UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed November 26, 2019

No. 17-16360

Makekau, *et al.*,
Appellants
v.

Hawaii, *et al.*
Appellees.

MEMORANDUM OPINION

Before: Susan P. Graber, Milan D. Smith, Jr., and Paul J. Watford, Circuit Judges.
Opinion by Judge Graber; Concurrence by Judge Milan D. Smith, Jr.

GRABER, Circuit Judge:

We must decide whether a plaintiff who obtains a preliminary injunction under the All Writs Act, 28 U.S.C. § 1651(a), qualifies as a "prevailing party" for fee-shifting purposes by virtue of that injunction, where the order granting injunctive relief makes no mention of the merits of the plaintiff's claims. We hold that the answer is "no."

BACKGROUND

In 2011, the Hawaii legislature enacted

measures designed "to provide for and to implement the recognition of the Native Hawaiian people by means and methods" that would help Native Hawaiians move toward "self-governance." Haw. Rev. Stat. § 10H-2. Those measures included establishing a commission to maintain and publish "a roll of qualified Native Hawaiians," thereby "facilitat[ing] the process under which qualified Native Hawaiians may independently commence the organization of a convention of qualified Native Hawaiians, established for the purpose of organizing themselves." *Id.* §§ 10H-3(a)(1), 10H-5.

Defendant Na'i Aupuni, a private nonprofit entity, supported self-governance efforts. *Akina v. Hawaii*, 835 F.3d 1003, 1008 (9th Cir. 2016) (per curiam) ("*Akina I*"). In 2015, Na'i Aupuni sought and received grant funding from Defendant Office of Hawaiian Affairs ("OHA"), a state agency, to use for three events: a delegate election, a constitutional convention of the elected delegates, and a referendum to ratify any governing documents produced at the convention. *Id.* Na'i Aupuni scheduled a vote-by-mail delegate election to run during November 2015. *Id.* Na'i Aupuni restricted the pools of delegates and voters to people who appeared on the commission's roll of qualified Native Hawaiians and who also affirmed "the unrelinquished sovereignty of the Native Hawaiian people."

In August 2015, Plaintiffs—five registered Hawaii voters—sued the State of Hawaii, OHA, other state agencies and officials, Na'i Aupuni, and another private nonprofit that participated in the election efforts. *Id.* Plaintiffs alleged that Na'i Aupuni and the

other nonprofit entity became state actors by conducting the elections and that the State's involvement in the self-governance process violated the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965 because of the race-based restrictions on eligibility. Plaintiffs moved for a preliminary injunction to prevent Defendants "from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians."

The district court denied Plaintiffs' motion in October 2015. Voting for the delegate election began on November 1. On November 19, we denied Plaintiffs' urgent motion for an injunction pending appeal. Four days later, Plaintiffs, relying on the All Writs Act, filed an emergency application for an injunction pending appeal in the Supreme Court. On November 27, Justice Kennedy enjoined ballot-counting in the delegate election.

After Justice Kennedy's order issued, Na'i Aupuni extended the voting deadline to December 21, 2015. Plaintiffs notified the Supreme Court of the extension. On December 2, the Supreme Court granted Plaintiffs' emergency application. In full, the order stated:

> Application for injunction pending appellate review presented to Justice Kennedy and by him referred to the Court granted. Respondents are enjoined from counting ballots cast in, and certifying 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.
> Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

Akina v. Hawaii, 136 S. Ct. 581, 581, 193 L. Ed. 2d 464 (2015) (Mem.) ("injunction order").

In mid-December, Na'i Aupuni announced that it had "terminated" the delegate election and would not count the votes, but would continue the self-governance process by inviting all delegates to the constitutional convention planned for February 2016. Plaintiffs filed a motion for civil contempt, arguing that Defendants had violated the Supreme Court's injunction order by certifying all delegates as winners of the election. The Supreme Court summarily denied that motion. *Akina v. Hawaii*, 136 S. Ct. 922, 193 L. Ed. 2d 786 (2016) (Mem.).

The convention took place in February 2016 and produced a proposed constitution. *Akina I*, 835 F.3d at 1009. But Na'i Aupuni decided not to hold a ratification vote. Na'i Aupuni returned OHA's remaining grant funds, which had been allocated to cover the cost of a ratification vote. Na'i Aupuni dissolved as an entity in April 2016.

Several months later, we dismissed as moot Plaintiffs' appeal of the district court's denial of their preliminary injunction. *Id.* at 1011. The district court then granted Plaintiffs' motion to dismiss their complaint voluntarily and without prejudice under Federal Rule of Civil Procedure 41(a)(2). Plaintiffs

subsequently sought attorney fees under 42 U.S.C. § 1988, arguing that they were the "prevailing party" because they obtained an injunction from the Supreme Court that caused Defendants to cancel the challenged election and referendum. The district court denied Plaintiffs' motion, holding that Plaintiffs were not a "prevailing party" within the meaning of the statute.

DISCUSSION

We review de novo a district court's denial of attorney fees where, as here, the denial "turns on an issue of statutory construction—the meaning of 'prevailing party.'" *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715 (9th Cir. 2013). To qualify as a "prevailing party" under a fee-shifting statute, a plaintiff must obtain "actual relief on the merits" that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)). Relief "on the merits" requires some form of "judicial *imprimatur* on the change." *Id.* (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)).

Accordingly, two questions drive the analysis in determining whether a plaintiff "who wins a preliminary injunction but does not litigate the case to final judgment" is a prevailing party: (1) whether the preliminary injunction was "sufficiently 'on the merits' to satisfy *Buckhannon*'s 'judicial imprimatur' requirement"; and (2) whether the plaintiff "obtained

relief sufficiently enduring" to cause a material alteration of the parties' legal relationship. *Id.* at 715-16. Because we conclude that the injunction order did not address the merits of Plaintiffs' claims, we answer only the first question.

Under the All Writs Act, a court may issue an injunction only where it is "necessary or appropriate in aid" of the court's jurisdiction, 28 U.S.C. § 1651(a), and "the legal rights at issue are indisputably clear," *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403, 133 S. Ct. 641, 184 L. Ed. 2d 448 (2012) (Sotomayor, J., in chambers) (internal quotation marks omitted). Plaintiffs contend that the Supreme Court always must consider the merits when deciding whether to issue an injunction under the All Writs Act, whether the Court grants or denies relief. Not so. In several prior cases, the Supreme Court has expressly disavowed any view of the merits when addressing a party's request for an All Writs Act injunction. *See, e.g.*, *Wheaton College v. Burwell*, 573 U.S. 958, 134 S. Ct. 2806, 2807, 189 L. Ed. 2d 856 (2014) (granting relief and stating that "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, 134 S. Ct. 1022, 1022, 187 L. Ed. 2d 867 (2014) (Mem.) (same); *Hobby Lobby*, 568 U.S. at 1403 (denying relief and stating: "First, *whatever the ultimate merits* of the applicants' claims, their entitlement to relief is not 'indisputably clear.'" (emphasis added)).

At oral argument, Plaintiffs relied on *Dunn v. McNabb*, 138 S. Ct. 369, 199 L. Ed. 2d 274 (2017) (Mem.), for the proposition that the All Writs Act

requires a court to consider the merits before granting relief. There, the Supreme Court held that the All Writs Act "does not excuse a court from making [certain] findings" before enjoining an inmate's execution, because "[i]nmates seeking time to challenge 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. at 369* (internal quotation marks omitted). Read in context, *Dunn* stands 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." *Hill v. McDonough*, 547 U.S. 573, 584, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006). But that requirement of a merits showing has nothing to do with the All Writs Act; it applies no matter the vehicle for an inmate's claim. *See, e.g.*, *id.* (addressing a 42 U.S.C. § 1983 claim for a stay of execution and stating that the inmate "must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits"); *Barefoot v. Estelle*, 463 U.S. 880, 895, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) (stating that, to obtain a stay of execution, a habeas petitioner needed to show both "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and "a significant possibility of reversal of the lower court's decision"). This case does not involve an inmate seeking a stay of execution (or any party seeking a stay of anything), so *Dunn* cannot bear the weight

that Plaintiffs ask it to carry.

Moreover, in "appropriate circumstances," a court may direct an order under the All Writs Act "to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977). Plainly, an order directed to a nonparty who engaged in no wrongdoing would stem from considerations separate from the merits of a case.

Thus, contrary to Plaintiffs' view, 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. Aside from the brevity of the order, the Supreme Court later denied Plaintiffs' contempt motion in a one-sentence order, which strongly suggests that the injunction order was not on the merits. And Plaintiffs sought (and received) a voluntary dismissal without prejudice in the district court—"the opposite" of an adjudication on the merits. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001) (stating that Rule 41(a), "in discussing the effect of voluntary dismissal by the plaintiff, makes clear that an 'adjudication upon the merits' is the opposite of a 'dismissal without prejudice'"). In short, Plaintiffs are not prevailing parties.

AFFIRMED.

M. SMITH, Circuit Judge, concurring in the result:

I write separately to express my view that the key legal issues in this case are close to equipoise. I differ from the majority because I find that the "on the merits" analysis only narrowly disfavors Appellants. I would find that the "sufficiently enduring relief" analysis favors Appellants.

I briefly recount the most essential facts. Appellants, five registered Hawaii voters, sued the State of Hawaii, various state officers including the trustees and director of the Office of Hawaiian Affairs (OHA), and the nonprofit entities Na'i Aupuni and the Akamai Foundation, on constitutional and statutory grounds alleging race-and viewpoint-based voting discrimination. The *Akina* lawsuit challenged efforts by Na'i Aupuni—using grant funds awarded by, and a voter roll of "qualified Native Hawaiians" maintained by, OHA—to hold a delegate election, a convention, and a ratification election for purposes of Native Hawaiian self-governance.

Appellants unsuccessfully sought a preliminary injunction from the district court, and then an injunction pending interlocutory appeal from our court, which denied the injunctions under *Winter v. NRDC*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008),[1] primarily for failure to show likelihood of proving that Na'i Aupuni was a state actor. *Akina v.*

---

[1] *Winter* considers (1) the plaintiff's likelihood of prevailing on the merits, (2) whether the plaintiff will suffer irreparable harm, (3) the balance of equities amongst the parties, and (4) the public interest. 555 U.S. at 20-22.

Hawaii, 141 F. Supp. 3d 1106, 1125-35 (D. Haw. 2015); *Akina v. Hawaii*, 835 F.3d 1003, 1009 (9th Cir. 2016). As a result, voting in the delegate election began as scheduled.

Plaintiffs then applied to Justice Kennedy for an emergency interlocutory injunction. With a few days of voting remaining, Justice Kennedy enjoined ballot counting and certification of winners pending further order of the Court, offering no explanation for his reasoning. *Id.* Na'i Aupuni publicly announced the injunction and officially extended the voting deadline. On referral, a divided Supreme Court re-entered the same injunction pending resolution of the appeal to our court, again offering no explanation. *Akina v. Hawaii*, 136 S. Ct. 581, 193 L. Ed. 2d 464 (2015) (mem.). Shortly thereafter, Na'i Aupuni cancelled the delegate election with several days of voting remaining, declared that the ballots would not be counted, and invited all of the delegate candidates to a convention. Appellants filed a motion for civil contempt with the Supreme Court, arguing that Na'i Aupuni's invitation was tantamount to certifying all of the candidates as winners. The Court summarily denied the motion. *Akina v. Hawaii*, 136 S. Ct. 922, 193 L. Ed. 2d 786 (2016) (mem.). Na'i Aupuni held the convention and the participants produced a document.

Na'i Aupuni then initiated efforts to hold a ratification election, again using the disputed voter roll. Appellants submitted briefing to our court citing the upcoming ratification election as evidence that the appeal was not moot. Before we issued any decision, Na'i Aupuni canceled the ratification

election, and thereafter dissolved as an entity. This court dismissed the appeal as moot. *Akina*, 835 F.3d at 1010-11.

Appellants voluntarily dismissed their complaint without prejudice and moved for attorney's fees as the "prevailing party" in a civil rights lawsuit. The district court denied the motion, concluding that the writ Appellants obtained was merely a status quo injunction driven by considerations regarding irreparable harm, and that it was not based on—as required for prevailing party status—the merits of Appellants' claims. This appeal followed.

I. On the Merits

In certain civil rights actions, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. To determine whether a preliminary injunction without a final judgment entitles a plaintiff to prevailing party status, we ask two questions: "First, is the court's preliminary injunction ruling sufficiently 'on the merits' to satisfy *Buckhannon*'s 'judicial imprimatur' requirement? And second, has the plaintiff obtained relief sufficiently enduring to satisfy the 'material alteration of the parties' legal relationship' requirement?" *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 716 (9th Cir. 2013) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)).

I begin with the first question. "Judicial imprimatur" can take the form of "an enforceable judgment on the merits," "a court-ordered consent decree," or "[o]ther court-approved actions . . ., provided they entail a judicial determination that the claims on which the plaintiff obtains relief are *potentially meritorious*." *Id.* at 715 (emphasis added); *see also Jensen v. City of San Jose*, 806 F.2d 899, 900 (9th Cir. 1986) ("[T]he benefit a party achieves must come from success on the merits of a civil rights claim, not from success on procedural or collateral issues.").

The judicial determinations on which Appellants stake their claim for attorney's fees are the injunctions entered by Justice Kennedy and subsequently by the full Supreme Court pursuant to the All Writs Act, 28 U.S.C. § 1651(a). Appellants' claim narrowly fails because there is a reasonable argument that those injunctions did not involve a judicial determination that Appellants' claims were "potentially meritorious." *Higher Taste*, 717 F.3d at 715. Fundamentally, it is unresolved whether such writs require an assessment of the merits.

A. Writs of Interlocutory Injunction

The All Writs Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).[2] Relevant

[2] This authorization survives nearly unchanged from the Judiciary Act of 1789. *See* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82. For greater historical detail pertaining to the discussion that follows, through note 4, see Samuel I. Ferenc,

to this case is the § 1651(a) writ for an interlocutory injunction.

The first Supreme Court precedent recognizing the power of the federal courts to issue § 1651(a) writs "in the form of compulsory injunctions aimed at private parties" seems to have been *FTC v. Dean Foods Co.*, 384 U.S. 597, 605, 86 S. Ct. 1738, 16 L. Ed. 2d 802 & n.3 (1966) (upholding writ enjoining consummation of merger pending final review by FTC). The Court justified an appellate court's writ in that case based on a threat to the court's jurisdiction, and notably did not discuss the underlying merits or any other factor typically relevant to preliminary injunctions. *See id.* at 605.[3]

By contrast, in *Sampson v. Murray*, 415 U.S. 61, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974), the Court readily assumed that the four preliminary injunction factors apply to status quo injunctions granted under the All Writs Act, and held that a *heightened* version of those factors should have applied in the context at

---

Note, *Clear Rights and Worthy Claimants: Judicial Intervention in Administrative Action Under the All Writs Act*, 118 Colum. L. Rev. 127, 136-62 (2018).

[3] This omission cannot be explained away as simply predating the Court's 2008 articulation of the four factors in *Winter*. As early as *Ex Parte Young*, the Court recognized that "no [preliminary] injunction ought to be granted unless in a case reasonably free from doubt," and acknowledged that the injunction at hand was justified by "great and irreparable injury" to the complainants. 209 U.S. 123, 166-67, 28 S. Ct. 441, 52 L. Ed. 714 (1908). *See generally* Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 Wash. & Lee L. Rev. 109 (2001).

hand. *See id.* at 83-84 & n.53 (recognizing the law governing available relief in the federal employment dispute context). However, the Court specifically held that frustration of the court's jurisdiction was not at stake as it was in *Dean Foods*. *Id.* at 78-80. *Murray* did not clarify whether an injunction that *is* justified by jurisdictional threats might *also* need to satisfy the traditional injunction factors, if not the heightened version the Court ultimately applied in that case.[4]

Around the same time as *Murray*, the Justices of the Supreme Court began developing a terse body of case law applying a unique "indisputably clear" standard to § 1651(a) interlocutory injunction applications addressed to individual Justices. *See Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235, 1235, 93 S. Ct. 16, 34 L. Ed. 2d 40 (1972) (Rehnquist, J., in chambers) ("the applicants' right to relief must be indisputably clear") (citing no authority). Justice

---

[4] Different circuits have supplied different answers to this question at different times. *See, e.g.*, *United States v. BNS Inc.*, 848 F.2d 945, 947 (9th Cir. 1988) (requiring both jurisdictional threat and irreparable harm); *Wagner v. Taylor*, 836 F.2d 566, 571, 575-76, 266 U.S. App. D.C. 402 (D.C. Cir. 1987) (requiring both jurisdictional threat and all four preliminary injunction factors); *V.N.A. of Greater Tift County Inc. v. Heckler*, 711 F.2d 1020, 1030 (11th Cir. 1983) (requiring both jurisdictional threat and a *heightened* showing on all four preliminary injunction factors); *Klay v. United Healthgroup*, 376 F.3d 1092, 1100, 1101-02 n.13 (11th Cir. 2004) (asserting that jurisdictionally justified writs require no analysis of the preliminary injunction factors, unless the writ is "in reality" a preliminary injunction), *called into doubt by Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1131 n.20 (11th Cir. 2005).

Scalia placed this standard in the context of other authority in *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Commission*, 479 U.S. 1312, 107 S. Ct. 682, 93 L. Ed. 2d 692 (1986) (Scalia, J., in chambers):

> A Circuit Justice's issuance of [a § 1651(a) writ of injunction]—*which, unlike a . . . stay, does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts*—demands a significantly higher justification than that described in the . . . stay cases cited by the applicant. The Circuit Justice's injunctive power 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." Moreover, the applicant must demonstrate that the injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]."

Id. at 1313 (emphasis added) (citations omitted) (first quoting *Fishman v. Schaffer*, 429 U.S. 1325, 1326, 97 S. Ct. 14, 50 L. Ed. 2d 56 (1976) (Marshall, J., in chambers), second quoting *Communist Party*, 409 U.S. at 1235, third quoting 28 U.S.C. § 1651(a)).

Though many individual Justice opinions have denied § 1651(a) interlocutory injunctions based on the "indisputably clear" standard,[5] most relevant to

---

[5] *See, e.g., Brown v. Gilmore*, 533 U.S. 1301, 1303-04, 122

the case at hand are the few and far between cases in which a Justice or the Court has actually granted the writ. No such case, as far as I could find, has ever applied the "indisputably clear" standard.

