IN THE SUPREME COURT OF GUAM

GUAM ELECTION COMMISSION,
Respondent-Appellant,

v.

RESPONSIBLE CHOICES FOR ALL ADULTS COALITION and FRANKLIN P. LEON GUERRERO,
Petitioners-Appellees,

COALITION 21,
Intervenor-Appellee.

Supreme Court Case No. CVA06-018
Superior Court Case No. SP0154-06

OPINION

Cite as: 2007 Guam 20

Appeal from the Superior Court of Guam
Argued and submitted on October 19, 2007
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] Intervenor-Appellee Coalition 21 petitioned to have a ballot initiative, Proposal A, placed on the November 2006 ballot. The initiative would change the legal age for purchasing and possessing alcohol from eighteen to twenty-one. Respondent-Appellant Guam Election Commission ("GEC") allegedly failed to comply with numerous statutes and regulations related to processing the ballot initiative, and a writ of mandamus was requested by Petitioners-Appellees Responsible Choices for All Adults Coalition and Franklin Leon Guerrero (collectively "Responsible Choices"), a group of citizens opposed to Proposal A. The lower court granted the writ of mandamus, ordering that GEC either remove the initiative from the ballot or decline to certify the results. GEC appeals that ruling, arguing that the lower court's ruling was erroneous in multiple respects. We affirm, finding that GEC has violated numerous election statutes and regulations.

I.

A. GEC's History in Processing Initiatives

[2] GEC has been making errors in its processing of ballot initiatives since the first initiative petitions were brought in the mid-1980s, and Responsible Choices asserts that GEC's actions in its processing of Proposal A violated twenty-one different statutes and regulations, including several that GEC has violated previously.

[3] In 1977, Guam enacted its first statute permitting initiatives to be placed on the ballot. Guam Pub. L. 14-23, § 1 (May 3, 1977) (codified as amended at 3 GCA Chapter 17). Later that year, GEC enacted regulations to govern the processing of initiatives. 6 Guam Admin. R. & Regs. Ch. 2. At that time, Guam's Organic Act did not explicitly authorize initiatives, and in 1982 the U.S. Congress amended the Organic Act to specifically provide the people of Guam the right to initiative. U.S.

Pub. L. 97-357, § 101, 96 Stat. 1705 (1982) (codified at 48 U.S.C. § 1422a). Guam reenacted 3 GCA Chapter 17 the following year, before any initiative petitions had been brought. Guam Pub. L. 17-25, Ch. III, § 8 (Oct. 7, 1983), 3 GCA § 17514 (2005). Neither the Guam Legislature nor the GEC ever explicitly reenacted the implementing regulations.

[4] After an initiative qualified for the ballot in 1986, GEC failed to comply with its duty to send ballot pamphlets related to an initiative to voters, instead publishing the information in newspapers. *Hartsock v. Leon Guerrero*, SP246-86 (Super. Ct. Guam Oct. 31, 1986). The lower court found that GEC had not complied with Guam election statutes, and ordered that the proposal either be removed from the ballot or not certified. *Id.* at 4.

[5] In 2002, the lower court found that GEC Executive Director Gerald Taitano had failed to timely notify an initiative proponent that his initiative petition did not contain a sufficient number of valid signatures, as required by section 2108(c) of Volume 6 of the Guam Administrative Rules and Regulations. *Wade v. Taitano*, SP0079-002, at 7 (Super. Ct. Guam June 11, 2002), *aff'd on other grounds*, 2002 Guam 16 ¶ 18. The court also found that GEC's verification of petition signatures was flawed, causing a number of valid petition signatures to be improperly rejected. *Id.* at 11. Further, the court invalidated a regulation promulgated by GEC – section 2108(c) – because it conflicted with statutory requirements. *Id.* at 7.

[6] In 2004, the GEC failed to mail to voters the full text of an initiative proposal that had qualified for the November 2004 ballot, instead mailing a summary. *Aguon-Schulte v. Guam Election Comm'n*, 469 F.3d 1236, 1237 (9th Cir. 2006). After GEC's actions were challenged in court, the Guam Legislature passed emergency legislation to keep the measure on the ballot. Guam Pub. L. 27-108, § 3 (Oct. 27, 2004) (codified at 3 GCA § 17509.1). The legislation waived the requirement that the entire text of this proposal be mailed, and provided that defects in the ballot pamphlet shall not be grounds to invalidate an election. *Id.* While the parties disputed the validity

of the legislation and GEC admitted its failure to comply with certain aspects of Public Law 27-108, the election went forward and the challenge was dismissed on procedural grounds. *Aguon-Schulte*, 469 F.3d at 1236; *Aguon-Schulte v. Guam Election Comm'n*, CV1103-04, at 5, 15 (Super. Ct. Guam May 3, 2006).

[7] In 2007, GEC improperly failed to include an initiative measure related to slot-machine gambling on a special election ballot, and did not properly provide notice of the deadline for submitting arguments for or against the measure. *Cruz v. Guam Election Comm'n*, 2007 Guam 14 ¶¶ 19, 36-39.

[8] In addition to finding that GEC has failed to properly process initiatives, courts have found that GEC has failed to properly conduct other recent elections. *See, e.g.*, *Benavente v. Taitano*, SP140-06, at 1 (Super. Ct. Guam Oct. 5, 2006) ("[I]t is clear that the Guam Election Commission has committed numerous violations of the law and its regulatory authority. Should the substantive issues raised by the Petitioners resurface in any future elections [and] proper claims and parties [are] before the Court . . . the Court will be faced with the situation in which it must void an entire election due to substantial irregularities and failure of the Guam Election Commission to follow the law."); *Pablo v. Guam Election Comm'n*, CV0716-06, at 5 (Super. Ct. Guam July 18, 2006) ("GEC would better serve the public's interest by not repeating such a blunder, asking for legal opinions . . . far in advance of the next election to avoid such destructive results in the future."); *Guam v. Taitano*, CV1241-06, at 1 (Super. Ct. Guam Oct. 16, 2006) ("Over the past eight years, the Supreme Court of Guam has been faced with no less than five challenges to actions of the Guam Election Commission. Studying the actions of those who have gone before is necessary to avoid repeating past mistakes.").

B. The Filing and Processing of Proposal A

[9] In processing the initiative at issue here, GEC has allegedly repeated several of its previous

mistakes, and made additional mistakes, violating approximately twenty different statutory and regulatory provisions. On November 14, 2005, a draft initiative, Proposal A, was submitted to GEC making it a petty misdemeanor for any person under age twenty-one to purchase or possess alcoholic beverages. The proponent of the initiative was Coalition 21, a group that supports increasing the lawful age for purchase and possession of alcohol from eighteen to twenty-one. GEC's Executive Director, Gerald Taitano, referred the draft initiative to GEC Legal Counsel, Cesar Cabot, to determine whether it embraced unrelated subjects, and for the preparation of a short title and summary. Cabot responded on November 29, 2005, finding that the initiative did not embrace unrelated subjects and providing a short title and summary. Even though the initiative prohibited only possession and purchase of alcohol – not consumption, the short title stated: "An Initiative to Raise the Minimum Age for *Consumption* and Purchase of Alcoholic Beverages to Twenty-One Years of Age." Appellee's Supplemental Excerpts of Record ("SER"), p. 166 (Sample Ballot) (emphasis added). GEC delivered the short title and summary to Coalition 21 on November 30, 2005, which became the "official summary date" and triggered the deadline for submitting signed petitions. 6 GAR §§ 2103(c), 2107(a).

[10] On December 20, 2005, Coalition 21 submitted to GEC a revised draft of the initiative, which was referred to Cabot the following day. Cabot never prepared a short title or summary, nor did he certify that it did not embrace unrelated subjects, and GEC failed to deliver the summary and short title of the initiative to Coalition 21.

[11] On January 10, 2006, GEC accepted a third version of the initiative measure from Coalition 21, which was slightly different from the first two. The lower court found that this submission was not accompanied by the statutorily required filing fee. GEC referred the measure to Cabot, who certified that the initiative did not embrace unrelated subjects, and provided a short title and summary. On January 24, 2006, Coalition 21 submitted an amendment, deleting a section that

appeared in the January 10 draft. On January 27, GEC delivered the short title and summary to Coalition 21. Because the lower court found that a filing fee was not paid, it found that this date did not constitute a new "official summary date."

[12] GEC typically treats revised draft initiatives as new proposals, each of which triggers a new set of deadlines, and the original initiative is typically withdrawn. It is unclear whether any of the three drafts were ever withdrawn.

[13] GEC gave Coalition 21 a petition template – in an improper format – to obtain signatures for the initiative to qualify for the general election ballot, and for the petition circulators to sign. Coalition 21 obtained signatures and began submitting the petitions in February. GEC compared the names and dates of birth listed in the petition with those on file, but did not compare actual signatures. GEC verified an adequate number of voters, and officially accepted the petition for filing on March 14, 2006, which constituted the date of certification. GEC did not prepare a ballot title, but shortly after the end of March, decided to use the short title as the ballot title.

[14] On June 1, 2006, GEC sent letters to representatives of Coalition 21, Responsible Choices, and other potentially interested parties requesting that, prior to September 22, 2006, they submit arguments for or against Initiative A for possible inclusion in the ballot pamphlet. Responsible Choices ran advertisements in the Pacific Daily News on September 4 and 22, 2006 opposing Proposal A, criticizing the effectiveness of the measure because it did not prohibit the *consumption* of alcohol. On September 15, 2006, Responsible Choices submitted to GEC an argument against Proposal A making the same criticism.

[15] On September 20, 2006, GEC sent the official general ballots to the printer, and received 120,000 ballots around September 22 and 23, 2006. GEC mailed absentee ballots to voters

beginning on or around September 22.[1]

C. GEC Violations of Guam Statutes and Regulations

[16] GEC's conduct related to Proposition A apparently failed to comply with a number of requirements of the Guam Code and of the Guam Administrative Rules and Regulations, including:

- Placing the January 10, 2006 draft initiative on the ballot, even though that version was never properly submitted with the applicable filing fee. 3 GCA § 17104(c) (2005); 6 Guam Admin. R. & Regs. § 2102(f) (1997).
- Not verifying the *signatures* contained in the initiative petition, as opposed to names and dates of birth. 3 GCA § 18101 (2005).
- Not providing a ballot title within ten days of certification. 3 GCA § 17105 (2005); 6 Guam Admin. R. & Regs. § 2109(a) (1997).
- Not publishing the ballot title once a week for three consecutive weeks in a newspaper of general circulation on Guam. 3 GCA § 17105; 6 GAR 2109(c).[2]
- Not publishing the ballot title as soon as it was available. 6 GAR 2109(c).
- Not providing a ballot title with a "true and impartial" statement of the purpose of the measure. 3 GCA § 17105; 6 GAR 2109(a).
- Not having GEC's legal counsel prepare a neutral analysis of the initiative, but allowing GEC's Executive Director to do so. 6 Guam Admin. R. & Regs. § 2111 (1997).

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[1] Appellant's Excerpts of Record ("ER"), p. 17 (Taitano Affidavit) ("On September 22, 2006, GEC mailed the general election absentee ballots."); ER, pp. 195-97 (10/19/06 Hr'g Tr.) (testimony of Taitano) ("Most likely this [mailing of absentee ballots] would have been September 27.").

