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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

ROBERT L.G. BENAVENTE, TRINI T. TORRES, FRANK DUENAS CRUZ, PETER ANTHONY SAN NICOLAS, JAMES THOMAS MCDONALD,
Petitioners-Appellants,

vs.

GERRY TAITANO, DIRECTOR, GUAM ELECTION COMMISSION and THE GUAM ELECTION COMMISSION,
Respondents-Appellees.

Supreme Court Case No.: CVA06-015
Superior Court Case No.: SP0140-06

OPINION

Cite as: 2006 Guam 16

Appeal from the Superior Court of Guam
Argued and submitted on November 28, 2006
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; RICHARD H. BENSON, Justice *Pro Tempore*; J. BRADLEY KLEMM, Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] Petitioners-Appellants Robert L.G. Benavente, Trini T. Torres, Frank Duenas Cruz, Peter Anthony San Nicolas, and James Thomas McDonald (collectively, "Petitioners") appeal from the trial court's grant of summary judgment in favor of Respondents-Appellees Gerry Taitano, Director of the Guam Election Commission and the Guam Election Commission (collectively, "the Commission"), which confirmed the results of the September 2, 2006 Primary Election pursuant to 3 GCA § 12115.

[2] We hold that the trial court erred in voiding the iVotronic votes cast by the voters of Guam, and to this extent, we reverse. However, we hold that the trial court properly concluded, with respect to the claimed statutory violations on the part of the Commission, that any errors did not affect the outcome of the election, and for this reason, summary judgment in favor of the Commission was proper. We also hold that the Guam law requiring the cancellation of a party primary is constitutional, and that the trial court's grant of summary judgment in favor of the Commission in this regard was also proper. As such, we affirm the trial court's ultimate conclusion confirming the results of the September 2, 2006 Primary Election.

[3] Accordingly, we reverse in part, affirm in part, and remand for entry of judgment consistent with this Opinion.

I.

[4] This matter arises from Petitioners' challenge to the September 2, 2006 Primary Election. The Primary Election did not include a race for the Republican Party's senatorial candidates, as the

Guam Election Commission[1] canceled the race pursuant to 3 GCA § 16108, as amended by section 6 of Guam Public Law Guam 28-128.[2] After the unofficial results of the Primary Election, but before the results had been certified, Petitioners Benavente and Torres, Democrat senatorial candidates in the Primary Election, challenged the results and sued the Commission in the Superior Court. They alleged constitutional violations, specifically, violations of the Fifth and Fourteenth Amendment rights of equal protection under the law and due process of law, and violations of the First Amendment rights of association and speech. Petitioners also alleged statutory violations under Title 3 GCA and the Organic Act of Guam. Petitioners filed a First Amended Petition ("the Petition") which, *inter alia*, added as parties to the action Petitioners Cruz, San Nicolas and McDonald, Republican voters.

[5] During a hearing on October 4, 2006, the trial court addressed the Commission's written motion to dismiss pursuant to Rule 12(b)(6) of the Guam Rules of Civil Procedure. Although Petitioners made an oral motion for summary judgment at the hearing, the court did not rule on this motion, and ultimately dismissed the case on other grounds. Petitioners appealed the dismissal to

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[1] Title 3 GCA § 1103 (2005) defines "Commission" as the Election Commission.

[2] As amended, the provision states, in relevant part:

> **§16108. Primary Election Cancelled When Unnecessary.**
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> (a) When the Commission determines that a political party that has qualified for placement on the primary ballot has:
>
> (i) the same or fewer number of candidates running for nomination to the Legislature than the number of senatorial seats allowed in law, it shall cancel such Primary Election for that party for the Legislature because of the lack of any contest . . .
>
> . . .
>
> (b) Certification of candidates. Following such cancellation, the Commission shall certify all candidates who qualified to appear on the ballots in such cancelled primary elections for placement on the general election ballot as candidates of their respective political parties for the general election.

3 GCA § 16108 (as amended by Guam Pub. L. 28-128:6 (June 27, 2006)).

this court. We reversed, and instructed the trial court to vacate its Judgment of dismissal. *See Benavente v. Taitano*, 2006 Guam 15 (*Benavente I*).

[6] On remand, during a November 1, 2006 hearing, the Commission orally renewed its previously-filed motion to dismiss, and Petitioners orally renewed its motion for summary judgment that had been made at the October 4, 2006 hearing. Both parties agreed that there were no material facts in dispute. On November 3, 2006, the trial court orally granted summary judgment in favor of the Commission, and confirmed the results of the election pursuant to 3 GCA § 12115.[3] Petitioners that same day sought an injunction from this court requesting a stay of the General Election, scheduled for November 7, 2006, and an expedited briefing schedule for the appeal. The Commission opposed. This court denied the injunction, but granted the request for expedited briefing.

II.

[7] This court has jurisdiction over this appeal from a final judgment. 48 U.S.C. § 1424-1(a)(2) (Westlaw through Pub. L. 109-382 (approved 2006)); 7 GCA §§ 3107, 3108(a) (2005).

III.

[8] Petitioners appeal from the trial court's grant of summary judgment, wherein the court held that there were no genuine issues of material fact presented to the extent that any errors occurring in the September 2, 2006 Primary Election affected the outcome of the election, and therefore, as a matter of law, the Commission was entitled to summary judgment.

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[3] Trial court Decision and Order, filed on November 6, 2006, treated the Commission's motion to dismiss as one for summary judgment. The court granted summary judgment in favor of the Commission, and Judgment was entered on November 7, 2006.

[9] A trial court's grant of summary judgment is reviewed *de novo*. *Guam Hous. & Urban Renewal Auth. v. Pac. Superior Ent. Corp.*, 2004 Guam 22 ¶ 14. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c). "In rendering a decision on a motion for summary judgment, the court must draw the evidence in a light most favorable to the non-moving party." *Taitano v. Lujan*, 2005 Guam 26 ¶ 11.

[10] "If the movant can demonstrate that there are no genuine issues of material fact, the non-movant cannot merely rely on allegations contained in the complaint, but must produce at least some significant probative evidence tending to support the complaint." *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10 ¶ 8. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 30 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* (quoting *Anderson*, 477 U.S. at 248).

IV.

[11] Petitioners raise several issues on appeal, more specifically, they argue: (1) contrary to the trial court's determination, Petitioners were not required to prove that any of the claimed errors affected the outcome of the election; (2) the numerous alleged statutory violations committed by the Commission required the voiding of the September 2, 2006 Primary Election; (3) the Guam law

which requires the cancellation of a primary where there are less candidates than seats for office is unconstitutional and inorganic because it abridges First Amendment rights of free association of Republican Party members and independent voters, and impinges on a candidate's right to seek voter support; (4) Petitioners were denied equal protection under the laws because the Republican Party candidates were not required to obtain a minimum number of votes to proceed to the General Election, and because voters in the Republican Primary were not allowed to write-in candidates because this race had been canceled; and finally, (5) because the trial court held that the iVotronic voting system was unauthorized by law and thereby invalidated the corresponding electronic votes, Petitioners argue that 19.3% of Guam's electorate was disenfranchised as a result, and for this reason, the September 2, 2006 Primary Election must be voided in its entirety, and a new Primary Election must be held.

[12] In addressing the issues raised by Petitioners, we begin by considering the appropriate standard and principles to be applied where an election contest is filed in the Superior Court of Guam pursuant to Chapter 16 of Title 3 GCA, particularly where the relief sought is the annulment of a primary election. We next consider, based on such standard and principles, whether the trial court properly granted summary judgment in favor of the Commission as a result of Petitioners' failure to establish some proof that the statutory errors and/or irregularities affected the outcome of the election. Finally, we consider the constitutional arguments raised by Petitioners with respect to 3 GCA § 16108.

A. Standard to be applied in determining whether to set aside or annul an election as a result of statutory violations

[13] We first consider the appropriate standard to be applied when an election contest is filed pursuant to Chapter 16 of Title 3 GCA and the remedy requested is to annul or set aside a primary election.

1. Chapter 12 standard: the "outcome" test

[14] To be clear, the provisions of Chapter 16 do not provide the standard or form of review to be applied by a court in determining whether to annul or set aside an election. Several provisions found in Chapter 12, however, expressly set forth the standard to be applied where the court finds the existence of irregularity, misconduct, or illegal votes. Section 12103, entitled "Irregularity or Misconduct Not Affecting Result," provides that "[n]o irregularity or improper conduct in the proceedings of any precinct election board shall void an election result, unless such irregularity or misconduct resulted in a defendant being declared either elected or tied for election." 3 GCA § 12103 (2005). Similarly, 3 GCA § 12104 (2005), entitled "Where Illegal Votes Not Necessary to Majority," provides:

> An election shall not be set aside on account of illegal votes, unless it appears that such number of illegal votes has been given to the person whose right to the office is contested or who has been certified as having tied for first place, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person.

[15] Thus, to succeed, a person filing a contest under Chapter 12 must establish that any claimed error or errors will affect the outcome of the election. The standard found in Chapter 12 parallels what is sometimes known as the "outcome" test, a test generally accepted and used by many other jurisdictions. *See Carlson v. Oconto County Bd. of Canvassers*, 623 N.W.2d 195, 199 (Wis. Ct. App. 2000) (concluding that "the outcome test is to be applied in Wisconsin"); *Appeal of Soucy*, 649 A.2d 60, 64 (N.H. 1994) (holding that the outcome test was state law and explaining that "to set aside an election the party challenging the results must prove either 'fraud which leaves the intent of the voters in doubt or irregularities in the conduct of the [election] of such a nature as to affect the

result'") (quoting *Leonard v. Sch. Dist.*, 99 A.2d 415, 416 (N.H. 1953); *Marks v. Stinson*, 19 F.3d 873, 888-889 (3rd Cir. 1994) (discussing the interaction between federal civil rights cases and state's "outcome test."). *See also Maschari v. Tone*, 816 N.E.2d 579, 583-584 (Ohio 2004); *Waters v. Gnemi*, 907 So. 2d 307, 315-316 (Miss. 2005); *Banker v. Cole*, 604 S.E.2d 165, 167-68 (Ga. 2004); *Jones v. Jessup*, 615 S.E.2d 529, 530 (Ga. 2005); *Bielamowicz v. Cedar Hill Indep. Sch. Dist.*, 136 S.W.3d 718, 721 (Tex. App. 2004); *Andrews v. Powell*, 848 N.E.2d 243, 251-52 (Ill. Ct. App. 2006).

[16] The trial court in this case applied the Chapter 12 standard to the claims in the Petition, and ultimately held that because none of the claimed errors affected the outcome of the election, summary judgment in favor of the Commission was proper. Petitioners argue that the Chapter 12 standard applies only to Chapter 12 claims, and the trial court erred in holding otherwise.

[17] In *Benavente I*, 2006 Guam 15, we discussed the relationship between Chapters 12 and 16 in our determination of whether the remedy provided in 3 GCA § 12115, that is, to annul or set aside an election, was a remedy available to those who file a primary election contest under Chapter 16. *Id.* ¶ 37. There, we held that "[t]he election contest provisions in Chapters 12 and 16 of Title 3 GCA relate to the same subject matter and are aimed at the same situation. As such, they should be construed together and applied harmoniously and consistently." *Id.* ¶ 42.

[18] We recognized in *Benavente I*, that "[i]t is a cardinal rule of statutory construction that courts must look first to the language of the statute itself." *Id.* ¶ 35 (quoting *Sumitomo Constr. Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶ 17). We also recognized that "[i]t is a 'rudimentary principle[] of construction' that 'statutes dealing with similar subjects should be interpreted harmoniously.'" *Id.* (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 739 (1989) (Scalia, J., concurring)).

[19] In addition, we observed that "[l]aws providing for election contests are liberally construed so that doubtful questions of election will be expeditiously settled," *id.* at ¶ 36, and that "an election code is to be liberally construed so that candidates are not deprived of their right to office, and voters are not deprived of their vote to elect the candidate of their choice." *Id.* (quoting 3A Norman J. Singer, *Sutherland Statutory Constr.* § 73:8 (6th ed. 2006) ("Statutes regulating public elections"). More specifically, we stated:

> In carefully construing an election contest statute, no single statutory provision would be construed in such a way as to render meaningless or absurd and [sic] other statutory provision. If more than one statute applies, they shall be considered in *pari materia* . . . . Where statutes relate to the same subject matter they must be read together and applied harmoniously and consistently.

Id. (quoting 3A Norman J. Singer, *Sutherland Statutory Constr.* § 73:8 (6th ed. 2006) (footnotes omitted).

