls. *Agsalud v. Blalack*, 67 Haw. 588, 589, 699 P.2d 17, 18 (1985) ("It is axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement.").

[4] Alternatively, if the motion to dismiss for lack of jurisdiction was not resolved in Petitioner's favor on the Clerk's failure to satisfy his burden of proof of service, this Court should remand the case to the Board for development of the record regarding the date on which Petitioner was personally served with the Clerk's decision. Petitioner is prepared to testify that he did not receive the Clerk's decision on Friday, October 3, 2014, and that he never picks up mail from his post office box on Saturdays. This too would resolve the motion in Petitioner's favor: if the Clerk effected personal service on Petitioner on or after Monday, October 6, 2014, then even if the Board and the ICA were correct that "filing" requires delivery, then Petitioner perfected his

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II. MAILING CONSTITUTES BRINGING OR FILING AN APPEAL

Even if Petitioner's appeal window opened on October 2, 2014, he timely brought his appeal by mailing it on Tuesday, October 14, 2014. The tenth day after mailing was Sunday, October 12, 2014. Because the tenth day was a Sunday—and the following day was Columbus Day, a holiday—the last day to bring or file an appeal was Tuesday, October 14, 2014. *See* Haw. Rev. Stat. § 1-29.[5]

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appeal, because it was received by the Office of Elections on the tenth day thereafter, Thursday, October 16, 2014.

[5] There are two ways to get to Tuesday as the final day, not Monday. The first is that Columbus Day was a holiday. Section 1-29 adds additional days when the last day is a Sunday or holiday: "The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a Sunday or holiday and then it is also excluded." Haw. Rev. Stat. § 1-29. Monday, October 13, 2014 was Columbus Day, a federal, but not State, holiday. The post office was closed, and the mail was not delivered. *See USPS.com Will be Open on Columbus Day—While Post Offices observe the holiday become an explorer by discovering New Worlds* (Oct. 8, 2014), *available at* http://about.usps.com/news/state-releases/ny/2014/ny_2014_1008.htm (last visited Nov. 15, 2016) ("Monday, October 13th is Columbus Day, a holiday for federal agencies like the U.S. Postal Service, so Post Offices will be closed and there won't be mail delivery. But that doesn't mean we aren't available for our customers."). Section 1-29 uses the term "holiday" without modifiers, and thus does not limit it to state holidays. But relying on Haw. Rev. Stat. § 8-1 (which designates "*state* holidays"), the ICA wrongly concluded that in order to qualify as a "holiday" under section 1-29, the holiday must be a *State-designated* holiday. *See* ICA Op. at 6 n.9. This is incorrect. Section 8-1 also accounts for federal holidays by including, in addition to State Holidays, "[a]ny day designated by proclamation by the President of the United States or by the governor as a holiday." Haw. Rev. Stat. § 8-1. According to the U.S. Office of Personnel Management, Columbus Day 2014 was a federal holiday. *See 2014 Holiday Schedule*, *available at* https://www.opm.gov/policy-data-oversight/snow-dismissal-procedures/federal-holidays/#url=2014 (last visited Nov. 16, 2016).

Alternatively, the ICA wrongly concluded that the mailbox rule in Hawaii Rules of Civil Procedure did not govern Petitioner's appeal, as all parties had acknowledged. ICA Op. at 6 n.8. However, Haw. R. Civ. P. 81 provides that the Rules "shall apply to the following proceedings except insofar as and to the extent that they are inconsistent with specific statutes of the State or rules of court relating to such proceedings: . . *Proceedings concerning voter registration or elections*." Haw. R. Civ. P. 81(b) (emphasis added). Thus, because Petitioner's appeal to the Board was a proceeding "concerning voter registration," by Rule 81's express terms, the Rules of Civil Procedure governed the process, including the mailbox rule in Haw. R. Civ. P. 6(e).