The most recent § 1651(a) interlocutory injunction of which I am aware is the 2015 writ granted to Appellants. *Akina*, 136 S. Ct. at 581. As is precisely at issue here, that order did not articulate the standard under which it was granted, nor did the immediately preceding writ issued by Justice Kennedy.

The same can be said of the two similar writs

S. Ct. 1, 150 L. Ed. 2d 782 (2001) (Rehnquist, C.J., in chambers) (denying the writ because it was unclear whether Virginia's "minute of silence" statute had enough of a secular purpose to distinguish it from an Alabama statute previously invalidated as mandating school prayer) (citing *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985)); *Lux v. Rodrigues*, 561 U.S. 1306, 1307, 131 S. Ct. 5, 177 L. Ed. 2d 1045 (2010) (Roberts, C.J., in chambers) (denying the writ because it was unclear whether Virginia's residency requirement for a petition signature's witness was distinguishable from Colorado petition circulation restrictions previously invalidated as violating free speech rights) (citing *Meyer v. Grant*, 486 U.S. 414, 422, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988); *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 186-87, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999)); *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403, 133 S. Ct. 641, 184 L. Ed. 2d 448 (2012) (Sotomayor, J., in chambers) (denying writ because the Court had not yet decided whether "closely held for-profit corporations and their controlling shareholders" have religious free exercise rights). I disagree with the majority that any of these cases can be interpreted as not considering the merits. *See id.* (disclaiming any determination of the "ultimate merits" while nevertheless considering the merits in order to recognize that the merits were not "indisputably clear").

granted in 2014. In both *Wheaton College v. Burwell*, 573 U.S. 958, 134 S. Ct. 2806, 189 L. Ed. 2d 856 (2014) (mem.), and *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171, 134 S. Ct. 1022, 187 L. Ed. 2d 867 (2014) (mem.), the Court granted a § 1651(a) writ enjoining the federal government from requiring the plaintiff religious nonprofit entities to fill out and send a form to their third party insurers regarding their objections to the Affordable Care Act's contraceptive coverage mandate. 134 S. Ct. at 2807; 571 U.S. at 1171. Neither memorandum order hinted as to the standard the Court had applied in granting the writ. In both cases, the Court expressly directed that the order "not be construed as an expression of the Court's views on the merits." 134 S. Ct. at 2807; 571 U.S. at 1171.

Although *Little Sisters* was decided unanimously, a three-Justice dissent criticized the *Wheaton College* majority for failing to apply the "indisputably clear" standard. 134 S. Ct. at 2808 (Sotomayor, J., dissenting) (quoting *Turner Broadcasting*, 507 U.S. at 1303).[6] Notably, the dissent cited no precedent in which a single Justice or the full Court had *granted* a writ after applying the "indisputably clear" standard. *See id.* at 2808, 2810-

[6] The dissent distinguished *Little Sisters* because, "whatever the merits of that unusual order, it did not affect any individual's access to contraceptive coverage." *Id.* at 2814 n.6 (noting that Little Sisters' third party insurer was a "church plan" that also had no obligation to provide contraceptive coverage).

11 & n.3.[7]

Taking the Court at its word, *Wheaton College* and *Little Sisters* demonstrate that the Court has authority to issue § 1651(a) interlocutory injunctions without applying the "indisputably clear" standard (whatever that standard may entail), and indeed without reaching the merits of the underlying legal challenge.[8]

B. Application

The delegate election and related self-governance processes challenged in the *Akina* lawsuit began to unravel only after Justice Kennedy and then the full Court issued writs of injunction. I have no

---

[7] Prior to *Little Sisters*, the most recent case I am aware of in which a single Justice or the Court granted a § 1651(a) interlocutory injunction was *Lucas v. Townsend*, 486 U.S. 1301, 1304, 108 S. Ct. 1763, 100 L. Ed. 2d 589 (1988) (Kennedy, J., in chambers). Despite ruling two years after *Ohio Citizens*, Justice Kennedy in *Lucas* applied the test typically applied to a § 1651(a) application for a *stay* pending certiorari, including "a fair prospect that five Justices will conclude that the case was erroneously decided below." *Id.* Given the intervening three decades, it is unlikely that the Court was tacitly applying this stay standard in *Little Sisters*, *Wheaton College*, or *Akina*.

[8] I agree with the majority that *Dunn v. McNabb*, 138 S. Ct. 369, 199 L. Ed. 2d 274 (2017) (mem.) does not prove that the Court or any individual Justice is required to find "a significant possibility of success on the merits" before granting a § 1651(a) interlocutory injunction outside the context of capital punishment stays. *Id.* at 369 (quoting *Hill v. McDonough*, 547 U.S. 573, 584, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2016)).

trouble thus concluding that "judicial imprimatur" was present. *Higher Taste*, 717 F.3d at 716. The difficulty in this case comes from the uncertainty regarding whether that "judicial imprimatur" represented a finding that Appellants' civil rights claims were "potentially meritorious." *Id.* at 715 (quoting *Buckhannon*, 532 U.S. at 606).

Because I find little indication that the Supreme Court was applying the *Winter* framework, I do not attempt to reverse engineer the Court's likely assessment of the *Winter* factors (which would have to have been contrary to this court's assessment when we *denied* an interlocutory injunction). Nor will I attempt to evaluate whether the Court's jurisdiction was genuinely at stake, as I am aware of no Supreme Court precedent clearly endorsing a distinction between jurisdictional and merits-based § 1651(a) injunctions.

If Justice Kennedy or the Court had said anything at all about the merits of Appellants' claims, even without making an express finding of "probable success on the merits," I might have some basis on which to state confidently that Justice Kennedy or the Court considered the claims at least "potentially meritorious." *Id.* But, given the Court's clearly expressed authority to avoid the merits entirely in *Wheaton College* and *Little Sisters*, there is too much uncertainty in the *Akina* writs' silence to reach this conclusion.[9] The "indisputably clear" standard does

---

[9] I note, however, that Appellees argued to the Supreme Court in briefing on the writ that the relevant standard was whether it was "indisputably clear" that Appellants would

not appear to be a universal requirement, nor do we have any example of the Court granting a writ under the "indisputably clear" standard that would illustrate its meaning.

Accordingly, I concur in the denial of attorney's fees on the grounds that the judicial relief obtained provided no indication that Appellants' claims were potentially meritorious.

II. Sufficiently Enduring Relief

I turn now to the second question we ask of a would-be prevailing party who has won a preliminary injunction but not litigated the case to final judgment: "[H]as the plaintiff obtained relief sufficiently enduring to satisfy the 'material alteration of the parties' legal relationship' requirement?" *Higher Taste*, 717 F.3d at 716 (quoting *Buckhannon*, 532 U.S. at 605). I would hold that Appellants have obtained relief "sufficiently enduring." *Id.*

"A material alteration of the parties' legal relationship occurs when 'the plaintiff can force the defendant to do something he otherwise would not have to do.' *Id.* (quoting *Fischer v. SJB—P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000)).[10] If a preliminary

---

prevail under the *Winter* test, including consideration of the merits. Appellees' convenient reversal on this position is troubling.

[10] Other circuits have held that a preliminary injunction granting temporary relief that merely maintains the status quo pending final resolution of the merits does not confer prevailing party status. *See N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006) (collecting cases). We have left the question

injunction creating such material alteration is rendered moot by the defendant's own actions, prevailing party status is not disturbed. *See id.* at 717-18. "The defendant's action in rendering the case moot ensures that the injunction's alteration of the parties' legal relationship will not be undone by subsequent rulings in the litigation." *Id.* A plaintiff's "relief sufficiently enduring" need not encompass all of the demands made in their complaint. "[P]laintiffs may be considered 'prevailing parties' . . . if they succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought in bringing the suit." *Jensen*, 806 F.2d at 900 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)).

Plaintiffs ultimately did get much of what they sought in the *Akina* lawsuit: the delegate election and the ratification election were both cancelled; no election based on the disputed voter roll was ever counted or certified; and no DOI-qualifying self-governance document was produced through processes dependent on the disputed voter roll. However, most of these victories went beyond any judicial ruling, and therefore must be excluded from consideration as an impermissible application of the "catalyst theory." *Buckhannon*, 532 U.S. at 609.

Appellants' one victory directly tied to a judicial ruling was the enjoining of vote counting and

---

open. *Higher Taste*, 717 F.3d at 716 n.1. I see no need to disturb that silence here, where the Supreme Court had to foresee that its writ would affect the behavior of voters in the ongoing election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006).

certification of winners in the 2015 delegate election. This was a "significant issue" because a publicized vote count and certification of winners would have effectuated the results of a race-and viewpoint-restricted voting process. *Jensen*, 806 F.2d at 900. By voluntarily then cancelling the delegate election before the end of the voting period, Na'i Aupuni permanently voided it. This action ensured that the Court's writ would "not be undone by subsequent rulings in the litigation." *Higher Taste*, 717 F.3d at 717-18. It does not matter that Appellees remain able to pursue various other actions Appellants sought to enjoin through their lawsuit (e.g. hold a new election via a new nonprofit using the same disputed voter roll), because "some of the benefit" Plaintiffs sought became permanent. *Jensen*, 806 F.2d at 900.

I disagree with the district court's conclusion that Appellants obtained only "ephemeral" relief. Appellants' lawsuit sought to enjoin the "calling, holding, or certifying of any election" using the disputed voter roll. Appellants successfully enjoined the certifying of one such election.[11] Moreover, our subsequent dismissal of Appellants' appeal as moot depended on the conclusion that "the allegedly wrongful behavior could not reasonably be expected

---

[11] The Supreme Court's denial of Appellants' civil contempt motion should be read to preclude the theory that Appellants failed to prevent certification of the winners of the election. *See Akina*, 136 S. Ct. at 922. If Na'i Aupuni's invitation of all the delegate candidates to the convention had counted as certifying them as winners, the Court would have granted the contempt motion.

to recur." *Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016).

Thus, were it not for the uncertainty surrounding the standard of review applied in the *Akina* writs, I would hold that Appellants are prevailing parties and entitled to attorney's fees.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

No. 15-00322 JMS-RLP

Kealii Makekau, *et al.*,
Plaintiffs,
v.

The State of Hawaii, *et al.*,
Defendants.

ORDER OVERRULING OBJECTIONS AND ADOPTING FINDINGS AND RECOMMENDATION TO DENY PLAINTIFFS' AMENDED MOTION FOR ATTORNEYS' FEES AND RELATED NON-TAXABLE EXPENSES

I. INTRODUCTION

Plaintiffs[1] Kealii Makekau, Joseph Kent, Yoshimasa Sean Mitsui, Pedra Kanae Gapero, and Melissa Leinaala Moniz ("Plaintiffs") object under 28 U.S.C. § 636(b)(1) to Magistrate Judge Richard Puglisi's February 24, 2017 Findings and Recommendation to Deny Plaintiffs' Amended Motion

[1] On March 15, 2017, Magistrate Judge Puglisi granted Plaintiffs' "Motion to Drop Plaintiff Kelii Akina Pursuant to Fed. R. Civ. P. 21," given Akina's intervening election as a Trustee of the Office of Hawaiian Affairs, where such Trustees are Defendants in their official capacities in this action. ECF No. 169. Accordingly, the caption no longer reflects Akina as the lead Plaintiff.

for Attorneys' Fees and Related Non-Taxable Expenses Under L.R. Civ. 54.3" (the "February 24, 2017 Findings and Recommendation"). ECF No. 170.

After due consideration, and being intimately familiar with the extensive proceedings in this case, the court OVERRULES Plaintiffs' Objections and ADOPTS the February 24, 2017 Findings and Recommendation. The Amended Motion for Attorneys' Fees and Non-Taxable Expenses, ECF No. 152, is DENIED.

II. BACKGROUND

The court need not reiterate this case's full history and background, which is detailed in several published decisions. *See Akina v. Hawaii*, 141 F. Supp. 3d 1106 (D. Haw. 2015) (denying motion for preliminary injunction); *Akina v. Hawaii*, 136 S. Ct. 581, 193 L. Ed. 2d 464 (2015) (granting stay pending final disposition of the appeal then-pending before the Ninth Circuit) (mem.); *Akina v. Hawaii*, 835 F.3d 1003 (9th Cir. 2016) (affirming in part and dismissing appeal as moot in part). And the February 24, 2017 Findings and Recommendation further describes the procedural history, which this court adopts as modified as follows.

This action arises from Native Hawaiian self-governance efforts. As part of those efforts, Defendant Na'i Aupuni was planning an election of delegates to a proposed constitutional convention to discuss, and possibly organize, a Native Hawaiian governing entity. The voters in this election were based on a "Roll" of "qualified Native Hawaiians" as set forth in

Act 195, 2011 Haw. Sess. Law, as amended. Prospective registrants to the Roll were asked to make three declarations related to Native Hawaiian sovereignty, their connection to the Native Hawaiian community, and their Native Hawaiian ancestry. The delegate election was scheduled for November 1 through November 30, 2015. The elected delegates would then attend a constitutional convention to discuss forming a government and possibly to draft a constitution. Any proposed constitution would then be subject to a ratification vote by qualified Native Hawaiians listed on the Roll.

Plaintiffs filed this suit on August 13, 2015, alleging that the restrictions on registering for the Roll, and the election process, violated the United States Constitution and the Voting Rights Act of 1965. *See* ECF No. 1. Plaintiffs named as Defendants the State of Hawaii; the Governor in his official capacity; the Trustees and Chair of the Office of Hawaiian Affairs, in their official capacities; the Commissioners, Chair, and Executive Director of the Native Hawaiian Roll Commission, in their official capacities; Na'i Aupuni; and the Akamai Foundation, a non-profit organization that was a party to an agreement that provided funds for Na'i Aupuni's efforts. Plaintiffs sought to enjoin Defendants "from requiring prospective applicants for any voter roll to confirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry" and to enjoin "the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll." *Id.* at 32.

Approximately two weeks after filing the

Complaint, Plaintiffs moved for a preliminary injunction preventing Defendants "from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians." *See* ECF No. 47, Mot. at 3. This court denied Plaintiff's motion for preliminary injunction on October 23, 2015 (followed by a written order on October 29, 2015), concluding that Plaintiffs had not met their burden of demonstrating that excluding them from the election was unconstitutional or would otherwise violate federal law. ECF Nos. 103, 114. The primary basis for denying relief was a lack of state action -- the subject election was not a public election. *Akina*, 141 F. Supp. 3d at 1126-29. Na'i Aupuni proceeded with the election of delegates by mailing ballots to certified Native Hawaiians on November 1, 2015. *See* ECF No. 157 at 11. The deadline to vote was November 30, 2015. *Id.*

Plaintiffs appealed the court's order denying a preliminary injunction to the Ninth Circuit, and filed an "Urgent Motion for an Injunction While Appeal is Pending." ECF Nos. 122, 173-2. The Ninth Circuit denied that motion on November 19, 2015. ECF No. 122. On November 23, 2015 -- three days before the Thanksgiving holiday -- Plaintiffs filed with the U.S. Supreme Court an Emergency Application for Injunction Pending Appellate Review. ECF No. 170-2. After Defendants filed an Opposition on November 25, 2015, Supreme Court Justice Anthony Kennedy issued an order on November 27, 2015 (the day after Thanksgiving) that enjoined the counting of ballots and certification of winners "pending further order" of the court. *See Akina v. Hawaii*, 193 L. Ed. 2d 420,

2015 WL 7691943 (2015). This was three days before voting in the delegate election was to end. On December 2, 2015, a five-Justice majority of the Supreme Court issued an order (the "December 2, 2015 order") which read in full:

> [The] [a]pplication for injunction pending appellate review presented to Justice Kennedy and by him referred to the Court [is] granted. Respondents are enjoined from counting ballots cast in, and certifying 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.
> Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

Akina, 136 S. Ct. at 581; *see also* ECF No. 171-6 (original order).

Two weeks after the Supreme Court's order, Na'i Aupuni cancelled the delegate election, which had been extended in the interim. *See Akina*, 835 F.3d at 1009. Instead of holding the delegate election, Na'i Aupuni offered all delegate candidates "a seat as a delegate" to the convention "to learn about, discuss and hopefully reach a consensus on a process to achieve self-governance." *Id.* Plaintiffs responded by filing a motion for civil contempt in the Supreme Court, arguing that Na'i Aupuni's actions essentially declared all the candidates winners and violated the Supreme Court's injunction pending appeal. *See* ECF

No. 157-5. In particular, Plaintiff asked the Supreme Court (1) to instruct Defendants "to withdraw the December 15, 2015 certification of the delegates and cease and desist in any effort to send delegates to the convention," ECF No. 173-6 at 21-22; (2) require Defendants "to judicially preclear any further steps they seek to take with regard to selection of delegates or holding of the convention while the Temporary Injunction remains in force," *id.* at 22; and (3) "award to [Plaintiffs] the attorney's fees and costs incurred in bringing this Motion." *Id.* at 23. The Supreme Court denied Plaintiff's contempt motion. ECF No. 173-7, *Akina v. Hawaii*, 136 S. Ct. 922, 193 L. Ed. 2d 786 (2015) (mem.).

The convention took place in February 2016, resulting in a proposed constitution for a Native Hawaiian government. *Akina*, 835 F.3d at 1009. Na'i Aupuni decided not to fund a ratification vote and returned the remaining grant funds allocated for the ratification. *Id.* In April 2016, Na'i Aupuni dissolved as an entity. *Id.*; ECF No. 173-8.

On August 29, 2016, the Ninth Circuit issued an Opinion dismissing as moot Plaintiffs' interlocutory appeal of this court's order denying Plaintiffs' motion for a preliminary injunction. *Akina*, 835 F.3d at 1011. In determining that Plaintiffs' appeal was moot, the Ninth Circuit focused on the fact that the delegate election had been cancelled, no ratification vote was scheduled, and Na'i Aupuni had dissolved as a non-profit corporation. *Id.* On November 30, 2016, this court granted Plaintiffs' motion to voluntarily dismiss this action without prejudice, and declined to award fees or costs as a

condition of dismissal. ECF No. 146.

Thereafter, on January 17, 2017, Plaintiffs filed the present Amended Motion for Attorney Fees and Related Non-Taxable Expenses. ECF No. 152. Magistrate Judge Puglisi issued the February 24, 2017 Findings and Recommendation, recommending that the Amended Motion be denied. ECF No. 165. On March 24, 2017 Plaintiffs filed objections to the February 24, 2017 Findings and Recommendation, ECF No. 170, and Defendants filed their Responses on April 7, 2017. ECF Nos. 171-73.