[20] In applying the above rules of statutory construction, we held in *Benavente I* that the remedy provided in Chapter 12 was equally available to those persons who filed a Chapter 16 election contest. In doing so, we relied on the statutory language found in section 16102, which mandates that Chapter 16 "shall be liberally construed in favor of the primary voter." *Id.* ¶ 40 (quoting 3 GCA §§ 16102(2005)). We also deemed relevant the directive found in 3 GCA § 16103, which provides that "[t]he laws relating to elections shall apply to a primary insofar as they are consistent with [] Chapter [16], the intent of this being to place the primary under the regulation and protection of the election laws, as far as possible, consistently with [] Chapter [16]." *Id.* (quoting 3 GCA § 16103(2005)). Therefore, we appropriately "presume[d] that the Legislature, in enacting Chapter 16, was mindful of the election contest provisions in Chapter 12," and recognized that "the Legislature could have limited an election contest for a primary election to the provisions of Chapter

16." *Id.* ¶ 41. Because the Legislature did not so limit the election contest to the provisions of Chapter 16, we found instead that "the Legislature's intent was to apply all election laws, not inconsistent with Chapter 16 of Title 3 GCA, to primary elections." *Id.* (citing 3 GCA § 16103 (2005)).

[21] Applying the above rules of statutory construction which we laid out in *Benavente I*, we similarly consider whether the Chapter 12 standard for annulling or setting aside an election for irregularities, misconduct, or illegal votes applies to the underlying primary election contest filed pursuant to Chapter 16. As previously stated, Chapter 16 provides no form of review from which a court may determine whether to annul or set aside an election. Cognizant of the directive in 3 GCA § 16103, which states that "[t]he laws relating to elections shall apply to a primary insofar as they are consistent with [] Chapter [16]," we therefore hold that the Chapter 12 standard applies to the underlying statutory claims filed by Petitioners pursuant to Chapter 16. Applying the Chapter 12 standard to the instant Chapter 16 election contest will not be inconsistent with the provisions of Chapter 16. Moreover, adherence to the widely accepted outcome test, coupled with the liberal construction given to our Elections Law, protects the primary voter, as only where the statutory errors claimed affects the outcome of an election will the will of the majority of voters not be upheld. *See Benavente I*, 2006 Guam 15 ¶ 40 (instructing that Chapter 16 of the Elections Law, pursuant to 3 GCA § 16102 "shall be liberally construed in favor of the primary voter").

[22] We disagree with Petitioners' argument that the Chapter 12 standard does not apply to the instant contest because they do not contest any one person's nomination. In other words, they argue that under section 12103, it must be proven that "irregularity or misconduct resulted in *a defendant* being declared either elected or tied for election," and in this election contest, there is no candidate

"defendant." Petitioners' Brief at 11 (Nov. 15, 2006). In the same vein, they argue that under section 12104, it must be proven that "illegal votes has been given to *the person* whose right to the office is contested . . . which, if taken from *him*, would reduce the number of his legal votes below the number of votes given to some other person," and in this election contest, there is no identified "person" whose right to the office is contested. Petitioners' Brief at 11 (Nov. 15, 2006).

[23] To be sure, the Chapter 12 standard would have clearly applied had Petitioners joined the winning candidates as defendants in this election contest, based on the identical causes of action in the petition.[4] This is because the Chapter 12 standard is not inconsistent with Chapter 16, and further, there would clearly be an identified defendant or person whose right to office is contested. However, the fact that Petitioners here chose not to bring suit against the nominees does not foreclose the application of the standards found in sections 12103 and 12104 to this election contest. Simply stated, all persons who file a primary election contest and seek to annul or set aside a primary election because of alleged irregularities, misconduct, or illegal votes as a result of statutory violations are required to meet the same standard for annulment. We therefore find, contrary to the argument advanced by Petitioners, that where the relief requested is the complete annulment of the primary election, the standard of proof required to attain such relief is not contingent upon whether there is a "defendant" or an identified "person whose right to the office is contested."

[24] Moreover, this result is not inconsistent with our prior holding that in order to annul an election, plaintiffs bringing a Chapter 16 action need not submit to the court the names of the candidates that the plaintiff believes should have been nominated. As we have previously

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[4] In *Benavente I*, in discussing Rule 19, while we held that the nominees are not "indispensable" and therefore dismissal of the underlying petition was not required, we did find that such parties were "necessary" under the facts and the law. 2006 Guam 15 ¶ 73.

recognized, one can conceivably file a petition claiming substantial irregularities which affect the outcome of the election, seeking to void such election, without having to name any person or persons believed to be otherwise entitled to a nomination. *Benavente I*, 2006 Guam 15 ¶ 43. And under these circumstances, the standard for determining whether the evidence of irregularities or illegal votes warrants the annulment of an election may still be effectively applied. That is, while no identified nominee is challenged, the court may at the same time determine whether the alleged errors complained of affected the outcome of the election.

[25] Thus, while Petitioners contend that they do not contest any one person's nomination – which we have held they are allowed to do under Chapter 16 – the fact remains that where a primary election contest is filed, and the relief requested is the annulment of the election results, such contest is in effect a challenge to *all* those persons deemed nominated by the declaration of such results. In this case, the "defendant" under 3 GCA § 12103 and the "person" under 3 GCA § 12104 would be deemed to be *all* those persons who have been certified by the Commission as nominated for purposes of proceeding to the General Election.

[26] Accordingly, we hold that in a Chapter 16 primary election contest, where, as here, a petitioner seeks to annul or set aside a primary election, such petitioner must establish, consistent with Chapter 12, that the claimed irregularity, misconduct or illegal votes resulting from a statutory violation affected the outcome of the election.

2. Mandatory/Directory distinction in determining whether to void an election

[27] In addition to the outcome test found in Chapter 12, in assessing whether statutory violations committed by election officials will necessitate the holding of a new election, many state election cases distinguish between "mandatory" and "directory" statutes that election officials must adhere

to. Simply stated, the well-settled rule is that "[m]andatory provisions of election laws are those the violation of which invalidates the election, whereas directory provisions are those which, while they should be obeyed, may nevertheless be deviated from without necessarily invalidating the election." 29 C.J.S. *Elections* § 341 (2006); *see People ex rel. Agnew v. Graham*, 108 N.E. 699, 703 (Ill. 1915) ("A mandatory provision in a statute is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding."). Thus, "[v]iolations of directory provisions stemming from the conduct of election officials . . . do not result in illegal votes." *Honts v. Shaw*, 975 S.W.2d 816, 823 (Tex. Ct. App. 1998). The significance of the mandatory/directory distinction is that "[d]irectory provisions are not intended by the Legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them." *Siedschlag v. May*, 2 N.E.2d 836, 837-38 (Ill. 1936).

[28] The Indiana Supreme Court examined the policy reasons supporting the distinction between mandatory and directory statutes, and acknowledged that post-election challenges "must be regarded in a different light. 'If the statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits.'" *Schafer v. Ort*, 177 N.E. 438, 440 (Ind. 1931) (quoting *Parvin v. Wimberg*, 30 N.E. 790, 792 (Ind. 1892)). The court focused on the importance of "secur[ing] a free and untrammeled vote and a correct record and a return thereof" but recognized that the validity of the election is not affected by departing from a statute "which does not deprive legal voters of their right to vote or permit illegal voters to participate in the election or cast uncertainty on the result." *Id.*

[29] Courts have further observed that the timing of a challenge raised with respect to the statutory duties of election officials may affect the characterization of a provision as mandatory or directory. The mandatory/directory distinction becomes especially important where, as in the instant case, an election contest is filed after, as opposed to before, an election. *See id.; see also Swanberg v. Tart*, 778 S.W.2d 931, 933 (Ark. 1989); *Kelley v. Mayor and Council of City of Dover*, 300 A.2d 31, 36 (Del. Ch. 1972), *State ex rel. Town of White Bear v. City of White Bear Lake*, 95 N.W.2d 294, 301-302 (Minn. 1959).

[30] This is because once the will of the voters has been expressed, courts prefer to ascertain and effectuate such will. As expressed by one court:

> Ordinarily, provisions of an election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after an election such provisions are directory only, in support of the result, unless they are of such a character that their violation would effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless they affect an essential element of the election, or it is expressly declared by statute that compliance with them is essential to the validity of the election.

Vorva v. Plymouth-Canton Cmty. School Dist., 584 N.W.2d 743, 746 (Mich. Ct. App. 1998) (quoting 29 C.J.S. *Elections* § 67).

[31] Likewise upholding the integrity of the expressed will of the voters, another court has held that "all provisions of election laws are mandatory in the sense that they impose the duty of obedience upon those who come within their purview, but irregularities, which were not caused by fraud and which have not interfered with a full and fair expression of the voters' choice, should not effect a disenfranchisement of the voters . . . ." *Martin v. Porter*, 353 N.E.2d 919, 923 (Ohio Ct. C.P. 1976). Stated another way, where the will of the voters has already been expressed, that will should be given effect wherever possible, and for this reason, "statutory enactments concerning

elections must be strictly enforced to prevent fraud but liberally construed in order to ascertain and effectuate the will of the voters." *Prado v. Johnson*, 625 S.W.2d 368, 369 (Tex. Civ. App. 1981). "This important rule helps undergird the stability of elections [by] making it more difficult to set aside an election because of an inadvertent or technical violation of an election law provision." *Spires v. Compton*, 837 S.W.2d 459, 461 (Ark. 1992).[5]

[32] This sentiment is echoed by many other courts. For instance, in a Minnesota case, while the court acknowledged that the election prerequisites were not complied with completely, it nonetheless applied "the well-settled rule that statutory provisions which are treated as mandatory before an election is held will be construed as directory after the election, provided there was no fraud, bad faith, or misleading of the voters." *Lindahl v. Indep. Sch. Dist. No. 306 of Hubbard County*, 133 N.W.2d 23, 27 (Minn. 1965) (affirming the trial court's grant of summary judgment, and finding that the irregularities were not sufficient to invalidate the vote of the people). *Accord Morandi v. Heiman*, 178 N.E.2d 314, 318 (Ill. 1961) (stating that "provisions designed merely for information and guidance of officers should be regarded as directory only, particularly after the election has occurred."); *Jones v. State ex rel. Wilson*, 55 N.E. 229, 233 (Ind. 1899) (holding that "all provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, . . . unless the provisions affect an essential element of the election . . . . "); *Swaim v. Redeen*, 55 P.2d 1, 5

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[5] For illustration purposes only, we note that courts have refused to invalidate elections where the form of the ballot failed to disclose the words, "Official Ballot" or the date of the election or designate a polling place, though these were statutory, for the reason that the omissions were inadvertent and no voter appeared to have been deprived of his or her vote. *Hester v. Kamykowski*, 150 N.E.2d 196, 200-201 (Ill. 1958). In addition, some courts have recognized that secrecy of the ballot is an "essential element of the election" and is therefore always protected. Other courts have also refused to invalidate an election where the requirement that an election judge initial an absentee ballot was overlooked, because the failure to apply this requirement did not threaten the integrity of the election process. *Pullen v. Mulligan*, 561 N.E. 2d 585, 596-99 (Ill. 1990).

(Mont. 1936) (stating that "[a] statutory provision relating to elections may be mandatory if some proceeding be attacked in advance, and directory only thereafter."); *Hunt v. Campbell*, 169 P. 596, 602 (Ariz. 1917) (concluding that "courts will construe [an imperative] provision as directory merely in so far as a failure to comply with it is concerned when it is first called into question after the election.").

[33] Moreover, if the complainant has the chance to correct an irregularity before the election but then waits to see the outcome of the election before seeking to correct it, then there should be a different level of review. *See Martin*, 353 N.E.2d at 922-23 This is because "the election having been held, should not be disturbed when there was full opportunity to correct any irregularities before the vote was cast . . . ." *Id.*

[34] The mandatory/directory distinction, and its application with respect to the timing of a challenge raised, underscores that "[t]he purpose of an election contest is 'to ascertain the will of the people at the polls, fairly, honestly and legally expressed.'" *Friends of Sierra Madre v. City of Sierra Madre*, 19 P.3d 567, 584 (Cal. 2001). In fact, we find that the mandatory/directory distinction is no different in principle from the Chapter 12 standard discussed above. Rather, the mandatory/directory distinction parallels the principle embodied by the outcome test insofar as the popular will of the people will be given effect as much as possible. Stated another way,"whether or not the provisions are mandatory or directory, the rule usually applied is that informalities or irregularities in an election which do not affect the result will not invalidate it, for the courts prefer to give effect to the popular will whenever possible." 12 McQuillin, *The Law of Municipal*

Corporations, § 12.10 (Westlaw database updated Oct. 2006).[6]

[35] Accordingly, we adopt the mandatory/directory distinction in this jurisdiction, and hold, consistent with the cases discussed herein, that in the context of a primary election contest filed pursuant to 3 GCA, the provisions of the Guam Elections Law are mandatory if enforcement is sought before the primary election in a direct proceeding for that purpose. However, where the primary election has already been held, and the will of the voters expressed, we hold that such provisions are directory only, in support of the result. This rule will apply unless the provisions are of such a character that their violation would effect an obstruction to the free and intelligent casting of the vote, or an obstruction to the ascertainment of the result, or unless they affect an essential element of the election, or it is expressly declared by Guam law that compliance with the provision is essential to the validity of the election.