[2] GEC partially remedied this defect by publishing the ballot title in the Marianas Variety on October 11, October 18, and October 25, 2006. The publications failed, however, to include certain information required by the regulations to be printed in the ad, namely "notice of the right to file voter's arguments for or against the measure, . . . the deadline for filing such arguments, and . . . the length limitations on such arguments." 6 GAR § 2109(c). Presumably this information was omitted because the deadline for submitting arguments had already passed prior to publication. *See, e.g.*, SER, p. 217 (6/1/06 Letter from Gerald Taitano, Executive Director, GEC, to Responsible Choices for All Adults Coalition (June 1, 2006)) (requesting argument submissions by September 22, 2006). The publications also included the name and slogan of the proponent of the initiative – Coalition 21 Save Lives, Save Families – even though the regulations do not indicate that such information should be included in the newspaper publications. 6 GAR § 2109(c). In addition to the three publications of the ballot title in October, GEC also published a sample ballot on September 29, 2006, which included the ballot title.

- Not preparing the neutral analysis of the initiative at least 45 days before the election. 6 GAR 2111.
- Not making the GEC analysis impartial. 3 GCA § 17507 (2005); 6 GAR 2111.
- Not mailing a copy of the ballot pamphlet to each registered voter at least 30 days prior to the general election. 6 Guam Admin. R. & Regs. § 2114(a) (1997).
- Not mailing a copy of the ballot pamphlet to each judge of the Superior Court at least 30 days prior to the general election. 6 GAR 2114(c).
- Not properly preparing the ballot pamphlet. 3 GCA § 17509 (2005); 6 Guam Admin. R. & Regs. § 2112(b) (1997).
- Not printing the ballot question in the proper format. 6 Guam Admin. R. & Regs. § 2116(b)(1) (1997).
- Not delivering a short title and summary related to Coalition 21's December 20, 2005 submission.

6 Guam Admin. R. & Regs. § 2103(c) (1997).

D. Responsible Choices' Lawsuit

[17] After a sample ballot was published on September 29, 2006, Responsible Choices filed complaints with GEC that the ballot was defective because it included the word "consumption" in the title. After a draft ballot pamphlet was made available a few days later, Responsible Choices complained to GEC that the pamphlet improperly used "consumption" and included "Coalition 21 Save Lives, Save Families" in GEC's impartial analysis. Responsible Choices received no response to its complaints, and filed a Verified Petition seeking a writ of mandamus on October 12, 2006, alleging, *inter alia*, that GEC had violated their right of initiative by failing to comply with the mandates of the Guam Election Code. They requested that GEC be ordered to correct the ballot and ballot pamphlet, remove Proposal A from the ballot, or not count the votes cast on the proposal.

[18] A hearing on the order to show cause was held on October 17 through October 20, 2006. At the beginning of the hearing, the court denied a motion to quash a subpoena to GEC's counsel, Cesar

Cabot, even though GEC had intended for him to serve as one of two trial counsel for GEC. The court excluded Cabot and all other witnesses from the proceedings. In addition, the court ordered GEC to produce documents related to Proposal A.

[19] The witnesses at the hearing were: GEC Executive Director Taitano, GEC counsel Cabot, GEC Board Chairman Frederick Horecky,[3] and Responsible Choices member Franklin Leon Guerrero. During the hearing, Responsible Choices learned of additional violations of the election statutes and regulations, and filed an Amended Verified Petition on October 19, 2006, to conform to the evidence.[4]

E. Judgment and Appeal

[20] On October 25, 2006, the court issued Findings of Fact and Conclusions of Law granting the writ of mandamus and requiring that GEC either remove Proposal A from the ballot, or not certify the results. GEC objected to the findings, and sought to introduce additional evidence, but the court rejected this evidence as inexcusably untimely.[5] The lower court's judgment granting a peremptory writ of mandate was filed on November 5, 2006. Notice of entry on the docket was issued November 6, 2006. GEC timely filed its notice of appeal on December 6, 2006.[6]

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[3] While the Executive Director has a duty to "perform and discharge all of the powers, duties, purposes, functions, and jurisdiction . . . vested in the Commission," 3 GCA § 2102(a) (2005), he is accountable to GEC Board of Directors, which can remove him with the concurrence of four of the seven Commissioners. 3 GCA § 2102(c).

[4] SER, p. 105 (10/19/06 Hr'g Tr.) ("I will be filing an amended verified petition to include the other violations of GARRs and Guam Election Code statutes that have been brought up by the hearing the last two days."); SER, pp. 40-53 (10/19/06 Am. Verified Pet.).

[5] ER, pp. 86-93 (Decision & Order at 2-3, Nov. 6, 2006) (rejecting the argument that certain receipts were newly discovered evidence where they were in GEC's possession, the court had ordered GEC to produce all documents relating to Proposal A, testimony during the hearing raised questions about whether the initiative was properly on the ballot, and Responsible Choices had indicated that they intended to file an Amended Petition asserting additional violations by GEC).

[6] This appeal is timely under the old Rule 4(a) of the Guam Rules of Appellate Procedure, which applies to this case.

II.

[21] This court has jurisdiction over this appeal from a final order or judgment that disposes all of the parties' claims. 48 U.S.C. § 1424-1(a)(2) (2000); 7 GCA §§ 3107, 3108(a) (2005).

III.

[22] A trial court's decision on whether a party has standing is reviewed *de novo*. *Benavente v. Taitano*, 2006 Guam 15 ¶ 10.

[23] Generally, a reviewing court examines whether the Superior Court's grant of a writ of mandate is supported by substantial evidence. *Guam Fed'n of Teachers ex rel. Rector v. Perez*, 2005 Guam 25 ¶ 13. But where there are no facts in dispute and the questions presented for review are strictly questions of law the court's review is *de novo*. *Id.*

[24] Whether a constitutional right has been violated is considered *de novo*. *Coffey v. Gov't of Guam*, 1997 Guam 14 ¶ 6.

IV.

[25] The issues raised by the parties regarding this appeal are: (a) Petitioners' standing; (b) mootness of the appeal; (c) whether the writ should be affirmed on the merits; (d) laches, waiver, and estoppel; and (e) due process of law.

A. Standing / Subject Matter Jurisdiction

[26] Standing is a component of subject matter jurisdiction, and is a threshold jurisdictional matter reviewed *de novo* by this court. *Taitano v. Lujan*, 2005 Guam 26 ¶ 15. The petitioner has the burden of showing that a writ should issue. *Sorensen Television Sys., Inc. v. Super. Ct.*, 2006 Guam 21 ¶ 12.

[27] Title 7 GCA § 31203 limits standing in seeking a writ of mandamus to parties with a beneficial interest: "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It must be issued on the verified petition of the *party beneficially interested*." 7 GCA § 31203 (2005) (emphasis added). A "beneficially interested" party

generally must have "'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.'" *People v. Super. Ct. (Laxamana)*, 2001 Guam 26 ¶ 24 (quoting *Carsten v. Psychology Examining Comm.*, 614 P.2d 276, 278 (Cal. 1980)).

[28] In an analogous case, *Sonoma County Nuclear Free Zone '86 v. Superior Court*, the petitioners were several individuals and a group supporting a ballot initiative to create a nuclear free zone. 234 Cal. Rptr. 357, 359 (Ct. App. 1987).[7] They sought relief related to a superior court's writ of mandate that ordered the county clerk to accept late-filed arguments against an initiative for inclusion on the ballot. *Id.* at 359-61. The *Sonoma County* court held that the pro-initiative petitioners "clearly" had a special interest above the interest held by the public at large. *Id.* at 362 ("When a county initiative is qualified for the ballot and direct arguments are made, and two cognizable groups are in existence in direct conflict on the merits of the initiative, each group has a clear interest in rebutting on the ballot pamphlet and opposing in public debate the direct ballot arguments of the other."); *see also Cruz v. Guam Election Comm'n*, 2007 Guam 14 ¶ 12 (finding that proponents of an initiative had standing to seek a writ of mandate).

[29] Even if a party does not have a special interest, there is a public interest exception that has "often been invoked" to provide citizen standing. *See Green v. Obledo*, 624 P.2d 256, 266 (Cal. 1981). The California Supreme Court has stated that, "'where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.'" *Bd. of Soc. Welfare v. L.A. County*, 162 P.2d 627, 628-29 (Cal. 1945) (quoting 35 Am. Jur. 73, § 320); *see also Cruz*, 2007

[7] *See generally Laxamana*, 2001 Guam 26 ¶ 8 (finding that Guam's writ of mandamus statute, 7 GCA §§ 31301, 31302, is derived from the California Code of Civil Procedure (sections 1085, 1086), and that we therefore look to the substantial precedent developed within that state to assist in interpreting parallel Guam provisions).

Guam 14 ¶ 12 (citing *Bd. of Soc. Welfare*, 162 P.2d at 628-29).[8] "The exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." *Green*, 624 P.2d at 266. The propriety of a citizen's suit requires a judicial balancing of interests, and the interest of a citizen may be considered sufficient when the public duty is sharp and the public need weighty. *Marshall v. Pasadena Unified Sch. Dist.*, 15 Cal. Rptr. 3d 344, 353 (Ct. App. 2004) (awarding standing to ensure public bidding of construction projects and award of projects to lowest bidder). In *League of Women Voters v. Eu*, for example, several nonprofit groups sought a writ of mandamus to keep an initiative off the ballot for purportedly violating California's single-subject rule for initiatives. 9 Cal. Rptr. 2d 416, 417 (Ct. App. 1992). Because the initiative involved state welfare programs and the state budget – "issues of substantial public interest," and because the petitioners were groups involved in lobbying on behalf of those most likely to be affected by proposed modifications, the court granted standing. *Id.* at 421.

[30] Here, GEC asserts that Responsible Choices is not a beneficially interested party and lacks standing because its interests are no different from the public at large. Responsible Choices is a committee comprised of concerned businesses and individuals, including Guam residents, registered voters, and taxpayers, opposed to the passage of a ballot initiative. They seek to "'procure the enforcement of a public duty'" – ensuring a fair and impartial vote on the initiative. *Bd. of Soc. Welfare*, 162 P.2d at 628-29 (quoting 35 Am. Jur. 73 § 320). Thus, Responsible Choices is "clearly" a beneficially interested party with a special interest separate from the public at large, *Sonoma*

[8] Even if the public interest exception applies, competing considerations of a more urgent nature may nullify the exception. *Nowlin v. DMV*, 62 Cal. Rptr. 2d 409, 415 (Ct. App. 1997). For example, "the policy which militates against allowing an administrative board member to sue her own agency outweighs the public right of the board member as a taxpayer to challenge the legality of the expenditure of public funds by a government agency." *Id.* Such competing considerations are not present here.

County, 234 Cal. Rptr. at 362, and also qualifies for public interest citizen standing. *Bd. of Soc. Welfare*, 162 P.2d at 628-29.

B. Mootness of the Appeal

[31] In general, an appeal should be dismissed as moot when, by virtue of an intervening event, the appellate court cannot grant effective relief in favor of the appellant. *Town House Dep't Stores v. Ahn*, 2000 Guam 32 ¶ 9. Courts may not give opinions upon moot questions or abstract propositions. *Id.* A controversy is not moot, however, when the case "presents issues capable of repetition yet evading review." *Guam Publ'ns, Inc. v. Super. Ct.*, 1996 Guam 6 ¶ 9 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)). This exception applies when: "(1) the challenged action is too short in duration to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will again be subject to the same action." *ACLU v. Lomax*, 471 F.3d 1010, 1017 (9th Cir. 2006) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978)).

[32] Under the first element, the duration is too short if the challenged action is "almost certain to run its course before [the appellate court] can give the case full consideration." *Id.* Election cases "'often fall within this [capable of repetition, yet evading review] exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits.'" *Id.* (quoting *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003)). If cases challenging election laws were rendered moot by the occurrence of an election, many suspect election laws could never reach appellate review. *Caruso v. Yamhill County*, 422 F.3d 848, 853 (9th Cir. 2005).

[33] To satisfy the second element, a party need only show that it is reasonable to expect that the opposing party will engage in conduct that will once again give rise to the assertedly moot dispute. *Lomax*, 471 F.3d at 1017. It is not necessary that there be evidence that a similar initiative will be brought in the future. *Caruso*, 422 F.3d at 853-54.