A. The Statute Contemplates Appeals By Mail

As the headlines constantly remind us, Hawaii possesses the embarrassing distinction of having one of the nation's most dismal voter registration statistics. For example, in 2010 only 48.3% of our voting-age population bothered to register. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2012 Table 400: Persons Reported Registered and Voted by State: 2010*. As the legislative history regarding the 1990 amendments to the elections code noted, "[y]our Committee believes that declining voter participation is unhealthy." H. Stand. Comm. Rep. No. 627-90, in 1990 House Journal at 1075. The legislature was "committed to increasing public participation in the political life of our state," because "the strength of our democratic form of government depends on the fullest voter participation possible." *Id*. Focusing on the convenience of mailing, the legislature noted the "purpose of this bill as amended is to provide for the registration of voters by self subscribing oaths and through the mail; and to clarify, streamline, and update statutory provisions relating to voter challenges and questionable address procedures taken during elections." *Id*. at 1074. Consequently, it amended the elections code (including section 11-26) to "make the process of voter registration more convenient," and to "clarify the appeals procedures from a decision by the county clerk or an election official." S. Stand. Comm. Rep. No. 2902, in 1990 Senate Journal at 1190. Specifically, the amendments remedied the fact that "current law is vague as to the length of time before an appeal must be brought by an applicant declared ineligible to vote." H. Stand. Comm. Rep. No. 627-90, in 1990 House Journal at 1075.

The statute, however, is silent regarding how a challenger brings an appeal, but does not preclude an appeal being brought by mailing. *See* Haw. Rev. Stat. § 11-26(b). When read in context of the entire voter registration chapter, section 11-26 cannot be read to give anything less than the full ten days to appellants who choose to bring their appeals that way.[6] This is especially

[6] As Petitioner's Application correctly notes, one logical reading of section 11-26(b) is that "service" of the appeal "shall be deemed complete upon deposit in the mails," because the sentence regarding "[s]ervice of the decision" immediately follows the sentence regarding the timing of the bringing of appeals, and the statute does not preclude "the decision" being the appeal. If there is any ambiguity in the statute, it should be resolved in favor of Petitioner, especially since he was not represented by counsel. *Dupree v. Hiraga*, 121 Haw. 297, 314, 219 P.3d 1084, 1102 (2009) ("Pleadings prepared by *pro se* litigants should be interpreted

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true for challengers in Hawaii, Maui, and Kauai counties, who cannot personally bring an appeal to their Boards of Registration—whose offices are administered through the Office of Elections on Oahu—unless they board a plane. Apparently recognizing that reality, on October 8, 2014, in response to a call from Petitioner asking how to file an appeal, the Office of Elections advised him to mail it to Oahu.[7] The Office of Elections did not advise Petitioner that he must have ensured delivery to Oahu within the ten day statutory window. Only on October 28, 2014—two weeks after the limitations period expired—did the Board inform Petitioner of its local address and "in order to file documents with the Board of Registration, please file with: Office of the County Clerk Attn: Dee Torres, 25 Aupuni Street, Suite 1402, Hilo, HI 96730." Pet. App. C.

B. Symmetry, Uniformity, And Practicality

Three decisions in very similar circumstances, including one from this Court, undertake the analysis applicable here.

1. *General*: "It would be inconsistent to hold that the legislature intended to employ two different standards to mark the beginning and the end of the appeal period."

In *General v. E. Roseman Co*., 336 A.2d 287 (Pa. 1975), the Pennsylvania Supreme Court held that an appeal is "brought" when mailed. The court considered a statute similar to ours in all material parts which required an appeal to the worker's compensation board be "brought" within twenty days. *Id*. at 289 ("The section provides: 'Such appeal must in all cases be *brough*t within twenty days after notice of the action of the board has been serviced upon such party[.]") (emphasis original). Like ours, the Pennsylvania statute "does not use the word 'file.'"

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liberally."). The same is true when *pro se* litigants are asked to interpret and apply (upon pain of dismissal) what is at best a less than clear statute.

[7] "Thank you for your phone call requesting information on how you can *file* an appeal to the Board of Registration on the decision of the County Clerk. Attached is a copy of HAR 3-172-43. The appeal can be addressed to the following: . . . . Board of Registration for the Island of Hawaii, c/o Office of Elections, 802 Lehua Avenue, Pearl City, Hawaii 96782." Pet. App. B (emphasis added). Thus, even if this Court were to conclude that as a general matter appeals must be received by the Board within ten days, that should not prevent Petitioner from having the Board consider his claim on the merits, because in this instance, the Office of Elections induced reasonable reliance by Petitioner that he had to mail his appeal to Oahu. *See Waianae Model Neighborhood Area Ass'n v. City and Cnty of Honolulu*, 55 Haw. 40, 514 P.2d 861 (1973) (agency estopped from enforcing deadline because applicant reasonably relied on official's contrary assurances).