[36] In so holding, we agree with the sentiment of the Illinois court that:

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[6] Before announcing this general rule, these prefatory explanatory remarks were made in the McQuillin treatise:

> Where certain things are required to be done which are in the nature of conditions precedent to the validity of the election, such prerequisites are regarded as mandatory directions, and failure to observe them, in substance at least, will nullify the election.
>
> . . .
>
> Usually provisions as to secret ballots, the nomination of candidates and the qualifications of electors or candidates are mandatory; and frequently so are provisions as to the manner of calling, and the time and place of elections. Appointment of the requisite number of election officials is likewise mandatory. Under some circumstances, however, irregularities in some of the above respects were held not to be fatal.
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> With some exceptions, laws relating to the manner of procedure, the keeping of the record, returns of results, and the like are ordinarily viewed as directory. That is, laws merely regulating the manner of conducting an election are usually regarded as directory, and hence a departure from the mode prescribed will not ordinarily vitiate the election. So also, compliance by voters with registration requirements aimed at ensuring that only eligible residents cast votes have been held directory only where the disputed votes were in fact cast by otherwise eligible residents.

12 McQuillin, *The Law of Municipal Corporations* § 12.10 (Westlaw database updated Oct. 2006).

> We do not mean to suggest, of course, that election officials may simply ignore directory provisions of the [Elections Law]. All of the provisions of the [Elections Law] are mandatory in the sense that election officials are obligated to comply with their terms. It does not follow, however, that every failure to comply should invalidate the ballot in question.

Pullen, 561 N.E.2d at 596. Rather, we find that "[l]iteral compliance with directory provisions will not be required if it appears that the spirit of the law has not been violated and the result of the election has been fairly ascertained." *Id.*

B. Petitioners' claims of statutory violations: iVotronic voting system

[37] The trial court held that "the use of the iVotronic voting machines violates both statutes and administrative rules, and Petitioners have produced enough evidence to invalidate the use of the iVotronic voting machines in the primary election. Therefore, the results of the electronic voting machines must be discounted." Petitioners' Excerpts of Record ("ER") Vol. I at 28 (Decision and Order, Nov. 6, 2006). The trial court's decision appears to be based on the following: (1) Taitano's undisputed admission that the iVotronic machines did not provide instructions to voters as required by 3 GCA § 16301(d); (2) Taitano's undisputed testimony that the machines produced no paper ballot which can be placed in the ballot box as required by 3 GCA § 16402; and (3) Taitano's undisputed testimony that the Commission did not receive proper approval of the iVotronic machines under the Administrative Adjudication Law ("AAL") before using them. ER Vol. I at 14 (Decision and Order, Nov. 6, 2006).

[38] We first address the trial court's conclusion of law that the iVotronic voting system was not authorized by Guam law. We next consider whether the trial court properly discounted, or voided, all iVotronic votes. Finally, we consider the trial court's ultimate conclusion that any errors with respect to the use of the iVotronic voting machines did not affect the outcome of the September 2,

2006 Primary Election, and thus the Commission was entitled to judgment as a matter of law.

1. Ballot instructions pursuant to 3 GCA § 16301(d)

[39] In concluding that the iVotronic voting system was not authorized by Guam law, the trial court based its decision in part on the failure of the Commission to comply with the requirements of 3 GCA § 16301(d) (2005). That section states:

> There shall appear specific instructions in boldface type on each ballot that a voter may cast for candidates appearing on that ballot for one (1) party only; that if votes are cast for candidates of more than one (1) party for any office or nomination of offices appearing on the ballot, the entire ballot shall be void. The instructions on the ballot shall clearly indicate that the voters are allowed to cast votes in only one (1) party for all offices in that Primary Election. Any ballot wherein votes are cast for more than one (1) party for all offices in that Primary Election shall be void.

[40] However, it is undisputed that while the instructions do not specifically appear on the iVotronic ballot as required by the above statute, the iVotronic voting system does not allow its users to cross over in a primary election. In addition, according to the Precinct Official Manual ("the Manual"), the iVotronic voters are orally instructed by the precinct judge as follows: "In all the races on the Partisan Ballot, you will vote for candidates in one party only. The iVotronic Voting System will not allow you to cross-over. It will also not allow you to over-vote." *See* Commission's Supplemental Excerpts of Record ("SER") at 77 (Manual).

[41] Applying the Chapter 12 standard to the instant issue, Petitioners have failed to establish that any alleged violation of 3 GCA § 16301 would have affected the outcome of the election.

[42] Applying the mandatory/directory distinction, we find that the above statute with respect to the printing of the particular instructions on the ballot is directory in nature. Specifically, this challenge was raised after the Primary Election, and a violation of such section does not affect the free and intelligent casting of the vote or the ascertainment of the result, and further does not affect

an essential element of the election. Nor does Guam law declare that compliance with such provision is essential to the validity of the election. *See Hester*, 150 N.E.2d at 200 (stating that "requirements as to the form of ballot are directory only, and . . . a failure to strictly comply does not necessarily render the ballot void."); *People ex rel. Woods v. Green*, 106 N.E. 504, 507 (Ill. 1914) ("The will of the people should not be defeated by useless forms or idle technicalities."). When the result of the election has been fairly ascertained, it should be given full effect. For this reason, any violation of 3 GCA § 16301(d) will not be cause for invalidation of the iVotronic results.

[43] Furthermore, courts have held that "[d]eparture from a directory provision does not render the election void if there has been substantial compliance with the law, and there is no indication that the result of the election was changed or the rights of the voters impaired by the violation." *Daniels v. Tergeson*, 259 Cal. Rptr. 879, 882 (Ct. App. 1989); *McNally v. Tollander*, 302 N.W.2d 440, 444 (Wis. 1981) ("The Court has consistently sought to preserve the will of the electors by construing election provisions as directory if there has been substantial compliance with their terms."). Applying such law to the circumstances herein, we find that because the iVotronic system disallows voters to cross over or overvote in a primary election, the Commission substantially complied with section 16301.

[44] Finally, and as will be discussed below, we find that the Commission's failure to strictly comply with the above statutory authority does not necessitate the conclusion that the iVotronic voting system was not authorized by Guam law.

2. Ballot box requirement pursuant to 3 GCA § 16402

[45] The trial court also based its holding on language found in 3 GCA § 16402, which requires that the ballot be placed in a ballot box. That statute provides:

> Any person desiring to vote at a primary shall state his name and residence to the election officials. If the person desiring to vote is not challenged, one of the officials shall give to him one and only one official primary ballot. The voter shall proceed to one of the compartments provided and therein mark the ballot. *The marked ballot shall immediately be placed in the ballot box provided.* In addition, the provisions of Chapter 10 of this Title (Absent Voting) shall also apply to a primary election so as to permit voting by absentee ballot therein.

3 GCA § 16402 (2005) (emphasis added).

[46] According to the Manual, after a person votes through the iVotronic voting machine, a precinct judge then approaches the machine and "records" the vote onto the cartridge provided for collecting iVotronic votes. ER Vol. I, at 186 (Manual). Petitioners claimed that the failure to have a traditional ballot box for the casting of the iVotronic votes necessitated a finding that such votes were unauthorized by law and therefore illegal, and the trial court agreed.

[47] However, in a recent appellate case in Tennessee, the court rejected a similar argument made by the plaintiff. In *Mills v. Shelby County Election Commission*, No. W2005-02883-COA-R3-CV, 2006 WL 2257313 (Tenn. Ct. App. Aug. 8, 2006), the court stated:

> In his argument, [plaintiff] asserts that the use of the words "ballot box" in Art. IV, § 1 requires the use of paper ballots. We disagree. . . .[T]he word "ballot" as it occurs in the Tennessee Constitution is "not used in a literal sense but merely by way of designating a method of conducting elections that will guarantee the secrecy and integrity of the ballot." . . .[T]he use of voting machines [in] Tennessee is based upon the authority of the legislature to "provide different methods of exercising the elective franchise. . . . "

2006 WL 2257313 at *8 (quoting *Mooney v. Phillips*, 118 S.W.2d 224, 226 (Tenn. 1938)).

[48] While it is true that no paper ballot is placed in a traditional ballot box when an iVotronic vote is cast, the iVotronic vote is recorded on the cartridge provided. We find it significant that the Petitioners here do not assert that the secrecy of the vote or the integrity of the ballot has been hampered through the failure to comply with 3 GCA § 16402. In fact, it remains undisputed that the

cartridge containing the record of the iVotronic votes is always in the possession of the precinct official and always in plain view for security purposes. *See* Tr. at 22 (Cont'd Mot. Argument, Oct. 4, 2006) (testimony of Taitano). We therefore find that the Commission substantially complied with section 16402. *Daniels*, 259 Cal. Rptr. at 882.

[49] Thus, applying the mandatory/discretionary distinction, we find that the above statute with respect to the existence of a traditional ballot box is directory in nature. Specifically, this challenge was raised after the Primary Election, and a violation of such section does not affect the free and intelligent casting of the vote or the ascertainment of the result, and further, does not affect an essential element of the election. Nor does Guam law declare that compliance with such provision is essential to the validity of the election. *See, e.g.*, *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998) (holding that "even in a situation in which a trial court finds substantial noncompliance caused by unintentional wrongdoing as we have defined it, the court is to void the election *only* if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters.") For this reason, any violation of such provision will not be cause for invalidation of the iVotronic results. *Mills*, 2006 WL 2257313, at *7-8.

[50] Furthermore, applying the Chapter 12 standard to the instant issue, Petitioners have failed to establish that any alleged violation of 3 GCA § 16402 would have affected the outcome of the election.

[51] Lastly, and as will be explained fully below, the fact that the iVotronic voting system does not utilize the traditional ballot box to collect votes does not necessitate the conclusion that the iVotronic voting system is not authorized by Guam law.

3. The Commission's statutory authority to institute the iVotronic system

[52] We next consider whether, under the law as it existed at the time of the 2006 Primary Election, the Commission was authorized to institute the iVotronic voting system.[7] We find that the Commission, to the extent addressed herein, was so authorized.

[53] "The GEC is clearly conferred with the power to promulgate rules and regulations to effectuate its enabling statutes . . . . " *Wade v. Taitano*, 2002 Guam 16 ¶ 11.

[54] Several provisions of the Guam Elections Law anticipate, and to this extent, authorize the Commission to institute an electronic voting method such as the iVotronic voting system. First, 3 GCA § 2103(d), entitled "Election Commission, Duties and Responsibilities Of; Audit Report; Rule-Making Authority," states that "The Commission shall promulgate rules pursuant to 5 GCA Chapter 9 necessary and convenient to carry out the provisions of this Title." Second, 3 GCA § 7103(a), entitled "Method of Tabulating Ballots," provides in relevant part that "[t]he Commission shall determine *the appropriate method of casting ballots*, the method of tabulating ballots, the appropriate vote tabulating device if such a device is to be used and the form of ballot to be used in an election on Guam."[8] (Emphasis added.) Third, 3 GCA § 7111, entitled "Delivery of Ballots, Machines and Supplies," provides:

> The Commission shall, before the opening of the polls at any election, cause to be delivered to the precinct board of each precinct where an election is to be held, the proper number of ballots, *voting machines* and supplies to be used in that precinct. The ballots shall be delivered in sealed packages, with marks on the outside

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[7] On November 3, 2006, the 28th Guam Legislature passed into law "An Act to Prohibit the Use of Electronic and Mechanical Voting Machines in Guam Elections." Guam Pub. L. 28-152 (Nov. 3, 2006). This law does not affect our analysis and operates prospectively.

[8] The comment by the Compiler of Laws to this section states: "The purpose of this amendment is to give the Commission authority to determine the nature of ballots used, whether they be paper, punch cards or other electronic or electro-mechanical types of ballots." 3 GCA § 7103 Compiler cmt. (2005). Moreover, this provision was amended by the 15th Guam Legislature in a public law entitled "An act to amend sections of the election code to grant the election commission authority to determine how results of elections should be tabulated. . . ." *See* Guam Pub. L. 15-115:1 (Mar. 25, 1980).

> clearly designating the precinct or polling place for which they are intended, and the number of ballots enclosed.

(Emphasis added.) Finally, 3 GCA § 16301 (2005), entitled "Form of Primary Election Ballot," states in pertinent part:

> Ballots used in the Primary Election shall be in the form prescribed by the Guam Election Commission and shall conform to the following minimum requirements:
>
> . . .
>
> (g) Should the Guam Election Commission *adopt a ballot form using any* mechanical, electro-mechanical, or *electronic device to record the vote*, or aid in recording the vote, the information required by this Section shall appear on the device in the place provided therefore, or otherwise prominently within the voting booth so as to be easily read by the voter.

(Emphases added.)

[55] Upon review of the above statutory provisions, we find that the Commission is authorized to "determine the appropriate method of casting ballots." 3 GCA § 7103(a)(2005). We further find that the statutory scheme further anticipates the use of such machines, as it requires that the Commission deliver "the voting machines" to the polls before opening, 3 GCA § 7111, and gives form instructions for the situation where the Commission "adopt[s] a ballot form using . . . [an] electronic device to record the vote." 3 GCA § 16301(g).