[34] In *Aguon-Schulte v. Guam Election Commission*, GEC mailed ballot pamphlets to voters that did not contain the full text of Proposal A for the 2004 election. 469 F.3d 1236, 1237 (9th Cir. 2006). Although the "election ha[d] already taken place and the measure did not pass," the Ninth Circuit found that the case was not moot because the parties "still dispute[d] the legality of the November 2, 2004 election," and because the case presented an issue that was "capable of repetition yet will evade review." *Id.* at 1239 n.2.[9]

[35] Here, Responsible Choices argues that this appeal is moot because the court cannot grant effective relief, as the election occurred in November 2006, and while GEC did not certify the result, Proposal A remained on the ballot and failed to pass. GEC responds that effective relief can be granted – the initiative should be resubmitted to the voters and GEC should be permitted to certify the result. Alternatively, GEC argues that the case is not moot because it presents issues capable of repetition, yet evading review.

[36] This court cannot grant effective relief to GEC. Even if the court were to reverse the lower court's ruling, GEC could not certify the results of the November 2006 election with respect to Proposal A, which the lower court had publicly declared null and void before the election occurred, resulting in thousands of ballots without a vote on Proposal A. Nor would resubmission of the same initiative to the voters be an appropriate option, as the lower court found that no filing fee was ever paid for the final draft of the initiative submitted to GEC.

[37] This case is not moot, however, because the issues raised are capable of repetition yet evading review. *Aguon-Schulte*, 469 F.3d at 1239 n.2 (finding that a case related to GEC's failure to follow proper procedures for submitting a ballot initiative to voters raised issues "capable of repetition yet will evade review"). First, the allegedly defective draft ballot pamphlet for Proposal A was not issued until October 2, 2006 for the November 2006 election, a duration "too short . . .

[9] *See also Sonoma County*, 234 Cal. Rptr. at 359 ("[T]he occurrence of the November election prior to our resolution of this petition does *not* render the petition moot.") (emphasis added).

to allow full litigation before it ceases." *Lomax*, 471 F.3d at 1017. Second, "there is a reasonable expectation that [Appellant] will again be subject to the same action," *id.*, related to the procedures it follows related to ballot initiatives, as: GEC allegedly failed to comply with numerous requirements; GEC has violated some of the same provisions in the past; GEC's failure to comply with at least some of the regulations is an intentional and consistent practice; and GEC contends, *inter alia*, that 6 GAR Chapter 2 is void, and that GEC should not have to follow those rules and regulations.[10] Thus, this case is not moot.[11]

C. Whether the Writ of Mandamus Was Supported by Substantial Evidence and by Law

[38] This court examines whether the superior court's grant of a writ of mandate "is supported by substantial evidence," but where "there are no facts in dispute, and the questions presented for review are strictly questions of law, the court's review is *de novo*." *Guam Fed'n of Teachers*, 2005 Guam 25 ¶ 13.

[39] A petitioner seeking mandamus relief generally must show that there is a "'clear, present, and usually ministerial duty on the part of the respondent.'" *Bank of Guam v. Reidy*, 2001 Guam 14 ¶

[10] SER, p. 80 (10/19/06 Hr'g Tr. 61) (testimony of Taitano) ("[W]e rely more on Title 3 GCA than we do the GAR. We don't have a GAR in our office, and whatever we do . . . we've done based on advice of legal counsel. And . . . in the six years that I've been with the [GEC], we've never . . . published, for three consecutive weeks, the ballot title right after legal counsel has . . . developed it."); SER, p. 104 ("I've read [6 GAR Chapter 2] and, you know, a lot of it is -- is obsolete or, you know, it's no longer in the actual 3 GCA . . . ."); SER, p. 119 (testifying that GEC does not verify signatures as required by 3 GCA § 18101, but only dates of birth); *Aguon-Schulte*, 469 F.3d at 1237 (discussing GEC's failure to submit to voters the full text of a ballot initiative); *Hartsock v. Leon Guerrero*, SP246-86, at 4 (Super. Ct. Guam Oct. 31, 1986) (granting writ of mandamus to remove proposed initiative from the ballot because GEC failed to mail ballot pamphlets to voters within thirty days); *Wade*, 2002 Guam 16 ¶ 4 (examining whether GEC's alleged failure to comply with rules and regulations related to an initiative was excused by the purported invalidity of the regulation); *Guam v. Taitano*, CV1241-06, at 38 (Super. Ct. Guam Oct. 16, 2006) ("Over the past eight years, the Supreme Court of Guam has been faced with no less than five challenges to actions of the Guam Election Commission.").

[11] The cases cited by Responsible Choices do not compel a contrary result, as those courts issued opinions on the merits. *See Town House Dep't Stores*, 2000 Guam 32 ¶ 12 (holding that the appeal was *not* moot); *Costa v. Super. Ct.*, 128 P.3d 675, 676-77 (Cal. 2006) ("Although the defeat of Proposition 77 renders moot the legal challenge to the measure, we nonetheless have concluded that we should retain this matter and issue an opinion in order to provide guidance for future cases . . . ."); *Mann v. Super. Ct. (Sandoval)*, 226 Cal. Rptr. 263, 264 (Ct. App. 1986) ("The election mooted the dispute" between the two parties, but the "public interest in proper conduct of elections and the probability that the issue will arise again warrant a decision on the merits of the issue presented").

13 (quoting *Baldwin-Lima Hamilton Corp. v. Super. Ct.*, 25 Cal. Rptr. 798, 805 (Ct. App. 1962)). The primary purpose of mandamus is the enforcement of a plain, nondiscretionary legal duty to act. *Guam Fed'n of Teachers*, 2005 Guam 25 ¶ 28. "Mandamus may not ordinarily issue to command a body to exercise its discretion in a particular manner. . . . Nonetheless, where the exercise of discretion, or the failure to exercise such discretion is so fraudulent, arbitrary, or palpably unreasonable that it constitutes an abuse of discretion as a matter of law, mandamus may issue." *Holmes v. Territorial Land Use Comm'n*, 1998 Guam 8 ¶ 12.

[40] Several ministerial duties on the part of GEC are at issue in this case. Title 3 GCA § 2102(a) provides that GEC's Executive Director "shall administer the election law of Guam and shall perform and discharge all of the powers, duties, purposes, functions and jurisdiction hereunder, or which hereafter by law may be vested in the Commission in accordance with the rules of the Commission . . . ," including duties related to initiatives, which are governed by 3 GCA §§ 17201 to 17212 and by Chapter 2, Title 6 of the Guam Administrative Rules and Regulations. The administrative rules and regulations are just as binding on the agency as statutes, and GEC is obligated to follow them. *Wade v. Taitano*, 2002 Guam 16 ¶ 7.

[41] GEC contends that some of the lower court's factual findings were not supported by the evidence, and that its legal conclusions were erroneous.

1. Whether the Lower Court's Factual Findings Were Supported by Substantial Evidence

[42] The lower court found that GEC failed to comply with numerous ministerial duties, including duties related to: (a) the timing and content of the publication of the ballot title; (b) the content and mailing of the ballot pamphlet; (c) the content of the ballot; and (d) the short title, summary, and an official summary date.

a. Timing and Content of the Publication of the Ballot Title

[43] Title 3 GCA §17105 provides that GEC "shall provide a ballot title for each initiative . . . to

be submitted to the voters within ten (10) days after the measure is certified for a position on the ballot and publish said title once a week for three (3) consecutive weeks in a newspaper of general circulation on Guam." *See also* 6 GAR § 2109(a) (requiring preparation of a ballot title within ten days of certification); 6 GAR § 2109(c) (requiring publication "[a]s soon as the ballot title is available."). The ballot title shall be a "true and impartial statement of the purpose of the measure in such language that the ballot title shall not be an argument or likely to create prejudice either for or against the measure." 3 GCA § 17105; 6 GAR § 2109(a).

[44] The lower court found that the ballot title was not prepared within ten days of certification, and was not published for three consecutive weeks as required by 3 GCA §17105. There is evidence in the record to support these findings.[12]

[45] The lower court also found that GEC never prepared the ballot title required by 3 GCA §17105, but simply used the summary as the ballot title, and found that GEC's ballot title was not true or impartial as required by 3 GCA §17105 and 6 GAR § 2109(a). Instead, the ballot title stated that the measure prohibited "consumption" and purchase of alcohol by persons under twenty-one, but the initiative only prohibits *possession* and purchase, not consumption. In addition, the ballot title was not impartial because it included the name and slogan of the initiative's proponent: "Coalition 21 Save Lives, Save Families."[13] These findings are supported by the record.[14]

[46] GEC does not dispute that the slogan was on the ballot title, but contends that the words

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[12] SER, pp. 80-82 (10/18/06 Hr'g Tr.) (testimony of Taitano) ("It hasn't been our practice to [follow 6 GAR § 2109(c)]."); SER, p. 135 (10/19/06 Hr'g Tr.) (testimony of Cabot) ("[W]e decided to use the summary also as the ballot title . . . . [b]etween March and perhaps June."); SER, p. 209 (4/19/06 GEC Bd. of Directors Meeting Minutes) ("[W]e are awaiting Legal Counsel's formal ballot title and summary."). GEC points out that the ballot title was published for three consecutive weeks in October (including one publication after the hearing was over), Appellant's Reply Brief, p. 10 (Sept. 4, 2007), but such publication was untimely.

[13] ER, p. 46 (Findings of Fact & Conclusions of Law (Super. Ct. Guam Oct. 25, 2006)); *cf. Nelson v. Roberts*, 784 P.2d 432 (Or. 1990) (revising ballot title); *Pac. Power & Light Co. v. Paulus*, 576 P.2d 1252, 1253-55 (Or. 1978) (revising ballot title and caption to ensure impartiality).

[14] SER, p. 23 (Ballot Pamphlet); SER, p. 79 (10/18/06 Hr'g Tr.) (testimony of Taitano) ("[T]he short title is – as is our practice – it's synonymous with the ballot title[.]"); SER, p. 180 (Short Title).

"Coalition 21 Save Lives, Save Families" should be viewed as mere political rhetoric and opinion, and their inclusion did not violate 6 GAR § 2109. GEC relies on *Huntington Beach City Council v. Superior Court (Blackford)*, 115 Cal. Rptr. 2d 439, 452 (Ct. App. 2002), but that case fails to support GEC's argument because it did not address the requirement that a ballot title be impartial. Rather, the *Huntington Beach* decision held that political rhetoric and opinion in a voter pamphlet *argument* (not ballot title) for an initiative could not be excluded as "false, misleading, or inconsistent with the [California election code] requirements." *Id.* at 442. The *Huntington Beach* court recognized that voter pamphlet arguments and ballot titles are "governed by different standards." *Id.* at 450.

b. Content and Mailing of the Ballot Pamphlet

[47] Guam regulations require that an analysis of an initiative be prepared for inclusion in the ballot pamphlet by GEC's legal counsel, at least forty-five days before the election, and that the analysis be impartial. 6 GAR § 2111. The trial court found that GEC's Executive Director, not its legal counsel, prepared the analysis of the measure. The court found that the analysis was not prepared forty-five days before the election. Further, the court found that the requirement of an impartial assessment of the measure, required by 6 GAR §§ 2111, 2112(b)(2), was also violated. These findings were supported by the record.[15]

[48] The ballot title included in the pamphlet must also be impartial.[16] The trial court found that "the ballot title included in the ballot pamphlet by GEC is not impartial" because it contained the

[15] SER, p. 162 (Ballot Pamphlet) (including Coalition 21 slogan and reference to "Consumption" of alcohol); SER, p. 137 (10/19/06 Hr'g Tr.) (testimony of Cabot that Taitano prepared the impartial analysis); SER, pp. 164-65 (Oct. 2, 2006 Letter from Responsible Choices to GEC) ("I telephoned the G[EC] today . . . and was informed that the pamphlet has not yet been approved by the Commission.").

