No. 19-_____

IN THE
Supreme Court of the United States

KEALII MAKEKAU, ET AL.,
Petitioners,

v.

THE STATE OF HAWAII, ET AL.,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court's grant of an injunction pursuant to the All Writs Act, 28 U.S.C. § 1651(a), which requires a "finding that [plaintiff] has a significant possibility of success on the merits," *Dunn v. McNabb*, 138 S. Ct. 369 (2017), constitutes, in the absence of any statement to the contrary, a sufficient consideration of the merits to be the "judicial *imprimatur*" necessary for prevailing-party status under 42 U.S.C. § 1988.

2. Whether the cancellation of a challenged election during the voting period, and the cancellation in advance of a second, challenged election, constitute an enduring change in the legal relationship of the parties, so that the plaintiffs who challenged those elections may be deemed prevailing parties under 42 U.S.C. § 1988.

PARTIES TO THE PROCEEDING

Petitioners are Kealii Makekau, Joseph Kent, Yoshimasa Sean Mitsui, Pedro Kana'e Gapero, and Melissa Leina'ala Moniz, individual registered voters in Hawaii.

Respondents are the State of Hawaii; Governor David Y. Ige, in his official capacity; Robert K. Lindsey Jr., Chairperson, Board of Trustees, Office of Hawaiian Affairs, in his official capacity; Colette Y. Machado, Peter Apo, Haunani Apoliona, Rowena M.N. Akana, John D. Waihe'e IV, Carmen Hulu Lindsey, Dan Ahuna, Leina'ala Ahu Isa, Trustees, Office Of Hawaiian Affairs, in their official capacities; Kamana'opono Crabbe, Chief Executive Officer, Office of Hawaiian Affairs, in his official capacity; John D. Waihe'e III, Chairman, Native Hawaiian Roll Commission, in his official capacity; Nā'ālehu Anthony, Lei Kihoi, Robin Danner, Māhealani Wendt, Commissioners, Native Hawaiian Roll Commission, in their official capacities; Clyde W. Nāmu'o, Executive Director, Native Hawaiian Roll Commission, in his official capacity; the Akamai Foundation; and the Na'i Aupuni Foundation.

RELATED PROCEEDINGS

United States District Court (D. Haw.):

Makekau v. Hawaii, No. 15-cv-322 (June 6, 2017)

Akina v. Hawaii, No. 15-cv-322 (Feb. 24, 2017)

Akina v. Hawaii, No. 15-cv-322 (Nov. 30, 2016)

Akina v. Hawaii, No. 15-cv-322 (Oct. 29, 2015)

United States Court of Appeals (9th Cir.):

Makekau v. Hawaii¸ No. 17-16360 (Nov. 26, 2019)

Akina v. Hawaii, No. 15-17134 (Aug. 29, 2016)

Akina v. Hawaii, No. 15-17134 (Nov. 19, 2015)

United States Supreme Court

Akina v. Hawaii, No. 15A551 (Jan. 19, 2016)

Akina v. Hawaii, No. 15A551 (Dec. 2, 2015)

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Petitioners Kealii Makekau, Joseph Kent, Yoshimasa Sean Mitsui, Pedro Kana'e Gapero, and Melissa Leina'ala Moniz respectfully petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion affirming the district court's decision is reported at 943 F.3d 1200, and is reprinted in the appendix ("App.") at 1a-23a. The district court's opinion adopting the magistrate judge's findings and recommendation is not yet available in the Federal Supplement, but is available at 2017 U.S. Dist. LEXIS 86557 and 2017 WL 2450159, and is reprinted at App. 24a-38a. The magistrate judge's opinion containing his findings and recommendation is not yet available in the Federal Supplement, but is available at 2017 U.S. Dist. LEXIS 87424, and is reprinted at App. 39a-52a.

JURISDICTION

The judgment of the district court was entered on June 6, 2017. Petitioners filed a notice of appeal on July 5, 2017. App. 140a. The court of appeals' jurisdiction rests on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Excerpts from the All Writs Act

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

. . . .

Excerpts from the Civil Rights Attorney's Fees Awards Act of 1976

42 U.S.C. § 1988. Proceedings in vindication of civil rights

. . . .