Id. It "says nothing about filing an appeal. Rather, it speaks of an appeal being *brought* and the time for *taking* an appeal." *Id*. (emphasis original). That statute—like Hawaii's—also provided that when served by mail, the notice of the action appealed from was deemed to have been served on the date of mailing. *Id*. ("For the purposes of this article any notice or copy shall be deemed served *on the date when mailed*[.]") (emphasis original). The appellant mailed his appeal within twenty days, but it was not received and filed until the day after the limitations period expired. *Id*. at 288. The trial court *sua sponte* dismissed the appeal as untimely. *Id*.

The Pennsylvania Supreme Court disagreed, framing the issue as whether an appeal "is perfected as of the date when it is mailed or as of the date when it is received and filed in that court." *Id*. The court concluded the "statute is remedial, and should receive a liberal construction," *id*. at 289, and "when read in its statutory context, . . . an appeal has been brought or *taken* when the appeal is *mailed* on time." *Id*. at 289 (emphasis original).

> The above section places great emphasis on *mailing* both as a method of communication and as a procedural guidepost. Under the above section the twenty days allowed under Section 427 for the 'bringing' or 'taking' of an appeal commences when a Board order is *mailed* because mailing constitutes service of the order even though the appellant may not receive the order for several days. *In the absence of language to the contrary, it would be inconsistent to hold that the legislature intended to employ two different standards to mark the beginning and the end of the appeal period*. Under Section 406, the appeal period begins when the board mails its order. *The end of the appeal period should likewise be the day the appellant mails his appeal—not when it is received and filed. Otherwise, the appellant would not have the benefit of a full twenty-day appeal period allowed in Section 427, because mail is seldom, if ever, received on the date of mailing*.

Id. (some emphases added).

The same rationale governs here. Our statutory scheme for voter registration and appeals emphasizes mail. The legislative history of section 11-26 shows that the statute is remedial, designed to make registrations and appeals easier, the process more clear, and to encourage citizen participation. Moreover, the Clerk is expressly allowed to mail the decision, and service is "deemed complete" upon mailing by registered mail. Haw. Rev. Stat. § 11-26(b). As the Pennsylvania Supreme Court noted, the absence of a symmetrical rule that service of the appeal is also complete upon mailing deprives the appellant of the full benefit of the limitations period, because "an appellant may not receive the order for several days," which means that if an appellant chooses mail, the days in transit in the mail to the Board are subtracted. *General*, 226 A.2d at 288. Here, as there, it would be "inconsistent to hold that the legislature intended to

employ two different standards to mark the beginning and the end of the appeal period." *Id*. The Hawaii legislature provided that the appeal limitations window opens upon mailing, and there is no indication in the statute itself or its history revealing the legislature meant to adopt a different standard for when the window closes, especially where asymmetry substantially shortens the limitations period.

By requiring receipt, the ICA reduced Petitioner's actual appeal window from the statutory ten days (plus two additional days for Sunday and the Columbus Day holiday) to something less than ten days. The Clerk mailed his decision on Thursday, Oct. 2, 2014. Because he did not use registered mail, the record lacks evidence of when Petitioner received it. But allowing for two days for mail from Kapaau to Oahu, Petitioner needed to have mailed his appeal by Wednesday, October 8, 2014, and hope the postal service delivered it by the ICA's deadline of Friday, October 10, 2014 (the last day on which mail would be delivered to a State office before the three-day federal weekend).

2. *Johnson*: the mailbox rule promotes symmetry and uniformity

Similarly, in *Johnson v. Tony's Town Mister Quik*, 915 P.2d 355 (Okla. 1996), the Oklahoma Supreme Court held that an appeal was timely brought when mailed within the limitations period, even though it was not received until after the time expired. Oklahoma law has a statutory mailbox rule under which the filing of an appeal generally may be accomplished by mail, with the date of mailing being deemed the date of filing. Worker's compensation appeals were subject to the requirement that they be "brought" within twenty days of the date on which the adverse decision was deposited in the mail, but the statute did not indicate whether the general mailbox rule applied to these cases. *Id*. at 356-57. The appellant mailed the appeal on the twenty-first day (the twentieth day was a Sunday). *Id*. at 356. The issue was whether the general mailbox rule applied to worker's compensation appeals. *Id*. at 357. The court held that despite the lack of express authority applying the rule to worker's compensation appeals, the appellate process should be "symmetrical and apply across the board." *Id*. at 356.