[16] 3 GCA § 17509(d) (2005) (requiring that the ballot pamphlet contain the "ballot title provided for in this Chapter"); 3 GCA § 17105 (requiring that the ballot title be a "true and impartial statement of the purpose of the measure . . . not . .. likely to create prejudice either for or against the measure"); 6 GAR § 2112(b)(1) (requiring that the ballot pamphlet contain the "ballot title described in 6 GAR § 2109"); 6 GAR § 2109(a) (requiring that the ballot title be a "true and impartial statement of the purpose of the measure . . . not . . . likely to create prejudice either for or against the measure").

name of the proponent and its slogan. ER, p. 47 (Findings of Fact & Conclusions of Law at 2 ¶ 8). The record supports this finding.[17]

[49] Next, GEC is required by 6 GAR § 2114(a), and (c) to mail a copy of the ballot pamphlet to each registered voter and each judge of the Superior Court at least thirty days prior to the general election, and the court found that it failed to do so. This finding is supported by the record.[18]

c. Content of the Ballot

[50] The ballot is required to first state, "Shall Proposal [A] be adopted by the voters of Guam?" 6 GAR § 2116(b)(1); 1 GCA § 420 (2005). The lower court found that GEC did not comply with this requirement, but improperly inserted the short title of the initiative into the form language required by section 2116(b)(1). This finding is supported by the record.[19]

[51] GEC is required to next include on the ballot a properly prepared ballot title. 6 GAR § 2116(b)(2). As noted above, the ballot title, which was included on the ballot, was not properly prepared.

d. Short Title, Summary, and Official Summary Date

[52] GEC is required to deliver to the proponent a short title and summary of the initiative, prepared by GEC's legal counsel, within thirty days after the initiative is received by GEC. 6 GAR § 2103(a)-(c). The date of delivery constitutes the "official summary date," and triggers the deadline for submitting signed petitions. 6 GAR §§ 2103(c), 2107(a). GEC failed to deliver a short title and summary related to Coalition 21's December 20, 2005 submission, as required by section 2103(c). GEC delivered a short title and summary related to Coalition 21's January 10, 2006 draft initiatives

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[17] SER, p. 162 (Ballot Pamphlet) ("Coalition 21 Save Lives, Save Families"). The analysis and ballot title appear to be one and the same.

[18] SER, pp. 86-88 (10/18/06 Hr'g Tr.) (testimony of Taitano) (mailing the ballot pamphlets "i[s] continuing, even today"); SER, p. 96 (10/18/06 Hr'g Tr.) (testimony of Horecky).

[19] SER, p. 17 (Sample Ballot) ("Shall Proposal A, *an initiative to raise the minimum age for consumption and purchase of alcoholic beverages to twenty-one years of age*, be adopted by the voters of Guam?") (emphasis added).

on January 27, 2006, but the trial court found that a new official summary date was not created because no filing fee was paid. The draft initiative that was eventually placed on the ballot was the January 10, 2006 initiative, even though the court found that it was never properly submitted – a finding supported by the record.[20]

[53] In sum, each of the court's factual findings of violations by GEC were "supported by substantial evidence," *Guam Fed'n of Teachers*, 2005 Guam 25 ¶ 13, and the court properly found that GEC violated numerous statutes and regulations.

2. Whether the Lower Court's Legal Conclusions Were Erroneous

[54] GEC next argues that, even if it failed to comply with the relevant regulations and statutes, Proposal A should not have been disqualified because: (a) Title 6 GAR Chapter 2 is void in its entirety; (b) certain sections of 6 GAR Chapter 2 are void because they conflict with statutory provisions; and (c) the relevant regulations and statutes are directory rather than mandatory. We review questions of law *de novo*. *Guam Fed'n of Teachers*, 2005 Guam 25 ¶ 13.

a. Whether Title 6 GAR Chapter 2 Is Void

[55] "A party challenging a presumptively valid regulation carries a heavy burden." *Wade v. Taitano*, 2002 Guam 16 ¶ 12. In order to succeed, the challenging party must establish the absence of any conceivable grounds upon which the rule may be upheld, and an agency's regulation will not be invalidated unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate. *Id.*

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[20] SER, p. 102 (10/19/06 Hr'g Tr.) (testimony of Taitano) ("Well, it would have been the first one that we received, the $200. We didn't receive 200, 200, 200, we received the initial petition and then subsequent to that we considered them amendments, really . . . ."); 6 GAR § 2102(f) ("No submission of an initiative measure to the Commission shall be allowed unless accompanied by a non-refundable fee of . . . $200 . . . ."). *But see* ER, pp. 59-62 (Affidavit of Thomas Shieh); ER, p. 63 (12/21/05 & 1/10/06 Receipts); ER, pp. 86-88 (Decision & Order) (denying Motion to Amend the Court's Findings of Fact & Conclusions of Law because the untimely evidence offered by GEC was not newly discovered evidence).

[56] GEC argues that 6 GAR Chapter 2, which governs initiatives, is invalid because it was adopted before Congress granted Guam the right to legislate by initiative, and was therefore inorganic. *See* Title 6 GAR Chapter 2 (enacted 1977); Omnibus Territories Act, U.S. Pub. L. No. 97-357, § 101, 96 Stat. 1705 (enacted 1982). No challenges were ever made to Guam's initiative statutes prior to their reenactment in 1983, when Public Law 17-25 reenacted Title 3 of the Government Code of Guam, including 3 GCA § 17512, which directed GEC to promulgate necessary administrative rules and procedures to effectuate the relevant statutes. 3 GCA § 17514 (2005).[21] GEC stresses the fact that 6 GAR Chapter 2 was not reenacted after the 1982 revisions to the Organic Act that explicitly provided initiative rights to Guam residents, and GEC never reenacted those regulations.

[57] While Guam Public Law 17-25 reenacted the initiative statutes, it failed to repeal or otherwise mention 6 GAR Chapter 2. Thus, even if Chapter 2 were invalid prior to 1982, the infirmity of the regulations were "conceivabl[y]" cured by the legislation adopted in 1982 and 1983 – U.S. Public Law 97-357 and Guam Public Law 17-25. *See Wade*, 2002 Guam 16 ¶ 12 ("[T]he challenging party 'must establish the absence of *any conceivable grounds* upon which the rule may be upheld[.]'") (emphasis added and alteration omitted) (quoting *Mass. Fed'n of Teachers v. Bd. of Educ.*, 767 N.E.2d 549, 557 (Mass. 2002)).[22] There is no reason to believe that the Legislature intended to void the regulations at the same time that it ensured that there was a legitimate statutory basis for their existence, and GEC cites no relevant legislative history or case law to the contrary, thereby failing to meet its "heavy burden" in challenging the regulations. *Id.*

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[21] *See* P.L. 17-25, Ch. III, § 8, codified at 3 GCA § 17514, cmt. ("Before Congressional action [in 1982], there was doubt that this Chapter was within the power of the Legislature to enact. Since no referenda nor initiatives had been introduced before Congressional action, no challenges arose.").

[22] *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *Wade*, 2002 Guam 16 ¶ 13 n.7 (noting that if GEC believed its rules were invalid, it was within GEC's discretion to promulgate new rules).

[58] Moreover, if 6 GAR Chapter 2 were void, then GEC would have failed to comply with its statutory duty under 3 GCA § 17512, which mandates that GEC "shall promulgate the necessary administrative rules and procedures to effectuate the purposes of this Chapter." Responsible Choices and others have relied on those regulations since Public Law 17-25 was passed without any objection from GEC until after this lawsuit was filed, raising issues of estoppel.[23] GEC Counsel Cesar Cabot testified that GEC did not promulgate new rules and regulations because, "quite frankly we just never got around to it with our busy schedules."[24]

b. Whether Certain Sections of 6 GAR Chapter 2 Are Void

[59] Alternatively, GEC argues that more specific reasons require the invalidation of several provisions of 6 GAR, Chapter 2, namely: (i) 6 GAR § 2108©; (ii) 6 GAR § 2109(a); and (iii) 6 GAR § 2115(d)-(e).[25] A regulation is invalid if it is in contravention of the unambiguous expressed intent of the legislature. *Wade*, 2005 Guam 25 ¶ 8. If the statute is silent or ambiguous about the specific issue addressed by the regulation, the regulation is void if it is not a "'permissible construction'" of the statute. *Id.* (quoting *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988)).

i. 6 GAR § 2108(c)

[60] GEC argues that 6 GAR § 2108(c) is invalid and unenforceable *in its entirety*. While 6 GAR § 2108(c) was partially invalidated in *Wade v. Taitano*, 2002 Guam 16, the invalidated provision is irrelevant here and GEC provides no specific reasons for the invalidation of the remainder of section

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[23] The lower court found that GEC's argument was judicially estopped because GEC failed to make the argument when it had the opportunity in *Wade v. Taitano*. ER, p. 46 (Findings of Fact & Conclusions of Law at 10 (citing *Zedner v. United States*, 126 S. Ct. 1976 (2006))).

[24] SER, p. 128 (10/19/06 Hr'g Tr. 128); *see also Wade*, 2002 Guam 16 ¶ 13 n.7 (noting that if GEC believed its rules were invalid, it was within GEC's discretion to promulgate new rules).

[25] GEC makes a conclusory statement in a heading in its brief that 6 GAR § 2111 is also void, but provides no support for that statement. Appellant's Opening Brief, p. 40 (July 19, 2007). It is unclear whether the reference to section 2111 is intentional. Regardless, they have failed to carry their burden of demonstrating that it is invalid.

2108(c).[26] The lower court held that "the remaining provisions of 6 GAR § 2108(c) that require that the proponents be given notice of acceptance or refusal of the initiative are still effective" (ER, p. 53 (Findings of Fact & Conclusions of Law at 8)), and GEC has failed to carry its heavy burden of establishing otherwise.[27]

ii. 6 GAR § 2109(a)

[61] GEC next argues that 6 GAR § 2109(a), which requires GEC legal counsel to prepare a ballot title, conflicts with 3 GCA § 17507. GEC contends that Section 17507 requires GEC – and not GEC's legal counsel – to provide said ballot title.[28] GEC's counsel is a representative of GEC, and a regulation clarifying who at GEC is responsible for preparing the ballot title does not conflict with the statute, but permissibly "'fill[s] up the details of the statutory scheme.'" *Wade*, 2005 Guam 25 ¶ 12 (quoting *Marshall v. McMahon*, 22 Cal. Rptr. 2d 220, 224 (Ct. App. 1993)).

iii. 6 GAR § 2115

[62] GEC asserts that 6 GAR § 2115(d) conflicts with the governing statute, 3 GCA § 17203, because it impermissibly authorizes the Governor to call a territory-wide special election for the purpose of voting on an initiative. Title 6 GAR § 2115(d) provides that "[t]he Legislature *or the Governor* may call a territory-wide special election expressly for the purpose of voting on an initiative measure . . . ." (emphasis added).

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[26] The overturned provision called for automatic acceptance of an initiative if GEC failed to provide notice of acceptance or refusal of the initiative petition to the initiative's proponent within twenty days of presentation to GEC. The *Wade* court found that the provision conflicted with 3 GCA § 17201, which required a certain number of signatures to qualify an initiative for the ballot. *Wade*, 2002 Guam 16 ¶ 15.

[27] *See also K Mart Corp.*, 486 U.S. at 294 (holding that an invalidated portion of a regulation was severable where severance and invalidation would not impair the function of the statue as a whole and there was no indication that the regulation would not have been passed but for its inclusion).