> **(b) Attorney's fees.** In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981–1983, 1985, 1986] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

STATEMENT

I. Introduction.

Petitioners in this case seek to be deemed prevailing parties entitled to attorney's fees. Although this Court employed the All Writs Act to grant the truly extraordinary relief of enjoining an election already under way, the Ninth Circuit denied

"that the Supreme Court found [Petitioners'] claims to be even potentially meritorious." App. 8a. Because this Court has held that an injunction under the All Writs Act requires a "finding that [the plaintiff] has a significant possibility of success on the merits," *Dunn v. McNabb*, 138 S. Ct. 369 (2017), the Ninth Circuit was wrong. Because this Court's "judicial imprimatur" caused Respondents to abandon the election and the project they intended the election to implement, attorney's fees should have been awarded under 42 U.S.C. § 1988.

This case arises out of a third, failed attempt by Hawaiian officials to use race-based criteria to restrict who may register, vote, or run for office in particular elections.[1] Petitioners here obtained a stay pending appeal from the Court under the All Writs Act that caused Respondents to abandon two planned elections, one in which voting was still taking place. The elections were intended to select delegates to a convention that would draw up a "governance document" for a proposed Native Hawaiian entity. A second election was planned to ratify that document. Voting was restricted to the descendants of those living in the Hawaiian Islands before 1778. The electorate was also restricted by viewpoint, in that registrants were required to pre-endorse the proposed entity. The project was authorized by State law, the voter rolls were developed and maintained by a State

[1] *See Rice v. Cayetano*, 528 U.S. 495 (2000) (invalidating law requiring voters who select trustees of Office of Hawaiian affairs to have Hawaiian ancestry); *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (invalidating law requiring the trustees themselves to have Hawaiian ancestry).

agency, and $2.6 million of public funds was given to a non-profit created in order to hold the elections.

Petitioners obtained a stay pending appeal from the Court under the All Writs Act by satisfying one of the most demanding standards known to law, including a showing that their right to relief was "indisputably clear." Two weeks later, the non-profit cancelled the ongoing delegate election. Within a few months it had cancelled the second election, returned unspent funds to the State, and dissolved as an entity.

The petition for certiorari should be granted because, by ignoring the holding of *Dunn*, the Court of Appeals for the Ninth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). The petition should also be granted so that the Court can determine an unsettled issue of law concerning the kind of relief that justifies prevailing-party status following a grant of injunctive relief where a case is subsequently mooted by a defendant's voluntary conduct.

II. Legal Framework.

A. Fee Awards in Civil Rights Cases.

The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, was "designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866." S.

REP. NO. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

"[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (calling this is a "generous formulation") (citation omitted). With regard to such success, the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792-93 (1989). This "alteration," moreover, must be "judicially sanctioned" by a court order. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). Unless there is a "judicial *imprimatur* on the change," a "defendant's voluntary change in conduct" is not enough on its own to establish prevailing-party status. *Id.*

B. Injunctions Pursuant to the All Writs Act.

The ordinary standards for injunctive relief apply to writs issued under the All Writs Act. In particular, "[t]he All Writs Act does not excuse a court from making" a "finding that [a plaintiff] has a significant possibility of success on the merits." *Dunn v. McNabb*, 138 S. Ct. 369 (2017). The power to grant an injunction under the All Writs Act, 28 U.S.C. § 1651(a), "is to be used 'sparingly and only in the most

critical and exigent circumstances' . . . and only where the legal rights at issue are 'indisputably clear.'" *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers), quoting *Fishman v. Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers), and *Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers). "Moreover, the applicant must demonstrate that the injunctive relief is 'necessary or appropriate in aid of [the Court's] [jurisdiction].'" *Id.* at 1313-14 (citation omitted).

III. History of This Litigation.

A. Facts Giving Rise to the Underlying Claims.

In July 2011, Hawaii's Act 195 became law. Its purpose was to "facilitate" the "self-governance" of the "Native Hawaiian people." HAW. REV. STAT. § 10H-2. The Act established a five-member Native Hawaiian Roll Commission (NHRC) within the Office of Hawaiian Affairs (OHA), a state agency established by Hawaii's Constitution. *Id.* § 10H-3; HAW. CONST. art. XII, § 5. The NHRC was charged with preparing and verifying a voter roll of "qualified Native Hawaiians," defined in terms of their racial ancestry as "descendant[s] of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands." *Id.* § 10H-3(a)(2)(A). The purpose of this voter roll was to "serve as the basis for the eligibility of qualified Native Hawaiians" who would participate in establishing a "Native Hawaiian

governing entity." *Id.* § 10H-4. The NHRC developed an online registration process that was both viewpoint restricted and racially exclusive. The NHRC's website required an applicant to "affirm the unrelinquished sovereignty of the Native Hawaiian people," and to prove the required racial ancestry. App. 79a, 154a.