4. AAL approval pursuant to 3 GCA § 2104

[56] Notwithstanding such authorization, another undisputed issue surfaces at this point with respect to whether the Commission's use of such machines were required to proceed through the Administrative Adjudication Law ("AAL"), codified at Chapter 9 of Title 5 GCA. Title 3 GCA § 2104 (2005) states:

> It shall be the duty and responsibility of the Commission to prepare a public manual of administrative procedures, rules, regulations and forms to be used in the conduct of elections. *After January 1, 2001, all manuals and publications shall be prepared pursuant to the Administrative Adjudication Law.* The manual shall set forth the regulations to be followed by all election officials, as well as the descriptions of the necessary equipment and forms to be used in election procedures.

(Emphasis added.)

[57] It is clear that the 2006 Manual, which comprises one part of the Elections Manual[9] delineated the procedures for use of the iVotronic voting system.[10] The testimony of Taitano, during hearings on motions filed in the trial court, reveals that the first Manual which included the iVotronic voting procedures was created in 2004. Transcript ("Tr."), at 20 (Cont'd Mot. Argument, Oct. 4, 2006). Taitano's testimony also reveals that the Manual was not submitted to the Legislature for review. Tr. at 20 (Cont'd Mot. Argument, Oct. 4, 2006). Regarding the 2006 Manual, Taitano testified that basically the same manual, that is, the 2004 Manual, was used as the 2006 manual, "because all we did here was to change the date" which was "an administrative change to the manual . . . because of the dates of the . . . election." Tr. at 19 (Cont'd Mot. Argument, Oct. 4, 2006). Other than Taitano's testimony, there is nothing in the record before us to confirm whether a manual which sets forth the regulations to be followed and "the descriptions of the necessary equipment and forms to be used in election procedures" was prepared by the Commission. 3 GCA § 2104.

[58] Because there was no testimony disputing Taitano's statement that the iVotronic voting procedures were not prepared pursuant to the AAL, we agree with the trial court's finding that the

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[9] The entire Elections Manual consists of five parts.

[10] During motions hearings held before the trial court, Taitano also testified that the Executive Order by Governor Felix Camacho "[a]pproximately three years ago" directed the Commission "to develop a state plan to implement the requirements of the Help America Vote Act, which is a federal law." Transcript ("Tr."), at 14-15 (Cont'd Mot. Argument, Oct. 4, 2006). Taitano was not certain on whether the "state plan" was adopted in accordance with the AAL. Tr. at 17 (Cont'd Mot. Argument, Oct. 4, 2006).

iVotronic voting system was not approved through AAL. Counsel for the Commission conceded this fact at oral argument.

[59] The issue therefore becomes whether the Commission's failure to comply with section 2104 of the Guam Elections Law necessitates the voiding of the election, or even the voiding of the affected ballots. We find that it does not. To this extent, and for the reasons stated below, we disagree with and reverse the trial court's decision to void, or discount, the iVotronic votes.

[60] To begin with, this court has already determined in its adoption of the mandatory/directory distinction that where the primary election has already been held, the provisions found in the Guam Elections Law are directory only, in support of the result, unless the provisions are of such a character that their violation would effect an obstruction to the free and intelligent casting of the vote, or an obstruction to the ascertainment of the result, or unless they affect an essential element of the election, or it is expressly declared by Guam law that compliance with the provision is essential to the validity of the election.

[61] While courts employ the mandatory/directory distinction in determining whether to void an entire election, courts have equally applied the distinction to determine whether *affected ballots* should be voided. That is, the "[f]ailure to comply with a mandatory provision renders the affected ballots void, whereas technical violations of directory provisions do not affect the validity of the affected ballots." *Pullen*, 561 N.E.2d at 595.

[62] In the case of *Vorva v. Plymouth-Canton Community School District*, 584 N.W.2d 743, the statute in question required that if an approved electronic voting system is improved or changed, that approval for the use of the voting system must be certified by the Board of State Canvassers. The plaintiff in that case thus argued that because the changes made to the electronic voting system did

not receive Board approval, the election must be declared invalid. *Id.* at 745. Disagreeing with the plaintiff, and relying on the mandatory/directory distinction, the court held that "[b]ecause plaintiff's challenge came after an election, the statutory provisions became purely directory. As such, statutory noncompliance does not render the election invalid." *Id.* at 746 (citation omitted). The court's holding was further supported by the failure of the plaintiff to prove that the "alleged violation obstructed the free and intelligent casting of the vote, or the ascertainment of the results, or that it affected an essential element of the election." *Id.* The court further based its holding on the outcome test, observing "that irregularities in the conducting of an election will not invalidate the action taken unless it appears that the result was, or may have been affected thereby." *Id.* (quoting *Rosenbrock v. Sch. Dist. No. 3*, 74 N.W.2d 32, 34 (Mich. 1955); *see also Nordby v. Dolan*, 78 N.W.2d 689, 692 (N.D. 1956) ("There is no provision in the statute that failure to submit a proposed bond issue to a board of budget review would render an election thereon illegal. Since the plaintiffs did not bring their action until after the election had been held, the provision of [law] requiring bond issues to be submitted to a board of budget review for approval or rejection is held to be directory rather than mandatory, and the failure of the directors to comply therewith did not invalidate the election challenged by the plaintiffs.").

[63] With respect to violation of 3 GCA § 2104, Petitioners have not alleged or offered proof that the failure to promulgate the iVotronic voting system procedure through the AAL effectuated an obstruction to the free and intelligent casting of the vote, or an obstruction to the ascertainment of the result. Nor have Petitioners alleged or offered proof that the failure to proceed through the AAL affected an essential element of the election. Finally, Guam law does not provide that compliance with 3 GCA § 2104 is essential to the validity of the election. *See, e.g., State ex rel. O'Dowd v.*

Rottman, 139 A.2d 818, 819 (Conn. Super. Ct. 1956).

[64] As a result, and under the circumstances of this case, including the timing of the challenge to the Commission's failure to implement the iVotronic voting system in accordance with the AAL, we hold that 3 GCA § 2104 is directory in nature, as such term is used in elections case law. Consequently, a violation of such provision on the part of the Commission, does not require the voiding, or discounting, of the affected iVotronic votes.[11]

[65] Moreover, it is important to note that even where the provision may be deemed a mandatory one, the general rule parallels our Chapter 12 standard, that is, "irregularities in an election which do not affect the result will not invalidate it, for the courts prefer to give effect to the popular will whenever possible." *McPherson v. City Council of City of Burlington*, 107 S.E.2d 147, 151 (N.C. 1959) (citations omitted). Specifically where the results will not be affected by irregularities or illegal votes, the popular will of the people will be given effect.

[66] Applying the Chapter 12 standard to the instant violation, we hold that Petitioners have failed to present a dispute of a material fact such that the Commission's failure to implement the iVotronic voting system pursuant to section 2104 affected the outcome of the election. The failure of the Election Commission to properly promulgate regulations relating to electronic voting is not essential to determining the will of the people as expressed in the September 2, 2006 Primary Election, and under these conditions, the will of the people must prevail. Just as the voiding of an election is not necessitated where a statutory violation does not affect the outcome of an election, so too should affected ballots be preserved where the will of the voters can be ascertained and the outcome of the

[11] Although we hold that, in this case, because the challenge to the election came after the election, the failure to adopt the iVotronic voting system in accordance with the AAL is not fatal to the Primary Election, we do not hold that the electronic voting procedures need not be adopted in the future in accordance with the AAL.

election is not affected.

[67] Moreover, as previously discussed, "[t]he election having been held, should not be disturbed when there was full opportunity to correct any irregularities before the vote was cast." *Martin*, 353 N.E.2d at 922-23. We find that the error complained of – the lack of AAL approval in this case of the iVotronic voting system – could have been corrected in advance of the election. Petitioners, however, chose rather to wait until the election was held and then brought the noncompliance to the attention of the court, after thousands of people voted. The people who voted on September 2, 2006 did so with no forewarning that a non-compliance with the AAL would threaten whatever rights they possess to have their votes counted.

1. Voiding of iVotronic votes and Disenfranchisement

[68] Based on the foregoing, we conclude that the use of the iVotronic machines was authorized by law, and that any error on the part of the Commission to comply with 3 GCA § 2104, a directory statute, did not require the invalidation of the iVotronic votes.

[69] This conclusion is further buttressed by the court's application of the Chapter 12 standard. That is, Petitioners have failed to establish that any error as a result of the Commission's failure to gain AAL approval affected the outcome of the election.

[70] For these reasons, we hold that the trial court erred in voiding, or discounting, all iVotronic votes. To this extent, we reverse the decision of the trial court and remand with instructions to enter judgment in accordance with our conclusion.

[71] We recognize the concerns raised by Petitioners that under the standard adopted by the trial court, "[t]he Superior Court would not nullify an election no matter the transgression unless there could be alleged a change in result. How then could a court address post-election challenges based

on racial discrimination or a poll tax?" Petitioners' Brief at 12 (Nov. 15, 2006). Petitioners additionally urged at oral argument that if the court were to only invalidate elections when the results would be affected, that this would leave the door open for any sort of nefarious practice to take place during an election, and the courts would have to endorse any such conduct because the result would not change.

[72] We do not through this Opinion address the situation where there is alleged a transgression that would justify a departure from the outcome test, but we acknowledge that such a situation may exist. Just because the results of the election will not change, the courts of Guam should still be able to reach constitutional violations that occur in elections. As Petitioners' cited case of *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) reminds us, there are some cases in which there is such "outrageous racial discrimination [that] some courts have chosen not to apply [the outcome test] at all, but to invalidate the election simply for its lack of integrity." *Id.* at 1080 (citing *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966), *Brown v. Post*, 279 F.Supp. 60 (W.D. La.1968)).

[73] Our adoption of the mandatory/directory distinction is also an acknowledgment that the outcome test is not always dispositive. As we previously expressed, the court will interpret statutes in a post-election dispute as mandatory where there is an obstruction to the free and intelligent casting of the vote, or an obstruction to the ascertainment of the result, or where the noncompliance affects an essential element of the election, or it is expressly declared by Guam law that compliance is essential to the validity of the election. As stated by an Indiana court:

> Unless this country has recently undergone a revolution that has escaped our notice, a voter can be lawfully deprived of his suffrage or a popular election can rightfully be quashed for only a few causes, namely, fraud or corruption, intimidation or violence, or such gross irregularity as renders the ascertainment of the will of the

individual or of a majority, or a plurality, as the case may be, impossible.

Brown v. Grzeskowiak, 101 N.E.2d 639, 647 (Ind. 1951) (quoting *Griffith v. Bonawitz*, 103 N.W. 327, 329 (Neb. 1905)).

[74] However, we do not reach beyond the outcome test and the mandatory/directory distinction because this is not such a case. In the future, a case may present itself where the entire will of the electorate is disenfranchised, *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1998), in which there is class-based disenfranchisement *Dunn v. Blumstein*, 405 U.S. 330 (1972), or outrageous racial discrimination as recognized in *Griffin*, 570 F.2d at 1080.

[75] But this is simply not that case. Petitioners concede that they do not allege that a significant group has been discriminated against. There is also no allegation of discriminatory or undemocratic pervasive error that undermines the integrity of the vote such that the will of the voters cannot be ascertained.

[76] We therefore clarify that this case is not meant to limit the review of more serious voting violations that may arise in the future.[12]

[77] We therefore find it unnecessary at this point to address Petitioners' argument that the voiding of 19% of all votes gives rise to a claim of unconstitutional disenfranchisement. That is, because we have through this opinion reinstated the previously voided iVotronic votes, the issue of disenfranchisement has necessarily been rendered moot.

C. Other Statutory Violations

[78] Petitioners present numerous claims of statutory violations in support of their petition seeking

[12] Also, of course, a cause of action for violation of civil rights may arise in federal court in election cases under 42 U.S.C. § 1983, such as the disenfranchisement case, *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), argued by Petitioners.

the annulment of the September 2, 2006 Primary Election. They argue that the instructions on the paper ballot issued to voters and the electronic devices failed to contain the warnings required by 3 GCA §16301(d); that the Commission failed to properly tabulate the vote; that numerous systemic failures occurred, such as exclusion of poll watchers in violation of 3 GCA § 9115, unsecured ballot boxes, persons standing too close to voters, the existence of inconsistent, incomplete, inaccurate, and misleading instructions given to voters at the polls; and that votes from Yona and Asan-Maina precincts were lost.

[79] Generally, the trial court found that the statutory violations committed by the Commission, if any, were "minimal, technical violations of statute and the failure [by the Commission] to follow the procedures set forth in their own policy manual" and do not rise to the magnitude of affecting the outcome of the election. ER Vol. I at 28 (Decision and Order, Nov. 6, 2006). Applying the Chapter 12 standard to each claimed statutory violation, the trial court found that because Petitioners failed to show that any error affected the outcome of the election, summary judgment in favor of the Commission was required.

[80] In assessing *de novo* whether the trial court properly granted summary judgment in favor of the Commission, we apply the Chapter 12 standard, as well as the mandatory/directory distinction, to each of the errors claimed by Petitioners.