[28] GEC presumably meant section 17105, not section 17507, as only section 17105 provides that GEC "shall provide a ballot title." 3 GCA § 17105; *see also* 3 GCA § 17507 ("[T]he Election Commission shall prepare an impartial analysis of the measure . . . .").

[63] Title 3 GCA § 17203 explicitly authorizes the Legislature, but not the Governor, to call a special election for the purpose of voting on an initiative.[29] Title 3 GCA § 17212, meanwhile, explicitly authorizes *both* the Legislature and the Governor to call a single-site special election for the purpose of voting on an initiative.[30] Although we do not understand the Legislature's motivation for permitting the Governor to call only a single-site special election for purposes of voting on an initiative measure, "the courts are bound to give effect to the expressed intent of the legislature." 2A Norman J. Singer, *Statutes & Statutory Construction* § 46:03, at 135 (6th ed. 2000).[31]

[64] Thus, 6 GAR § 2115(d) exceeds the scope of the governing statutes, and is not a "permissible construction" of the statute. *See Wade*, 2005 Guam 25 ¶ 8. Section 2115(d) is void to the extent that it permits the Governor to call a special election (other than a single-site special election) for the purpose of voting on an initiative measure.[32]

[65] GEC does not provide any specific arguments against any other regulations at issue, nor does GEC challenge the validity of the applicable statutes. The lower court properly upheld the validity

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[29] 3 GCA § 17203 (2005) ("The Election Commission shall submit the initiative . . . at the next general election . . . or at a territory-wide special election held at least ninety (90) days after certification, provided however that *the Legislature may call a territory-wide special election for the purpose of having the electors vote on an initiative measure.*") (emphasis added).

[30] 3 GCA § 17212 (2005) ("For the purpose of submitting an initiative measure . . . the Commission may, pursuant to a call by the *Governor or Legislature*, conduct a Special Election dealing only with such measure[] . . . during which election a single polling place shall be designated by the Commission. . . . . Only the Legislature or the Governor may call such an election for the purpose of having the electors vote on an initiative measure . . . .") (emphasis added).

[31] Title 3 GCA § 13103 provides that "[a]ll special elections shall be called by proclamation of the Governor of Guam." In *Cruz*, we found that this provision does not expand the Governor's authority to initiate special elections. Rather, it is a notice provision requiring the Governor to issue a proclamation after another authorized entity has called the election. 2007 Guam 14 ¶¶ 27-34.

[32] We find no reason to invalidate the remaining portions of 6 GAR § 2115. GEC argues that 6 GAR § 2115(e) is invalid for the same reasons as § 2115(d). Subsection (e) provides that "[i]f a special election is called pursuant to (d), all pending measures that have been certified as of the date the special election is called, whether they be initiative measures, referendum measures or legislative submission, shall be submitted to the voters . . . ." GEC has not met its burden of demonstrating a conflict between this provision and 3 GCA § 17203.

of the numerous regulations and statutes violated by GEC in processing Proposal A.[33]

c. Whether the Writ of Mandamus Was Further Supported by GEC's Alleged Failure to Verify Signatures

[66] Responsible Choices argues that the writ of mandamus was further supported by GEC's failure to "verify all signatures contained in any petition for any initiative." 3 GCA § 18101. GEC admits that it did not compare the signatures on Coalition 21's initiative petitions with signatures on file, but contends that GEC complied with the statutory requirement by comparing the names and dates of birth of petition signers to those in its files.

[67] The issue was raised by the parties below, but the lower court did not rule on the issue. "Although we ordinarily 'do[] not consider an issue not passed upon below,' the decision to resolve a question 'for the first time on appeal is one left primarily to the discretion of the courts of appeals.'" *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1173 (9th Cir. 2001) (alteration in original) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976)).[34] Responsible Choices included the issue in its Amended Petition and argued the issue before the lower court. We exercise our discretion to consider the issue. *See Arakaki v. Lingle*, 477 F.3d 1048, 1057 n.1 (9th Cir. 2007) (addressing an alternative theory not ruled on by the lower court "[i]n the interest of being thorough").

[68] Petitions to place an initiative on a ballot must contain a printed name, signature, address, and social security or C.I. number. 3 GCA § 17207(a) (2005). GEC is required to verify all

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[33] While we find that 6 GAR § 2115(d) improperly permits the Governor to call a special election for the purpose of voting on an initiative in a non-single site election, that provision was not relevant to the lower court's invalidation of the vote on Proposal A.

[34] "'[I]t is sometimes appropriate for an appellate court to pass on issues of law that the trial court did not consider.'" *Id.* (alteration in original) (quoting *Bibeau v. Pac. Nw. Research Found. Inc.*, 188 F.3d 1105, 1111 n.5 (9th Cir. 1999)); *see also Spicer Accounting, Inc. v. United States*, 918 F.2d 90, 94 n.3 (9th Cir. 1990) (ruling on an issue that was raised but not addressed below); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007) ("The court may . . . affirm on any ground supported by the record even if the district court did not consider the issue.").

"signatures" in the petition.[35] The term "signature" is not among the terms defined by the statute. 3 GCA § 17102. Thus, "signature" should be given its plain meaning.[36] A "signature" is "1. A person's name or mark written by that person or at the person's direction"; or "2. *Commercial law.* Any name, mark, or writing used with the intention of authenticating a document." Black's Law Dictionary 1387 (7th ed. 1999).

[69] GEC has voter signatures on file, but did not compare the signatures on file with those in the petitions. Rather, GEC's practice has been to verify the names and dates of birth of voters contained in initiative petitions with those on file. A date of birth, however is not a piece of information that must be included on an initiative petition.[37] While a comparison of signatures might be burdensome, section 18101 seems to anticipate this issue, providing that: "In order to facilitate the verification of signatures on petitions, the Election Commission may promulgate rules allowing any proponent to submit petitions to the Election Commission on a staggered schedule, as the signed petitions are received by the proponents, rather than waiting until all petitions have been signed." 3 GCA § 18101.[38]

[70] GEC argues that 3 GCA § 18101 mandating "verif[ication of] all signatures" should not require a verification of actual signatures because such an interpretation is purportedly inconsistent

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[35] 3 GCA § 18101 ("The Election Commission shall verify all signatures contained in any petition for any initiative, referendum, or recall, to insure that all signatures on the petitions are the signatures of persons registered to vote in the territory.").

[36] *People v. Root*, 2005 Guam 16 ¶ 9 ("It is '[o]ur duty to interpret statutes in light of their terms and legislative intent' and thus, '[a]bsent clear legislative intent to the contrary, the plain meaning prevails.'") (alteration in original) (quoting *People v. Flores*, 2004 Guam 18 ¶ 8).

[37] 3 GCA § 17207(a) ("Each signer shall sign his signature next to his printed name, and in the next place, print his place of residence (giving the street and number if such exist, plus P.O. Box) and social security or C.I. number."). Contrary to statutory requirements, Coalition 21's petitions did not include a column for "social security or C.I. number," but had a column for "Date of Birth, C.I.#." SER, p. 191 (Petition). A number of voters provided their dates of birth, but it is unclear whether *any* provided a social security or C.I. number. *Id.* A number of voters also provided only a P.O. Box rather than a "place of residence." *Id.*

[38] While this court is sympathetic to GEC's concerns about the potentially burdensome nature of this task, the appropriate recourse is to request that the legislature amend the law.

with 3 GCA § 17207(c),[39] which provides that "the affidavit of any person soliciting signatures hereunder . . . shall be *prima facie* evidence that the signatures thereon are genuine and that the persons signing the same are qualified electors." GEC suggests that the *prima facie* validity of signatures provided by 3 GCA § 17207(c) somehow relieves it of the signature verification requirements imposed by 3 GCA § 18101.[40]

[71] The same issue arose in *Wheelright v. County of Marin*, 467 P.2d 537 (Cal. 1970), in which California statutes similarly provided that the affidavit of the person soliciting signatures constituted *prima facie* evidence of the validity of the petition signatures, and that the county clerk had a duty to determine whether the initiative petition had a sufficient number of signatures. *Id.* at 541. The California Supreme Court found no conflict between the two provisions. *Id.* at 542. Despite the presumption of validity, the clerk "must compare th[e] handwriting with that on the registration affidavit." *Id.* at 541. The court must generally defer to the clerk's determination, except where the signature is "obviously spurious" or the dissimilarities are so minor as to make the clerk's determination "unreasonable or arbitrary." *Id.* at 542. The court concluded that "[t]his view of the law does not conflict with the provision[] . . . that a referendum petition, when verified by the affidavit of the circulator, is *prima facie* evidence that the signatures thereon are genuine and that the persons signing the same are qualified electors. Thereafter the clerk must make his determination of the genuineness thereof." *Id.*

[72] Thus, *Wheelright* indicates that GEC should verify the signatures by comparing the handwriting of the actual signatures in the petitions with those on file, not comparing dates of birth

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[39] GEC cites to 3 GCA § 17306(c), which applies to referenda. Appellant's Opening Brief, p. 46. GEC presumably intended to cite to the statute applicable to initiatives, 3 GCA § 17207(c), which is identical.

[40] This argument directly contradicts an argument made in a previous case by GEC Executive Director Taitano. Decision & Order, *Wade v. Taitano*, SP0079-02, at 9 (Guam Super. Ct. June 11, 2002) ("The Executive Director also argues that the G.E.C. must verify that each signature on the petition is that of a registered voter, regardless of whether they are prima facie valid by virtue of the circulator's affidavit.").

or addresses. GEC's failure to verify the signatures in Coalition 21's initiative petition was a violation of 3 GCA § 18101.

d. Whether the Regulations and Statutes Are Directory or Mandatory

[73] GEC contends that the election should not have been invalidated because, even if it violated election regulations and statutes, the violated provisions were directory rather than mandatory, in part because the challenge was purportedly filed after voting began. As this court stated in *Benavente v. Taitano*, "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.'" 2006 Guam 16 ¶ 27 (alteration in original) (quoting 29 C.J.S. *Elections* § 341 (2006)). The timing of a challenge may affect whether a provision is mandatory or directory. *Id.* ¶ 29. When enforcement is sought "before [an] election," election law provisions are "ordinarily" mandatory, but when enforcement is sought after an election, they are directory only, with some exceptions. *Id.* ¶ 30 (quoting *Vorva v. Plymouth-Canton Cmty. Sch. Dist.*, 584 N.W.2d 743, 746 (Mich. Ct. App. 1998)). This is because, once the will of the voters has been expressed, courts prefer to ascertain and effectuate such will. *Id.* ¶¶ 30, 33.

[74] Here, Responsible Choices filed its Verified Petition on October 12, 2006 – before the November 7, 2006 election. GEC argues that the challenge was filed *after* the election began, because it mailed ballots to absentee voters on September 22, 2006, and started receiving absentee ballots from voters on October 5, 2006. GEC relies on language in *Benavente* stating that after an "'election ha[s] been held, [the result] should not be disturbed when there was full opportunity to correct any irregularities before *the vote was cast.*'" 2006 Guam 16 ¶ 33 (quoting *Martin v. Porter*, 353 N.E.2d 919, 922-23 (Ohio Ct. C.P.)) (emphasis added). The *Benavente* court drew the line at the "election," finding that the issue in that case was whether the election results were made known, not whether *any* votes had been cast. *Id.* ¶ 30 ("[I]f 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.") (emphasis added). At the time of the hearing in this case, the outcome of the election was unknown and the will of the voters had not yet been expressed. In fact, the ballots could still have been corrected at the time of the hearing. SER, p. 89 (10/18/06 Hr'g Tr.) (testimony of Horecky) ("Q. . . . So re-printing the entire ballot . . . that can still be done[?] A. Yes."). Thus, the regulations and statutes violated by GEC were mandatory rather than directory.