> More importantly, the provisions of § 990A(B)(1) *do not prohibit* the mailbox rule's application to proceedings for review of compensation decisions, (2) create no burden on this court's operation and (3) facilitate filings by persons who reside outside this court's immediate situs.

Id. at 357-58 (emphasis original). The court's last point—mailing "facilitate[s] filings by persons who reside outside this court's immediate situs"—is particularly applicable here, where

Petitioner resides on Hawaii island and could not, except by mail, bring his appeal as instructed by the Office of Elections without finding a means of actually traveling to Oahu.

3. *Setala*: meaningful access to justice, and the lack of practical alternatives

This Court recognizes "meaningful access to the courts" requires that in similar unique circumstances where a private litigant cannot easily accomplish physical filing, an appeal is timely filed upon mailing. *See Setala v. J.C. Penney Co.*, 97 Haw. 484, 491, 40 P.3d 886, 893 (2002). In that case, a prisoner appealed the circuit court's dismissal of his personal injury suit. He timely mailed his notice of appeal, but it was not received and filed within thirty days as required the rules of appellate procedure. *Id*. at 485, 40 P.3d at 887. This Court concluded his appeal was timely filed when he mailed it. The Court held that *pro se* prisoners present "unique circumstances" because they "cannot personally travel to the courthouse to ensure that their notice is stamped 'filed' by the clerk[.]" *Id*. at 487, 40 P.3d at 889. Thus, prisoners have "no choice" but to turn over documents to prison authorities for forwarding. *Id*. The Court also noted "the 'mailbox rule' is particularly applicable to Plaintiff" because he had previously accomplished filing by mail. *Id*. at 490, 40 P.3d at 892.

Setala's rationale applies equally here: Petitioner, a *pro se* litigant, had no means to travel to the Oahu Office of Elections, and had no practical choice but to mail his appeal. True, Setala was incarcerated, while Petitioner was not similarly restrained, and thus it was not literally impossible for Petitioner to have found a way to get to Oahu. But requiring him to do so in order for him to have the full ten day appeal period unduly burdened his right to appeal and his access to the justice system (and, after all, the Office of Elections had expressly informed him to mail the appeal to its Oahu address). The ICA's approach would deny Petitioner meaningful access to the administrative appeals process because instead of ten days, he had only a few to appeal.

III. SUBJECTING PETITIONER TO THE DELIVERY RULE WOULD VIOLATE EQUAL PROTECTION AND DUE PROCESS

A. Neighbor Island Appellants Must Have The Same Ten Days As Their Oahu Counterparts

There is no rational reason to allow Oahu appellants the full statutory ten days to appeal, but provide their neighbor island counterparts with less time unless they get on an airplane. If the ICA's rationale is correct and neighbor island appellants inherently have less time to bring their

appeals, the statute if strictly applied to Petitioner in these circumstances would violate equal protection.[8] In *Silva v. City and Cnty of Honolulu*, 115 Haw. 1, 165 P.3d 247 (2007), this Court held a statute which required plaintiffs suing the City and County of Honolulu to present a claim within six months of the injury—while a different statute afforded two years to plaintiffs suing the State of Hawaii for similar claims—violated equal protection because there was no rational basis to distinguish between a plaintiff suing the City, and a plaintiff suing the State. *Id*. at 14, 165 P.3d at 260. The Court held that nothing "might justify the unequal treatment of victims of [government] torts." *Id.* The same is true here. Neighbor island voters like Petitioner challenging adverse registration rulings by county clerks should be in exactly the same position as Oahu voters. Similarly, our record is devoid of any reason why appellants like Petitioner should, unless they board an airplane, have less than the entire statutory period, while Oahu appellants may take advantage of the full ten days without going through such efforts. *Id*. ("The record on appeal and the legislative history are silent with respect to any budgetary, logistical, or other difference between the County and the state that might justify the unequal treatment of victims of their torts.").