Na'i Aupuni was a Hawaiian nonprofit incorporated in 2014 to assist with "self-governance for Native Hawaiians." App. 92a. In April 2015 OHA provided just shy of $2.6 million of public funds to Na'i Aupuni through the Akamai Foundation. App. 93a, 94a, 156a. These funds were to be used to conduct an election of delegates to a Native Hawaiian convention which, it was hoped, would draft a "governance document" for a Native Hawaiian entity. This document would then be submitted to Native Hawaiian voters to be ratified. App. 93a, 99a. In July 2015, it was announced that the election of delegates would take place during the month of November 2015. App. 157a. Na'i Aupuni planned to use the NHRC's voter roll in that election. App. 2a, 95a.

B. Facts Occurring After the Case was Filed.

In August 2015 Petitioners filed a complaint, raising challenges to the NHRC's voter roll under the First, Fourteenth, and Fifteenth Amendments, the Civil Rights Act, and the Voting Rights Act. The original plaintiffs[2] included individuals who failed the

[2] Plaintiff Keli'i Akina was elected a trustee of OHA in November 2016 and was dropped as a plaintiff. Order Granting Plaintiffs'

racial requirement and who could not agree with the required viewpoint. App. 144a, 145a. The complaint requested "preliminary and permanent relief enjoining the use of the [NHRC's] Roll . . . and the calling, holding, or certifying of any election utilizing the Roll," and attorney's fees and expenses. App. App. 175a. Petitioners moved for a preliminary injunction to prevent the use of the NHRC's roll in the delegate elections planned for November 2015.

While that motion was pending, the Department of the Interior (DOI) proposed a regulation that subsequently was promulgated. 43 C.F.R. Part 50 (2016); *see* App. 99a-102a. It is relevant to this case as it would have given the disputed elections force and significance under federal law. Written with Act 195 in mind, the regulation sets forth an "administrative procedure" for establishing a "government-to-government relationship between the United States and the Native Hawaiian community." 43 C.F.R. § 50.1. The "native Hawaiian community" was to draft a "governing document" which must be approved in a "ratification referendum" restricted to Native Hawaiian voters. 43 C.F.R. §§ 50.10(a), 50.12(a)(1)(i). In conducting that election, "the community may rely on a roll of Native Hawaiians prepared by the State under State law." 43 C.F.R. § 50.12(a)(3).

The district court denied Petitioners' motion. App. 80a-81a. Notwithstanding that the Hawaiian government authorized State officials to create a race-

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Motion to Drop Plaintiff Keli'i Akina Pursuant to Fed. R. Civ. P. 21, *Akina v. Hawaii*, No. 15-322 (D. Haw. Mar. 15, 2017), ECF No. 169.

based voter roll and gave $2.6 million in government funds to an entity incorporated to hold an election using it, the district court found that Petitioners were unlikely to prevail on the merits because the election was a private affair. App. 113a.[3] Petitioners appealed, and also filed an urgent motion with the Ninth Circuit for an injunction pending appeal. This motion was denied. App. 75a.

Petitioners then applied to the Court for an emergency injunction under the All Writs Act. Petitioners argued the merits in their application and included hundreds of pages of record exhibits. *See* Emergency Application for Injunction Pending Appellate Review at 18-26 & Appendix, *Akina v. Hawaii*, No. 15A551 (Nov. 23, 2015). Respondents filed additional exhibits and, as noted by the Ninth Circuit, "argued to the Supreme Court . . . that the relevant standard was whether it was 'indisputably clear' that Appellants would prevail under the *Winter* [*v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)], test, including consideration of the merits." App. 19a-20a n. 9. (Smith, J., concurring in the result).

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[3] The district court also made a remarkable alternative ruling, holding that, "assuming Nai Aupuni is involved in state action and/or that Act 195 implicates equal protection," the challenged actions would still meet the exacting test of "strict scrutiny." App. 126a. As far as counsel for Petitioners are aware, this is one of only two opinions in the history of American jurisprudence to hold that a racially exclusive election was narrowly tailored to achieve a compelling governmental interest. The other such opinion was reversed. *Rice v. Cayetano*, 146 F.3d 1075, 1082 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000), *vacated*, 208 F.3d 1102 (9th Cir. 2000).