1. Ballot instruction under 3 GCA § 16301(d)

[81] We first assess Petitioners' claim that the instructions on the paper ballot violated 3 GCA § 16301(d). Petitioners argue that the ballot did not include the instruction to voters that they were not allowed to cast votes "in only one party for *all* offices." Petitioners' Brief at 44 (Nov. 15, 2006). Rather, Petitioners contend that the ballot instructed voters to vote for candidates for "*one* party

only" and further, that "voting for more than one party" on the ballot shall void the entire ballot. Petitioners' Brief at 44 (Nov. 15, 2006). Petitioners thus contend that as a result of the Commission's noncompliance with section 16301(d), there were 1,990 crossover votes in the primary election, and for this reason, a new election is warranted.

[82] Title 3 GCA § 16301(d) (2005) provides:

> There shall appear specific instructions in boldface type on each ballot that a voter may cast for candidates appearing on that ballot for one (1) party only; that if votes are cast for candidates of more than one (1) party for any office or nomination of offices appearing on the ballot, the entire ballot shall be void. The instructions on the ballot shall clearly indicate that the voters are allowed to cast votes in only one (1) party for all offices in that Primary Election. Any ballot wherein votes are cast for more than one (1) party for all offices in that Primary Election shall be void.

[83] As we previously stated, "directory provisions are those which, while they should be obeyed, may nevertheless be deviated from without necessarily invalidating the election." 29 C.J.S. *Elections* § 341 (2006); *see also Graham*, 108 N.E. at 703 ("A mandatory provision in a statute is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding."). Further, in order to preserve the will of the electors, election provisions are construed as directory when there is substantial compliance with the provision. *Roth v. La Farge Sch. Dist. Bd. of Canvassers,* 634 N.W.2d 882, 889 (Wis. Ct. App. 2001).

[84] Thus, in applying the mandatory/directory distinction, we find that the above statute with respect to the form of the primary election ballot is directory in nature. Specifically, this challenge was raised after the Primary Election, and a violation of such section does not affect the free and intelligent casting of the vote or the ascertainment of the result, and further does not affect an essential element of the election. Nor does Guam law declare that compliance with such provision

is essential to the validity of the election. Furthermore, Petitioners have failed to show that the Commission's use of the term "any" office instead of "all" offices resulted in the 1,990 crossover votes.

[85] Specifically, the actual ballot instruction provided:

> YOU MAY VOTE FOR CANDIDATES OF ONE (1) PARTY ONLY, DO NOT CROSS OVER. IF YOU VOTE FOR CANDIDATES OF MORE THAN ONE (1) PARTY FOR ANY OFFICE APPEARING ON EITHER SIDE OF THIS BALLOT, THE ENTIRE BALLOT SHALL BE VOID.

ER Vol. III at 1 (Primary Election Sample Ballot). The above instruction was provided on each ballot for each race,[13] specifically instructing voters not to cross over when voting. In fact, Petitioners concede in their Opening Brief that "GEC effectively resolved the ambiguity for the voter though by repeating an instruction next to each race that you should vote for candidates of one party only." Petitioners' Brief at 44 (Nov. 15, 2006). In addition, the Manual states that a precinct judge shall instruct a voter selecting to vote on a paper ballot that in "all the races" on the Partisan Ballot, the voter must vote for candidates in one party only. *See* ER Vol. I at 185 (Manual).

[86] Under these circumstances, we find that the Commission substantially complied with section 16301(d). *See Daniels*, 259 Cal. Rptr. at 882 (observing that substantial compliance is sufficient to prevent the voiding of an election). A court therefore will not invalidate an election where there is at least substantial compliance with a directory provision in a statute. We agree with the trial court's conclusion that "the interchangeable use of the words 'any' and 'all' in the language of the statute lends itself to the interpretation that there is no significant difference in meaning between the two words." ER Vol. I at 28 (Decision and Order, Nov. 6, 2006).

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[13] *See* Commission's Supplemental Excerpts of Record ("SER") at 13 (Primary Election Sample Ballot).

[87] Furthermore, applying the Chapter 12 standard, even assuming that strict compliance was required with respect to section 16301(d), we find that Petitioners below have failed to establish that any alleged violation of 3 GCA § 16301(d) would have affected the outcome of the election. We therefore hold that the trial court properly granted summary judgment in favor of the Commission with respect to this issue.

2. Exclusion of poll watchers

[88] Petitioners next argue that the exclusion of poll watchers from the polling stations violated 3 GCA § 9115, and that officials thereby frustrated the voter challenge mechanism under section 3 GCA § 9119 ("Grounds for Challenge").

[89] Section 9115 allows poll watchers to be present when the polls open in order to "witness the conduct of the election and to challenge any voter." 3 GCA § 9115 (2005). Although allowed to witness the conduct of an election, poll watchers "shall not interfere with the precinct officials in the conduct of the election, nor be permitted within the [voting area]." *Id.* In addition, the Manual provides guidelines for poll watchers. *See* ER Vol. I at 174-75 (Manual). The guidelines provide that poll watchers shall be placed at a distance of 8 to 12 feet from the voting area which includes the ballots, ballot boxes, voting booths, and electronic voting machines. In addition, the guidelines provide that the Commission ensure reasonable accommodation is provided to poll watchers, given the conditions of the precincts.

[90] Thus, in applying the mandatory/directory distinction, we find that the above statute with respect to the poll watchers is directory in nature. Specifically, this challenge was raised after the Primary Election, and a violation of such section does not affect the free and intelligent casting of the vote or the ascertainment of the result, and further does not affect an essential element of the

election. Nor does Guam law declare that compliance with such provision is essential to the validity of the election. The proffer of proof by Petitioners did not establish that the results would have changed if this irregularity were not present. Moreover, violation of such provision will not invalidate an election where substantial compliance is established. Furthermore, improperly denying poll watchers access to the polls as required by the election laws does not automatically provide a basis to order a new election. *Conroy v. Levine*, 474 N.Y.S.2d 588 (N.Y. App. Div. 1984). *See also Stevenson v. Nine*, 314 N.Y.S.2d 185, 187 (N.Y. App. Div. 1970).

[91] In this case, Petitioners presented two affidavits to show that poll watchers at some point during the election were excluded from the polling area, and they therefore argue that such poll watchers could not challenge unregistered voters. The Commission also provided affidavits explaining its reasons for temporarily excluding several poll watchers from the polling area. There is no dispute in this case that poll watchers from Dededo precinct were removed temporarily. The undisputed evidence establishes that the poll watchers were temporarily removed so that precinct officials could ensure reasonable accommodations for the poll watchers, and to ensure that the poll watchers were at least 8 to 10 feet from the voting areas. ER Vol. I at 17 (Decision and Order, Nov. 6, 2006). Thus, the temporary removal was a result of the Commission representatives desire to properly allocate space to the poll watchers.

[92] We agree with the trial court that Petitioners failed to offer proof that the poll watchers were not allowed to view the conduct of the election pursuant to section 9115, and further failed to offer proof that any poll watchers were prevented from viewing the conduct of the election pursuant to 3 GCA § 9119. Thus, while Petitioners argue that unregistered voters were allowed to vote, they presented no offer of proof that any of the poll watchers challenged or objected to any of the alleged

unregistered voters. Nor do Petitioners offer any proof that voting took place while the poll watchers were excluded. Most importantly, Petitioners present no evidence to show that the amount of votes from unregistered voters were sufficient to change the results of the election. We therefore find that the Commission substantially complied with section 9115.

[93] Accordingly, applying the Chapter 12 standard, we agree with the trial court that because Petitioners have failed to provide proof that a violation of 3 GCA § 9115 affected the outcome of the election. For this reason, the trial court's grant of summary judgment as to this issue was proper.

3. Unsecured ballots

[94] We next consider Petitioners' contention that the ballot boxes were not secured in accordance with 3 GCA §§ 7117 and 11108.

[95] Section 7117 requires that:

> the ballot boxes be locked and sealed under Commission seal at all times from the time the ballot box leaves the Commission to their opening at the Election Return Center after the polls close; that all Precinct Board members accompany the ballot boxes at all times to the Election Return Center after the polls close along with at least one (1) Guam Police Department Officer; that government of Guam buses be utilized to transport the ballot boxes, the precinct board members and Guam Police Department Officers to the Election Return Center; and that only the Executive Director, or the Deputy Executive Director may open the boxes.

3 GCA § 7117 (2005).

[96] In addition, section 11108 provides that: "The *locked ballot box* . . . shall be brought to the election center for tabulation." 3 GCA § 11108 (2005) (emphasis added.)

[97] Petitioners proffer evidence that because the ballot boxes were locked on one end, and secured with a "twist tie" on the other end, a new election is required. However, nothing in the statutory sections above require that the ballot boxes be locked with two padlocks, as Petitioners argue. We therefore agree with the trial court that the Commission's use of a padlock together with

a twist tie to secure the ballot boxes is not violative of sections 7117 and 11108.

[98] Petitioners further assert a violation of section 7117 because the assigned police officer did not secure and physically accompany the ballot boxes during transport. The testimony was undisputed that while the police officers did not accompany the ballot boxes on the bus provided for transportation, the boxes were locked when placed on the bus, and the police officer followed behind in a police vehicle. There was also no evidence that failure of the police officer to accompany the precinct board member on the bus with the ballots resulted in tampered ballot boxes or lost ballots. Rather, Taitano's testimony revealed that only he possessed the keys to the ballot boxes and he personally opened and verified the contents of each ballot box from each precinct.

[99] Thus, in applying the mandatory/directory distinction, we find that the above statute with respect to the physical security of ballots is directory in nature. A violation of such section does not affect the free and intelligent casting of the vote or the ascertainment of the result, and further does not affect an essential element of the election. Nor does Guam law declare that compliance with such provision is essential to the validity of the election. We also find that the Commission substantially complied with section 7117. While a police officer did not accompany the precinct board member on the bus with the ballot boxes, the evidence showed that the police officer instead followed the bus to the election return center. There was no evidence that failure of the police officer to accompany the precinct board member on the bus with the ballots resulted in tampered ballot boxes or lost ballots. Rather, the evidence showed that the ballot boxes were locked and secured before leaving the precincts and remained secured during transport to the center. Failure of the police officer to be on the bus does not effect an obstruction to the free and intelligent casting of the vote, or an obstruction to the ascertainment of the result, or affect an essential element of the

election, nor is it expressly declared by Guam law that compliance with the provision is essential to the validity of the election. Thus, any violation as a result of the Commission's failure to ensure that the police officer physically boarded the bus with the secured ballot boxes cannot require the voiding of an election.

[100] Even assuming that there was no substantial compliance with sections 7117 and 11108, in applying the Chapter 12 standard to the violation, we find that Petitioners have failed to show that any violations of such sections affected the outcome of the election. We therefore hold that the trial court's grant of summary judgment in this regard was proper.

4. Violation of 3 GCA § 9147

[101] Petitioners next contend that precinct officials committed criminal acts prohibited by 3 GCA § 9147. Petitioners thus allege by affidavit that (1) a precinct official opened three brown envelopes without explanation and that such envelopes contained ballots; (2) a precinct official stood right behind voting booths and the iVotronic machines watching the voters and who they voted for; and (3) a precinct official stood by the ballot boxes watching people put ballots in a box and who they voted for.

[102] The statute at issue is 3 GCA § 9147 (2005), which states:

> Every inspector, judge or clerk of a precinct board is guilty of a misdemeanor who:
>
> (a) Attempts to find out any name on the ballot;
>
> (b) Except as otherwise authorized by this Title, examines, exhibits or discloses the ballot of any voter;
>
> (c) Makes or places any mark or device on any ballot with a view of ascertaining the name of any person for whom the voter has voted;
>
> (d) Opens or permits to be opened the ballot box during the time of voting.

[103] In accordance with instructions found in the Manual, a precinct inspector must ensure that

the voter places his/her paper ballot in the ballot box. To be certain that voters place their paper ballots in the ballot box, the inspector is instructed to be within eye contact of the ballot box, but shall not linger directly over the ballot box. Where a voter uses the iVotronic machine to vote, the precinct inspector is also advised to remain within eye contact of the machine, but again, shall not linger directly over the machine.

[104] We agree with the trial court that the claims in the affidavit do not establish that a precinct official attempted to find out any name on the ballot, or examined, exhibited, or disclosed the ballot of any vote, or made or placed any mark or device on any ballot so as to later ascertain who that voter voted for, or opened or permitted to be opened the ballot box during the time of voting such as to invoke the prohibitions of section 9147 or affect the outcome of this election. Importantly, Petitioners fail to offer proof that whatever occurred with regard to officials opening envelopes or standing near the voting booth or ballot boxes were actions unauthorized by Chapter 9 of 3 GCA or the Manual. As previously stated, the Manual authorizes, and in fact, requires, precinct inspectors to be within eye contact. There was no offer of proof of a "systematic invasion of privacy," as has been required by courts with ballot secrecy laws. *Taylor v. Town of Atlantic Beach Election Comm'n*, 609 S.E.2d 500, 505 (S.C. 2005) (holding where the alleged irregularity did not threaten to set aside the election results, the potential that a poll worker may have been within sight of a ballot will not suffice to invalidate election).