III. STANDARD OF REVIEW

When a party objects to a magistrate judge's findings or recommendations, the district court must review de novo those portions to which the objections are made and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also United States v. Raddatz*, 447 U.S. 667, 673, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) ("[T]he district judge must review the magistrate judge's findings and recommendations de novo *if objection is made*, but not otherwise.").

Under a de novo standard, this court reviews "the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered." *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006); *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988). The district court need not hold a de novo hearing; however, it is the court's

obligation to arrive at its own independent conclusion about those portions of the magistrate judge's findings or recommendation to which a party objects. *United States v. Remsing*, 874 F.2d 614, 618 (9th Cir. 1989).

IV. DISCUSSION

Plaintiffs lost at almost every juncture of this action. This court denied Plaintiffs' Motion for Preliminary Injunction on October 23, 2015, ECF No. 103 (oral ruling), and on October 29, 2015, ECF No. 114 (written Order). The Ninth Circuit denied Plaintiffs' emergency motion seeking an injunction pending appeal on November 19, 2015. ECF No. 122. The Supreme Court denied Plaintiffs' motion for civil contempt on January 19, 2016. ECF No. 173-7. The Ninth Circuit ultimately dismissed Plaintiffs' appeal on August 29, 2016. ECF No. 136. And this court granted Plaintiffs' Motion to Voluntarily Dismiss Complaint pursuant to Federal Rule of Civil Procedure 41(a)(2) on November 30, 2016. ECF No. 146.

Plaintiffs contend, however, that they are "prevailing parties" for purposes of entitlement to attorney's fees under 42 U.S.C. § 1988(b) because they obtained the December 2, 2015 order from the United States Supreme Court -- an order granting preliminary relief that preserved the status quo.[2]

---

[2] Section 1988(b) provides in pertinent part that "[i]n any action or proceeding to enforce a provision of [42 U.S.C. § 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part

ECF No. 123. As set forth above, the Supreme Court enjoined Defendants "from counting ballots cast in, and certifying 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." *Akina*, 136 S. Ct. at 581. Read in context, the order simply limited irreparable harm that might come from a private election that was alleged to be unconstitutional, until a final decision on the merits by the Ninth Circuit as to Plaintiffs' then-pending Ninth Circuit appeal.[3]

But "virtually every circuit court to consider the question has concluded that a preliminary injunction granting temporary relief that merely maintains the status quo does not confer prevailing party status." *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006) (citing *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 493, 356 U.S. App. D.C. 222 (D.C. Cir. 2003); *John T. Ex Rel. Paul T. v. Del. Cty.*, 318 F.3d 545, 558-59 (3rd Cir. 2003); *Dubuc v. Green Oak Twp.*, 312 F.3d 736, 753-54 (6th Cir. 2002); *Race v. Toledo-Davila*, 291 F.3d 857, 858 (1st Cir. 2002); and *Smyth v. Rivero*, 282 F.3d 268, 276-77 (4th Cir. 2002)). "Some initial injunctions, sometimes called

---

of the costs[.]"

[3] Indeed, Plaintiffs made this very argument to the Supreme Court. *See* ECF No. 173-3 at 11 (arguing that "Injunctive relief under the All Writs Act is necessary to prevent irreparable harm to Applicants during the appellate process, and to preserve this Court's jurisdiction regarding the issues raised in this case"); *id.* at 35 ("The Court may issue a writ to maintain the status quo and take action 'in aid of the appellate jurisdiction which might otherwise be defeated.'") (citation omitted).

stay-put or status quo injunctions, turn more on the grave risks of irreparable harm to one party or to the public interest than on the legal virtues of the parties' positions." *McQueary v. Conway*, 614 F.3d 591, 600 (6th Cir. 2010) (citation omitted).

For example, *LaRouche v. Kezer*, 20 F.3d 68 (2d Cir. 1994), concluded that a party obtaining an injunction pending appeal was not a prevailing party for purposes of § 1988(b) where there was no indication that such provisional relief was based on the merits of the underlying claims. *Id.* at 75. *LaRouche* reasoned in part that "a grant of provisional relief that merely preserves the status quo does not constitute final relief on the merits," *id.* at 74, and reiterated that "the procurement of a TRO in which the court does not address the merits of the case but simply preserves the status quo to avoid irreparable harm to the plaintiff is not by itself sufficient to give a plaintiff prevailing party status." *Id.* (quoting *Christopher P. v. Marcus*, 915 F.2d 794, 805 (2d Cir. 1990)). Ninth Circuit authority, although not directly on point, is consistent with this principle. *See, e.g., LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1161 (9th Cir. 2000) (finding that an organization that obtained a TRO was a prevailing party because "[i]t is clear that the TRO in this case did more than preserve the status quo"); *Friedman v. State of Ariz.*, 912 F.2d 328, 333 (9th Cir. 1990) ("Although [appellant] prevailed on the injunction pending appeal, he is not the prevailing party on the merits[.]"), *superseded by statue on other grounds, as recognized in Warsoldier v. Woodford*, 418 F.3d 989, 997 (9th Cir. 2005).

Here, nothing on the face of the Supreme

Court's December 2, 2015 one-paragraph order indicates it was based, even in part, on the merits of the underlying claims. *See LaRouche*, 20 F.3d at 75 ("Although the stay panel could have granted the injunction pending appeal based on a determination as to the merits, there is no indication that it did so."). As *Larouche* reasoned, "[a]n injunction pending appeal that is not clearly based on the merits merely heightens the confusion. As a general matter, a court should not resolve the uncertainty in favor of a finding that plaintiff prevailed." *Id.* (citations omitted). *See also Dearmore v. City of Garland*, 519 F.3d 517, 524 (5th Cir. 2008) (requiring "an unambiguous indication of probable success on the merits" to qualify as a prevailing party).

Further, the timing -- where the emergency motion was being considered over the Thanksgiving holiday only three days before voting was to end -- is also a factor indicating that the stay was not sufficiently "on the merits." The circumstances suggest, instead, that the Supreme Court was acting to prevent irreparable harm based on an allegedly unconstitutional election. Although this court certainly believes that the Supreme Court thoroughly reviewed the filings submitted on the emergency motion, the December 2, 2015 order simply does not indicate it was based on any assessment of the merits. Indeed, the order left the merits to the Ninth Circuit in its then-pending appeal. *See Dupuy v. Samuels*, 423 F.3d 714, 722 (7th Cir. 2005) (concluding that a fee award was premature where further proceedings on the merits were clearly contemplated).

In contrast, Plaintiffs' contempt motion *did*

seek relief on the merits -- (1) a "withdrawal" of Na'i Aupuni's December 15, 2015 certification of delegates and a halt to "any effort to send delegates to the convention," (2) "preclearance" of "any further steps . . . with regard to selection of delegates or holding of the convention," and (3) an award of attorney's fees and costs incurred in bringing its contempt motion. ECF No. 173-6 at 21-23. And when squarely presented with the merits of Defendants' ongoing activities, the Supreme Court summarily denied that request.

In any event, even assuming that the Supreme Court's December 2, 2015 order did more than merely maintain the status quo, Plaintiffs otherwise fail to prove they are entitled to fees and costs under § 1988(b). As the February 24, 2017 Findings and Recommendation correctly analyzed, Plaintiffs fail to meet the test set forth in *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712 (9th Cir. 2013), which analyzed a situation where a plaintiff "wins a preliminary injunction but does not litigate the case to final judgment," *id.* at 716, such as where a case is rendered moot before final judgment. *Id.* at 717. *Higher Taste* describes the test as follows:

> [T]wo recurrent questions arise when making prevailing-party determinations in this context: First, is the court's preliminary injunction ruling sufficiently "on the merits" to satisfy [*Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)'s] "judicial

> imprimatur" requirement? And second, has the plaintiff obtained relief sufficiently enduring to satisfy the "material alteration of the parties' legal relationship" requirement?

Id. at 716.[4]

Applying *Higher Taste*, the court agrees with the February 24, 2017 Findings and Recommendation that the December 2, 2015 order was not sufficiently on the merits to satisfy the "judicial imprimatur" requirement, and that even if it was, Plaintiffs did not obtain "relief sufficiently enduring" to satisfy the "material alteration of the parties' legal relationship" requirement.

Again, the December 2, 2015 order did not mention the merits, and the timing of the order strongly suggests its purpose was to prevent irreparable harm, should a court subsequently find Defendants' actions to be unconstitutional. Although the December 2, 2015 order appears to have been based on the All Writs Act -- leading to Plaintiffs' argument that the Supreme Court rarely issues such

---

[4] *Higher Taste* reiterated that "[a] plaintiff 'prevails' for purposes of § 1988 'when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" 717 F.3d at 715 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)). In turn "[r]elief 'on the merits' occurs when the material alteration of the parties' legal relationship is accompanied by 'judicial *imprimatur* on the change.'" *Id.* (quoting *Buckhannon*, 532 U.S. at 605).

orders in this context and must have found the legal rights at issue to have been "indisputably clear" -- the order does not recite this standard, nor make mention of any legal rights. And the Court can issue injunctions pending appeal under the All Writs Act that are not "on the merits." *See Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807, 189 L. Ed. 2d 856 (2014) (granting stay while expressly withholding views on the merits); *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022, 187 L. Ed. 2d 867 (2014) (same); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100-01 (11th Cir. 2004).

Further, the relief obtained -- preventing the counting of the ballots cast, and the certification of the winners -- was "ephemeral" and not an "enduring" change in the parties' relationship. *See Higher Taste*, 717 F.3d at 717. Nothing with the December 2, 2015 order compels the remaining Defendants (i.e., besides the now-dissolved Na'i Aupuni, and Akamai Foundation) from using the Roll for self-determination efforts, or from conducting a different private election. And nothing requires Defendants to make any modifications to the Roll, or to include all Hawaii citizens in the process. Rather, the action has been dismissed without prejudice, and presumably such actions of Defendant could be challenged in the future. *See Cadkin v. Loose*, 569 F.3d 1142, 1148 (9th Cir. 2009) ("Because 'a dismissal without prejudice is not a decision on the merits' and plaintiff was free to re-file his complaint in federal court, 'dismissal without prejudice does not alter the legal relationship of the parties [for purposes of the prevailing-party inquiry] because the defendant remains subject to the risk of re-filing.'") (quoting *Oscar v. Alaska Dep't of*

Educ. & Early Dev., 541 F.3d 978, 981 (9th Cir. 2008)). In short, there has been no enduring material alteration of the legal relationship between the parties.

Finally, although Na'i Aupuni voluntarily cancelled the delegate election, nothing obtained by Plaintiffs specifically prevented the subsequent convention. At best, Plaintiffs' suit and the December 2, 2015 order was a "catalyst" for change by Defendants, but such a "catalyst" theory of prevailing-party status was abrogated in *Buckhannon* for federal fee-shifting statutes. *See* 532 U.S. at 610.

V. CONCLUSION

Plaintiffs' objections are OVERRULED. The court ADOPTS the February 24, 2017 Findings and Recommendation to Deny Plaintiffs' Amended Motion for Attorneys' Fees and Related Non-taxable Expenses Under L.R. Civ. 54.3. ECF No. 165. The Amended Motion, ECF No. 152, is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 6, 2017.

/s/ J. Michael Seabright

J. Michael Seabright

Chief United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

No. 15-00322 JMS-RLP

Kelii Akina, *et al.*,
Plaintiffs,
v.

The State of Hawaii, *et al.*,
Defendants.

FINDINGS AND RECOMMENDATION TO DENY PLAINTIFFS' AMENDED MOTION FOR ATTORNEYS' FEES AND RELATED NON-TAXABLE EXPENSES UNDER L.R. CIV. 54.31

Before the Court is Plaintiffs' Amended Motion for Attorneys' Fees and Related Non-Taxable Expenses, filed on January 17, 2017 ("Motion"). *See* ECF No. 152. Plaintiffs request an award of $318,679.63 for attorneys' fees and non-taxable expenses as the "prevailing party" pursuant to 42 U.S.C. § 1988(b). Defendants filed Oppositions to the Motion on February 7, 2017. *See* ECF Nos. 157, 158, 159. Plaintiffs filed their Reply on February 21, 2017. ECF No. 164. After careful consideration of the submissions of the parties and the relevant legal authority, the Court FINDS AND RECOMMENDS that Plaintiff's Motion be DENIED.

BACKGROUND[1]

[1] The full background of this case is set forth in *Akina v.*

This action arises from Defendants' actions in connection with Native Hawaiian self-governance efforts. As part of those efforts, Defendant Na'i Aupuni was going to conduct an election of delegates to a proposed constitutional convention to discuss, and possibly organize, a Native Hawaiian governing entity. The voters in this election were based on a "Roll" of "qualified Native Hawaiians." Prospective registrants to the Roll were asked to make three declarations related to Native Hawaiian sovereignty, their connection to the Native Hawaiian community, and their Native Hawaiian ancestry. The delegate election was scheduled for November 1 through November 30, 2015. The elected delegates would then attend a constitutional convention to discuss forming a government and to possibly draft a constitution. Any proposed constitution would then be subject to a ratification vote by qualified Native Hawaiians listed on the Roll.

Plaintiffs filed this suit on August 13, 2015, alleging that the restrictions on registering for the Roll violated the United States Constitution and the Voting Rights Act of 1965. *See* ECF No. 1. Plaintiffs sued the State of Hawaii, various state government officers and agencies, Na'i Aupuni, and another non-profit organization that was a party to the agreement that provided state funds for Na'i Aupuni's election efforts. Plaintiffs sought to enjoin Defendants "from requiring prospective applicants for any voter roll to

---

Hawaii, 141 F. Supp. 3d 1106 (D. Haw. 2015) (denying motion for preliminary injunction); *Akina v. Hawaii*, 136 S. Ct. 581, 193 L. Ed. 2d 464 (2015) (granting injunction pending appeal); and *Akina v. Hawaii*, 835 F.3d 1003 (9th Cir. 2016) (affirming in part and dismissing appeal as moot in part).

confirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry" and to enjoin "the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll." *Id.* at 32.

Approximately two weeks after filing the Complaint, Plaintiffs moved for a preliminary injunction preventing Defendants "from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians." *See* ECF No. 47. The district court denied Plaintiff's motion for preliminary injunction on October 23, 2015, after concluding that Plaintiffs had not met their burden of demonstrating that excluding them from the election was unconstitutional or would otherwise violate federal law. ECF No. 114. Defendant Na'i Aupuni proceeded with the election of delegates by mailing ballots to certified Native Hawaiians on November 1, 2015. *See* ECF No. 157 at 11. The deadline to vote was November 30, 2015. *Id.*

Plaintiffs appealed the district court's order denying a preliminary injunction and sought an injunction pending appeal from the Ninth Circuit. ECF No. 122. The Ninth Circuit denied the request for an injunction pending appeal on November 19, 2015. *Id.* On November 27, 2015, three days before voting in the delegate election was to end, Supreme Court Justice Kennedy enjoined the counting of ballots and certification of winners "pending further order" of the court. *See Akina v. Hawaii*, 193 L. Ed. 2d 420 (2015). On December 2, 2015, a five-Justice majority of the Supreme Court enjoined the defendants "from counting ballots cast in, and

certifying winners of, the election described in the application, pending final disposition of the appeal by" the Ninth Circuit. *Akina v. Hawaii*, 136 S. Ct. 581, 193 L. Ed. 2d 464 (2015).

Two weeks after the Supreme Court's order, Defendant Na'i Aupuni cancelled the delegate election. *See Akina v. Hawaii*, 835 F.3d 1003, 1009 (9th Cir. 2016). Instead of holding the delegate election, Defendant Na'i Aupuni offered all delegate candidates "a seat as a delegate" to the convention "to learn about, discuss and hopefully reach a consensus on a process to achieve self-governance." *Id.* Plaintiffs filed a motion for civil contempt in the Supreme Court arguing that Defendant Na'i Aupuni's actions essentially declared all the candidates winners and violated the Supreme Court's injunction pending appeal. *See* ECF No. 157-5. The Supreme Court summarily denied Plaintiff's motion. *See Akina v. Hawaii*, 136 S.Ct. 922, 193 L. Ed. 2d 786 (2016). The convention took place in February 2016, resulting in a proposed constitution for a Native Hawaiian government. *Akina*, 835 F.3d at 1009. Defendant Na'i Aupuni decided not to fund a ratification vote and returned the remaining grant funds allocated for the ratification. *Id.* In April 2016, Na'i Aupuni dissolved as an entity. *Id.*

On August 29, 2016, the Ninth Circuit issued its decision dismissing as moot Plaintiffs' interlocutory appeal of the district court's decision to deny Plaintiffs' motion for a preliminary injunction. *Akina*, 835 F.3d at 1011. In determining that Plaintiffs' appeal was moot, the Ninth Circuit focused on the fact that the delegate election had been

cancelled, no ratification vote was scheduled, and Defendant Na'i Aupuni had dissolved as a non-profit corporation. *Id.* On November 30, 2016, the district court granted Plaintiffs' motion to voluntarily dismiss this action without prejudice. ECF No. 146. The district court declined to award fees or costs to Defendants as a condition of dismissal. *Id.* at 6. The present Motion followed.

ANALYSIS

Courts may award reasonable attorneys' fees to the "prevailing party" in certain civil rights actions, including those brought under 42 U.S.C. § 1983. *See* 42 U.S.C. § 1988(b). "Before deciding whether an award of attorney's fees is appropriate . . . a court must determine whether the party seeking fees has prevailed in the litigation." *CRST Van Expedited, Inc. v. EEOC*, 136 S.Ct. 1642, 1646, 194 L. Ed. 2d 707 (2016). "Congress has included the term 'prevailing party' in various fee-shifting statutes, and it has been the Court's approach to interpret the term in a consistent manner." *Id.* A party "prevails" when there has been a judicially sanctioned material alteration in the legal relationship of the parties. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604-05, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)**;** *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). Here, Plaintiffs assert that the Supreme Court's injunction pending appeal conferred prevailing party status on Plaintiffs. *See* ECF No. 152-1 at 12-13.