On November 27, 2015, with three days of voting left, Justice Kennedy ordered that "the respondents are enjoined from counting the ballots cast in, and certifying the winners of, the election described in the application, pending further order of the undersigned or of the Court." App. 28a; 74a. Na'i Aupuni announced in response that it was extending the voting period through December 21, 2015. App. 3a; 180a.

On December 2, 2015, the full Court granted Petitioners' application, ordering that "Respondents are enjoined from counting the ballots cast in, and certifying the winners of, the election described in the application, pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit." App. 73a.

Two weeks later, on December 15, 2015, Na'i Aupuni cancelled the delegate elections. App. 4a; 178a. Its counsel made clear that "the election votes will never be counted . . . 'Na'i Aupuni does not know and will never learn the election results.'" App. 178a. Indeed, because it was terminated with six days remaining, the election was not just suspended, it was invalidated, as it can never be known how voting would have proceeded during that time. By "cancelling the delegate election before the end of the voting period, Na'i Aupuni permanently voided it." App. 22a (Smith, J., concurring in the result).

Na'i Aupuni also announced that, in lieu of an election, all of the delegate *candidates* would be offered a seat at a Native Hawaiian convention. App.

178a. Petitioners moved for contempt on the ground that this was "certifying the winners" of the cancelled election in violation of the Court's stay order. The Court denied this motion. *Akina v. Hawaii*, 136 S. Ct. 922 (2016) (Mem.). A meeting of these candidates was held in February 2016, and they drafted a proposed constitution. App. 29a.

Petitioners remained concerned that Respondents might submit a document produced by the *un*elected convention to a ratification vote using the NHRC's voter roll. App. 10a. But on March 16, 2016, Na'i Aupuni announced that "it would not be conducting a ratification vote on the proposed constitution." App. 177a. It added that the "remaining grant funds of a little over $100,000, allocated to cover the cost of the ratification vote, would be returned to OHA." *Id.* In April 2016, Na'i Aupuni dissolved as an entity. App. 4a. Petitioners' appeal was dismissed as moot (App. 60a), and the district court subsequently granted Petitioners' motion for voluntarily dismissal. App. 53a.

C. Petitioners' Motion for Attorney's Fees.

Petitioners moved for attorney's fees and expenses in the district court. The magistrate judge recommended that this motion be denied. App. 39a. He concluded that the Court's injunction was not on the merits and did not constitute the "judicial imprimatur" needed for prevailing-party status; and that Petitioners could not show a material alteration

of the parties' legal relationship. App. 48a, 50a-51a.[4] The district court adopted the magistrate's recommendation, agreeing that the context of the Court's stay order showed that it did not sufficiently address the merits. App. 33a-37a. The district court also characterized Petitioners' success as too limited and "ephemeral" to constitute the necessary change in the parties' legal relationship. App. 37a. Petitioners timely appealed.

The Ninth Circuit affirmed. App. 1a. It held that "the mere fact that the injunction order issued under the All Writs Act does not prove that the Supreme Court found Plaintiffs' claims to be even potentially meritorious. There is simply no indication that the injunction order addressed the merits." App. 8a. Given this holding, the Ninth Circuit did not address whether the relief was a material change in the parties' relationship. App. 6a.

Judge Smith wrote separately to concur in the result. In his opinion, "the key legal issues in this case are close to equipoise." App. 9a. While he could not "state confidently that Justice Kennedy or the Court considered the claims at least 'potentially meritorious,'" he had "no trouble . . . concluding that 'judicial imprimatur' was present." App. 18a-19a. The "enjoining of vote counting and certification of winners" was "directly tied to a judicial ruling." App. 21a-22a. The fact that Na'i Aupuni "permanently

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[4] Given these findings, the recommendation did not reach or discuss whether the particular attorney's fees and expenses requested by Petitioners were reasonable, and such matters are not relevant to this petition.

voided" the election by cancelling it during the voting period meant that "the Court's writ 'would not be undone by subsequent rulings in the litigation.'" App. 22a. (citation omitted).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to correct the Ninth Circuit's erroneous interpretation of the standards governing the issuance of injunctions under the All Writs Act. This interpretation conflicts with the Court's holding in *Dunn v. McNabb*. *See* SUP. CT. R. 10(c). The Ninth Circuit denied that the Court, in issuing its December 2, 2015 stay pending appeal, found Petitioners' claims "to be even potentially meritorious." App. 8a. The Court should reverse this ruling and make clear that the grant of an injunction, whether under the Act or in other circumstances, involves a review of the merits in all but a few exceptional cases.