[105] In applying the Chapter 12 standard to the instant issue, Petitioners have failed to present any proof that any alleged violation of 3 GCA § 9147 would have affected the outcome of the election. We therefore hold that the trial court's grant of summary judgment on this ground was proper.

5. Loss of votes and mis-tabulation: Yona and Asan-Maina precincts

[106] We next address Petitioners' claim that the Commission failed to properly tabulate the votes of the Yona and Asan-Maina precincts. Petitioners argue, quite confusingly, that because the iVotronic votes from these two precincts were counted after the Election Center was closed, but before the official results were issued, the Commission mis-tabulated the votes in violation of 3 GCA § 11128, which resulted in a loss of hundreds of votes from the two precincts, and therefore a new election must be held.

[107] The only evidence presented by Petitioners on this issue were two newspaper articles which the trial court took judicial notice of in light of Taitano's testimony which confirmed that the iVotronic votes from these two precincts were counted after the unofficial results were tabulated. The newspaper articles showed that 115 iVotronic votes from the Asan-Maina precinct and 176 votes from the Yona precinct were not counted immediately, which delayed the certification of the results. Because the trial court discounted iVotronic votes, including these "late votes" the trial court merely stated that this alleged claim by Petitioners was an "overlap of the irregularities concerning iVotronic votes" and was not a separate issue which would have affected the outcome of the election. ER Vol. I at 24 (Decision and Order, Nov. 6, 2006).

[108] Petitioners do not allege that the iVotronic votes from these two precincts were not counted at all. Nor do they allege that they should not be counted. It is undisputed that the official results include the iVotronic votes from both of the precincts at issue. Violation of section 11128 requires us to determine whether such provision is a mandatory or directory provision. Keeping with the standard discussed above regarding mandatory and directory provisions, we find that section 11128 is directory in nature. A violation of such section does not affect the free and intelligent casting of the vote or the ascertainment of the result, and further does not affect an essential element of the

election. Nor does Guam law declare that compliance with such provision is essential to the validity of the election.

[109] Finally, applying the Chapter 12 standard, Petitioners fail to establish how the counting of the iVotronic votes after the unofficial results are issued, but before the official results are issued, would have changed the outcome of the election. The trial court thus properly granted summary judgment on this ground.

6. Tabulation of votes

[110] We next consider Petitioners' allegation that the Commission failed to properly tabulate the votes. While the Petition does not specifically address the mis-tabulation of the votes in the precincts, the trial court addressed this issue upon review of the uncertified and certified results against the EC13 forms. The trial court found no discrepancies between the signature rosters and the certified results in thirty-two of the fifty-three precincts, or 60% of the precinct vote tallies. In 40% of the remaining precincts the trial court explained that in almost all the precincts, a difference between the ballots cast and the roster signatures, the discrepancies were explained by the precinct officials. The trial court held that even if the discrepancies constituted mis-tabulation, the ballot totals differed by one or two votes, except in one precinct where the difference was by 19 votes. Again, the trial court found that the variance in the ballot totals and signature rosters did not affect the outcome of the election.

[111] Applying the Chapter 12 standard to this issue, we find that Petitioners have failed to show that the tabulation of votes and the alleged discrepancies found affected the outcome of the election. Although the trial court did find discrepancies in many of the precincts, the trial court explained that the variances were by one or two votes and were explained in writing by precinct officials.

Moreover, "[w]hile mere irregularities in the counting of votes which do not appear to have affected the result will not nullify an election, the contrary is true where the irregularities are sufficient to cause doubt as to the result or are such as to indicate an intention of the election officers to positively violate the statutory requirements." 29 C.J.S. *Elections* § 362 (2006). For these reasons, we conclude that the trial court's grant of summary judgment in favor of the Commission was proper with respect to this claim of error.

7. Summary

[112] Upon review of the alleged statutory violations, we find that the trial court consistently and properly applied the outcome test found in Chapter 12. Furthermore, in applying the mandatory/directory distinction, we find that the violations found by the trial court may be characterized as directory only. That is, none of the provisions violated effect an obstruction to the free and intelligent casting of the vote, or an obstruction to the ascertainment of the result, or affect an essential element of the election. *See, e.g.*, *Rottman*, 139 A.2d at 819. Nor do such violations require, under Guam law, the invalidation of the primary election as a result of noncompliance. Accordingly, we find that the popular will of the people in this case should be given effect. We therefore affirm the trial court's grant of summary judgment with respect to the multitude of statutory claims.

[113] In so holding, we disagree with Petitioners' argument that because of the numerous alleged statutory violations, the whole election process was tainted and a new primary election is therefore required. Even assuming *arguendo* that collectively speaking, the statutory violations are substantial in nature, courts have held, and we agree, that where the will of the people can be ascertained, it will be given effect. Thus, the Supreme Court of Florida has held that a trial court can sustain a certified

election result even after finding *substantial* noncompliance with the election statutes, where the result reflects the will of the people despite the substantial noncompliance. *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720. There, the court observed:

> [A] trial court's factual determination that a contested certified election reliably reflects the will of the voters outweighs the court's determination of unintentional wrongdoing by election officials in order to allow the real parties in interest -- the voters -- to prevail. By unintentional wrongdoing, we mean noncompliance with statutorily mandated election procedures in situations in which the noncompliance results from incompetence, lack of care, or, as we find occurred in this election, the election officials' erroneous understanding of the statutory requirements. In sum, we hold that even in a situation in which a trial court finds substantial noncompliance caused by unintentional wrongdoing . . . the court is to void the election *only* if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters.

Id. at 725. *See also Cambre v. Brignac*, 140 So. 702, 705 (La. App. 1932), *In re Election of U.S. Representative for Second Congressional Dist.*, 653 A.2d 79, 119 (Conn. 1994); *In re Petition to Contest General Election for Dist. Justice in Judicial Dist.*, 670 A.2d 629, 638 (Pa.1996); *Matter of Protest Election Returns and Absentee Ballots in November 4, 1997 Election for City of Miami, Fla.*, 707 So.2d 1170, 1174 (Fla. App.1998).

[114] We find the above authority persuasive and therefore Petitioners' request to invalidate the entire 2006 Primary Election is without merit. We find it instructive that even where there is "substantial noncompliance caused by unintentional wrongdoing . . . the court is to void the election only if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters." *Id.* In this case, there is no dispute that Petitioners have failed to prove, despite the many claimed errors, that such errors affected the outcome of the election. As such, the will of voters must be given effect.

D. Petitioners claims regarding 3 GCA § 16108

[115] Petitioners assert that the September 2, 2006 Primary Election was constitutionally infirm, specifically arguing that 3 GCA § 16108, as amended by section 6 of Guam Public Law 28-128,[14] and consequently the cancellation of the September 2, 2006 Republican senatorial primary election, resulted in the infringement of certain constitutional guarantees. In assessing the constitutionality of 3 GCA § 16108, Petitioners maintain that the court should apply the "strict scrutiny" standard, which requires a statute be narrowly tailored to serve a compelling governmental interest, in order to survive constitutional muster.

1. Standard of review

[116] Contrary to Petitioners' contention that strict scrutiny applies, the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), set forth the standard when reviewing constitutional challenges to state elections laws, stating:

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. *Storer, supra,* 415 U.S., at 730, 94 S.Ct., at 1279. *It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.* In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; *it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.* The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made." *Storer v. Brown, supra,* 415 U.S., at 730, 94 S.Ct., at 1279.

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[14] Petitioners' Opening Brief consistently refers to the so-called "Forbes Rider" to Guam Public Law 28-128 which amended 3 GCA § 16108 by allowing cancellation of the primary election for "a" party, where the law had formerly required a determination that "all political parties which have qualified for placement on the primary ballot have" less candidates than the number of available seats for that office. Guam Pub. L. 28-128:6 (June 27, 2006). We refer simply to section 16108, as amended by the public law.

460 U.S. at 789-90 (emphases added). *See also* Aimee Dudovitz, California Democratic Party v. Jones: *The Constitutionality of Blanket Primary Laws*, 44 N.Y. Sch. L. Rev. 13, 18 (2000) ("The modern standard of review for First Amendment challenges to state election regulations was first set forth in *Anderson v. Celebrezze* . . . . ").

[117] Although the test articulated in *Anderson v. Celebrezze* was first applied in evaluating a challenge to elections laws based on the First Amendment, the *Anderson* test has expanded beyond the First Amendment, and has been adopted and applied in equal protection cases as well. *See, e.g.*, *Rogers v. Corbett*, 468 F.3d 188, 193-94 (3rd Cir. 2006) (stating that "the *Anderson* test is the proper method for analyzing such equal protection due to their relationship to the associational rights found in the First Amendment"); *Republican Party of Arkansas v. Faulkner Co.*, 49 F.3d 1289, 1293 n.2 (8th Cir. 1995) (holding that *Anderson* sets out the proper method for balancing both associational and equal protection concerns because "[i]n election cases, equal protection challenges essentially constitute a branch of the associational rights tree"); *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992) ("In this circuit, however, equal protection challenges to state ballot-access laws are considered under the *Anderson* test."); *Rosen v. Brown*, 970 F.2d 169, 178 (6th Cir. 1992) ("utilizing the *Anderson* balancing test" in a challenge based on claims of free association and equal protection).

[118] When a statute "substantially restricts," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973), or imposes "heavy burdens" on asserted rights, then heightened scrutiny is required. *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). Even recognizing the "fundamental significance" of the right to vote, the Court stated that "[i]t does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Rather, referring to the *Anderson* test, the Court held that the "more flexible

standard applies." *Id.* at 434.

[119] The focus of Petitioners' constitutional challenge is 3 GCA § 16108 and the cancellation of the Primary Election for Republican candidates to the Guam Legislature. They argue that the enforcement of section 16108 prohibited them from voting in the Primary Election and nominating candidates to the General Election, thereby implicating the rights of free political association and free speech, and furthermore, that cancellation of the Primary Election infringed upon the right to campaign and participate in Republican Party affairs. Petitioners further maintain that there exists discrimination against Democrat senatorial candidates, who were required to obtain a minimum number of votes, as well as against Republican voters who were not allowed to write in candidates. Each ground is addressed in turn.

[120] Based on our application of the *Anderson* test, we hold that the burdens which Petitioners alleged infringed on their rights – if such burdens existed at all – were not unconstitutionally restrictive.

2. Right to choose nominees

a. The burden alleged

[121] The First Amendment and the Fourteenth Amendment protect against an infringement on free association and free speech in the context of the nomination process. *NAACP v. Ala.*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *Kusper*, 414 U.S. at 57 ("There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth

Amendments.") (quoting *NAACP v. Button*, 371 U.S. 415, 430 (1963)).

[122] Petitioners' precise argument, however, is that the cancellation of the Primary Election for Republican senatorial candidates denied "adherents of the Republican Party" of their "right to gather to choose their candidates." Petitioners' Brief at 30-31(Nov. 15, 2006). Although their Brief does not identify the "adherents" or the Republican Party members whose rights were violated, these claims were raised in the Petition before the trial court by Petitioners San Nicolas, Cruz and McDonald. ER Vol. I at 32, 35 (First Am. Pet.). Therefore, we presume for purposes of this argument, that the burden is advanced by Petitioners San Nicolas, Cruz and McDonald, who are members of the Republican Party.

[123] Petitioners on appeal maintain that it was unconstitutional to cancel the Republican Party's legislative Primary Election. The legislation that resulted in cancellation of such a primary election was expressly contemplated and ultimately enacted in 1994. The senators of the 22nd Guam Legislature passed 3 GCA § 16108, entitled, "Primary Elections Cancelled When Unnecessary," which required the cancellation of primary elections when there are less candidates than the number of vacant offices to be elected. Guam Pub. L. 22-129 (May 31, 1994). As first enacted, the statute provided: "When the Commission determines that *each* political party which has qualified for placement on the primary ballot has: (I) the same or fewer number of candidates running for nomination to the Legislature than the number of senatorial seats allowed in law, it shall cancel such Primary Election for that party for the Legislature because of the lack of any contest." Guam Pub. L. 22-129: 2 (May 31, 1994). The intent for this enactment was set forth by the Legislature, when it recognized that the Guam Election Commission must nonetheless carry out its election "functions despite having its regular budget reduced." Guam Pub. L. 22-129:1(a) (May 31, 1994). The

legislation was clearly a cost-savings measure for Guam when there was no need to narrow the field of candidates.

[124] This law was amended in 2004 in order to accommodate the Guam Legislature's intent to stop crossover voting, a practice which came into question following United States Supreme Court election cases. The only change to the law in 2004 involved the identification of the political parties as "all" rather than "each" and the statute read as follows: "When the Commission determines that *all* political parties which have qualified for placement on the primary ballot have: (I) the same or fewer number of candidates running for nomination to the Legislature than the number of senatorial seats allowed in law, it shall cancel such Primary Election for the Legislature." Guam Pub. L. 27-101: 2 (June 30, 2004).