[75] Even if the *timing* did not make the relevant laws mandatory, election laws are mandatory when the provisions "are of such a character that their violation would effect an obstruction to the free and intelligent casting of the vote" or "they affect an essential element of the election." *Benavente*, 2006 Guam 16 ¶ 30.[41] Here, the ballot pamphlet included the proponent's slogan as part of the "impartial" analysis, and the short title was potentially misleading, indicating that the initiative addressed consumption of alcohol rather than purchase and possession. The lower court found that these violations were "likely to create prejudice," and "substantially interfered with the rights of the public to be fully informed and exercise their right to vote." ER, p. 50 (Findings of Fact & Conclusions of Law at 5). We agree, and hold that the lower court did not err in preventing Proposal A from proceeding.

D. Whether Petitioners' Claims Were Barred by Laches, Waiver, or Estoppel

[76] GEC argues that Responsible Choices' claims were barred by the doctrines of laches, waiver, and estoppel. We review *de novo* whether a claim is barred by the applicable statute of limitations. *Perez v. Gutierrez*, 2001 Guam 9 ¶ 5; *O'Donnell v. Vencor*, 465 F.3d 1063, 1066 (9th Cir. 2006). We review *de novo* whether laches is available as a matter of law and we review for an abuse of

[41] Election law provisions are also mandatory if "'they are of such a character that their violation would effect an obstruction to the . . . ascertainment of the result, or . . . it is expressly declared by statute that compliance with them is essential to the validity of the election.'" *Benavente*, 2006 Guam 16 ¶ 30 (quoting *Vorva*, 584 N.W.2d at 746).

discretion the district court's decision whether to apply laches to the facts. *O'Donnell*, 465 F.3d at 1066. We review for an abuse of discretion the district court's decision whether to apply equitable estoppel. *Id.* GEC raised the issues of laches, waiver, and estoppel before the lower court. GEC asserts that the lower court ruled on this issue by implication by failing to dismiss the petition.

1. Laches

[77] Laches protects against "inexcusable delay which prejudices the [opposing party]'s ability to respond." *May v. People*, 2005 Guam 17 ¶ 27. The doctrine of laches has been applied to requests for writs of mandamus and to election disputes.[42] In order for the doctrine of laches to apply, there must be: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice against the party asserting the defense." *Torres v. Super. Ct.*, CV90-00049, 1990 WL 320360, at *5 (D. Guam App. Div. Oct. 26, 1990) (citing *United States v. Weintraub*, 613 F.2d 612, 619 (6th Cir. 1979)). In election disputes, the court considers the interests not only of those challenging a ballot measure, but also of "those devoting effort and funds to place a proposition on the ballot," and considers "fairness to the thousands of citizens who signed petitions and collected the signatures." *Harris v. Purcell*, 973 P.2d 1166, 1171 (Ariz. 1998). Further, delay in election cases "places an unreasonable burden on the court." *Id.* at 1169.

[78] In *Harris*, the Arizona Supreme Court applied laches where the plaintiff "failed to exercise diligence in preparing and advancing his case" challenging a ballot initiative. *Id.* at 1170. Similarly, in *State ex rel. Ascani v. Stark County Bd. of Election*s, the Ohio Supreme Court found prejudice where petitioners challenging the validity of an initiative petition inexcusably did not file a protest until ten weeks after the petition was filed, twenty-three days after the board certified the issue for the ballot, and the time for providing absentee ballots had unnecessarily passed by the time expedited

[42] *See, e.g.*, *Torres v. Super. Ct.*, CV90-00049, 1990 WL 320360, at *5 (D. Guam App. Div. Oct. 26, 1990) ("The extraordinary remedy of mandamus should remain available only to the most conscientious of litigants."); *Harris v. Purcell*, 973 P.2d 1166, 1169 (Ariz. 1998) ("[T]he doctrine of laches is available as a defense in an action challenging the legal sufficiency of an initiative measure and seeking to enjoin printing the measure on the official ballot.").

briefing was completed. 700 N.E.2d 1234, 1236-37 (Ohio 1998).

[79] GEC argues that Responsible Choices inexcusably delayed filing its Petition until October 12, 2006 even though it was aware of all the relevant facts by June 1, 2006, when GEC notified Responsible Choices that Coalition 21's initiative had qualified for placement on the ballot and that the initiative related to the drinking age.[43] Responsible Choices, however, did not challenge the wording of GEC's letter, but of the ballot and ballot pamphlet, which were not available until September 29 and October 2, respectively. Thus, Responsible Choices' failure to act between June 1 and September 29 does not suggest a lack of diligence.

[80] On September 15, 2006, Responsible Choices sent GEC its argument against Proposal A, using the words "drinking age" four times. GEC argues that this submission caused GEC to justifiably rely on Responsible Choice's initial silence and later use of the phrase "attempt to raise the drinking age to 21" and expend significant sums printing and mailing ballots. While Responsible Choices' September 15, 2006 submission uses the term "drinking age," the submission also argues that Proposal A "will NOT reduce underage drinking" because the proposal "makes it illegal . . . to **purchase or possess** alcohol, but it does not make it illegal to **drink or consume** alcohol."[44] Moreover, the ballot and ballot pamphlet were not published until after Responsible Choices submitted its argument. Thus, Responsible Choices September 15 argument does not provide a legitimate basis for printing a ballot title related to "consumption" of alcohol.

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[43] SER, p. 217 (6/1/06 Letter from GEC to Responsible Choices) ("The proponents for Coalition 21 have successfully qualified for placement in this year's general election ballot an initiative measure to: (1) change the minimum legal drinking of alcohol to age 21 [sic]; and, (2) change the minimum legal purchasing age of alcohol to age 21.").

[44] SER, p. 226 (9/15/06 Letter) (emphasis in original); *see also* SER, p. 154 (9/4/06 Responsible Choices PDN ad) ("Prop A won't reduce underage drinking. Prop A says persons under 21 can't buy or hold alcohol, but it doesn't make it illegal for them to drink alcohol."); SER, p. 155 (9/22/06 PDN ad) (same).

[81] GEC also argues that there was unjustifiable delay because Responsible Choices did not file its Petition until after absentee voting began. GEC began mailing absentee ballots on September 26, 2006, and began receiving absentee ballots on October 5, 2006, whereas Responsible Choices did not file its petition until October 12, 2006. While a delay until after voting has already begun would normally fulfill the prejudice requirement, laches also requires a lack of diligence. The facts indicate, however, that Responsible Choices acted diligently, and that any delay was excusable based on GEC's neglect of its own duties. GEC was required to publish the ballot title immediately after it was available.[45] Although the ballot title was available shortly after March, GEC failed to publish it until September 29, 2006 – *after* GEC had printed the general election ballots and mailed ballots to absentee voters.[46] The same day the ballot title was published, Responsible Choices sent the members of GEC a fax marked "URGENT!" informing GEC that Responsible Choices believed that the ballot question was "incorrect and defective" because it asked whether the age for "consumption" of alcohol should be raised to 21.[47] The fax asked GEC to "correct the defect."[48]

[82] Responsible Choices did not receive a copy of a draft ballot pamphlet until October 2, 2006, and the same day sent a fax to the members of GEC raising several objections, including the use of the word "consumption," and the inclusion of "Coalition 21 Save Lives, Save Families" in the

[45] 6 GAR § 2109(c) ("As soon as the ballot title is available, the Director shall publish the ballot title once a week for three (3) consecutive weeks . . . .").

[46] SER, p. 80 (10/18/06 Hr'g Tr.); ER, p. 17 (Taitano affidavit). In *State ex rel. Ascani*, the court applied laches where "the statutory time limits for . . . providing absentee ballots would [not] have been exceeded . . . under the best of circumstances." 700 N.E.2d at 1237 (internal quotation marks omitted). Here, however, under the best of circumstances – if Responsible Choices filed suit the same day as publication of the ballot title – the absentee ballots had already been mailed.

[47] SER, p. 157 (9/29/06 Fax from Responsible Choices to GEC); *see also* SER, p. 110 (testimony of Taitano) ("Q. When [Responsible Choices] sent you the letter in early October complaining about the fact that Coalition 21's name and slogan was in the ballot pamphlet, there was still time for you to make changes to the ballot pamphlet before it went out to the voters, correct? A. Yes.").

[48] SER, p. 157 (9/29/06 Fax from Responsible Choices to GEC).

"impartial analysis."[49] GEC did not respond to Responsible Choices' faxes, and GEC did not mail ballot pamphlets to voters until after the lawsuit was filed, contrary to 6 GAR § 2114, which requires mailing at least thirty days before the election.[50] Responsible Choices filed suit on October 12 – less than two weeks after the ballot title was published and ten days after the ballot pamphlet was made available.

[83] Thus, the delay in challenging the ballot title and ballot pamphlet was not "inexcusable," but was mainly caused by GEC's delay in making them available. Much of the prejudice asserted by GEC, such as the printing and mailing of ballots, occurred prior to September 29, 2006, and was not caused by any subsequent delay. The minimal delay between the publication of the ballot and Responsible Choices' Verified Petition – less than two weeks – does not suggest a lack of diligence by Responsible Choices, especially where some of the two-week delay was justified by Responsible Choices waiting, fruitlessly, for a response from GEC to its faxes.[51] In sum, laches does not bar the claim, and the lower court did not abuse its discretion in declining to apply laches.

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[49] SER, pp. 167-68 (10/2/06 Fax from Responsible Choices to GEC).

[50] SER, pp. 86-88 (10/18/06 Hr'g Tr.) (testimony of Taitano) (mailing the ballot pamphlets "i[s] continuing, even today); SER, p. 96 (testimony of Horecky) (10/18/06 Hr'g Tr.).

[51] GEC argues that Responsible Choices should have run directly to the court instead of first seeking administrative relief from GEC. While a complainant who believes that there has been a violation of 3 GCA Chapter 8, which governs Election Campaigns and Campaign Offenses, is explicitly provided the right to "file a complaint with the Commission," 3 GCA § 8132 (2005), there is no explicit provision regarding complaints related to 3 GCA Chapter 17, which governs initiatives. Nonetheless, GEC is empowered to take "such action as is necessary or appropriate to the carrying out of its powers and duties as specified in this Title," 3 GCA § 2106(c) (2005), which normally would include correcting errors it has made in the processing of initiatives. Judicial economy weighs in favor of providing an agency or other party with the opportunity to correct its errors before the matter is brought to the courts. In most circumstances, a brief delay caused by an attempt to negotiate with the opposing party does not suggest a lack of diligence, especially where there was no prior indication that the attempt to negotiate would be fruitless. *See Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1084 (9th Cir. 2000) ("For purposes of laches, we do not generally hold employment discrimination plaintiffs responsible for delays that occur during their pursuit of administrative remedies."); *NAACP v. NAACP Legal Def. & Educ. Fund, Inc.*, 753 F.2d 131, 137 (D.C. Cir. 1985) ("[O]ngoing negotiations . . . may negate the invocation of laches by excusing the delay"); *Guam v. FHP, Inc.*, No. 90-00014A, 1991 WL 275584, at *5 (D. Guam App. Div. July 10, 1991) ("As for laches, GovGuam filed these suits promptly after negotiations over the automatic annual renewal clauses in the 1990 health care services agreements reached an impasse. Waiver and laches do not bar GovGuam's claims.").

2. Waiver and Estoppel

[84] Both waiver and estoppel would require that Responsible Choices act in a manner that demonstrated its intention for GEC to proceed with the election process. Waiver can be shown by the "affirmative acts of a party or by conduct that supports the conclusion that waiver was *intended*." *Guam Hous. & Urban Renewal Auth. v. Dongbu Ins. Co.*, 2001 Guam 24 ¶ 18 (emphasis added). Equitable estoppel has four elements:

> (1) the party to be estopped must be apprised of the facts;
> (2) *he must intend that his conduct will be acted upon*, or act in such a manner that the party asserting the estoppel could reasonably believe that he intended his conduct to be acted upon;
> (3) the party asserting the estoppel must be ignorant of the true state of the facts; and
> (4) he must rely upon the conduct to his injury.