In addition, the Court should grant the petition to address the body of law now being developed at the circuit level in which prevailing-party status can be conferred by obtaining preliminary relief in a case that is later mooted. In particular, the Court should define the standard for finding a material change in the parties' legal relationship, which is a prerequisite for being entitled to an award of attorney's fees.

I. The Opinion Below Conflicts with Court Precedents Requiring the Merits to Be Considered When Granting Injunctions Under the All Writs Act.

The Ninth Circuit was wrong to conclude that the Court issued its injunction without considering the merits. An injunction granted pursuant to the All Writs Act is, after all, an injunction, which ordinarily incorporates a finding regarding the strength of the underlying merits. *See Winter*, 555 U.S. at 20 (a "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits"); *Nken v. Holder*, 556 U.S. 418, 434 (2017) (applicant for a stay pending appeal must make "a strong showing that he is likely to succeed on the merits"). As the Court has observed, the reason "[t]here is substantial overlap between these" standards is that "similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Id.* These same concerns apply to injunctions issued under the All Writs Act.

This principle was established in *Dunn v. McNabb*, 138 S. Ct. 369 (2017), where the Court vacated a stay issued under the All Writs Act in a death penalty case. The Court noted that inmates "challenging the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Id.* (citation omitted). The Court concluded that "[t]he All Writs Act does not excuse a court from making these findings. Because

the District Court enjoined Respondent's execution without finding that he has a significant possibility of success on the merits, it abused its discretion." *Id*.

The Ninth Circuit sought to distinguish *Dunn* as standing "only for the unremarkable proposition that the All Writs Act does not erase *separate* legal requirements for a given type of claim. Inmates seeking a stay of execution always must show 'a significant possibility of success on the merits.'" App. 6a-7a (citations omitted). But this argument concedes more than the Ninth Circuit acknowledges. The traditional standard for granting *any* stay pending appeal requires "a strong showing that [an applicant] is likely to succeed on the merits." *Nken*, 556 U.S. at 434. This standard is also a "separate legal requirement," which is not "erase[d]" simply because an applicant moves under the All Writs Act.

The Court's decisions applying the All Writs Act routinely discuss the merits of the underlying claims. In *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers), an injunction was denied under the Act because, "[w]hatever else may be said about the issues and equities in this case, the rights of the applicants are not 'indisputably clear.'" After considering "[t]he pros and cons of the applicants' claim on the merits," including the Court of Appeals' efforts "to distinguish the present case" from prior decisions, and "the lower court's finding of a clear secular purpose" that "casts some doubt on the question whether" a challenged statute violated the First Amendment, Chief Justice Rehnquist concluded that the applicants' "position is less than

indisputable." *Id*. at 1303-04; *see Hobby Lobby Stores, Inc. v. Sebelius,* 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers) ("whatever the ultimate merits of the applicants' claims, their entitlement to relief is not 'indisputably clear'"), quoting *Lux v. Rodrigues*, 561 U.S. 1306, 1308 (2010) (Roberts, C.J., in chambers) (considering merits and concluding that, "even if the reasoning in" certain cases "does support" the applicant's claim, "it cannot be said that his right to relief is 'indisputably clear'"); *Wisconsin Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1305-06 (2004) (Rehnquist, C.J., in chambers) (statute not enjoined because "this Court recently held [it] facially constitutional"); *Turner Broadcasting Sys., Inc. v. FCC*, 507 U.S. 1301, 1303, 1304 (1993) ("Nor is it 'indisputably clear' that applicants have a First Amendment right to be free of the must-carry provisions. . . . we have not decided whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters.") (Rehnquist, C.J., in chambers).