[125] Section 16108 was amended just this year by the 28th Guam Legislature, with a single change from the word "all" to the word "a" in reference to the political parties. The current version of this statute provides, in relevant part: "When the Commission determines that *a* political party that has qualified for placement on the primary ballot has (I) the same or fewer number of candidates running for nomination to the Legislature than the number of senatorial seats allowed in law, it shall cancel such Primary . . . . for that party for the Legislature." 3 GCA § 16108 (as amended by Guam Pub. L. 28-128:6 (June 27, 2006) (emphasis added)). Quite simply, this most recent amendment provides that a party primary election will be held where such party has more candidates than seats in the office sought. For instance, if a party has sixteen candidates in the running for the Guam Legislature, which has only fifteen seats, then a party primary will necessarily be held. Conversely, this amendment also provides that where a party has fewer candidates than available seats, then the party primary election would be canceled for a lack of contest. Thus, where a party has only ten

candidates in the running for the Guam Legislature, then the party primary will be canceled.

[126] It is precisely this cancellation that Petitioners challenge. To be clear, Petitioners dispute the trial court's characterization of their argument below, and assert that they do not ask that the Republican candidates be forced to participate in a Primary Election. Rather, Petitioners "complain that they are not allowed to choose 'their' candidates." Petitioners' Brief at 37 (Nov. 15, 2006).

b. Character and magnitude of the burden

[127] In accordance with *Anderson*, we first determine "the character and magnitude of the asserted injury" claimed by Petitioners with respect to "the rights protected by the First and Fourteenth Amendments" that they seek to vindicate. *Anderson*, 460 U.S. at 789.

[128] Petitioners assert that because of the cancellation of the Republican senatorial Primary Election pursuant to 3 GCA § 16108, voters were unable to cast ballots and vote in a primary election. Here, Petitioner Cruz had stated in the Petition before the trial court that he had wanted "some Republican candidates . . . to advance to the general election and others he did not want to advance. He wanted a voice in this." ER Vol. I at 32 (First Am. Pet.). Thus, "the character and magnitude of the asserted injury" claimed by Petitioners with respect to their First and Fourteenth Amendment rights that they seek to vindicate, it appears that the alleged "burden" asserted by Petitioners is that section 16108 prevents them from both selecting a nominee in the Primary Election, as well as making a choice to elect in the General Election itself. *See* Petitioners' Brief at 35 (Nov. 15, 2006).

[129] We find, first, that contrary to Petitioners claim, the exercise of the right to nominate in a primary election in an uncontested race will not give Petitioners the "voice" they seek, and for this reason, the "burden" complained of is in fact nonexistent. That is, even assuming that our laws did

not require the cancellation of an uncontested primary race, it is certain that the same candidates that would have "automatically advanced" under 16108 would have similarly advanced through the holding of a primary election. This is especially true where the Commission is required to provide a write-in space *only where a race is contested.* See 3 GCA § 16301(f) (2005) ("The Guam Election Commission shall make accommodation for the voter to write in the name of a person or persons not otherwise appearing on the ballot, under *each office being contested* under each party heading.") (emphasis added). In addition, as discussed below, there exists no constitutionally protected right to a vote for a write-in candidate. Even if such write-in votes were allowed, in a race that has fewer candidates than seats available to advance to the General Election, it remains highly likely that the same persons who qualified to a place on the Primary Election ballot would successfully proceed to the General Election. Thus, any vote cast in a primary election race that is uncontested will have almost no effect on the slate of candidates which will ultimately be declared as nominees to proceed to the General Election. In this regard, then, any vote cast in an uncontested race will be a hollow vote for purposes of determining the candidates who will advance to the General Election. For this reason, the court finds that the character and magnitude of the burden placed on one's right to nominate in an uncontested race is nonexistent.

[130] Second, that the burden is nonexistent is further underscored by the fact Petitioners have the opportunity to vote for these very same candidates in the General Election. In *Neier v. State*, 565 S.E.2d 229 (N.C. Ct. App. 2002), Republican Party member and plaintiff Neier asserted that his equal protection rights were violated when he was not allowed to vote in the Democratic Party primary. In that case, only the Democratic Party had candidates for the position of district court judge. Neier argued that because he was a Republican, "he was effectively denied the right to vote

in that election, since the winner of the Democratic primary was the *de facto* winner of the general election." *Id.* at 232-233. Neier also argued that his right to freedom of association under the First Amendment was violated because "the only way he could have participated in the election was by registering as a Democrat so that he could vote in the primary." Id. The court rejected the argument that Republican Neier was prevented from voting in the primary election for the district court seat where only a Democrat was running, stating: "Plaintiff was not prevented from voting in the general election. The fact that there was only one candidate on the ballot for the general election was not the result of any action of the State, but rather the failure of parties other than the Democratic party to field any candidates." *Id.* at 233-34.

[131] Third, section 16108 cancels only uncontested races in a party primary. Thus, Petitioners' rights to associate with a candidate who advances republican principles can be exercised through participation in the republican gubernatorial primary. Importantly, as discussed above, Petitioners may also exercise their associational rights by participating in the General Election. In this sense, we find that the magnitude of any burden on the right to associate is minimal, at the very most.

[132] Fourth, Petitioners' alleged burden is further undermined by the existence of Guam law which allows persons such as Petitioners to file a nomination petition and thereby present a candidate for place on the Primary Election ballot. Under Guam law, relatively minimal requirements must be met to designate a candidate to a place on the Primary Election ballot. This procedure requires first that "a nomination paper" on the candidate's behalf and in the candidate's legal name, 3 GCA § 16203 (2005), which includes at least 250 signatures of qualified electors. 3 GCA § 16205(a) (2005). Next, at least 60 days before the date of the primary election, the nominating petition must be filed with, and a $100.00 fee paid to, the Commission. 3 GCA § 16206 (2005). Nothing in the

plain words of these relevant Guam laws require that the nomination petition be circulated or the fee be paid by the candidate. Thus, if Petitioners desired, they could have complied with the above provisions which would have resulted in the candidate being placed on the Primary Election ballot, or in the case where there are fewer candidates than seats available, the same candidate, like all other candidates in the running, could also automatically proceed to the General Election.

[133] Based on the above, in applying the *Anderson* test to the burden alleged by Petitioners, we hold that the character and magnitude imposed by 3 GCA § 16108 is nonexistent, and at best, minimal. Presuming nonetheless for purposes of our analysis that *some* cognizable burden exists, we next consider the governmental interests advanced by section 16108.

c. Governmental interests

[134] In applying the second part of the *Anderson* test, we must identify and evaluate the interests put forward by the government as justifications for the burden imposed by section 16108.

[135] One of the legitimate governmental interests presented by the Commission is prevention of "party raiding," where voters affiliated with one party designate with themselves as voters of another party so as to influence the results of the other party's primary). SER at 25 (Mot. for Dism. of Am. Pet.). Other governmental interests include "regulating the number of candidates on the ballot," and saving "unnecessary costs." ER Vol. I at 9 (Decision and Order, Nov. 6, 2006). As discussed above, the legislative intent of Public Law 22-129, which enacted primary-cancelling statute in 1994, describes cost-savings as a legitimate government interest, which more than offsets any burden.

[136] The cancellation of primary elections for lack of contest is not a novel concept. For example, the New York state constitution provides that

> the legislature may provide that there shall be no primary election held to nominate candidates for public office . . . in any unit of representation of the state from which

> such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law.

N.Y. Const. art. I, § 1 (Westlaw, current through L. 2006, ch. 742 except for chapters 227, 291, 423, 435, 522, 547, 666, 672 and 730 (2006)). The New York Court of Appeals recognized that this constitutional provision "includes the right to participate in the nomination of candidates as well as the right to vote," yet nonetheless held that such right "is subject, in the manner of their exercise, to the plenary power of the Legislature to promulgate reasonable regulations for the conduct of elections." *Davis v. Bd. of Elections*, 153 N.E.2d 879, 880-881 (N.Y. 1958) (citations omitted). This holding was reaffirmed in *Dorfman v. Berman*, 718 N.Y.S.2d 142 (N.Y. Sup. Ct. 2000), where the court held that section 1 of article 1, quote above, "extends to the right to participate in the nomination of candidates, the Legislature may regulate the right within reasonable limitations." *Id.* at 143. It is not unreasonable to cancel an election, where, as here, the election is uncontested because there are fewer candidates than seats available in the office sought. In fact, the cancellation has been deemed constitutional even where it has affected only one party's race, while the other party was required to proceed with a primary election. *See, e.g., State ex rel. Smith v. Sandusky County Bd. of Elections*, 800 N.E.2d 81 (Oh. Ct. App. 2003).

d. Weighing these factors under *Anderson*

[137] Having examined both the alleged burden and the governmental interests, the *Anderson* test instructs that "[o]nly after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Anderson*, 460 U.S. at 790.

[138] Petitioners' appear to argue that they must be allowed to cast a hollow vote to nominate in a process in which all candidates would have proceeded to the General Election. This presents, for practical reasons, no burden at all, and the cancellation did not "substantially restrict[]" their rights.

Kusper, 414 U.S. at 57. Therefore, the strict scrutiny standard, as asserted by Petitioners, does not apply here.

[139] Specifically, first, the candidates who would "automatically proceed" under the challenged statute as certain to proceed to the General Election had a primary election been held, and as such, Petitioners would have cast a hollow vote. Second, Petitioners are not prohibited from voting (or not voting) for these same candidates in the General Election. Third, only the uncontested races are canceled, and thus Petitioners may still participate in the other party primary elections, such as the gubernatorial election, as an exercise of their associational rights. Fourth, Petitioners may circulate a nomination petition if they truly desired to have a candidate placed on the Primary Election ballot (and contend for a nomination either under section 16108 or, if more than fifteen candidates were qualified for nomination, through an election held).

[140] Against the alleged burdens, the Commission offers several interests in canceling the election, all of which have been held to be valid governmental interests. *See, e.g.*, *Clingman v. Beaver*, 544 U.S. 581, 594 (2005) (acknowledging that "guard[ing] against party raiding" to be a "regulatory interest[] that this Court recognizes as important"); *Bullock v. Carter*, 405 U.S. 134, 145 (1972) (stating that "[t]he Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot" and recognizing it was "bound to respect the legitimate objectives of the State in avoiding overcrowded ballots.).

[141] Appropriately weighing the burdens against the interests of the government pursuant to the *Anderson* test, we hold that 3 GCA § 16108 did not impose "heavy burdens" on Petitioners' First Amendment rights, and with respect to the right of the electorate, this statute imposed no burden at all. Any such burden is justified by the legitimate governmental interests discussed in section c.

above.

[142] Accordingly, we hold that 3 GCA § 16108 is rationally related a legitimate governmental interest and therefore, the trial court properly granted summary judgment with respect to the constitutionality of section 16108.[15]

3. The rights to campaign, participate in Republican Party affairs, and to have a meaningful choice of candidates

[143] We next examine whether the cancellation of the Republican senatorial Primary Election imposed a "direct and heavy burden[]" on what Petitioners contend is a candidate's right to campaign. *Weinschenk v. State*, 203 S.W.3d 201, 216 n.25 (Mo. 2006). More specifically, as asserted by Petitioners, we consider whether the cancellation of the primary imposed a burden on the right to gather support from Republican and independent voters, on "the right to appeal to voters at the primary who may support him or her in the general election,"on the "right to seek unaffiliated voter support," and on the right to "unaffiliated voter access to like-minded candidates." Petitioners' Brief at 30-34 (Nov. 15, 2006).

[144] Petitioners also contend the cancellation of the Primary Election denied to independent voters, having been allowed by the Republican Party's Unanimous Consent to vote in Republican primary elections, the right to participate in Republican Party affairs; and denied to voters in general the right "to a meaningful choice among candidates." Petitioners' Brief at 30-33 (Nov. 15, 2006); ER Vol I. at 121 (Petition Ex. 13, Unanimous Consent).

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[15] We are unconvinced by Petitioners' claim that the Democratic ticket has traditionally contained more candidates, and their implicit conclusion that the section 16108 results in primaries being conducted only for Democratic races. By its plain words, 3 GCA § 16108 does not discriminate, nor does it limit its application to certain parties. Rather, section 16108 refers to "a political party" and thus equally applies either Democrat, Republican, or Independent parties. As this proceeding is an appeal from a summary judgment, Petitioners must offer "at least some significant probative evidence" to support their argument; mere speculation is insufficient to overcome summary judgment. *Iizuka Corp.*, 1997 Guam 10 ¶ 8.

[145] Petitioners did not raise these arguments in the trial court. "Generally, this court will not entertain an issue raised for the first time on appeal." *Sinlao v. Sinlao*, 2005 Guam 24 ¶ 30. This court has, however, enumerated certain exceptions to the general rule precluding appellate review of newly-raised issues. That is, while generally this court will not address issues raised for the first time on appeal, it may exercise its discretion to do so in the following circumstances: "(1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law." *Id.* (quoting *Dumaliang v. Silan*, 2000 Guam 24 ¶ 12 n.1)).

[146] We decline to exercise our discretion with regard to these issues. First, this case involves the political process, not the judicial process and thus, we do not exercise our discretion based on the first ground. Second, Petitioners present and we find no change in law which raised a new issue on appeal, and thus, we do not exercise our discretion based on the second ground. Finally, judicial review of this case is not limited to an interpretation of law; it necessarily includes consideration of fact issues, and thus, the third ground does not exist.