The Ninth Circuit has held that when making a prevailing party determination in the context of "a

plaintiff who wins a preliminary injunction but does not litigate the case to final judgment," the court must address two questions: (1) "is the court's preliminary injunction ruling sufficiently 'on the merits' to satisfy *Buckhannon*'s 'judicial imprimatur' requirement?"; and (2) "has the plaintiff obtained relief sufficiently enduring to satisfy the 'material alteration of the parties' legal relationship' requirement?" *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715-16 (9th Cir. 2013) (quoting *Buckhannon*, 532 U.S. at 605). As discussed in detail below, the Court finds that Plaintiffs are not the prevailing parties in this action because the Supreme Court's decision was not sufficiently on the merits to satisfy the judicial imprimatur requirement and, even assuming that it was, Plaintiffs did not obtain relief sufficiently enduring to satisfy the material alteration of the parties' legal relationship requirement.

1. Is the Supreme Court's Injunction Ruling Sufficiently On the Merits to Satisfy the Judicial Imprimatur Requirement?

In resolving this question, the Ninth Circuit has held that a preliminary injunction satisfies the judicial imprimatur requirement if the preliminary injunction "is based on a finding that the plaintiff has shown a likelihood of success on the merits." *Higher Taste*, 717 F.3d at 716. In making this determination the Ninth Circuit examined the express findings of the court in granting the injunction and also examined whether the preliminary injunction hearing was "hasty and abbreviated." *Id.* (citing *Sole v. Wyner*, 551 U.S. 74, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007)). In *Sole v. Wyner*, the Supreme Court

similarly examined whether a preliminary injunction was a decision on the merits for purposes of awarding attorneys fees. 551 U.S. 74, 127 S. Ct. 2188, 167 L. Ed. 2d 1069. The Supreme Court held that "[t]he foundation for [the] assessment" of whether the court considered the parties' likelihood of success on the merits depends "on the thoroughness of the exploration undertaken by the parties and the court." *Id.* at 75. In that case, the Supreme Court noted that "the preliminary injunction hearing was necessarily hasty and abbreviated" and that there "was no time for discovery, nor for adequate review of documents or preparation and presentation of witnesses." *Id.*

Here, the preliminary injunction at issue is the injunction pending appellate review granted by the Supreme Court on December 2, 2015. The Supreme Court's December 2, 2015 Order states in full:

> The application for injunction pending appellate review presented to Justice Kennedy and by him referred to the Court is granted. 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.
> Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

ECF No. 123, *Akina v. Hawaii*, 136 S. Ct. 581, 193 L. Ed. 2d 464 (2015). Based on the record in this action,

the Court finds that the Supreme Court's ruling was not sufficiently on the merits to satisfy the judicial imprimatur requirement.

First, the Court finds that given the timeline at issue, the Supreme Court's decision on Plaintiff's application was necessarily not based on a thorough exploration of the merits. Plaintiffs filed their emergency application to the Supreme Court on November 23, 2015. *See* ECF No. 157-3. Justice Kennedy directed that responses to the application were due on November 25, 2015, and issued an order on November 27, 2015, granting the application pending further order of the court. ECF No. 157-4. On December 2, 2015, the Supreme Court granted the emergency application and enjoined Defendants "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." ECF No. 123. This abbreviated timeline, nine days from initial submission to final decision, indicates that the Supreme Court's decision was not based on a thorough consideration of Plaintiffs' likelihood of success on the merits. Although the circumstances are different in this case than in the Supreme Court's decision in *Sole v. Wyner*, the Supreme Court's directive to consider the "the thoroughness of the exploration undertaken by the parties and the court" in determining whether the injunction was based on a likelihood of success on the merits is equally applicable here. *See Sole*, 551 U.S. at 75. The Supreme Court considered Plaintiff's emergency application, the responses and reply thereto, but did not conduct an evidentiary hearing or consider oral

arguments. In contrast, this court held a three-and-a-half-hour evidentiary hearing on Plaintiff's motion for preliminary injunction and heard testimony from three witnesses and oral arguments from counsel. *See* ECF No. 100. These circumstances indicate that the Supreme Court's decision was not based on a thorough consideration of Plaintiff's likelihood of success on the merits.

Second, the Court is persuaded by the fact that there is no express finding by the Supreme Court in its decision that Plaintiffs showed a likelihood of success on the merits. Plaintiffs argue that such a finding can be implied based on the standard for granting injunctions pending appellate review. *See* ECF No. 152-1 at 13-16. Specifically, Plaintiffs argue that injunctions issued pursuant to the All Writs Act, as is the case here, are appropriate only if the legal rights at issue are "indisputably clear." *Id.* at 13 (citing *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 107 S. Ct. 682, 93 L. Ed. 2d 692 (1986) (Scalia, J., in chambers) (citations omitted)). Plaintiffs argue that the Supreme Court necessarily found that Plaintiffs' legal rights were "indisputably clear" when it granted the injunction pending appeal. *Id.* at 13-16. However, the Supreme Court's decision does not recite this standard and makes no mention of Plaintiff's legal rights. *See* ECF No. 123. Under the All Writs Act, "[t]he 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." 28 U.S.C. § 1651. Although the Supreme Court has often referred to the "indisputably clear" standard in its

orders regarding injunctions under the All Writs Act, the Supreme Court has also granted injunctions pending appeal and expressly stated that the decision to grant the injunction was not "an expression of the Court's views on the merits." *See Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807, 189 L. Ed. 2d 856 (2014); *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 134 S. Ct. 1022, 187 L. Ed. 2d 867 (2014). Based on the circumstances of this case, the Court finds that the Supreme Court's decision was not a determination on the likelihood of success on the merits, but was instead a temporary injunction issued to preserve the issues on appeal. To hold otherwise would undermine the appellate process. In denying Plaintiffs' motion for preliminary injunction, the district court held that Plaintiffs had failed to demonstrate a likelihood of success on the merits of their claims. *See* ECF No. 114 at 36-59. Plaintiffs appealed that determination to the Ninth Circuit. Plaintiffs now argue that the Supreme Court's decision granting an injunction pending appeal was a determination of that very issue -- in other words, Plaintiffs argue that the Supreme Court decided that Plaintiffs were likely to succeed on the merits of their claims when it issued the injunction pending appeal. If the Court were to adopt Plaintiffs' logic, the Court would essentially have to find that the Supreme Court decided an issue that was pending on direct appeal to the Ninth Circuit. The Court declines to do so and finds that the Supreme Court's decision was not sufficiently on the merits to satisfy the judicial imprimatur requirement necessary to make Plaintiffs the prevailing parties in this action.

2. Have Plaintiffs Obtained Relief Sufficiently Enduring to Satisfy the Material Alteration of the Parties' Legal Relationship Requirement?

Even assuming that the Court found that the Supreme Court's decision was on the merits, the Court also finds that Plaintiffs did not obtain relief sufficiently enduring to satisfy the material alteration of the parties' legal relationship requirement, and thus, Plaintiffs are not the prevailing parties in this action.

In resolving this question, the Ninth Circuit has held that "[a] material alteration of the parties' legal relationship occurs when the plaintiff can force the defendant to do something he otherwise would not have to do." *Higher Taste*, 717 F.3d at 716 (quoting *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000)). Injunctions normally satisfy the material alteration requirement for the time that they remain in effect because "[t]hat is typically the whole point of an injunction." *Id.* However, the inquiry does not stop there because in most cases, preliminary injunctions are intended "to afford only temporary relief pending the final resolution of the case." *Id.* at 717. If the plaintiff obtains only an "ephemeral" victory and does not gain an "enduring" change in the legal relationship of the parties, that plaintiff is not a prevailing party. *Id.* (quoting *Sole*, 551 U.S. at 86). To determine whether the material alteration requirement is satisfied, courts must also consider "events post-dating the injunction's issuance" to determine whether the "injunction results in sufficiently enduring change to warrant an award of fees." *Id.* Here, the Court finds that the injunction

pending appeal and Defendants' subsequent actions did not materially alter the parties' legal relationship and did not result in an enduring change in the legal relationship of the parties.

First, the Supreme Court's decision preserved the Ninth Circuit's appellate jurisdiction, but did not materially alter the parties' legal relationship. The Supreme Court's injunction was limited to enjoining Defendants "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." *See* ECF No. 123. The injunction did not cancel the election, stop voting, or prevent Defendants from proceeding with the convention. The limited scope of the Supreme Court's injunction is underscored by the Supreme Court's denial of Plaintiffs' contempt motion. In that contempt motion, Plaintiffs argued that Defendants violated the Supreme Court's injunction by inviting all delegate candidates to participate in the convention and proceeding with the convention as planned in February 2016. *See* ECF No. 157-4. As noted above, the Supreme Court summarily denied Plaintiffs' motion for contempt. *See Akina v. Hawaii*, 136 S.Ct. 922, 193 L. Ed. 2d 786 (2016). Accordingly, the Supreme Court's decision did not materially alter the parties' legal relationship because Defendants were able to invite all delegates to participate in the convention, proceed with the convention, and propose a governing document. The convention took place in February 2016, resulting in a proposed constitution for a Native Hawaiian government. *Akina*, 835 F.3d at 1009. The Supreme Court's decision did not

prevent Defendants from using the Roll that Plaintiffs challenged and did not change Plaintiffs' ability to participate in the convention.

Second, Defendants' voluntary actions following the Supreme Court's decision did not result in an enduring change in the legal relationship of the parties. As noted above, Defendant Na'i Aupuni decided not to fund a ratification vote and returned the remaining grant funds allocated for the ratification. *Id.* In April 2016, Na'i Aupuni dissolved as an entity. *Id.* Although Defendants' subsequent actions mooted Plaintiffs' appeal of the district court's order denying their motion for preliminary injunction, there is nothing to prevent Plaintiffs from bringing their claims in future litigation against Defendants because Plaintiffs' claims were ultimately dismissed without prejudice. *See* ECF No. 146. Although the Supreme Court's decision temporarily enjoined Defendants from proceeding with certain election activities, neither that decision nor Defendants' subsequent voluntary actions, resulted in a lasting alteration of the parties' legal relationship. *See Higher Taste*, 717 F.3d at 718; *see also Watson v. Cty. of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) ("it is not enough merely to have been a 'catalyst' in causing a voluntary change in the defendant's conduct.")(citing *Buckhannon*, 532 U.S. at 600)). The Court finds that Plaintiffs did not obtain relief sufficiently enduring to satisfy the material alteration of the parties' legal relationship requirement, and thus, Plaintiffs are not the prevailing parties in this action.

Because the Court FINDS that Plaintiffs are

the not the prevailing parties in this action, the Court RECOMMENDS that the district court DENY Plaintiffs' Motion.

CONCLUSION

The Court FINDS and RECOMMENDS that Plaintiffs' Amended Motion for Attorneys' Fees and Related Non-Taxable Expenses be DENIED.

IT IS SO FOUND AND RECOMMENDED.

DATED AT HONOLULU, HAWAII, FEBRUARY 24, 2017.

/s/ Richard L. Puglisi

Richard L. Puglisi

United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

No. 15-00322 JMS-RLP

Kelii Akina, *et al.*,
Plaintiffs,
v.

The State of Hawaii, *et al.*,
Defendants.

ORDER GRANTING PLAINTIFFS' MOTION TO VOLUNTARILY DISMISS COMPLAINT, ECF NO. 141

I. INTRODUCTION

Plaintiffs Keli'i Akina, Kealii Makekau, Joseph Kent, Yoshimasa Sean Mitsui, Pedro Kana'i Gapero, and Melissa Leina'ala Moniz (collectively, "Plaintiffs") move pursuant to Federal Rule of Civil Procedure 41(a)(2) to voluntarily dismiss their Complaint without prejudice. ECF No. 141. Defendants the Akamai Foundation and Na'i Aupuni, and the State Defendants[1] (joined by the Office of Hawaiian Affairs

[1] The State Defendants are the State of Hawaii; Governor David Y. Ige in his official capacity; John D. Waihe'e III, Chairman, Native Hawaiian Roll Commission, in his official capacity; Na'alehu Anthony, Lei Kihoi, Robin Danner, and Mahealani Wendt, Commissioners of the Native Hawaiian Roll Commission, in their official capacities; and Clyde W. Namuo, Executive Director, Native Hawaiian Roll Commission, in his official capacity.

Defendants[2]) have each filed oppositions, arguing that dismissal should be with prejudice and/or dismissal should be conditioned on Plaintiffs' payment of fees and costs. ECF Nos. 143-45. The court decides the Motion without an oral hearing under Local Rule 7.2(d).

II. BACKGROUND

The court need not set forth the procedural history of this case, which involved extensive proceedings on Plaintiffs' Motion for Preliminary Injunction and is detailed in several published decisions. *See Akina v. Hawaii*, 141 F. Supp. 3d 1106 (D. Haw. 2015) (denying motion for preliminary injunction); *Akina v. Hawaii*, 136 S. Ct. 581, 193 L. Ed. 2d 464 (2015) (granting injunction in part); *Akina v. Hawaii*, 835 F.3d 1003 (9th Cir. 2016) (affirming in part and dismissing appeal as moot in part). What is important now, however, is that the subject election was cancelled, no related election or vote is pending, and Defendant Na'i Aupuni has been dissolved. The court also takes judicial notice that Plaintiff Keli'i Akina was recently elected as an Office of Hawaiian Affairs Trustee, where such Trustees in their official

---

[2] The Office of Hawaiian Affairs Defendants are 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, and Leina'ala Ahu Isa, Trustees, Office of Hawaiian Affairs, in their official capacities; and Kamana'opono Crabbe, Chief Executive Officer, Office of Hawaiian Affairs, in his official capacity.

capacities are Defendants in this action.[3]

Although the Motion does not ask the court to determine whether this suit is now moot (or is no longer ripe), the court agrees with the Ninth Circuit's reasoning when it dismissed Plaintiffs' interlocutory appeal:

> It is possible . . . that a different group of individuals who are not parties to this case will try to hold a ratification election with private and public funds. No such vote, however, has been scheduled, and it is unclear what shape it would take. Any opinion by this court at this juncture would amount to an impermissible advisory opinion that would, at most, guide any future ratification efforts.

835 F.3d at 1010-11. In any event, regardless of mootness or ripeness, Plaintiffs seek to dismiss the action without prejudice under Rule 41.

III. DISCUSSION

Rule 41(a)(2) provides, in pertinent part:

> (a) Voluntary Dismissal.
> . . . .

---

[3] Without more, once Akina takes office, he will effectively be both a Plaintiff and a Defendant. *See* Fed. R. Civ. P. 25(d) ("[A public] officer's successor is automatically substituted as a party.").

> (2) *By Court Order; Effect*. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. . . . Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

"A district court should grant a motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as a result." *Smith v. Lenches*, 263 F.3d 972, 976 (9th Cir. 2001) (citations omitted). "'[L]egal prejudice' means 'prejudice to some legal interest, some legal claim, some legal argument.'" *Id.* (quoting *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996)). "'[U]ncertainty because a dispute remains unresolved' or because 'the threat of future litigation . . . causes uncertainty' does not result in plain legal prejudice." *Id.* (quoting *Westlands Water Dist.*, 100 F.3d at 96-97). "Also, plain legal prejudice does not result merely because the defendant will be inconvenienced by having to defend in another forum or where a plaintiff would gain a tactical advantage by that dismissal." *Id.* (citing *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982)). Furthermore, "the expense incurred in defending against a lawsuit does not amount to legal prejudice." *Westlands Water Dist.*, 100 F.3d at 97.

The State and OHA Defendants do not oppose dismissal, but contend that dismissal should be with prejudice (not without), arguing that "Plaintiffs should not be permitted to resort to Rule 41 so they can refile their claims later. In light of the history of

this case, it would be grossly inequitable and prejudicial to State Defendants to allow Plaintiffs to potentially refile this action in the future." State Defs.' Response at 4, ECF No. 144. Likewise, Defendants Na'i Aupuni and the Akamai Foundation contend that dismissal without prejudice is improper -- they seek fees and costs under Rule 41, reasoning in part that this is a "situation[] where the same suit will be refiled and will result in the imposition of duplicative expenses." Na'i Aupuni Opp'n at 9, ECF No. 143 (citation and internal quotation marks omitted).

Defendants have not established "legal prejudice" under Rule 41(a)(2). *See, e.g., Hamilton*, 679 F.2d at 145 ("Plain legal prejudice, however, does not result simply when defendant faces the prospect of a second lawsuit[.]"); *Westlands Water Dist.*, 100 F.3d at 97 ("Uncertainty because a dispute remains unresolved is not legal prejudice."). And there is no basis for dismissal with prejudice -- final judgment was not entered nor has there been an "adjudication on the merits." *See Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001) ("Rule 41 . . . use[s] the phrase 'without prejudice' as a contrast to adjudication on the merits.") (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4435 at 329 n.4 (1981)); *id.* ("'[W]ith prejudice' is an acceptable form of shorthand for 'an adjudication upon the merits.'") (quoting 9 Wright & Miller § 2373 at 396 n.4)). Any similar future challenge would necessarily be based on a *different* election or *new* set of facts. *See* Na'i Aupuni Opp'n at 7 ("Simply put, the factual allegations that formed the basis for Plaintiffs' claims

are no longer sustainable as against [Na'i Aupuni] and Akamai, and never will support such claims.").

The court also declines to award fees or costs to Defendants as a condition of dismissal under Rule 41(a)(2). *See, e.g., Westlands Water Dist.*, 100 F.3d at 97 ("Imposition of costs and fees as a condition for dismissing without prejudice is not mandatory[.]"); *Legacy Mortg., Inc. v. Title Guar. Escrow Servs., Inc.*, 2013 U.S. Dist. LEXIS 67343, 2013 WL 1991563, at *2 (D. Haw. May 10, 2013) ("District courts have broad discretion to impose an award of attorneys' fees as a condition for dismissing an action without prejudice."). Moreover, through all proceedings in this litigation, Defendants have gained detailed insight and knowledge of precise legal and factual issues that may arise in the future -- work product that can certainly be useful if a similar suit is filed later. *See Westlands Water Dist.*, 100 F.3d at 97 ("[D]efendants should only be awarded attorney fees [under Rule 41] for work which cannot be used in any future litigation of these claims.") (citations omitted); *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993) ("Only those costs incurred for the preparation of work product rendered useless by the dismissal should be awarded as a condition of the voluntary dismissal.").

IV. CONCLUSION

Plaintiffs' Motion to Voluntarily Dismiss Complaint, ECF No. 141, is GRANTED. This action is DISMISSED without prejudice under Federal Rule of Civil Procedure 41(a)(2). The Clerk of Court shall close the case file.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 30, 2016.