To show that the merits need not be considered, the Ninth Circuit cited two cases where the Court "expressly disavowed any view of the merits when addressing a party's request for an All Writs Act injunction." App. 6a, citing *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014) ("[i]n light of" the facts of the case, "this order should not be construed as an expression of the Court's views on the merits."); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171, 1172 (2014) ("The Court issues this order based on all the circumstances of the case, and this order should not be construed as an

expression of the Court's views on the merits."). While these cases suggest that the Court *may* issue injunctions under the All Writs Act that do not incorporate findings on the merits, it is important to note that in both *Wheaton College* and *Little Sisters* the Court explicitly *stated* that it was not making such a finding. By contrast, in *Brown*, *Hobby Lobby*, *Lux*, *Wisconsin Right to Life*, and *Turner Broadcasting Sys.*, the Court simply evaluated the merits without specially noting the fact. This shows that the Court uses the phrase "legal rights" as it is ordinarily understood, *viz.*, to refer to and include the merits of a case. In those unusual circumstances where an All Writs Act injunction does not indicate a view of the merits, the Court has recognized that it must make this point clear.

Ultimately, *Wheaton College* and *Little Sisters* are the exceptions that prove the rule—namely, that an injunction under the All Writs Act typically *does* constitute a positive finding regarding the merits. As a practical matter, moreover, these were exceptional cases. They were among a number of challenges on religious grounds to the contraception mandates of the Patient Protection and Affordable Care Act. The Court clearly sought to resolve them without issuing a final judgment. In *Zubik v. Burwell*, 136 S. Ct. 1557, 1559-60 (2016), consolidating seven such cases, the Court, after determining that a resolution was feasible, vacated the judgments below and remanded so the parties might "arrive at an approach . . . that accommodates petitioners' religious exercise while . . . ensuring that women covered by petitioners' health plans" receive the mandated coverage. *Id.* at 1560.

Thus, the Court declined to consider the merits of these cases only as part of an effort to resolve them. It was not declaring that the merits are irrelevant to injunctions issued under the All Writs Act.

Other cases cited by the Ninth Circuit do not prove any exception to the general rule. The Ninth Circuit cited and emphasized the first part of the statement from *Hobby Lobby* that, "*whatever the ultimate merits* of the applicants' claims, their entitlement to relief is not 'indisputably clear,'" apparently to suggest that the case did not address the merits. App. 6a, citing *Hobby Lobby*, 568 U.S. at 1403. The context of the quote, however, indicates that the opposite is true. In the next sentence, Justice Sotomayor observed that "[t]his Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion." *Id.* The whole point of this observation was to establish that the *merits* were not "indisputably clear." The Ninth Circuit also cited *U.S. v. N.Y. Tel. Co.*, 434 U.S. 159 (1977) as a case where the merits were not at issue because an All Writs Act injunction was issued to "a nonparty who engaged in no wrongdoing." App. 8a. The facts there were so wildly different, however, that the case is not instructive. The district court used an All Writs Act order to compel a telephone company to provide technical assistance to the FBI in conducting surveillance of a suspected gambling enterprise, and the company moved to vacate the order. There was no complaint, and no party

comparable to a "plaintiff," except perhaps the FBI. Yet even in that case, *the Court did address the merits,* namely, whether the order was authorized by Fed. R. Crim. P. 41, or was restricted by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *N.Y. Tel. Co.*, 434 U.S. at 163, 165, 168-69.

The other reasons given by the Ninth Circuit for doubting that the Court considered the merits in granting its stay order miss the mark. The Ninth Circuit interprets the Court's order denying Petitioners' contempt motion as "strongly suggest[ing] that the injunction order was not on the merits." App. 8a. But these orders concerned fundamentally different issues. The injunction prevented the use of the contested voter rolls to conduct delegate elections. The motion for contempt was addressed solely to the fact that, after those elections were cancelled, Na'i Aupuni seated unelected candidates at the convention. Petitioners argued that this was the same as certifying all candidates as "winners," which would have violated the Court's injunction. While the Court rejected this argument, there is no reason to think that its denial of the motion concerned anything other than that narrow issue—as Judge Smith recognized. App. 22a n. 11 (Smith, J., concurring in the result).