[147] Separate and apart from our analysis regarding exercise of our jurisdiction, we recognize two additional points. First, Petitioners' argument regarding the denial of the right to campaign is somewhat disingenuous. It cannot be disputed, from the print advertising to television and radio announcements, that Republican candidates for senator were campaigning alongside all other candidates, despite not appearing on the Primary Election ballot. Roadside signs were as prevalent among Republican senatorial candidates as all other candidates. Petitioners have made no proffer of proof that 3 GCA § 16108 has infringed on any candidate's "right to campaign" and, moreover, Petitioner has made no legally cognizable argument that such a right exists to begin with. Absent

a right, there can be no "burden" as contemplated by the United States Supreme Court, and therefore, we are not compelled to weigh any state interest. Second, the rights asserted by Petitioners were made on behalf of candidates and independent voters, yet neither the voters nor candidates are parties in this case. For these reasons, we decline to exercise our discretion to rule on these arguments, and conclude that the trial court was correct to grant summary judgment with respect to these issues.

4. Minimum vote requirement

[148] Petitioners next argue that their equal protection rights were violated by the cancellation of the Primary Election because Guam law was unequally applied between Republican and Democrat senatorial candidates. The statute in question here is 3 GCA § 16110 (2005), which states:

> **§ 16110. Minimum Vote Required.**
>
> No person shall be deemed nominated in a primary election unless the candidate receives votes at least three (3) times greater than the required number of signatures needed for a petition for candidacy for such election, or votes equal to four percent (4%) of the total number of persons who obtain ballots to vote in that primary election for all parties, whichever is less.

Petitioners challenge the minimum vote requirement of section 16110, and argue that it discriminates against Democrats by creating a state-imposed barrier for Democrat candidates and not for Republicans; that it discriminates against more popular parties and candidates, because when a party has many candidates, votes may be "diluted" making it more difficult to obtain the requisite minimum number of votes; and finally, that a "candidate seeing widespread interest in an office among fellow party members is forced to choose between continuing association with those of similar philosophical views and abandoning them to achieve certain nomination in to the general election with another party." Petitioners' Brief at 40 (Nov. 15, 2006).

[149] None of these arguments warrant extensive analysis. As discussed above, the *Anderson*

weighing test may be applied to the allegation that equal protection rights have been violated, and we apply the *Anderson* test here. First, the "character and magnitude" of Petitioners' asserted injury is that similarly-situated Democrats and Republicans are treated differently. Yet, our review of the case reveals that their claim to a "burden" is illusory.

[150] The plain words of 3 GCA § 16110 makes no distinction between any class, any political party, and implicates no equal protection concerns. It refers only to a "person" who is a "candidate" and thus, this statute applies equally to any person to any member of any political party that has participated in a primary election. The statute requires only that qualifying for candidacy must provide "equal opportunity, not equal outcomes." *Libertarian Party New Hampshire v. State*, No. 2005-606, 2006 WL 3359387, at *4 (N.H. Nov. 21, 2006). Guam's Elections Law offers "an equal opportunity to qualify for a place on the general election ballot" as required by *Liberatarian Party.*

[151] Second, despite the fact that the dispute involves two political parties, these parties are not similarly situated. Because there were fewer Republican candidates than seats on the Legislature, there was a "lack of contest" and therefore, all these candidates were automatically nominated pursuant to 3 GCA § 16108, which we have held survives constitutional scrutiny. On the other hand, the Democrat candidates were in a contested race because the number of candidates exceeded the number of seats available to proceed to the General Election. Therefore, Democrat candidates were required to participate in a primary election and obtain the minimum number of votes in order to be deemed nominated to proceed to the General Election.

[152] Third, Petitioners' assertion that a candidate is "forced to choose" between remaining in his or her party with a crowded ballot, or "achieving certain nomination" with the opposing party, is pure speculation. No evidence was presented at the trial court that a Democrat senatorial candidate chose

to join the Republican Party solely in order to gain automatic nomination to the General Election. This very argument was rejected in *Neier v. State*, 565 S.E.2d 229, when a Republican Party member insisted that his rights were violated because he could vote in a primary election for a judge only if he registered as a Democrat, as no Republican candidates ran in that particular race. *Id.* at 232-233. Moreover, assuming *arguendo* that a Democrat candidate chose to join the Republican Party as a the fourteenth senatorial candidate, this personal decision could not be interpreted as being a state-imposed burden upon the candidate. *See, e.g., Ca. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (where the Supreme Court rejected California's argument that a blanket primary system protected non-party members' ability to participate in a party's affairs, stating the voter "should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction . . . ."). Here, Petitioners' claim of a burden is not a "state-imposed restriction" and thus, this argument cannot stand.

[153] Petitioners additionally contend that equal protection concerns were implicated in that Democrat candidates bore the burden, expense, and labor of participating in the Primary Election, while Republicans did not. Evidence to support this contention was not in the record, and thus, Petitioners have not "produce[d] at least some significant probative evidence tending to support" this argument. *Iizuka Corp.*, 1997 Guam 10 ¶ 8. Rather, Petitioners' argument implicitly presumes that Republican senatorial candidates did not campaign at all during the Primary Election time period. Yet, as discussed above, print, television and radio advertising was as ubiquitous for Republican senatorial candidates as for Democrat candidates.

[154] Because Petitioners presented no burden as contemplated in *Anderson*, we need not make an inquiry as to government's interest, and therefore, we hold that the trial court correctly granted

summary judgment on this issue.

5. Denial of write-in vote

[155] Finally, Petitioners argue that eliminating the primary election for Republicans denied Republican voters the ability to write in a senatorial candidate. Petitioners argue, but cite no supporting authority, that once the right to write-in has been given to some, "it may not be den[ied] to others." Petitioners' Brief at 41 (Nov. 15, 2006). Although raised in the constitutional context, this argument implicates the Guam law which provides: "The Guam Election Commission shall make accommodation for the voter to write in the name of a person or persons not otherwise appearing on the ballot, under each office being contested under each party heading." 3 GCA § 16301(f) (2005).

[156] We are not persuaded by Petitioners' argument, for the reasons discussed more extensively above. First, the primary race for Republican senatorial candidates was not "contested" as was required by section 16301(f), because there were only thirteen candidates running for fifteen slots on the Republican side of the ballot in General Election. Second, 3 GCA § 16108 which required cancellation of the Primary Election for lack of contest, applies equally to both parties and does not give one party an advantage over another.

[157] We are guided by *Burdick v. Takushi*, 504 U.S. 428, where the United States Supreme Court held that it was a permissible burden on the electorate to prohibit write-ins votes. In confirming that reasonable restrictions on the voting process do not trigger strict scrutiny analysis, the Court said: "Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold." *Id.* at 432. In holding that Hawaii could restrict write-in votes in furtherance of conducting orderly and efficient elections, the

Court held that laws that prohibit write-in candidates will be held to be presumptively valid: "[A] prohibition on write-in voting will be presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme." *Id.* at 441. The Court recognized that the state's restriction was justified by the state's legitimate rational interest in regulating elections. *Id.* Moreover, "there [we]re other means available, however, to voice . . . generalized dissension from the electoral process; and we discern no adequate basis for our requiring the State to provide and to finance a place on the ballot for recording protests against its constitutionally valid election laws. *Id.*

[158] Under *Burdick*, Petitioners' argument cannot stand because a primary election is not rendered invalid if a statute results in a prohibition against write-ins. Therefore, the trial court correctly granted summary judgment with respect to this issue.

V.

[159] In conclusion, we hold, first, that Petitioners, in seeking to annul or set aside the September 2, 2006 Primary Election, consistent with 3 GCA Chapter 12, must prove that any claimed irregularity, misconduct, or illegal votes resulting from a statutory violation affected the outcome of the election.

[160] Second, we hold that the provisions of our Elections Law are mandatory in the sense that the Commission must comply with their terms. However, where the acts of the Commission are challenged after an election in which the will of the voters has been expressed, then the provisions are directory only, in support of the result of the election. We adopt this well-settled rule and find that where an election law provision is found to be a directory provision, then a violation of such

provision cannot void an election or even void any affected ballots. We hold that this general rule applies unless the provisions are of such a character that their violation would effect an obstruction to the free and intelligent casting of the vote, or an obstruction to the ascertainment of the result, or unless they affect an essential element of the election, or it is expressly declared by Guam law that compliance with the provision is essential to the validity of the election.

[161] Third, we hold that while the iVotronic voting system was authorized by Guam law as it existed at the time of the September 2, 2006 Primary Election, the iVotronic voting system did not receive Administrative Adjudication Law approval as required by law. However, we find that under the circumstances of this case, including the timing of the challenge to the Commission's failure to properly implement the iVotronic voting system in accordance with the AAL, the Guam law that requires AAL approval is directory in nature, as such term is used in elections case law. Consequently, a violation of such provision on the part of the Commission does not require the voiding, or discounting, of the affected iVotronic votes. Moreover, we conclude that Petitioners have failed to establish that the failure to gain AAL approval of the iVotronic voting system affected the outcome of the election. For these reasons, we hold that the trial court erred in voiding, or discounting, all iVotronic votes. To this extent, we reverse the decision of the trial court, and remand with instructions to reinstate all previously voided iVotronic votes.

[162] Fourth, we find that the trial court properly applied the Chapter 12 outcome test to all of Petitioners' claims of statutory violations. In addition, we find that any violations found by the trial court concerned only directory provisions. None of the violations effected an obstruction to the free and intelligent casting of the vote, or an obstruction to the ascertainment of the result, or affected an essential element of the election. The violations also do not require, under Guam law, the

invalidation of the primary election as a result of noncompliance. We therefore hold that despite the numerous allegations presented, there is no dispute that Petitioners have failed to prove that such errors affected the outcome of the election. The court holds that under such circumstances, the will of voters must be given effect. Accordingly, we hold that the trial court properly granted summary judgment on this issue.

[163] However, our use of the outcome test in this Opinion is not mandated for all election cases. We recognize that in the future, there may be a case of such undemocratic or unconstitutional magnitude that the courts of Guam may take action despite its not affecting the outcome of the election, but this is not that case.

[164] Fifth, with regard to Petitioners' constitutional challenge of Guam law which requires the cancellation of the primary election where a race is uncontested, we find that the Guam law is constitutional. Weighing the burden imposed by the law against governmental interests, we find that burden placed on the electorate is nonexistent, because even if a primary election was held, the same candidates would very likely proceed to the General Election, especially where the Commission is not required to provide a space for a write-in vote where a race is uncontested. Thus, the same candidates who would "automatically proceed" under the challenged statute would likely proceed to the General Election had a primary election been held, and therefore, Petitioners would have cast a hollow vote. We also find that Petitioners are not prohibited from voting (or not voting) for these same candidates in the General Election, and may also participate in other party primary elections, such as the gubernatorial election, to exercise their associational rights. We further find that Petitioners may circulate a nomination petition if they truly desired to have a candidate placed on the Primary Election ballot and contend for a nomination through an election or through the

automatic advancement under Guam law in the case of a canceled primary. We further find that the governmental interests in cancelling the primary include preventing party raiding, regulating the number of candidates on the ballot, and saving unnecessary costs to hold an election where a race is uncontested. Upon weighing of the burdens and the governmental interests, we hold that the statute, like similar statutes found in other jurisdictions, is constitutional. The trial court properly granted summary judgment on this ground.

[165] Sixth, we hold that the Guam law that required the Democrat candidates to meet a minimum number of votes in the September 2, 2006 Primary Election is constitutional, even where the Republican candidates did not also have to meet such requirement in an uncontested race. We find that the law at issue makes no distinction between any political party, and implicates no equal protection concerns. Moreover, despite the fact that the dispute involves two political parties, these parties are not similarly situated because the Republican senatorial race was uncontested, whereas the Democratic slate had more candidates than the number of seats available to advance to the General Election. Therefore, Democrat candidates were required to participate in a primary election and obtain the minimum number of votes in order to be deemed nominated to proceed to the General Election. We further find that Petitioners failed to offer any proof that the Democrat candidates bore a burden of expense or labor of participating in the Primary Election, while Republicans did not. Thus, we hold that the trial court properly granted summary judgment in this respect.

[166] Seventh, we hold, consistent with case law from the United States Supreme Court, that a primary election cannot be rendered invalid if a statute results in a prohibition against write-ins. Therefore, the trial court correctly granted summary judgment with respect to this issue.

[167] Finally, consistent with our precedent, we decline to address any issues raised for the first time on appeal.

[168] Accordingly, we **REVERSE** in part, **AFFIRM** in part, and **REMAND** for entry of judgment consistent with this opinion confirming the certified results of the September 2, 2006 Primary Election.

J. BRADLEY KLEMM
Justice *Pro Tempore*

RICHARD H. BENSON
Justice *Pro Tempore*

F. PHILIP CARBULLIDO
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam

DEC 12 2006

By: LISA C. IBANEZ
Deputy Clerk, Supreme Court of Guam