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed August 29, 2016

No. 15-17134, No. 15-17453

Akina, *et al.*,
Appellants

v.

Hawaii, *et al.*
Appellees.

MEMORANDUM OPINION

Before: Sidney R. Thomas, Chief Judge, and Consuelo M. Callahan and Mary H. Murguia, Circuit Judges

PER CURIAM:

These appeals concern recent efforts by a group of Native Hawaiians to establish their own government. The plaintiffs are Hawaii residents who challenge that process. They appeal the district court's order denying their request for a preliminary injunction to stop activities related to the drafting and ratification of self-governance documents. Separately, another group of Hawaii residents appeals the district court's denial of their motion to intervene in the plaintiffs' lawsuit. For the reasons that follow, we dismiss the plaintiffs' appeal of the preliminary

injunction order as moot, and we affirm the district court's denial of the motion to intervene.

I.

In 2011, the Hawaii Legislature approved measures "to provide for and to implement the recognition of the Native Hawaiian people by means and methods that will facilitate their self-governance." Haw. Rev. Stat. § 10H-2. The legislation contemplated that Native Hawaiians may "independently" host a convention "for the purpose of organizing themselves." *Id.* § 10H-5. The legislation also established a commission to maintain "a roll of qualified Native Hawaiians" who are descendants of the indigenous peoples who founded the Hawaiian nation. *Id.* § 10H-3.1.[1]

Na'i Aupuni, one of the defendants in this case, was a Hawaiian non-profit corporation that supported those Native Hawaiian self-governance efforts. In 2015, Na'i Aupuni proposed holding a constitutional

[1] A dispute exists over the definition of "qualified Native Hawaiian" used in the 2011 legislation. The statute at issue defines "qualified Native Hawaiian" in part as an adult "descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands." Haw. Rev. Stat. § 10H-3(a)(2)(A)(i). That liberal definition, however, has no blood quantum requirement, unlike the admission requirements of most Native American tribes. *See Rice v. Cayetano*, 528 U.S. 495, 526-27, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000) (Breyer, J., concurring). The prospective intervenors in this case are among those who believe the definition of Native Hawaiian should be more restrictive. In this opinion, "Native Hawaiian" refers to the definition in the 2011 legislation, unless otherwise noted.

convention or gathering, termed an '*Aha*,[2] to discuss and draft self-governance documents, such as a constitution. Na'i Aupuni requested and received grant funds from a state agency, the Office of Hawaiian Affairs (OHA), for the "election of delegates, election and referendum monitoring, a governance 'Aha, and a referendum to ratify any recommendation of the delegates arising out of the 'Aha." To select delegates for the convention, the organization scheduled a vote-by-mail election and limited the pool of candidates and voters to Native Hawaiians who appeared on the roll maintained by the state commission.

The delegate election was scheduled for November 1 through November 30, 2015. The elected delegates would then attend the constitutional convention to discuss forming a government, and to possibly draft a constitution. Any proposed constitution would then be subject to a ratification vote, with the universe of voters again limited to Native Hawaiians included on the roll maintained by the state commission. At the end of the process, any resulting government would lack an official legal status until it was recognized by the state or federal government.

In August 2015, three months before the planned delegate election, the plaintiffs sued the State of Hawaii, various state government officers and agencies, Na'i Aupuni, and another non-profit

---

[2] An '*Aha* is defined as a "[m]eeting, assembly, gathering, convention, court, party." Ulukau Hawaiian Dictionary, *available at http://wehewehe.org*.

organization that was a party to the agreement that provided state funds for Na'i Aupuni's election efforts. Central to the lawsuit was the contention that the delegate election and any election to ratify a constitution were unconstitutional because the state was intertwined in the process and had limited participation based on Hawaiian ancestry. The complaint specifically alleged various violations of the United States Constitution and Voting Rights Act arising from the race-based and viewpoint-based restrictions on voting and candidate eligibility. Among the requested relief, the plaintiffs sought an injunction to prevent the use of the contested roll of Native Hawaiians and "the calling, holding, or certifying of any election utilizing the Roll." The complaint further asked the court to "enjoin[] the defendants from requiring prospective applicants for any voter roll to" make any viewpoint-based declarations or verify their ancestry.

Approximately two weeks after filing the complaint, the plaintiffs moved for a preliminary injunction to "prevent[] Defendant's [sic] from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians." A month later, on September 25, 2015, a separate group of Hawaii residents moved to intervene in the lawsuit to challenge the definition of "Native Hawaiian" adopted by Na'i Aupuni and the 2011 state legislation. The residents also sought to recover state trust funds—designated to benefit Native Hawaiians—used in the election efforts.

The district court denied the preliminary injunction request after concluding that the plaintiffs had not met any of the requirements described in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The district court later denied the motion to intervene, reasoning that the prospective intervenors did not have a "significantly protectable interest relating to" the subject of the plaintiffs' lawsuit, and that they were not "situated such that the disposition of the" lawsuit "may impair or impede" their ability to protect any such interest, quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003).

The plaintiffs appealed the district court's preliminary injunction order and sought an injunction pending appeal from this court. A motions panel denied the request for an injunction pending appeal. On November 27, 2015, three days before voting in the delegate election was to end, Justice Kennedy enjoined the counting of ballots and certification of winners "pending further order." *Akina v. Hawaii*, __ S. Ct. __, 193 L. Ed. 2d 420 (Nov. 27, 2015) (mem.). On December 2, 2015, a five-Justice majority of the Supreme Court enjoined the defendants "from counting ballots cast in, and certifying winners of, the election described in the application, pending final disposition of the appeal by" this court. *Akina v. Hawaii*, 136 S. Ct. 581, 193 L. Ed. 2d 464 (2015) (mem.).

Two weeks after the Supreme Court's order, Na'i Aupuni cancelled the election due to concern about litigation-related delays. Instead of the

election, the organization decided to offer all 196 Native Hawaiian candidates "a seat as a delegate" to the convention "to learn about, discuss and hopefully reach a consensus on a process to achieve self-governance." The plaintiffs then filed a motion for civil contempt in the Supreme Court, alleging that Na'i Aupuni's decision essentially declared all the candidates winners, in violation of the Court's previous order. The Supreme Court denied the contempt motion. *Akina v. Hawaii*, 136 S.Ct. 922, 193 L. Ed. 2d 786 (2016) (mem.).

The *'Aha* took place in February 2016, resulting in a proposed constitution for a Native Hawaiian government. Na'i Aupuni, however, decided not to fund a ratification vote and stated that it would return remaining grant funds allocated for the ratification election. No other elections have been proposed and no governing entity has been formed or recognized by the state or federal government.

In April 2016, Na'i Aupuni dissolved as an entity. Although it appears that some *'Aha* participants are separately trying to organize and raise private funds for a ratification vote, it remains unclear what such an election would look like, who would hold it, and when it would take place, if at all.

II.

On appeal, the plaintiffs challenge the district court's order denying their request for a preliminary injunction. The prospective intervenors challenge the

denial of their motion to intervene. We consider each in turn.

A.

This court has jurisdiction under 28 U.S.C. § 1292 to review the district court's denial of preliminary injunctive relief. The court, however, has no jurisdiction over an appeal that has become moot. *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003).

An interlocutory appeal of the denial of a preliminary injunction is moot when a court can no longer grant any effective relief sought in the injunction request. *See In Def. of Animals v. U.S. Dep't of Interior*, 648 F.3d 1012, 1013 (9th Cir. 2011) (per curiam); *see generally Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669, 193 L. Ed. 2d 571 (2016). The interlocutory appeal may be moot even though the underlying case still presents a live controversy. *In Def. of Animals*, 648 F.3d at 1013; *see also CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 48 F.3d 618, 621 (1st Cir. 1995).

Here, the plaintiffs sought a preliminary injunction solely to "prevent[] Defendant's [sic] from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians." Before the district court, the plaintiffs focused their injunction request on the delegation election. That election, however, has been cancelled, and the plaintiffs do not argue that similar elections will occur in the future. Instead, the plaintiffs argue on appeal that the injunction should

encompass a ratification vote on the draft constitution produced at the *'Aha*. Na'i Aupuni, however, has decided not to call a ratification vote. No other ratification elections have been scheduled. Further, Na'i Aupuni itself has dissolved as a non-profit corporation and any future election would likely be held by an entity that is not a party to this litigation. Given those changed circumstances, this court cannot provide any effective relief sought in the preliminary injunction request.

We also conclude that the plaintiffs' appeal does not fall within an exception to the mootness doctrine. Under the voluntary cessation exception, a defendant's decision to stop a challenged practice generally "does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982)); *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 132 S. Ct. 2277, 2287, 183 L. Ed. 2d 281 (2012) (remarking that post-appeal "maneuvers designed to insulate a decision from review by [an appellate court] must be viewed with a critical eye"). But even in such circumstances, an appeal may be properly dismissed as moot if events make "it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (citing *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)). Here, for the reasons previously discussed, the defendants

have met their burden to convince "the court that the challenged conduct cannot be reasonably expected to start up again." *Id.*

It is possible, and perhaps even likely, that a different group of individuals who are not parties to this case will try to hold a ratification election with private and public funds. No such vote, however, has been scheduled, and it is unclear what shape it would take. Any opinion by this court at this juncture would amount to an impermissible advisory opinion that would, at most, guide any future ratification efforts. *See Princeton Univ. v. Schmid*, 455 U.S. 100, 102, 102 S. Ct. 867, 70 L. Ed. 2d 855 (1982) (per curiam) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us.").

For similar reasons, this appeal does not fall within the exception to mootness for disputes that are "capable of repetition, yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 148-49, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975) (per curiam). That exception is reserved for "'extraordinary cases' in which (1) 'the duration of the challenged action is too short to be fully litigated before it ceases,' and (2) 'there is a reasonable expectation that the plaintiffs will be subjected to the same action again.'" *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (en banc) (quoting *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1124 (9th Cir. 1997)); *accord United States v. Juvenile Male*, 564 U.S. 932, 938, 131 S. Ct. 2860, 180 L. Ed. 2d 811 (2011) (per curiam).

Here, the plaintiffs cannot satisfy the second requirement. There is no reasonable expectation that the plaintiffs will be subject to the same injury again, given Na'i Aupuni's disavowal of any election. Further, the district court retains jurisdiction over the underlying lawsuit, and dismissing the preliminary injunction appeal will not, by itself, insulate the defendants' practices from judicial scrutiny.[3]

We therefore dismiss the plaintiffs' interlocutory appeal as moot.

B.

We separately affirm the district court's denial of the motion to intervene as of right in the plaintiffs' underlying lawsuit. The prospective intervenors qualify as Native Hawaiians under a definition that is narrower than the one in the 2011 legislation. They seek to challenge the more liberal definition, the creation of a Native Hawaiian government based on that definition, and the related expenditure of state trust funds intended to benefit Native Hawaiians.

This court conducts a de novo review of the district court's order adjudicating a claim of intervention as of right. *Arakaki*, 324 F.3d at 1082. To the extent that the proposed intervenors seek to stop the delegate and ratification elections, their appeal is

---

[3] We pass no judgment on what aspects of the plaintiffs' lawsuit continue to present a live controversy.

moot for the reasons previously discussed. To the extent that they seek to intervene on other grounds—such as to recover state funds already spent on election efforts—we hold that the district court did not err by denying the motion to intervene.

Under Federal Rule of Civil Procedure 24(a), an individual seeking to intervene as of right must (1) timely move to intervene; (2) demonstrate "a significantly protectable interest relating to the property or transaction that is the subject of the action"; (3) "be situated such that the disposition of the action may impair or impede the party's ability to protect that interest"; and (4) not be adequately represented by existing parties. *Id.* at 1083. The question of whether protectable interests will be impaired by litigation "must be put in practical terms rather than in legal terms." 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1908.2 (3d ed. 2007); *see also Smuck v. Hobson*, 408 F.2d 175, 179, 132 U.S. App. D.C. 372 (D.C. Cir. 1969) ("The decision whether intervention of right is warranted . . . involves an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending.").

We agree with the district court that the prospective intervenors' interests would not, as a practical matter, be impaired or impeded as a result of the plaintiffs' litigation. The district court properly reasoned that the prospective intervenors' claims would raise entirely different issues from those raised

by the plaintiffs, and that the proposed intervenors could adequately protect their interests in separate litigation. Whereas the plaintiffs argue that the state is being too restrictive in limiting participation in the formation of a Native Hawaiian government, the proposed intervenors would argue that the state should be more restrictive. Further, as the district court noted, the prospective intervenors' challenge to the expenditure of state trust funds would "expand the suit well beyond the scope of the current action." *See Arakaki*, 324 F.3d at 1086 (holding that a prospective intervenor was "not permitted to inject new, unrelated issues into the pending litigation"). Regardless of how the plaintiffs' lawsuit is resolved, the prospective intervenors will remain free to attempt to organize a native government based on the narrower definition of Native Hawaiian, and then seek state and federal recognition. Further, the prospective intervenors may bring a separate action challenging the expenditure of trust funds, just as they have done previously in analogous contexts. *See Day v. Apoliona*, 616 F.3d 918, 927 (9th Cir. 2010) (holding that the OHA could legally use trust money to support legislation that defined "Native Hawaiian" without a blood quantum requirement); *Kealoha v. Machado*, 131 Haw. 62, 315 P.3d 213, 229-30 (Haw. 2013) (upholding the dismissal of the prospective intervenors' claim that OHA's expenditure of trust funds for the benefit of a broader set of "Native Hawaiians" was a breach of fiduciary duty).

We therefore affirm the district court's order denying intervention as of right.

III.

For the aforementioned reasons, we DISMISS the plaintiffs' interlocutory appeal as moot and AFFIRM the district court's denial of the motion to intervene.

(ORDER LIST: 577 U.S.)

WEDNESDAY, DECEMBER 2, 2015

ORDER IN PENDING CASE

15A551 AKINA, KELI'I, ET AL., V. HAWAII, ET AL.

The application for injunction pending appellate review presented to Justice Kennedy and by him referred to the Court is granted. 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.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

SUPREME COURT OF THE UNITED STATES

No. 15A551

KELI'I AKINA, ET AL.,

Applicants,

v.

HAWAII, ET AL.

O R D E R

UPON CONSIDERATION of the application of counsel for the applicants, the responses filed thereto, and the reply,

IT IS 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.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of November, 2015.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed: November 19, 2015

No. 15-17134

Keli'i Akina, *et al.*,
Plaintiffs-Appellants,
v.

Hawaii, *et al.*
Defendants-Appellees.

ORDER
Before: W. FLETCHER, N.R. SMITH, and OWENS, Circuit Judges.

This is a preliminary injunction appeal. Appellants have filed an urgent motion to enjoin, pending disposition of this appeal, appellee N'ai Aupuni from counting votes in an election that concludes on November 30, 2015.[1]

---

[1] The November 5, 2015 submission by non-party American Civil Rights Union and the November 9, 2015 submission by non-party the United States are construed as requests for leave to file briefs in support of or in opposition to the urgent motion. So construed, the requests are granted. The respective briefs have been considered for purposes of disposition of the urgent motion only.
The court has received the November 9, 2015 "Notice of Absent Necessary and Indispensable Party" (the "Notice") filed by attorney Lanny Alan Sinkin on behalf of a non-party purporting to be the Kingdom of Hawai'i. To the extent the Notice seeks relief from this court, it is referred to the panel assigned to decide

To justify an immediate injunction pending appeal, appellants must establish (1) a likelihood of the success on the merits of the appeal; (2) that they are likely to be irreparably harmed if the vote counting is not enjoined pending disposition of the appeal; (3) that the balance of the equities tips in their favor; and (4) that it is in the public interest to issue an injunction pending disposition of the appeal. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). We conclude that, at this stage, appellants have not made the required showing. Accordingly, the urgent motion is denied.

The previously established briefing schedule remains in effect for this appeal. To the extent that any non-party seeks to file an amicus brief with respect to the merits of the preliminary injunction appeal, it shall comply with Federal Rule of Appellate Procedure 29.

---

the merits of this appeal for whatever consideration the panel deems appropriate.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

No. 15-00322 JMS-RLP

Kelii Akina, *et al.*,
Plaintiffs,
v.
The State of Hawaii, *et al.*,
Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, DOC. NO. 47

I. INTRODUCTION

Defendant Nai Aupuni[1] is conducting an election of Native Hawaiian delegates to a proposed convention of Native Hawaiians to discuss, and perhaps to organize, a "Native Hawaiian governing

[1] Nai Aupuni is "a Hawaii non-profit corporation that supports efforts to achieve Native Hawaiian self-determination." Doc. No. 79-1, James Asam Decl. ¶ 6.

Some names and Hawaiian language words use the diacritical markings "<okina" and "kahako" to indicate proper pronunciation or meaning. "The <okina is a glottal stop, similar to the sound between the syllables of 'oh-oh.'. . . . The kahako is a macron, which lengthens and adds stress to the marked vowel." *See* https://www.hawaii.edu/site/info/diacritics.php (last accessed Oct. 27, 2015). But because different pleadings and sources use the markings inconsistently or improperly, this Order omits these diacritical marks for uniformity and to avoid compatibility issues between properly-used marks and electronic/internet publication.

entity." Delegate candidates have been announced, and voting is to run from November 1, 2015 to November 30, 2015. Plaintiffs[2] have filed a Motion for Preliminary Injunction seeking, among other relief, to halt this election.

The voters and delegates in this election are based on a "Roll" of "qualified Native Hawaiians" as set forth in Act 195, 2011 Haw. Sess. Laws, as amended (the "Native Hawaiian Roll" or "Roll"). A "qualified Native Hawaiian" is defined as an individual, age eighteen or older, who certifies that they (1) are "a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitutes the State of Hawaii," Haw. Rev. Stat. ("HRS") § 10H-3(a)(2)(A), and (2) have "maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity." HRS § 10H-3(a)(2)(B).

Through a registration process, the Native Hawaiian Roll Commission (the "commission") asked or required prospective registrants to the Roll to make the following three declarations:

- Declaration One. I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to

[2] The Plaintiffs are Kelii Akina, Kealii Makekau, Joseph Kent, Yoshimasa Sean Mitsui, Pedro Kanae Gapero, and Melissa Leinaala Moniz. Their backgrounds, as relevant to this suit, are discussed later in this Order.

participate in the process of self-governance.