Mobil Oil Guam, Inc. v. Young Ha Lee, 2004 Guam 9 ¶ 24 (emphasis added).

[85] As discussed above, nothing in the record suggests that Responsible Choices engaged in "affirmative acts . . . that support[] the conclusion that waiver was intended," *Guam Hous.*, 2001 Guam 24 ¶ 18, or that Responsible Choices "intend[ed] that [its] conduct will be acted upon," *Mobil Oil*, 2004 Guam 9 ¶ 24. While GEC points to Responsible Choices September 15 argument submission containing the word "consumption," the argument also stressed the fact that the initiative failed to prohibit consumption, and Responsible Choices raised several challenges beyond GEC's inclusion of the word "consumption." Waiver and estoppel therefore do not apply, and the lower court did not abuse its discretion in refusing to apply them.

E. Whether Respondent's Due Process Rights Were Violated

[86] "Due process centrally concerns the fundamental fairness of government activity." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992). The basic elements of procedural due process are reasonable notice and an opportunity to be heard. *Laxamana*, 2001 Guam 26 ¶ 26. Substantive due process has two requirements:

> First, . . . [it] specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the

> concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citations and quotation marks omitted). Whether a constitutional right has been violated is considered *de novo*. *Coffey*, 1997 Guam 14 ¶ 6.

[87] GEC argues that the lower court violated its constitutional due process rights in multiple respects, namely: (1) by permitting Responsible Choices to call GEC counsel Cesar Cabot as a witness and excluding him from proceedings; (2) by permitting inquiry into matters not raised by Responsible Choices in their petitions and basing its decisions on those matters; (3) by providing GEC insufficient time to respond to the amended petitions; and (4) by committing manifest error.[52] Appellant's Opening Brief, p. 27.

1. Subpoena of GEC's Counsel

[88] GEC argues that its due process rights were violated by the court's decisions permitting Responsible Choices to call one of GEC's intended trial counsel as a witness, and excluding that witness from the proceedings. "[T]here is no constitutional right to representation by a particular attorney, [but] due process requires that a defendant be afforded a fair and reasonable opportunity to secure representation of his or her own choosing." *Neal v. Texas*, 870 F.2d 312, 315 (5th Cir. 1989). Normally, "[a] tribunal should not permit a lawyer to call opposing trial counsel as a witness unless there is a compelling need for the lawyer's testimony," in part because it may interfere with counsel's function as an advocate. Restatement (Third) of Law Governing Lawyers § 108(4) & cmt.

[52] While GEC asserts that it raised the due process issue before the lower court, GEC's citations to the record only reflect arguments on the underlying issues. It does not appear that GEC ever argued that the lower court's purportedly erroneous rulings amounted to constitutional due process violations. A constitutional right "'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). However, "'[a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved.'" *People v. Cole*, 95 P.3d 811, 837 n.6 (Cal. 2004) (quoting *People v. Yeoman*, 72 P.3d 1166, 1187 (Cal. 2003)); *see also People v. Partida*, 122 P.3d 765, 769 (Cal. 2005) ("[Defendant] may argue that the asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process.").

b.[53] A lower court's determination of whether a compelling need requires testimony of opposing counsel is reviewed for a prejudicial abuse of discretion:

> Whether a defending or prosecuting attorney may testify in a case he is trying is within the discretion of the district court. . . . The party seeking such testimony must demonstrate that the evidence is vital to his case, and that his inability to present the same or similar facts from another source creates a compelling need for the testimony. The District Court's ruling on such a motion will not be reversed absent a clear and prejudicial abuse of discretion.

United States v. Watson, 952 F.2d 982, 986 (8th Cir. 1991) (citations and internal quotation marks omitted). For example, where an opposing counsel – a criminal prosecutor – was "both a witness to and a participant in the factual events at issue," the Ninth Circuit found an abuse of discretion in the denial of a defendant's motion to recuse the prosecutor from the case to facilitate his testimony. *United States v. Prantil*, 764 F.2d 548, 552 (9th Cir. 1985).[54]

[89] Here, Responsible Choices issued a subpoena duces tecum to GEC's counsel, Cesar Cabot, on October 16, 2006 to testify at a hearing the following day. The court denied a motion to quash the subpoena, and granted a request to exclude GEC witnesses, including Cabot, from the proceedings. The court found, based on the GARs, that "there were certain actions charged to legal counsel to take necessary steps in the processing of the Initiative. So it may become necessary for legal counsel [Cabot] to become a witness . . . ." ER, p. 103 (10/17/06 Hr'g Tr.). Cabot was "both a witness to and a participant in the factual events at issue," *Prantil*, 764 F.2d at 552, as he performed several duties related to processing Proposition A,[55] and provided general advice related

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[53] *See also United States v. Dack*, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984) ("Where evidence is easily available from other sources and absent 'extraordinary circumstances' or 'compelling reasons,' an attorney who participates in the case should not be called as a witness.") (quoting *United States v. Johnston*, 690 F.2d 638, 64 (7th Cir. 1982)).

[54] Generally, "'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1982)). "[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* at 710.

[55] *See, e.g.*, 6 GAR § 2102(c) (requiring counsel to review whether the initiative embraces unrelated subjects); 6 GAR § 2103(a)-(b) (requiring counsel to prepare and provide a short title and summary); 6 GAR § 2109(a) (requiring counsel to prepare a ballot title); 6 GAR § 2111 (requiring counsel to prepare an impartial analysis); 6 GAR § 2112(6)

to initiatives to GEC. Cabot's testimony was relevant and material, and he was the primary or only source of testimony regarding some relevant facts.[56]

[90] GEC argues that his testimony would have been unnecessary if the parties had stipulated to uncontested facts that were the subject of Cabot's testimony, but GEC did not offer to stipulate at trial, and courts have recognized advantages of live testimony over stipulations, such as a better opportunity to judge the demeanor and credibility of a witness, and to probe weaknesses in their testimony. *United States v. Yida*, 498 F.3d 945, 950-52 (9th Cir. 2007). The examination of Cabot, for example, elicited testimony that was inconsistent with Taitano's testimony.[57] GEC states that "disqualification of Mr. Cabot worked substantial hardship on GEC," but provides no support for the statement. Appellant's Opening Brief, p. 32. To the contrary, GEC was represented by two experienced attorneys of its choosing during the hearing. Thus, the evidence does not indicate a "clear and prejudicial abuse of discretion," *Watson*, 952 F.2d at 986 (internal quotation marks omitted), or that GEC was denied a "fair and reasonable opportunity to secure representation of his or her own choosing." *Neal*, 870 F.2d at 315.

[91] GEC also argues that the lower court erred in not quashing the document request accompanying the subpoena to Cabot. A trial court's ruling on a motion to quash a subpoena duces tecum is reviewed for an abuse of discretion. *Cowley v. Seattle Times Co.*, No. C052559, 2007 WL 241377, at *5 (Cal. Ct. App. Jan. 30, 2007) (citing, *e.g.*, *Lipton v. Super. Ct.*, 56 Cal. Rptr. 2d 341,

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(requiring counsel to determine whether existing statutory provisions would be affected).

[56] *See Prantil*, 764 F.2d at 552 ("Both the quality and quantity of the alternate sources of evidence are proper subjects for comparison with that sought directly from the [opposing counsel].").

[57] *Compare* SER, pp. 124-25 (Taitano testimony that the short title is synonymous with the ballot title), *with* SER, pp. 134, 136, 145 (Cabot testimony that the summary he prepared was the ballot title and that he told Taitano to use the summary). *Compare* SER, p. 104 (Taitano testimony that he does not refer to the GARs and that a lot of it is obsolete), *with* SER, p. 127, 129 (Cabot testimony that GEC "strive[s] to follow the GARRs" and that he advised GEC to follow the GARs). *Compare* SER, p. 126 (Taitano testimony that he made initiative decisions without Board approval), *with* Hr'g Tr. 139-40 (Oct. 19, 2006) (Cabot testimony that Taitano would forward the summary and short title to the Board).

348 (Ct. App. 1996)). Relying on a criminal case from Alabama, *State v. Reynolds*, 819 So.2d 72 (Ala. Crim. App. 1999), GEC argues that subpoenas cannot be used as a method of discovery to determine whether exculpatory evidence existed. *Reynolds*, however, does not apply in the civil context. Further, Responsible Choices subpoena was not part of a "fishing expedition," as GEC asserts, but requested only relevant documents – those related to Proposal A and ballot pamphlets related to Proposal B.

[92] The lower court's failure to quash the subpoena was not an abuse of discretion, nor did it violate GEC's constitutional due process rights.

2. Inquiry into Matters Outside the Pleadings

[93] GEC next argues that its due process rights were violated because inquiry was permitted into areas not raised in the petitions. GEC alleges that, as a result, it was unprepared to rebut related factual allegations, leading the lower court to make manifestly unjust and incorrect rulings.

[94] Guam only requires notice pleading, not fact pleading. Guam R. Civ. P. 8(a). GEC was on notice that it had allegedly failed to comply with applicable election laws with respect to Proposal A, as Responsible Choices alleged that "Petitioner's right of initiative, including the right to be fully informed before exercising their right to vote on Proposal A, has been violated by GEC's failure to comply with the mandates of the Guam Election Code . . . ."[58] Moreover, GEC does not point to any objections it made in the record to testimony as falling outside the scope of the pleadings. During the hearing, GEC could have requested a continuance if it needed more time to rebut the newly

[58] ER, pp. 32-33 (Am. Petition, pp. 7-8, ¶ 37); *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (requiring "fair notice of what the plaintiff's claim is and the grounds upon which it rests"), *abrogated on other grounds*, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *see also* ER, pp. 87-88 (Decision & Order) ("[T]he Court instructed GEC to provide all documents relating to proposal A . . . [T]estimony during the course of the proceedings raised questions of whether Proposal A was properly on the ballot and whether the ballot and ballot pamphlet needed to be corrected. Furthermore, Petitioners' counsel informed the Court and the parties that they would be filing an amended petition alleging various violations of GEC's rules and election statutes concerning Proposal A's inclusion on the ballot.").

raised issues, but it did not do so.[59] GEC received "reasonable notice and an opportunity to be heard," consistent with procedural due process requirements. *Laxamana*, 2001 Guam 26 ¶ 26.

3. Insufficient Time to Respond

[95] GEC argues that it did not have sufficient time to respond to the claims against it, but its argument is contradicted by the record. At an ex parte motion hearing on October 12, 2006, the court set the mandamus hearing date for October 17, 2006, without objection from GEC. The hearing continued until October 20, after GEC stated that it had no further witnesses or evidence.[60] The court subsequently issued a proposed judgment and proposed findings of fact and conclusions of law, and GEC filed objections that the court considered before the judgment was entered.[61] Thus, we must "reject [Appellant's] contention that the modified briefing schedule and expedited hearing violated his right to due process," as "[n]othing in the record indicates that [Appellant] did not receive notice or an opportunity to be heard[,] [n]or is there evidence that the expedited schedule prejudiced [Appellant] in any way." *Jones v. Thorne*, 132 F. App'x 150, 152 (9th Cir. 2005).