The Ninth Circuit was also incorrect in contending that the "voluntary dismissal without prejudice" in this case is "'the opposite' of an adjudication on the merits." App. 8a. (citation omitted). The most basic problem with this argument is that the district court's dismissal is not the court

order that made Petitioners prevailing parties. They prevailed by virtue of the Court's December 2015 injunction. Nor are Petitioners required to show an adjudication of *all* of the merits. They only need show that they "succeed[ed] on any significant issue in litigation which achieves some of the benefit" they "sought in bringing suit." *Hensley*, 461 U.S. at 433. Indeed, the dismissal was without prejudice for a specific reason: so that Petitioners could sue again if "a different group of individuals . . . try to hold a ratification election." App. 55a, citing 68a. This consideration had no effect on Petitioners' complete success in halting, and permanently voiding, the *delegate* elections.

Once it is conceded that the Court did consider the merits in issuing its injunction under the All Writs Act, the conclusion is inescapable that Petitioners are prevailing parties, given the heightened standard they had to satisfy. The ordinary standard for prevailing "on the merits" so as to be entitled to an award of fees in the Ninth Circuit simply requires that the relevant "court-approved action[] . . . entail a judicial determination that the claims on which the plaintiff obtains relief are potentially meritorious." *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715 (9th Cir. 2013) (citation omitted). The fact that Petitioners had to have shown that their right to relief on the merits was "indisputably clear" must mean that they showed much more than this ordinary finding. This remains

true regardless of whether the Court set forth explicit findings in its order.[5]

II. The Court Should Clarify the Meaning of a "Material Alteration of the Legal Relationship of the Parties" In the Context of Preliminary Relief.

In adopting the Civil Rights Attorney's Fees Awards Act of 1976, Congress recognized that the "phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." H.R. REP. No. 94-

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[5] Note also that there is ample reason to conclude that the Court considered the merits in this case. Both parties argued the merits to the Court, and Respondents even argued that the *Winter* factors, including success on the merits, must be "indisputably clear." App. 19a-20a n. 9. (Smith, J., concurring in the result). Further, it is significant that both Justice Kennedy and the Court issued injunctions while voting was still taking place. The equities normally weigh against enjoining even an impending election, so the fact that these injunctions were issued in an *ongoing* election must mean that the merits were strong. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief" even for an "invalid" electoral plan); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."); *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) ("Interference with impending elections is extraordinary . . . and interference with an election after voting has begun is unprecedented.") (citation omitted).

1558, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912. Prevailing-party status might be conferred by, for example, "litigation terminate[d] by consent decree" by "an out-of-court-settlement," or by a defendant's "voluntarily ceas[ing] the unlawful practice." *Id.* Consistent with this view, the Court has ruled that a plaintiff was a prevailing party even though the case was resolved by a consent decree that "did not purport to adjudicate" the underlying claims and did not "constitute an admission of fault." *Maher v. Gagne*, 448 U.S. 122, 126 n. 8 (1980). "Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id*. at 129.

The Court has yet to rule, however, on a claim for attorney's fees where a plaintiff obtains preliminary relief and the case is then mooted or settled out of court. In *Sole v. Wyner*, 551 U.S. 74 (2007), which determined that a preliminary injunction that is later reversed by a final judgment does not support a fee award, the Court reserved that issue: "We express no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Id.* at 86.

A majority of circuits, including the Ninth Circuit, have by now squarely held that a grant of preliminary relief followed by mootness can establish

prevailing party status.[6] What these courts have struggled with, including the courts below in this case, is how, in the context of temporary relief, it may be determined that there has been a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote." *Texas State Teachers Assn.*, 489 U.S. at 792-93. The Court should address the issue it reserved in *Sole* and clarify the standard that applies in this context.

In this case, notwithstanding that Respondent Na'i Aupuni cancelled two challenged elections, one while it was happening; cancelled its contracts with the State and with election contractors; returned remaining grant money to the State of Hawaii; and then dissolved as an entity, both the magistrate and the district court found that Petitioners had obtained *no* legally relevant relief. App. 37a-38a; 50a-51a. On its face this is a startling finding. Yet both the magistrate and the district court were persuaded by the argument that Respondents could take up where they left off by holding a new election using the challenged voter roll.