- Declaration Two. I have a significant cultural, social or civic connection to the Native Hawaiian community.
- Declaration Three. I am a Native Hawaiian: a lineal descendant of the people who lived and exercised sovereignty in the Hawaiian islands prior to 1778, or a person who is eligible for the programs of the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that person.

Doc. No. 1, Compl. ¶ 42; Doc. No. 47-9, Pls.' Ex. A. Separately, the Roll also includes as qualified Native Hawaiians "all individuals already registered with the State as verified Hawaiians or Native Hawaiians through the office of Hawaiian affairs [("OHA")] as demonstrated by the production of relevant [OHA] records[.]" HRS § 10H-3(a)(4). Those on the Roll through an OHA registry do not have to affirm Declarations One or Two.

Plaintiffs filed suit on August 13, 2015, alleging that these "restrictions on registering for the Roll" violate the U.S. Constitution and the Voting Rights Act of 1965, 52 U.S.C. § 10301. Doc. No. 1, Compl. ¶ 1. As to the constitutional claims, they allege violations of (1) the Fifteenth Amendment; (2) the Equal Protection and Due Process clauses of the Fourteenth Amendment; and (3) the First Amendment. They further allege that Nai Aupuni is acting "under color of state law" for purposes of 42

U.S.C. § 1983, and is acting jointly with other state actors.[3] *Id.* ¶¶ 59, 68, 70, 72, 74. The Complaint seeks to enjoin Defendants "from requiring prospective applicants for any voter roll to confirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry." *Id.* at 32, Prayer ¶ 2. The Complaint also seeks to enjoin "the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll." *Id.* ¶ 3.

To that end, Plaintiffs have moved for a preliminary injunction, seeking an Order preventing Defendants "from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians, as explained in Plaintiffs' Complaint." Doc. No. 47, Pls.' Mot. at 3. They seek to stop the election of delegates, and thereby halt the proposed convention.

The court heard Plaintiffs' Motion for Preliminary Injunction on October 20, 2015, and fully considered all written and oral argument, as well as

---

[3] In addition to Nai Aupuni, the Complaint names as Defendants: (1) the Akamai Foundation; (2) the State of Hawaii, Governor David Ige, the Commissioners of the Native Hawaiian Roll Commission (Chair John D. Waihee III, Naalehu Anthony, Lei Kihoi, Robin Danner, Mahealani Wendt), and Clyde W. Namuo, Executive Director, Native Hawaiian Roll Commission, all in their official capacities (collectively the "State Defendants"); and (3) OHA Trustees (Chair Robert Lindsey, Jr., Colette Y. Machado, Peter Apo, Haunani Apoliona, Rowena M.N. Akana, John D. Waihee, IV, Carmen Hulu Lindsey, Dan Ahuna, Leinaala Ahu Isa), and Kamanaopono Crabbe, OHA Chief Executive, all in their official capacities (collectively, the "OHA Defendants").

the evidence properly submitted in the record. The court issued an oral ruling on October 23, 2015, explaining much of the court's reasoning and analysis. This written ruling provides further background and explanation, but is substantively the same as the oral ruling.[4] Based on the following, Plaintiffs' Motion is DENIED.

II. BACKGROUND

A. Act 195 and the Native Hawaiian Roll

[4] On October 26, 2015, Plaintiffs filed a Notice of Interlocutory Appeal of the court's ruling. Doc. No. 106. "The general rule is that once a notice of appeal has been filed, the lower court loses jurisdiction over the subject matter of the appeal." *Bennett v. Gemmill (In re. Combined Metals Reduction Co.)*, 557 F.2d 179, 200 (9th Cir. 1977). Nevertheless, even after an appeal has been filed, a district court "may act to assist the court of appeals in the exercise of its jurisdiction." *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982). And, as summarized in *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007 (6th Cir. 2003), a district court's written opinion memorializing a court's prior oral ruling can certainly be "in aid of the appeal." *Id*. at 1013 (citing cases). *See also In re Grand Jury Proceedings Under Seal*, 947 F.2d 1188, 1190 (4th Cir. 1991) (concluding that a district court's written order memorializing oral ruling aided an intervening appeal such that the notice of appeal did not divest the district court of jurisdiction to issue the written order). At the October 23, 2015 hearing, the court anticipated the present posture by announcing that its oral ruling "is intended to be a summary of a more comprehensive written order to follow [and] [t]he written order is intended, if an appeal is taken from my ruling, to be in aid of the appellate process." Doc. No. 105, Tr. (Oct. 23, 2015) at 7. That is, on October 23, 2015, the court gave a detailed oral ruling pursuant to Federal Rules of Civil Procedure 52(a)(1) & (2), and issues this substantively-identical written decision with further background and explanation.

On July 6, 2011, then-Governor Neil Abercrombie signed into law Act 195, which is codified in substantial part in HRS Chapter 10H. Act 195 begins by declaring that "[t]he Native Hawaiian people are hereby recognized as the only indigenous, aboriginal, maoli people of Hawaii." HRS § 10H-1. The purpose of Act 195 is to:

> provide for and to implement the recognition of the Native Hawaiian people by means and methods that will facilitate their self-governance, including the establishment of, or the amendment to, programs, entities, and other matters pursuant to law that relate, or affect ownership, possession, or use of lands by the Native Hawaiian people, and by further promoting their culture, heritage, entitlements, health, education, and welfare.

HRS § 10H-2.

Act 195 establishes a five-member commission, which is responsible for preparing and maintaining a roll of "qualified Native Hawaiians." HRS § 10H- 3(a)(1). As summarized above, § 10H-3(a)(2) (as amended by Act 77, 2013 Haw. Sess. Laws), defines a "qualified Native Hawaiian" as

> an individual whom the commission determines has satisfied the following

criteria and who makes a written statement certifying that the individual:

(A) Is:

(i) An individual who is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitutes the State of Hawaii;

(ii) An individual who is one of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that individual;

(iii) or An individual who meets the ancestry requirements of Kamehameha Schools or of any Hawaiian registry program of the [OHA];

(B) Has maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to

> participate in the organization of the Native Hawaiian governing entity; and
>
> (C) Is eighteen years of age or older[.]

HRS § 10H-3(a)(2).[5] Further, the commission is responsible for:

> including in the roll of qualified Native Hawaiians all individuals already registered with the State as verified Hawaiians or Native Hawaiians through the [OHA] as demonstrated by the production of relevant [OHA] records, and extending to those individuals all rights

---

[5] Elsewhere, Hawaii law defines "Hawaiian" and "Native Hawaiian" consistently with HRS § 10H-3(a)(2). Specifically, for purposes of OHA, HRS § 10-2 defines "Hawaiian" as:

> any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

And it defines "Native Hawaiian" as:

> any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

> and recognitions conferred upon other members of the roll.

HRS § 10H-3(a)(4).

Under these provisions, persons who are included on the Roll through § 10H-3(a)(4) as having "already registered with the State" through OHA do not have to certify that they have "maintained a significant cultural, social, or civic connection to the Native Hawaiian community," nor that they "wish[] to participate in the organization of the Native Hawaiian governing entity" as set forth in § 10H-3(a)(2). And Nai Aupuni's President, Dr. James Asam, attests that:

> [Nai Aupuni] understood that OHA's Hawaiian Registry process did not require attestation of the "unrelinquished sovereignty of the Native Hawaiian people", and "intent to participate in the process of self-governance" ("Declaration One"). [Nai Aupuni] concluded, *on its own*, that having this alternate registration process was favorable because it provided Native Hawaiians who may take issue with Declaration One with the opportunity to participate in the [Nai Aupuni] process.

Doc. No. 79-1, Asam Decl. ¶ 19; *see also* Doc. No. 83-1, Kamanaopono Crabbe Decl. ¶ 11 ("[A]n OHA Database registrant may be transferred to the Roll Commission and included on the Roll without affirming the declarations required under Act 195.").

Indeed, according to the Complaint, many of these OHA-registrants were placed on the Roll without their knowledge or consent. Doc. No. 1, Compl. ¶ 35.[6]

At the October 20, 2015 hearing, the parties stipulated that approximately 62 percent of the Roll comes from an OHA registry, and the other 38 percent come directly through the Roll commission process. *See* Doc. No. 104, Tr. (Oct. 20, 2015) at 57-58. It follows that approximately 62 percent of the Roll did not have to affirm Declarations One or Two. That is, approximately 62 percent of the Roll did not have to make an affirmation regarding sovereignty or

---

[6] OHA was established under 1978 Amendments to the Hawaii Constitution, and has its mission "[t]he betterment of conditions of native Hawaiians . . . [and] Hawaiians." HRS § 10-3.

> Implementing statutes and their later amendments vested OHA with broad authority to administer two categories of funds: a 20 percent share of the revenue from the 1.2 million acres of lands granted to the State pursuant to § 5(b) of the Admission Act, which OHA is to administer 'for the betterment of the conditions of native Hawaiians,' Haw. Rev. Stat. § 10-13.5 (1993), and any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" and/or "Hawaiians," Haw. Const., Art. XII, § 6. *See generally* Haw. Rev. Stat. §§ 10-1 to 10-16.

Rice v. Cayetano, 528 U.S. 495, 509 (2000). *Rice* held that OHA is a public state agency, responsible for "the administration of state laws and obligations," and that OHA elections are "the affair of the State of Hawaii." *Id.* at 520.

significant connection to the Native Hawaiian community.[7]

Under Act 195, the Governor of Hawaii appointed the five members of the commission selected "from nominations submitted by qualified Native Hawaiians and qualified Native Hawaiian membership organizations," where "a qualified Native Hawaiian membership organization includes an organization that, on [July 6, 2011], has been in existence for at least ten years, and whose purpose has been and is the betterment of the conditions of the Native Hawaiian people." HRS § 10H-3(b). The commission is funded by OHA, Act 195 § 4, and is placed "within the [OHA] for administrative purposes only." HRS § 10H-3(a).

The commissioners are responsible for (1) "[p]reparing and maintaining a roll of qualified Native Hawaiians;" (2) "[c]ertifying that the

---

[7] The exact origin of Declaration One ("I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance") is not clear from the current record. When asked about Declaration One at the October 20, 2015 hearing, Roll commission executive director Clyde Namuo testified that "[t]he Akaka Bill had been around for at least 10 years by the time the Roll Commission started its work. The issue of unrelinquished sovereignty has been . . . included in every version of the Akaka Bill since its inception." Doc. No. 104, Tr. (Oct. 20, 2015) at 14. A full discussion of the "Akaka Bill" is well beyond the scope of this Order. A version of the Akaka Bill, known as "The Native Hawaiian Government Reorganization Act of 2009," H.R. 2314/S. 1011, 111th Cong. (2009), is discussed at Doc. No. 93-1, Amicus Br. Ex. A at 6 (80 Fed. Reg. at 59118).

individuals on the roll of qualified Native Hawaiians meet the definition of qualified Native Hawaiians;" and (3) "[r]eceiving and maintaining documents that verify ancestry; cultural, social, or civic connection to the Native Hawaiian community; and age from individuals seeking to be included in the roll of qualified Native Hawaiians." HRS § 10H-3(a).

The commission is required to "publish notice of the certification of the qualified Native Hawaiian roll, update the roll as necessary, and publish notice of the updated roll of qualified Native Hawaiians[.]" HRS § 10H-4(a). Under the Act,

> The publication of the initial and updated rolls shall serve as the basis for the eligibility of qualified Native Hawaiians whose names are listed on the rolls to participate in the organization of the Native Hawaiian governing entity.

HRS § 10H-4(b). Further,

> The publication of the roll of qualified Native Hawaiians, as provided in section 10H-4, is intended to facilitate the process under which qualified Native Hawaiians may independently commence the organization of a convention of qualified Native Hawaiians, established for the purpose of organizing themselves.

HRS § 10H-5.[8]

---

[8] Act 195 created the following other provisions regarding dissolution, effect, reaffirmation of delegation of federal authority, and severability:

> The governor shall dissolve the Native Hawaiian roll commission upon being informed by the Native Hawaiian roll commission that it has published notice of any updated roll of qualified Native Hawaiians, as provided in section 10H-4, and thereby completed its work.

HRS § 10H-6.

> Nothing contained in this chapter shall diminish, alter, or amend any existing rights or privileges enjoyed by the Native Hawaiian people that are not inconsistent with this chapter.

HRS § 10H-7.

> (a) The delegation by the United States of authority to the State of Hawaii to address the conditions of the indigenous, native people of Hawaii contained in the Act entitled "An Act to Provide for the Admission of the State of Hawaii into the Union", approved March 18, 1959 (Public Law 86-3), is reaffirmed.
>
> (b) Consistent with the policies of the State of Hawaii, the members of the qualified Native Hawaiian roll, and their descendants, shall be acknowledged by the State of Hawaii as the indigenous, aboriginal, maoli population of Hawaii.

HRS § 10H-8.

> If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other

The commission "began accepting registrations for the Roll in July of 2012." Doc. No. 80-1, Clyde Namuo Decl. ¶ 3. Registration "has been closed at times in the past, but [at least as of September 30, 2015] it is presently open." *Id.* "Registrations can be done either online or by paper registration." *Id.* Further, from time to time after Act 195 was amended in 2013 to require the commission to include OHA registrants in 2013, Act 77, 2013 Haw. Sess. Laws, OHA has transmitted to the commission updated "lists of individuals registered through OHA's registries and verified by OHA as Hawaiian or Native Hawaiian." *Id.* ¶ 6. The website of the "Kanaiolowalu" project of the commission lists 122,785 registered members on the Roll. *See* www.kanaiolowalu.org (last accessed Oct. 29, 2015).

Before OHA began transferring names of OHA registrants to the commission, the commission issued and distributed a press release on August 7, 2013 that, among other things, provided members on OHA lists a telephone number to call if they "[do] not wish to have their names transferred" to the Roll. Doc. No. 80-1, Namuo Decl. ¶ 5. On September 20, 2013, OHA transmitted an initial list of registrants to the commission that excluded approximately 36 persons

---

> provisions or applications of this Act, which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Act 195 § 6 (uncodified).

who had requested that their names be withheld from the transfer. *Id.* ¶ 6.

On approximately October 10, 2013, the commission posted information on its website about removal from the Roll. It included a removal request form that could, and still can, be downloaded and sent to the commission. *Id.* ¶ 8. At various times in October to December of 2013, the commission also sent newsletters and emails to OHA registrants that included information on how to remove oneself from the Roll. *Id.* ¶¶ 9, 10. And from March 24, 2014 to April 4, 2014, the commission made available for public viewing (with binders in various locations, and on its website) a "pre-certified" list of individuals on the Roll. *Id.* ¶ 11. The purpose was, in part, to allow individuals to remove themselves if they so chose. *Id.* ¶ 12.

Similarly, "[o]n at least three separate occasions in August, September, and October 2013, OHA provided public notice of the Act 77 transfer to OHA Database registrants[.]" Doc. No. 83-1, Crabbe Decl. ¶ 12. They "were informed of their right to complete and submit a short form . . . to opt-out of the Act 77 transfer." *Id.* ¶ 13. On August 14, 2013, "OHA sent email notification to OHA Database registrants regarding OHA's transfer of information to the Roll Commission pursuant to Act 77," *id.* ¶ 14, and that notification included information regarding such an "opt-out form." *Id.* OHA's chief executive, Dr. Crabbe, attests that this email was sent to an email address on file for Plaintiff Moniz. *Id.* When asked at the October 20, 2015 hearing about Plaintiff Gapero, Dr.

Crabbe testified that he had no specific knowledge regarding Gapero, but he "[is] confident that [OHA] took the appropriate measures to inform all those who were on the [OHA] databases[.]" Doc. No. 104, Tr. (Oct. 20, 2015) at 22.

B. Nai Aupuni, the Akamai Foundation, and a Grant from OHA

As noted above, Nai Aupuni "is a Hawaii non-profit corporation that supports efforts to achieve Native Hawaiian self-determination." Doc. No. 79-1, Asam Decl. ¶ 6. It was incorporated on December 23, 2014, and was intended to be independent of OHA and the State of Hawaii. *Id.*; Doc. No. 79-6, Nai Aupuni Ex. 4 (By-Laws) at 1. It "is comprised of five directors who are Native Hawaiian, [and] are active in the Native Hawaiian community[.]" Doc. No. 79-1, Asam Decl. ¶ 29. The current directors are James Kuhio Asam, Pauline Nakoolani Namuo, Naomi Kealoha Ballesteros, Geraldine Abbey Miyamoto, and Selena Lehua Schuelke. Nai Aupuni was formed "to provide a process for Native Hawaiians to further self-determination and self-governance for Native Hawaiians." *Id.*

OHA has a policy of supporting Native Hawaiian self-governance. Doc. No. 83-1, Crabbe Decl. ¶ 17. On October 16, 2014, the OHA Board of Trustees "realign[ed] its budget" -- consisting of trust funds under § 5(f) of the Admissions Act for its purpose of supporting the betterment of Native Hawaiians -- to "provide funds to an independent entity to formulate a democratic process through

which Native Hawaiians could consider organizing, for themselves, a governing entity." *Id.* Nai Aupuni subsequently "requested grant funds from the OHA so that [it] may conduct its election of delegates, convention and ratification vote process." Doc. No. 79-1, Asam Decl. ¶ 14.

"On April 27, 2015, at [Nai Aupuni's] request," OHA, the Akamai Foundation ('Akamai') and Nai Aupuni entered into a Grant Agreement whereby OHA provided $2,595,000 of Native Hawaiian trust funds to Akamai as a grant for the purpose of [Nai Aupuni] conducting an election of delegates, convention and ratification vote[.]" *Id.*; Doc. No. 79-2, Louis F. Perez III Decl.¶ 3. "Akamai is a non-profit Internal Revenue Code (IRC) Section 501(c)(3) organization incorporated in the State of Hawaii[.]" Doc. No. 79-2, Perez Decl. ¶ 2. "Akamai's mission and work is community development." *Id.*

The Grant Agreement contains the following autonomy clause:

> **Nai Aupuni's Autonomy.** As set forth in the separate Fiscal Sponsorship Agreement, OHA hereby agrees that neither OHA nor [Akamai] will directly or indirectly control or affect the decisions of [Nai Aupuni] in the performance of the Scope of Services, and OHA agrees that [Nai Aupuni] has no obligation to consult with OHA or [Akamai] on its decisions regarding the performance of the Scope of Services. [Nai Aupuni] hereby agrees that

> the decisions of [Nai Aupuni] and its directors, paid consultants, vendors, election monitors, contractors, and attorneys regarding the performance of the Scope of Services will not be directly or indirectly controlled or affected by OHA.