4. Manifest Error

[96] GEC contends that the lower court's ruling was manifest error in light of 3 GCA § 17509.1, which provides that "[a]ny defect *in the Ballot Pamphlet* shall not cause a delay in the election or be grounds to invalidate the election." 3 GCA § 17509.1 (2005) (emphasis added). The lawsuit,

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[59] SER, p. 117 (10/19/06 Hr'g Tr.) ("[O]n behalf of the Election Commission, I don't think we have anybody else that we're going to be calling."); *cf.* SER, p. 131A (10/19/06 Hr'g Tr.) ("THE COURT: . . . I know that we were striving to move forward and complete, but I want to give the election commission a fair opportunity to set out all its defenses, and I don't want to compromise that opportunity.").

[60] SER, p. 153 (10/20/06 Hr'g Tr. 71) (The Court: "Are we going to be calling any more witnesses at this juncture?" . . . . Mr. Hopkins: "There's no further evidence beyond the exhibits and the cross-examination testimony that we've submitted to the court already, Your Honor. . . . Nothing further.").

[61] ER, pp. 40-42 (Objections to Proposed Judgment); ER, pp. 56-58 (Objections to Proposed Findings of Fact and Conclusions of Law). The lower court appropriately rejected the untimely submission of evidence indicating that Coalition 21 paid the filing fee for its December 20, 2005 and January 10, 2006 initiative submissions, finding no excuse for GEC's failure to present the evidence during the hearing. ER, p. 88 (Decision & Order at 3) ("[S]uch evidence was in their possession . . . . [and] is not considered newly discovered evidence.").

however, went beyond the "defect[s] in the Ballot Pamphlet," but also addressed defects related to, *inter alia*, the late distribution of the pamphlet, the late publication of the ballot title, and defects in the ballot itself. Section 17509.1 therefore does not prevent the invalidation of the election on Proposal A.

[97] In addition, Responsible Choices asserts that 3 GCA § 17509.1 was not lawfully enacted because the law did not receive a public hearing, and 2 GCA § 2103 provides that "[n]o bill shall be passed by *I Liheslatura Guåhan* unless it received a public hearing, *except* . . . when the Presiding Officer of *I Liheslatura Guåhan* . . . certif[ies] that emergency conditions exist, involving danger to the public health, safety, or welfare . . . ." 2 GCA § 2103 (Westlaw through 29-003).

[98] The parties dispute whether emergency conditions actually existed. In 2004, GEC mailed voters a summary of an initiative proposal rather than the complete text, in apparent violation of 3 GCA § 17509. In order to avoid the possible invalidation of the election, the legislature passed section 17509.1. *See* Bill No. 374, Public Law 27-108, § 4 (Oct. 27, 2004) (codified at 3 GCA § 17509.1); *see also Aguon-Schulte v. GEC*, 469 F.3d at 1237-38 (discussing the history of Bill No. 374). The presiding officer of the legislature certified that there was an emergency involving danger to the public welfare, but did not provide a factual basis for that declaration.[62]

[99] The validity of 3 GCA § 17509.1 was not addressed by the lower court, and does not appear to have been raised by the parties below. This court has discretion to hear arguments raised for the first time on appeal "when the issue presented is purely one of law and either does not depend on the

[62] Appellee's Brief, app. 3 (Aug. 20, 2007) (Certification of Vicente Pangelinan, Speaker of the Guam Legislature (Oct. 25, 2004) ("I . . . hereby certify, in conformance with Title 2 Guam Code Annotated § 2103, *Public Hearings Mandatory*, as amended, that an emergency condition exists involving danger to the public welfare of the people and therefore waive the statutory requirements for a public hearing on Bill Number 374 . . . .")). Responsible Choices argues that this declaration of danger to the "public welfare" was insufficient, contending that the law only applies to certifications that emergency conditions exist, involving danger to the "'public health or safety.'" Appellee's Brief, p. 22 (quoting 2 GCA § 2103). But Responsible Choices quotes the statute as it existed prior to its amendment by Guam Public Law 25-22. *Compare* 2 GCA § 2103(a) (2005) (applying to emergencies involving danger to the "public health or safety"), *with* 2 GCA § 2103(a) (Westlaw through Pub. L. 29-003) (applying to emergencies involving danger to the "public health, safety, *or welfare*.") (emphasis added).

factual record developed below, or the pertinent record has been fully developed." *Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985).[63] The validity of section 17509.1 does not affect our holding in this case and the record on the issue is not fully developed.

[100] A fully developed record and more extensive briefing on the issue would be especially welcome in this case, where there appears to be conflicting case law. *See* 73 Am. Jur. 2d *Statutes* § 255 (discussing conflicting case law regarding the conclusiveness of a legislative declaration of public emergency); 110 A.L.R. § 1435(II)(a) (same).[64] Some jurisdictions give deference to the legislature, but examine whether the legislature had a sufficient basis for its findings, applying an abuse of discretion standard or another similar standard.[65] Other jurisdictions have held that a

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[63] *See also Benavente*, 2006 Guam 16 ¶ 145 ("[W]hile 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.") (quoting *Sinlao v. Sinlao*, 2005 Guam 24 ¶ 30). Even if the issue had been raised below, this court would still have discretion to rule on the issue for the first time on appeal. *City of Auburn*, 260 F.3d at 1173 (finding that it had discretion to resolve an issue for the first time on appeal where it had been raised below but not ruled upon).

[64] *See also* 33 A.L.R. 5th 731(II)(3) (collecting cases permitting judicial review of declarations of emergency by public bodies seeking to shorten notice periods); 35 A.L.R. 2d 586 (discussing opposing viewpoints regarding the conclusiveness of a municipal legislative body's declaration of an "emergency").

[65] *See, e.g.*, *Maryland v. Barry*, 604 F. Supp. 495, 501 n.9 (D.D.C. 1985) ("Substantial deference must . . . be accorded to the [D.C.] Council's determination of the existence of 'emergency circumstances' sufficient to warrant its circumvention of . . . hearing and layover provisions of [the] D.C. Code . . . . However, even so limited in the scope of its judicial review, the court cannot conclude that [there was] justification for emergency action."); *Pouquette v. O'Brien*, 100 P.2d 979, 982 (Ariz. 1940) ("The existence of a public emergency justifying the suspension of the ordinary constitutional limitations is primarily for the legislature, but the [legislature's] determination . . . is not conclusive . . . [but] open to judicial inquiry."); *Slack v. City of Colo. Springs*, 655 P.2d 376, 379 (Colo. 1982) ("Only upon a showing of bad faith or fraud are legislative judgments reviewable."); *Jefferson Std. Life Ins. Co. v. Noble*, 188 So. 289, 293 (Miss. 1939) ("'[A]s to the respect due to a declaration of this kind by the Legislature[,] . . . . a court is not at liberty to shut its eyes to an obvious mistake'") (quoting *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547 (1924)); *Osage Outdoor Adver., Inc. v. State Highway Comm'n of Mo.*, 687 S.W.2d 566, 569 (Mo. App. 1984) ("The legislative declaration of an act to be an emergency measure is entitled to great weight but is not conclusive, because the courts possess the final authority to determine whether an emergency in fact exists."); *Moscow v. Moscow Vill. Council*, 504 N.E.2d 1227, 1234 (Ohio Ct. C.P. 1984) (finding that municipal legislative authority's determination of emergency may be overturned if it is "obviously illusory or tautological"); *Wash. State Farm Bureau Fed'n v. Reed*, 115 P.3d 301, 305 (Wash. 2005) ("[A] legislative declaration of the existence of an emergency is deemed conclusive unless it is obviously false and a palpable attempt at dissimulation.") (internal quotation marks omitted); *see also S. Pac. Transp. Co. v. St. Charles Parish Police Jury*, 569 F. Supp. 1174, 1178 (D. La. 1983) ("The Parish Council cannot defeat the provisions of its charter requiring notice and a public hearing by declaring an emergency where none exists.").

legislative determination of an emergency is conclusive.[66]

[101] The applicable standard is further clouded by the fact that we are not faced here with a legislative determination, but a declaration made by a single legislator – the speaker. None of the cases we examined addressed such a situation, and the declaration by a single legislator may or may not be entitled to less deference than a declaration adopted by the entire legislature.

[102] Assuming that a legislative declaration of an emergency is subject to judicial review, it is far from clear that an emergency actually existed involving a danger to the public health, safety, or welfare. Title 3 GCA § 17509.1 was enacted as part of Public Law 27-108, which: repealed a statute addressing campaigning on election day; provided that an initiative would be voted upon at the upcoming election despite errors of GEC in processing the initiative; provided alternative notice procedures to compensate for GEC's failure to comply with notice requirements; and enacted section 17509.1. It is not clear how any of these provisions could be considered a response to a public emergency, though the resolution of that question may involve a factual determination. Because the issue presented is not purely one of law, and may depend on a record that has not been fully developed, we decline to exercise our discretion to rule on the issue. *Bolker*, 760 F.2d at 1042.

[103] Finally, GEC argues that the court committed manifest error by ordering GEC not to certify the election results based on standards governing mandamus, and without considering the legal standards for granting injunctive relief. Petitioners in this case sought a writ of mandamus, not an

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[66] *See, e.g., Idaho State AFL-CIO v. Leroy*, 718 P.2d 1129, 1136 (Idaho 1986) ("[T]he legislature's determination of an emergency in an act is a policy decision exclusively within the ambit of legislative authority, and the judiciary cannot second-guess that decision."); *Vill. of Am. Ins. Ass'n v. Geary*, 635 S.W.2d 306, 307 (Ky. 1982) ("[T]he court must have the ultimate authority of determining whether an emergency actually existed" but courts will only review "if there is any rational basis for concluding that the circumstances cited as constituting an emergency justified more expeditious action"); *Wash. Suburban Sanitary Comm'n v. Buckley*, 78 A.2d 638, 641 (Md. 1951) ("[I]t is the declaration of an emergency which produces the effect of putting the act in force at once, and not the actual question whether or not an emergency exists."); *Read v. City of Scottsbluff*, 138 N.W.2d 471, 474 (Neb. 1965) ("[T]he determination of whether or not an emergency exists . . . is a question for the Legislature, to be conclusively evidenced by a declaration of emergency."); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 497 (N.Y. 1994) ("It is not for this Court to question the reasonableness, propriety, wisdom or expediency of the legislative declaration that a housing emergency continues . . . .").

injunction, and the lower court applied the appropriate standard.[67]

V.

[104] In short, the evidence supports the conclusion that the Guam Election Commission violated approximately twenty different regulatory and statutory provisions governing the processing of Proposal A. Many of these provisions were unambiguous, some had been clarified by the courts after previous GEC violations, and violations of some provisions could potentially bias the outcome of the vote. The lower court's legal rulings are correct, with the exception of its ruling regarding 6 GAR § 2115(d), which inappropriately authorizes the Governor to call special elections and is invalid.

[105] We therefore **AFFIRM** the lower court's grant of a writ of mandamus, but **REVERSE** the lower court's ruling insofar as it found that 6 GAR § 2115(d) validly authorizes the Governor to call special elections (other than single-site special elections that the Governor is authorized to call pursuant to 3 GCA § 17212), and we further **HOLD** that 3 GCA § 18101 requires GEC to compare the signatures on initiative petitions with those on file.

J. BRADLEY KLEMM

J. BRADLEY KLEMM
Justice *Pro Tempore*

RICHARD H. BENSON

RICHARD H. BENSON
Justice *Pro Tempore*

F. PHILIP CARBULLIDO

F. PHILIP CARBULLIDO
Chief Justice

[67] *Cf. Guam Fed'n of Teachers*, 2005 Guam 25 ¶ 22 ("[T]his is not a suit for injunctive relief, but more specifically a suit seeking an order for a public official to perform what [petitioner] considers a ministerial duty."). Even if the standards for injunctive relief should have been applied, such error would have been harmless. GEC contends that the public interest factor of the test for injunctive relief weighs against GEC. The public interest would not have been promoted, however, by permitting voting on a biased ballot.