Silva also is instructive for the remedy: this Court "cure[d] this constitutional error by severing [the offending statute's] six-month provision, thereby relegating the Plaintiffs' claims to the same two-year limitation application to claims against private tortfeasors[.]" *Id*. Similarly, in *SCI Mgmt. Corp. v. Sims,* 101 Haw. 438, 71 P.3d 389 (2003), the Court noted a statute's constitutional infirmity did not require striking it down in its entirety. The Court held it could "harmonize" the statute with the requirements of the constitution. *Id*. at 452-453. The Court did so in that case by expanding the options available to the parties, requiring a jury trial in an administrative appeal, a remedy not allowed by the Administrative Procedures Act. The Court should take the same approach here to avoid the constitutional infirmity inherent in the ICA's rule. Adoption of a symmetrical mailbox rule—as in *General*, *Johnson,* and *Setala*—is the appropriate remedy to avoid these constitutional problems.

[8] Constitutional review is not necessary if the Court agrees with Petitioner that the statute contemplates mailing by an appellant within the ten days to be timely bringing of an appeal.

B. The Board Should Have Informed Petitioner Of The Delivery Requirement

Finally, if mailing within the ten day statutory window was indeed insufficient, and the appeal must have been delivered by Monday, October, 13, 2014, the Clerk or the Office of Elections should have informed Petitioner. *See Kellberg v. Yuen*, 131 Haw. 513, 536, 319 P.3d 432, 455 (2014). Their failure to do so, means Petitioner cannot be subject to the delivery rule without violating due process. In *Kellberg*, this Court held that when an agency's deadlines are "mandatory, exclusive, and short," due process requires it give express and conspicuous notice of the time deadline, and most critically, avenues for redress. Because the agency did not give notice of the thirty day limitations period, "Kellberg's failure to timely appeal the [agency action] is excused." *Id*. at 533, 319 P.3d at 452. The same is true here, because each of the three elements this Court set out in *Kellberg* are present.

First, the limitations period for voter registration appeals is incredibly short—a mere ten days—and it is likely that absent notice, the average citizen (like Petitioner) would not appreciate that if she chose to mail her notice of appeal to the Board, that it must be *delivered* within the ten day window, and that a federal holiday when the Postal Service does not deliver mail would not be considered a "holiday" for purposes of calculating the window.

Second, Petitioner possessed an interest in being able to appeal the Clerk's adverse decision, a right guaranteed by statute. Haw. Rev. Stat. § 11-25; *Dupree v. Hiraga*, 121 Haw. 297, 313, 219 P.3d 1084, 1100 (2009) (setting out standards for voter registration challenges and appeals). *See also Hoku Lele, LLC v. City & Cnty. of Honolulu*, 129 Haw. 164, 168-69, 296 P.3d 1072, 1076-77 (Haw. App. 2013) (undisclosed short deadlines pose substantial risk of depriving plaintiff ability to seek appellate review).

Third, the burden on the Office of Elections and the Clerk to have informed Petitioner that his appeal must be delivered within ten days of the Clerk's mailing regardless of method of delivery, that Columbus Day wasn't a "holiday" extending his deadline, and that Petitioner apparently could bring his appeal by physically in Hilo, was beyond minimal: as in *Kellberg*, it would take nothing more than a few words in the notice of the Clerk's decision "to clearly indicate when an appealable 'decision' has been made and how an interested person may challenge that decision." *Kellberg*, 131 Haw. at 537, 319 P.3d at 456.

Consequently, instead of understanding the clear deadlines of which this notice would have informed him, Petitioner was subject to an opaque process and left to proceed at his own

peril, unknowingly subject to an exceedingly narrow and unforgiving appeal window. Under the ICA's rationale, Petitioner had somewhere in the neighborhood of four days to ensure that the Board received his appeal, even though the statute on its face gave him ten days, and does not prohibit mailing. Four days to review the Clerk's decision, develop the issues, and research how to bring an appeal and where to file it, does not to allow for "adequate preparation." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) ("The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing."). Although election-related litigation tends to be short-fused in the interest of repose, the ICA's interpretation of section 11-26 curtailed Petitioner's ability to be heard in a "meaningful time" and "meaningful manner."[9] *See KNG Corp. v. Kim*, 107 Haw. 73, 80, 110 P.3d 397, 404 (2005) ("Due process encompasses the opportunity to be heard at a meaningful time and in a meaningful manner."). When the legislature gives you ten days, four days to appeal isn't meaningful.

CONCLUSION

The ICA's opinion and judgment should be vacated, and this case remanded to the Board for a decision on the merits of Petitioner's appeal.

DATED: Honolulu, Hawaii, November 18, 2016.

Respectfully submitted,

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[9] While repose is one of the purposes of the short limitations period, it cannot be applied in a way that deprives appellants of all of the time which the statute provides.