Doc. No. 79-1, Asam Decl. ¶ 14. "Pursuant to the Grant Agreement, OHA is prohibited from exercising direct or indirect control over [Nai Aupuni]; provided only that [Nai Aupuni's] use of the grant does not violate OHA's fiduciary duty to allocate Native Hawaiian trust funds for the betterment of Native Hawaiians." Doc. No. 83-1, Crabbe Decl. ¶ 19. "Similarly, [Nai Aupuni] has no obligation under the Grant Agreement to consult with OHA." *Id.* ¶ 21. There is no evidence in the record that OHA in fact controlled or directed Nai Aupuni as to any aspect of the Grant Agreement.

As referenced in the Grant Agreement clause, on April 27, 2015, Nai Aupuni and Akamai entered into a separate Fiscal Sponsorship Agreement. They did so "because [Nai Aupuni] does not have a 501(c)(3) exemption." Doc. No. 79-1, Asam Decl. ¶ 15; Doc. No. 79-2, Perez Decl. ¶ 4. And on May 8, 2015 "OHA, [Nai Aupuni] and Akamai entered into a Letter Agreement that addressed the timing and disbursement of the grant funds." Doc. No. 79-1, Asam Decl. ¶ 16; Doc. No. 79-2, Perez Decl. ¶ 6.

C. Nai Aupuni's Planned Election and Convention

Nai Aupuni's directors decided that "the voter[s] for election of delegates and the delegates should be limited to Native Hawaiians." Doc. No. 79-1, Asam Decl. ¶ 13. "While [Nai Aupuni] anticipated that the convention delegates will discuss and perhaps propose a recommendation on membership of the governing entity, [Nai Aupuni] decided, on its own, that Native Hawaiian delegates should make that determination and that its election and convention process thus should be composed of Native Hawaiians." *Id.* (emphasis omitted). "Prior to entering into the Grant Agreement, [Nai Aupuni] informed OHA that it intended to use the Roll but that it continued to investigate whether there are other available lists of Native Hawaiians that it may also use to form its voter list." Doc. No. 83 1, Crabbe Decl. ¶ 20; *see also* Doc. No. 79-1, Asam Decl. ¶ 13. Both OHA and Nai Aupuni agree that "under the Grant Agreement, [Nai Aupuni] has the sole discretion to determine whether to go beyond the inclusion of the Roll in developing its list of individuals eligible to participate in Native Hawaiians' self-governance process." Doc. No. 83-1, Crabbe Decl. ¶ 20; Doc. No. 79-1, Asam Decl. ¶ 13.

"[Nai Aupuni] directors discussed . . . the utility of available lists of adult Native Hawaiians other than the [commission's] list. After considering this issue for over two-months, [Nai Aupuni] directors determined that the [commission's] list was the best available option because it is extraordinarily

expensive and time consuming to compile a list of Native Hawaiians." Doc. No. 79-1, Asam Decl. ¶ 18 (emphasis omitted). "[O]n June 1, 2015, the [Nai Aupuni] board decided, on its own, that it would use the [commission's] certified list as supplemented by OHA's Hawaiian Registry program." *Id.* (emphasis omitted).

When asked at the October 20, 2015 hearing about Act 195, Dr. Asam testified credibly that "[t]here is no indication on my part or the board's part that [Nai Aupuni] needed to comply with Act 195." Doc. No. 104, Tr. (Oct. 20, 2015) at 41. That is, Dr. Asam indicated that he "didn't feel Act 195 controlled the decision-making of [Nai Aupuni]," and that it "could act independently of Act 195." *Id.* Nai Aupuni "[wasn't] driven by Act 195 at all." *Id.* at 42. The court finds this testimony credible, and accepts it as true.

"Although [Nai Aupuni] understood that unlike the [commission] process, [OHA's] Hawaiian Registry process . . . did not require registrants to declare 'a significant cultural, social or civic connection to the Native Hawaiian community,' ('Declaration Two'), [Nai Aupuni] believes that registering with OHA in and of itself demonstrates a significant connection." Doc. No. 79-1, Asam Decl. ¶ 20 (emphasis omitted). "[Nai Aupuni] believes that most of the OHA registrants have this connection because they either reside in Hawaii, are eligible to be a beneficiary of programs under the Hawaiian Homes Commission Act, participate in Hawaiian language schools or programs, attended or have family members who attend or attended Kamehameha Schools, participate

in OHA programs, are members of Native Hawaiian organizations or are regarded as Native Hawaiian in the Native Hawaiian community." *Id*.

"On June 18, 2015, [Nai Aupuni] and Election-America ('EA') entered into an Agreement for EA to provide services to conduct the delegate election." *Id.* ¶ 21. On August 3, 2015, "EA sent to approximately 95,000 certified Native Hawaiians a Notice of the election of delegates that included information about becoming a delegate candidate." *Id*. ¶ 25; Doc. No. 79-14, Nai Aupuni Ex. 12. The Notice included the following timeline for 2015 to 2016:

> End of September: List of qualified delegate candidates announced.
>
> October 15: Voter registration by the Roll Commission closes.
>
> November 1: Ballots will be sent to voters certified by the Roll Commission as of 10/15/15.
>
> November 30: Voting ends.
>
> Day after voting ends: Election results announced publicly.
>
> After the election of delegates, the target dates for the Aha [(convention)] and any ratification vote are as follows:

> Between February and April 2016: Aha held on Oahu over the course of eight consecutive weeks (40 work days, Monday through Friday).
>
> Two months after the Aha concludes: If delegates recommend a governance document, a ratification vote will be held among all certified Native Hawaiian voters.

Doc. No. 79-14, Nai Aupuni Ex. 12.

According to Dr. Asam, "[Nai Aupuni], on its own, decided on these dates and deadlines, the apportionment plan and the election process set forth in the Notice." Doc. No. 79-1, Asam Decl. ¶ 25 (emphasis omitted). This statement is consistent with evidence from the commission's executive director, Doc. No. 80-1, Namuo Decl. ¶ 22, and from OHA's chief executive. Doc. No. 83-1, Crabbe Decl. ¶ 22. "For purposes of determining who is eligible to vote in the November delegate election, [Nai Aupuni] will allow individuals that the [commission] has certified as of October 15, 2015." Doc. No. 79-1, Asam Decl. ¶ 25. And Dr. Asam attests that:

> [Nai Aupuni] intends to proceed with and support the delegate election in November, regardless of whether the Roll Commission has certified the final version of the Roll by that date. In February to April [2016], [Nai Aupuni] intends to proceed with and support the elected

> delegates [to] come together in a convention to consider matters relating to self-governance. In or about June 2016, or thereafter, [Nai Aupuni] intends to proceed with and support a ratification vote of any governing document that the delegates may propose.

Id. ¶ 32.

D. The Department of the Interior's Notice of Proposed Rulemaking

On October 1, 2015, the United States Department of the Interior ("Department") published a Notice of Proposed Rulemaking ("NPRM") titled "Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community." Doc. No. 93-1, Amicus Br. Ex. A (80 Fed. Reg. 59113 (Oct. 1, 2015)). The public comment period is open, with comments on the proposed rule due by December 30, 2015. 80 Fed. Reg. at 59114. The Department has submitted an amicus brief that explains, as background information to the NPRM, some of the context for the actions of the Roll commission, OHA, and Nai Aupuni. *See* Doc. No. 93. As the Department describes it, the NPRM is based in part on the United States' "special political and trust relationship that Congress has already established with the Native Hawaiian community," Doc. No. 93, Amicus Br. at 5, as well as the suggestion by the Ninth Circuit in *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004), for the Department to apply its expertise to "determine whether native

Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis." 80 Fed. Reg. at 59117-18. A full description of this NPRM is not necessary here, and is well beyond the scope of current proceedings. Some aspects, however, are particularly relevant.

"The NPRM proposes an administrative procedure, as well as criteria, for determining whether to reestablish a formal government-to-government relationship between the United States and the Native Hawaiian community." Doc. No. 93, Amicus Br. at 4 (citing Proposed Rule ("PR") 50.1). It was issued after a 2014 Advance Notice of Proposed Rulemaking ("ANPRM"), which "solicited public comment regarding whether the Department should facilitate (1) reorganization of a Native Hawaiian government and (2) reestablishment of a formal government-to-government relationship with the Native Hawaiian community." *Id.* at 3-4 (citing 79 Fed. Reg. 35297, 35302-03). After considering comment to the ANPRM, "the Department determined that it would not propose a rule presuming to reorganize a Native Hawaiian government or prescribing the form or structure of that government; the Native Hawaiian community itself should determine whether and how to reorganize a government." *Id.* at 4. Rather, "[t]he process of drafting a constitution or other governing document and reorganizing a government should be driven by the Native Hawaiian community, not by the United States." 80 Fed. Reg. at 59119. And, similar to Act 195's definition of a "qualified Native Hawaiian," the NPRM defines a "Native Hawaiian" as "any

individual who is a: (1) Citizen of the United States; and (2) Descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." 80 Fed. Reg. at 59129 (PR § 50.4).

And so, "[t]he Department's proposed rule contemplates a multistep process for a Native Hawaiian government to request a government-to-government relationship with the United States, if it chooses to do so." Doc. No. 93, Amicus Br. at 5. It contemplates the use of the Native Hawaiian Roll for determining who may participate in any referendum, but does not require such use. *Id.* at 6 (citing PR §§ 50.12(b), 50.14(b)(5)(iii), (c); and 80 Fed. Reg. at 59121). "T]he Secretary [of the Interior] [would, however,] reestablish a formal government-to-government relationship with only one sovereign Native Hawaiian government, which may include political subdivisions with limited powers of self governance defined in the Native Hawaiian government's governing document." 80 Fed. Reg. at 59129 (PR § 50.3).

The NPRM would require "specific evidence of broad-based community support," Doc. No. 93, Amicus Br. at 6, and would require a Native Hawaiian governing entity to demonstrate that its governing document was "based on meaningful input from representative segments of the Native Hawaiian community and reflects the will of the Native Hawaiian community." 80 Fed. Reg. at 59130 (PR § 50.11); *see also* 80 Fed. Reg. at 59119 ("The process

should be fair and inclusive and reflect the will of the Native Hawaiian community.").

E. The Legal Challenge

Plaintiffs' suit challenges the constitutionality of the Roll process and the election for delegates to Nai Aupuni's proposed convention on various grounds, with each of the six Plaintiffs having slightly different claims:

1. The Six Plaintiffs

As alleged in the Complaint and in his declaration, Plaintiff Kelii Akina is a Hawaii resident of Native Hawaiian ancestry. Doc. No. 1, Compl. ¶ 6. Doc. No. 47-8, Akina Decl. ¶¶ 7-8. He contends he was denied registration on the Roll because he would not affirm "the unrelinquished sovereignty of the Native Hawaiian people" in Declaration One, and objects to that statement. Doc. No. 47-8, Akina Decl. ¶¶ 11-12. He would like to register and vote in Nai Aupuni's election. *Id.* ¶ 16. He would also like to run for delegate to the convention, but cannot run because he claims he could not register. *Id.* ¶¶ 19-20. He contends he was discriminated against because of his viewpoint regarding Declaration One. *Id.* ¶ 18.

Plaintiff Kealii Makekau is a Hawaii resident of Native Hawaiian ancestry. Doc. No. 47-2, Makekau Decl. ¶¶ 2-3. He would like to register and vote in the election "that those on the Kanaiolowalu Roll are eligible to vote in," *id.* ¶ 12, and contends he was denied the right to vote because he objects to

Declaration One -- he could not truthfully affirm that he supports "the unrelinquished sovereignty of the Native Hawaiian people." *Id.* ¶¶ 7-8. He contends he was discriminated against because of his viewpoint regarding Declaration One. *Id.* ¶ 14.

Plaintiff Joseph William Kent is a Hawaii resident of non-Hawaiian ancestry as defined in Act 195. Doc. No. 47-6, Kent Decl. ¶¶ 2, 5. He attempted to register on the Roll, but was denied registration because he could not affirm Hawaiian ancestry and did not have a "significant connection to the Native Hawaiian Community." *Id.* ¶¶ 6-7. He wants to "participate in the governance of my State through the democratic process," and "participate in the election that those on the Kanaiolowalu Roll will be able to participate in." *Id.* ¶ 10. He objects to the inability to "sign up for an election in the United States of America because of [his] race." *Id.* ¶ 11.

Plaintiff Yoshimasa Sean Mitsui is a Hawaii resident of Japanese ancestry. Doc. No. 47-3, Mitsui Decl. ¶¶ 2,5. He would like to register on the Roll and vote in the upcoming election of delegates, but could not truthfully affirm Native Hawaiian ancestry, or "significant connections to the Native Hawaiian community." *Id.* ¶¶ 4, 6-8. He contends he is "being denied the right to vote in that election because of [his] race." *Id.* ¶ 8.

Plaintiff Pedro Kanae Gapero is a Hawaii resident of Native Hawaiian ancestry. Doc. No. 47-4, Pedro Gapero Decl. ¶¶ 2-3. He claims he was registered on the Roll without his knowledge or

consent. *Id.* ¶ 4. He objects to "the use of his name . . . without [his] free, prior and informed consent." *Id.* ¶ 6. He contends that such use "violates [his] rights and provides an unauthorized assertion that [he] support[s] a position that [he] did not affirmatively consent to support." *Id.* ¶ 7.

Plaintiff Melissa Leinaala Moniz is a resident of Texas of Native Hawaiian ancestry. Doc. No. 47-5, Moniz Decl. ¶ 2, 4. She registered with Kau Inoa (an OHA registry). *Id.* ¶ 2. She attests that she was registered on the Roll without her permission. *Id.* ¶ 6. She believes that the Roll is "race-based and has caused great division among Hawaiians." *Id.* ¶ 8. She believes that the use of her name on the Roll without her permission "provides an unauthorized showing that [she] support[s] the Kanaiolowalu Roll and its purpose, which [she] [does] not." *Id.* ¶ 9.

2. The Complaint

Plaintiffs' Complaint alleges nine separate counts, as follows:

Count One (titled "Violation of the Fifteenth Amendment and 42 U.S.C. § 1983") alleges that "Act 195 and the registration process used by defendants restrict who may register for the Roll on the basis of individuals' Hawaiian ancestry." Doc. No. 1, Compl. ¶ 80. It alleges that "[t]he registration process used by the defendants is conduct undertaken under color of Hawaii law," *id.* ¶ 83, and that "Act 195 and the defendants' registration procedures deny and abridge the rights of Plaintiffs Kent and Mitsui to vote on

account of race, in violation of the Fifteenth Amendment." *Id.* ¶ 84.

Count Two (titled "Violation of the Equal Protection Clause of the Fourteen Amendment and 42 U.S.C. § 1983") alleges that "Act 195 and the registration process used by the defendants discriminate against Plaintiffs Kent and Mitsui on account of their race," *id.* ¶ 87, and thus "violate[s] the rights of Plaintiffs Kent and Mitsui under the Fourteenth Amendment to the equal protection of the laws." *Id.* ¶ 89.

Count Three (titled "Violation of Section 2 of the Voting Rights Act") alleges that "Act 195 intentionally discriminates, and has the result of discriminating, against Plaintiffs Kent and Mitsui on the basis of their race, in violation of Section 2 of the Voting Rights Act [(52 U.S.C. § 10301)]." *Id.* ¶ 94.

Count Four (titled "Violations of the First Amendment, Fourteenth Amendment, and 42 U.S.C. § 1983") alleges that "[i]t is not possible to register for the Roll without confirming [Declaration One]." *Id.* ¶ 97. It claims that "[a]s a practical matter, requiring confirmation of [Declaration One] will stack the electoral deck, guaranteeing that Roll registrants will support the outcome favored by the defendants in any subsequent vote." *Id.* ¶ 98. It alleges that "[r]equiring agreement with Declaration One in order to register for the Roll is conduct undertaken under color of Hawaii law," *id.* ¶ 99, and that "[b]y conditioning registration upon agreement with Declaration One, the defendants are compelling speech based on its

content." *Id.* ¶ 100. It contends that "[r]equiring agreement with Declaration One in order to register for the Roll discriminates against those who do not agree with that statement, including Plaintiffs Akina and Makekau." *Id.* ¶ 101. These practices are alleged violations of the First and Fourteenth Amendments. *Id.* ¶¶ 104-05.

Count Five (titled "Violation of the Fifteenth Amendment and 42 U.S.C. § 1983") alleges that "[o]n information and belief, the process for determining who may be a candidate for the proposed constitutional convention restricts candidacy to Native Hawaiians, as defined by Hawaii law." *Id.* ¶ 109. It contends that "[t]he disqualification of candidates based on race is conduct undertaken under color of Hawaii law," *id.* ¶ 111, and thus "violates the Fifteenth Amendment rights of all Hawaii voters, including Plaintiffs Akina, Makekau, Kent, Mitsui, and Gapero." *Id.* ¶ 112.

Count Six (titled "Violation of Section 2 of the Voting Rights Act") alleges that "[t]he disqualification of candidates based on race ensures that the political process leading to nomination or election in the State are not equally open to participation by citizens who are not Hawaiian," *id*. ¶ 114, and "results in a discriminatory abridgement of the right to vote." *Id.* ¶ 115. This violates Section 2 of the Voting Right Act. *Id.* ¶ 116.

Count Seven (titled "Violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983") challenges Declaration Two, which

states "I have a significant cultural, social or civic connection to the Native Hawaiian community." *Id.* ¶ 118. It alleges that "Plaintiffs Kent and Mitsui cannot affirm this statement as they understand it." *Id.* ¶ 119. It contends that "[r]equiring Plaintiffs Kent and Mitsui to confirm this statement . . . is a burden on Plaintiffs Kent and Mitsui that is not required for the sake of election integrity, administrative convenience, or any other significant reason." *Id.* ¶ 120. It concludes that "[r]equiring Plaintiffs Kent and Mitsui to have particular connections with the Native Hawaiian community violates the rights of Plaintiffs Kent and Mitsui under the Fourteenth Amendment to the equal protection of the law." *Id.* ¶ 123.

Count Eight (titled "Violation of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983") contends that "[b]y requiring Plaintiffs to confirm Declarations One, Two, and Three, the registration process used by the defendants will cause the planned election to be conducted in a manner that is fundamentally unfair." *Id.* ¶ 126. It allegedly "burdens the right to vote of all Plaintiffs in violation of their constitutional rights to Due Process." *Id.* ¶ 127.