But it is always true that a party that had been subject to a preliminary injunction could resume its

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[6] *See Higher Taste,* 717 F.3d at 716-17; *Watson v. County of Riverside*, 300 F.3d 1092, 1094 (9th Cir. 2002); *People Against Police Violence v. City of Pittsburgh,* 520 F.3d 226, 233–34 (3d Cir. 2008); *Dearmore v. City of Garland,* 519 F.3d 517, 523–24 (5th Cir. 2008); *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000); *Kan. Judicial Watch v. Stout*, 653 F.3d 1230 (10th Cir. 2011); *Common Cause/Ga. v. Billups,* 554 F.3d 1340, 1355–56 (11th Cir. 2009); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005).

conduct when the injunction ends. Indeed, it remains true even where a party has voluntarily taken steps—like repealing offending statutes, for example—that make resumption more difficult. All that is needed is motivation. A more principled standard for assessing wins is necessary.

The Ninth Circuit majority did not reach the issue of the sufficiency of the relief Petitioners obtained. Judge Smith wrote separately to express his view that Petitioners' "one victory directly tied to a judicial ruling was the enjoining of vote counting and certification of winners in the 2015 delegate election." App. 21a-22a. Yet even this view unfairly dismisses as irrelevant the cancellation of the scheduled ratification vote, the dissolution of Na'i Aupuni, and, for that matter, the implicit abandonment of plans to submit the convention's document to the DOI for use in its administrative process. These were real victories.

Petitioners respectfully submit that the Court should grant the petition and impose a standard based on proximate cause. Where a preliminary order proximately causes a defendant to take steps to abandon, undo, significantly alter, or postpone challenged conduct, the plaintiff has prevailed to that extent. This standard is consistent with current case law. *See, e.g., Watson*, 300 F.3d at 1094 (party prevailed by enjoining the use of a challenged report in one hearing, even though the claim became moot and all other claims were dismissed); *Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980) (plaintiffs prevailed by enjoining searches during the pendency

of an investigation, even though the appeal was dismissed as moot); *Dearmore*, 519 F.3d at 525 (defendant "mooted the case *after* and *in direct response to* the district court's preliminary injunction order. There is an obvious direct causal link" to actions taken 12 days later).

The Court should grant the petition to clarify the standards governing this issue.

III. This Case is Important.

Congress has always viewed attorney's fees "as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven." S. REP. NO. 94-1011, at 3 (1976). Indeed, the "very first attorneys' fee statute was a civil rights law" enacted in 1870 to protect voting rights. *Id.* The rationale for these statutes is that those "who must sue to enforce" civil rights laws often "have little or no money with which to hire a lawyer." *Id.* "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." *Id.*

The Court has recognized that these considerations are even more pressing where civil rights plaintiffs seek injunctive relief rather than money damages. Where such a plaintiff "obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that

Congress considered of the highest priority." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Without an opportunity to recover fees, "few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Id.*

The is the kind of case the civil rights laws were made for. The facts are egregious. The State of Hawaii tried here, *for the third time*, to use public money to hold an election restricted on the basis of racial ancestry. Petitioners include ordinary individuals who were told they could not register or vote in a statewide election because they were the wrong race. They were also told they could not register or vote unless they publicly affirmed a statement of opinion drafted by a government official. They could not afford attorneys.

The vote itself had enormous public significance, as it promised to set guidelines for a "Native Hawaiian governing entity," which was defined to include a large percentage of the State's population. Indeed, the ancestry requirement was so broad, extending to *any* lineal descendant of the residents of the Hawaiian islands in 1778, that it was utterly arbitrary. Commenting on this standard, Justice Breyer noted that defining "membership in terms of 1 possible ancestor out of 500 . . . goes well beyond any reasonable limit." *Rice*, 528 U.S. at 527 (Breyer, J., concurring in the result). This sort of law, where a "single drop of blood" is relied on to define racial ancestry, also has a tragic resonance in American

history. *See, e.g., Loving v. Virginia,* 388 U.S. 1, 5 n. 4 (1967) (discussing similar standards).

Once the Court enjoined the delegate elections, Respondents abandoned the entire project as quickly and completely as they could. Yet they insist that the Court's order had nothing to do with the merits of the case. Their argument is inconsistent with their actions. It is also inconsistent with the position they previously asserted to this Court, when they argued that it *must* consider the merits under the *Winter* factors. Now they assert the opposite, in an attempt to avoid paying attorney's fees.

The Court has in the past had to deal with recalcitrant jurisdictions that repeatedly resisted the local enforcement of civil rights laws. Petitioners respectfully submit that the Court should grant this petition for the reasons stated above, and also in recognition of the justice of Petitioners' cause.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant the petition for certiorari.

Respectfully submitted,

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