Finally, Count Nine (titled "Violation of the First Amendment and 42 U.S.C. § 1983") alleges that "[v]oter registration is speech protected by the First Amendment," *id.* ¶ 130, and that "[f]orcibly registering an individual amounts to compelled speech." *Id.* ¶ 131. It contends that Plaintiffs Gapero and Moniz do not wish to bolster the legitimacy of the Roll," *id.* ¶ 134, and "have not agreed, and do not

agree, with Declaration One." *Id.* ¶ 136. Thus, "[b]y registering Plaintiffs Gapero and Moniz without their consent and without notice to them, the [commission] compelled their speech and violated their First Amendment right to refrain from speaking." *Id.* ¶ 137.

As summarized above, the Complaint asks the court to:

> 1. Issue a declaratory judgment finding that the registration procedures relating to the Roll violate the U.S. Constitution and federal law, as set forth above;
>
> 2. Issue preliminary and permanent relief enjoining the defendants from requiring prospective applicants for any voter roll to confirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry;
>
> 3. Issue preliminary and permanent relief enjoining the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll;
>
> 4. Order Defendants to pay reasonable attorneys' fees incurred by Plaintiffs, including litigation expenses and costs, pursuant to 52 U.S.C. § 10310(e) and 42 U.S.C. § 1988; [and]

> 5. Retain jurisdiction under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c), for such a period as the Court deems appropriate and decree that, during such period, no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force at the time this proceeding was commenced shall be enforced by Defendants unless and until the Court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color[.]

Id. at 31-32.

The Motion for Preliminary Injunction incorporates such relief by seeking "an Order preventing [Defendants] from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians, as explained in Plaintiffs' Complaint." Doc. No. 47, Pls.' Mot. at 3 (referring to "Doc. No. 1, p. 32, Prayer for Relief").

III. STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). It is "an extraordinary and drastic remedy,

one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (internal quotation marks and citation omitted).

To obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "[I]f a plaintiff can only show that there are 'serious questions going to the merits' -- a lesser showing than likelihood of success on the merits -- then a preliminary injunction may still issue if the 'balance of hardships tips sharply in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)). "The elements . . . must be balanced, so that a stronger showing of one element may offset a weaker showing of another." *Lopez*, 680 F.3d at 1072. All four elements must be established. *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir. 2011).

IV. DISCUSSION

A. Plaintiffs Have Standing to Bring this Challenge

The court begins by addressing standing. The court has a duty to address jurisdiction and standing "even when not otherwise suggested." *Steel Co. v.*

Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (citation omitted); *see also Bernhardt v. Cty. of L.A.*, 279 F.3d 862, 868 (9th Cir. 2002) ("[F]ederal courts are required sua sponte to examine jurisdictional issues such as standing.") (citations omitted). And indeed Defendants have challenged Plaintiffs' standing, at least as to some claims, contending that they have not suffered a particularized injury. *See* Doc. No. 83, OHA Def.'s Opp'n at 14 ("[A] plaintiff lacks standing to challenge the mere fact of a classification itself.") (citing *Carroll v. Nakatani*, 342 F.3d 934, 946 (9th Cir. 2003)); Doc. No. 79, Nai Aupuni Opp'n at 29 (joining OHA's arguments regarding standing).

"Article III restricts federal courts to the resolution of cases and controversies." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732 (2008) (citation omitted). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). "[A] claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis*, 554 U.S. at 733 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). "[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Id.*

at 734 (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

When determining Article III standing, courts "'accept as true all material allegations of the complaint' and 'construe the complaint in favor of the complaining party.'" *Davis v. Guam*, 785 F.3d 1311, 1314 (9th Cir. 2015) (quoting *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011)). "[S]tanding doesn't depend on the merits of the plaintiff's contention that particular conduct is illegal." *Id.* at 1316 (quotation marks and citation omitted).

The court concludes that there is standing to challenge Act 195 and the proposed election, at least at this preliminary injunction stage. Among other matters, Plaintiffs allege that Nai Aupuni is acting under color of law, and is holding a state election. Assuming those allegations are true, and without determining the merits of those allegations, at least some Plaintiffs are injured – at minimum, if true on the merits, Plaintiffs Kent and Mitsui would be deprived of a right to vote in a public election. Further, for purposes of standing, this case is similar to *Davis*, where the Ninth Circuit found a plaintiff's allegations of injury in being excluded on the basis of race from a Guam plebescite vote that could have led to a change in Guam's future political relationship with the United States were sufficient to confer standing. 785 F.3d at 1315. Moreover, generally, "[i]t is enough, for justiciability purposes, that at least one party with standing is present." *Kostick v. Nago*, 960 F. Supp. 2d 1074, 1089 (D. Haw. 2013) (citing *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S.

316, 330 (1999)); *see also Pickup v. Brown*, 740 F.3d 1208, 1224 n.2 (9th Cir. 2013) ("[T]he presence in a suit of even one party with standing suffices to make a claim justiciable.") (quoting *Brown v. City of Los Angeles*, 521 F.3d 1238, 1240 n.1 (9th Cir. 2008) (per curiam)).

B. The *Winter* Analysis for a Preliminary Injunction

The court now applies the four-part *Winter* test, beginning with a discussion of whether Plaintiffs can demonstrate a likelihood of success.

1. Likelihood of Success

a. Plaintiffs Have Not Demonstrated a Likelihood of Success on Their Fifteenth Amendment and Voting Rights Act Claims.

As to Plaintiffs' Fifteeth Amendment and Voting Rights Act claims -- Counts One, Three, Five, and Six -- the evidence demonstrates that Nai Aupuni's upcoming election is a private election, and not a State election. As a result, Plaintiffs have not demonstrated a likelihood of success on these claims.

This election is fundamentally different than the elections at issue in *Rice v. Cayetano*, 528 U.S. 495 (2000), and in *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002), which found Fifteenth Amendment violations. Those opinions were based on a conclusion that OHA elections are an "affair of the State of

Hawaii" for public officials for public office to a "state agency" established by the State Constitution. *See Rice*, 528 U.S. at 520-21, 525; *Arakaki*, 314 F.3d at 1095. Not so here. As set forth in *Terry v. Adams*, 345 U.S. 461 (1953), the Fifteenth Amendment precludes discrimination against voters in "elections to determine public governmental policies or to select public officials," *id.* at 467, not in private elections to determine private affairs. Similarly, the Voting Rights Act applies to "votes cast with respect to candidates for public or party office." *Chisom v. Roemer*, 501 U.S. 380, 391 (1991).

Certainly, this is not a state election governed by Chapter Eleven of the Hawaii Revised Statutes, or the State's regulatory systems covering public elections. It is not an election run by the State of Hawaii Office of Elections for any federal, state, or county office, nor is it a general or special election to decide any referendum, constitutional, or ballot question. No public official will be elected or nominated; no matters of federal, state, or local law will be determined. Rather, the evidence indicates it is an election conducted by Elections America, Inc. -- a private company -- with all decisions regarding the election made by Nai Aupuni, not by any state actor or entity. There is no evidence before the court that any state official dictated or controlled the requirements for this election.

So what is this election? How is it best characterized? The court concludes -- at this preliminary injunction stage -- that this is an election for delegates to a private convention, among a

community of indigenous people for purposes of exploring self-determination, that will not -- and cannot -- result in any federal, state, or local laws or obligations by itself. Stated differently, this election will not result in any federal, state, or county officeholder, and will not result, by itself, in any change in federal or state laws or obligations. Although it might result in a constitution of a Native Hawaiian governing entity, as OHA correctly argues, "even if such a constitution is ratified, the resulting Native Hawaiian self-governing entity would have no official legal status unless it were otherwise recognized by the state or federal government." Doc. No. 83, OHA Opp'n at 9.

And as Nai Aupuni recognizes, "even if the convention results in the formation of a Native Hawaiian governing entity, that [governing entity] *by itself* would not alter in any way how the State is governed." Doc. No. 79, Nai Aupuni Opp'n at 28. Nai Aupuni recognizes that "[a]ny such alteration of government will require subsequent action (*e.g.*, formal recognition) by the federal and possibly state governments. Similarly, any alteration of inter-governmental structure will require subsequent Federal and State legislative and/or executive action with respect to the [entity]." *Id.* This statement is absolutely true, and critical to an understanding of the court's conclusion.

The court likewise agrees with the Department of the Interior's observation that "this case is about Native Hawaiian elections for Native Hawaiian delegates to a convention that might propose a

constitution or other governing document for the Native Hawaiian community. This election has nothing to do with governing the State of Hawaii." Doc. No. 93, Amicus Br. at 21.

Plaintiffs argue that this is an important election about "public issues," and has the potential to be historic, and thus falls under the Fifteenth Amendment. They point to the Department of the Interior's October 1, 2015 NPRM as indicative of the election's importance -- it could conceivably lead to a "Native Hawaiian governing entity" that could eventually negotiate important questions on a "government-to-government" basis. But such potential is entirely speculative. Notably, the NPRM is just that -- proposed -- and has no force at all as of yet. Even if adopted in proposed form, many discretionary steps would be required before any proposed governing entity could even be recognized. *See* 80 Fed. Reg. at 59129-31 (explaining proposed "Criteria for Reestablishing a Formal Government-to-Government Relationship," PR §§ 50.11 to 50.16).

Plaintiffs rely heavily on *Terry v. Adams*, a case invalidating elections of the private "Jaybird party" that excluded African-Americans from primary elections that functioned essentially as a nominating process for public primary elections for county office. 345 U.S. at 463-64. Specifically, Plaintiffs rely on *Terry's* statement that the Fifteenth Amendment "includes any election in which public issues are decided or public officials selected." *Id.* at 468. But this statement must be read in the specific context addressed by the court -- "[t]he Jaybird primary has

become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county." *Id.* at 469. Thus, the racist selection of candidates stripped African-Americans "of every vestige of influence" in selecting public county officials. *Id.* at 470. This court simply cannot read, in context, the statement that the Fifteenth Amendment applies to an election to decide "public issues" to apply to this private election.

In short, much more will need to happen under any scenario before this election leads to any public change at all. A Native Hawaiian governing entity may recommend change, but cannot alter the legal landscape on its own.

Morever, this is not a public election based on Act 195 itself. The creation of a Roll of Native Hawaiians does not mean its commissioners are conducting an election. Act 195, although it contemplates a convention of Hawaii's indigenous peoples to participate in the organization of a Native Hawaiian governing entity, does not mandate any election. It doesn't impose, direct, or suggest any particular process. Under HRS § 10H-5, the Roll is intended to facilitate an *independent* process for Native Hawaiians to organize *themselves*. As an internal matter of self-governance by a group of the Native Hawaiian community, it does not involve a public election at all. At most, Act 195 facilitates *private* self determination, not governmental acts of organization.

b. Plaintiffs Have Not Demonstrated a Likelihood of Success on Their Fourteenth Amendment Claims.

Nor is Nai Aupuni's election, or Act 195 itself, a violation of Plaintiffs' equal protection or due process rights under the Fourteenth Amendment as asserted in Counts Two, Four, Seven, and Eight of the Complaint. To state a cause of action under 42 U.S.C. § 1983 for deprivation of a constitutional right, Plaintiffs must demonstrate that the deprivation occurs "under color of any statute, ordinance, regulation, custom, or usage of any State[.]" *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982). That is, there must be "state action." *Id.* at 935 n.18 ("[C]onduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law [under § 1983]."). This requirement "excludes from [§ 1983's] reach merely private conduct, no matter how discriminatory or wrongful." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quotation marks and citation omitted). And determining whether there is state action is a "necessarily fact-bound inquiry." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001).

But, because Nai Aupuni's election is a private election, Nai Aupuni is not a "state actor" for much the same reason. Its election does not fit under the "public function" test of state action, which requires a private entity to be carrying out a function that is "traditionally the *exclusive* prerogative of the State."

Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). In the area of elections, "[t]he doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials.'" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). And although *some* (even most) elections are "public functions," clearly not all elections are public.

Nor does Nai Aupuni's election fall under a "joint action" test, which asks "whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002) (quotation marks and citation omitted). The evidence does not suggest joint action here -- although certainly Nai Aupuni obtained significant funds through an OHA grant, it did so with a specific autonomy clause whereby OHA agreed not to "directly or indirectly control or affect the decisions of [Nai Aupuni]." Doc. No. 79-1, Asam Decl. ¶ 14. All the evidence suggests that OHA has no control over Nai Aupuni, and that Nai Aupuni is acting completely independently. Plaintiffs have not met their burden to demonstrate otherwise.

That is, OHA's grant of funds to Nai Aupuni, through the Akamai Foundation, does not make this a public election. Indeed, Plaintiffs admitted at the October 20, 2015 hearing that public funding is a "red herring." Doc. No. 104, Tr. (Oct. 20, 2015) at 126-27 ("[I]t's not public action because it's public[ly] funded. Defendants amply demonstrate that that's not the

test. We never said it was the test, we never will say it's the test."). And this admission was well-taken given cases such as *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), and *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 544 (1987), which explain that "[t]he Government may subsidize private entities without assuming constitutional responsibility for their actions." For example, in *Rendell-Baker* the Supreme Court found no relevant state action by a private school even where public funds accounted for at least 90 percent of its budget. 457 U.S. at 832. The "receipt of public funds does not make [the agency's] discharge decisions acts of the State." *Id.* at 840.

Rather, "[s]tate action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 955 (9th Cir. 2008) (en banc) (citing *Brentwood Acad.*, 531 U.S. at 295). And in addressing that "nexus," the inquiry must begin by focusing on the "specific conduct of which the plaintiff complains." *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (quoting *Sullivan*, 526 U.S. at 51); *see also, e.g.*, *Barrios-Velasquez v. Asociacion de Empleados del Estado Libre Asociado de P.R.*, 84 F.3d 487, 490 n.1 & 493 (1st Cir. 1996) (finding no state action in private election of a quasi-public entity with several indicia of government control, emphasizing that the analysis focuses on "the government's connection to the complained-of action, not the government's connection to the [organization]

itself"). Thus, "an entity may be a State actor for some purposes but not for others." *Caviness*, 590 F.3d at 812-13.

There is no such "close nexus" here between the State and this particular election that would make this a public election. An OHA grant was not for the purpose of a public election. And even if OHA -- certainly a "state actor" -- desires or agrees with some of Nai Aupuni's choices it makes in conducting the election of delegates and holding a convention, the Supreme Court has held that "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Sullivan*, 526 U.S. at 52.

Likewise -- although Act 195 itself, and the commission's actions in creating the Roll, certainly constitute "state action" -- this does not mean such action is an equal protection violation. The court finds merit in Defendants' argument that the Roll itself is simply a list of people with Native Hawaiian ancestry who may or may not have declared that they have a civic connection to the Hawaiian community or believe in "unrelinquished sovereignty." *See* Doc. No. 83, OHA Defs.' Opp'n at 15-17; Doc. No. 80, State Defs.' Opp'n at 1. The Roll is essentially a classification, and as the Supreme Court stated in *Nordlinger v. Hahn*, "[t]he Equal Protection Clause does not forbid classifications." 505 U.S. 1, 10 (1992). Rather, it is directed at unequal *treatment*. *Id.* It is the *use* of the Roll that Plaintiffs attack. But Act 195's creation of the commission and a Roll does not actually *treat* persons differently. Nothing in Act 195

calls for a vote. Even if HRS § 10H-5 contemplates or even encourages a convention, it simply calls for a chance for certain Native Hawaiians to *independently* organize *themselves*, without involvement from the State.

The court also finds some merit in Defendants' argument that *Brentwood Academy* acknowledged a type of exception or consideration (where state action might otherwise exist) for "unique circumstances" where that action raises "some countervailing reason against attributing activity to the government." 531 U.S. at 295-96. And Act 195 is certainly a unique law -- its stated purpose is meant to facilitate *self*-governance and the organizing of the State's indigenous people independently and amongst themselves. *See* HRS §§ 10H-2, 10H-5. By definition, then, such organizing (especially private organization as is at issue here) must occur amongst Native Hawaiians only -- and this is a "countervailing reason against attributing activity to the government."

Furthermore, forcing a private entity such as Nai Aupuni to associate with non-Native Hawaiians in its convention to discuss matters of potential self-governance could implicate Nai Aupuni's own First Amendment rights. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private

viewpoints.") (citation omitted).[9] The Ninth Circuit explained in *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743 (9th Cir. 2003), that such First Amendment rights can also be a "countervailing reason against attributing" even "significant government involvement in private action" to be state action. *Id.* at 748.

In short, Plaintiffs have not demonstrated a likelihood of success on their Fourteenth Amendment claims.

c. Morton v. Mancari, 417 U.S. 535 (1974).

The court next addresses the Defendants' secondary argument as to equal protection -- that is, *assuming* that Nai Aupuni is a state actor and that Act 195's Roll otherwise implicates equal protection under § 1983, under *Mancari*, unequal treatment need only be "tied rationally" to some legitimate governmental purpose. 417 U.S. at 555. That is, "legislative classifications are valid unless they bear no rational relationship to the State's [legitimate] objectives." *Wash. v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 502 (1979). The court recognizes that this secondary analysis may not be necessary, given the court's findings regarding a lack of state action and that Act 195 does not otherwise violate equal protection. Nevertheless, it is important to reach some of these secondary questions

[9] This is a factor whether considered at this first prong of *Winter*, or when considering the balance of the equities at the third prong.

to help explain, and perhaps bolster, the court's ultimate conclusion.

"In *Mancari*, the Supreme Court upheld an employment preference for Native Americans seeking positions in the Bureau of Indian Affairs ('BIA'). The class action plaintiffs, who were non-Indian applicants for BIA employment, argued that the preference amounted to invidious racial discrimination that violated their right to equal protection." *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 732 (9th Cir. 2003). *Mancari* "concluded that strict scrutiny did not apply because the preference for Indians relied on a political, rather than a racial, classification. The hiring preference was not directed toward 'a "racial" group consisting of "Indians"; instead, it applie[d] only to members of "federally recognized" tribes.'" *Id.* (quoting *Mancari*, 417 U.S. at 554 n.24).

In this regard, although Native Hawaiians have not been classified as a "tribe," Defendants and amicus have made a strong argument that *Mancari* can also apply to uphold Congressional action taken under its powers to support Native Hawaiians as indigenous people. *See, e.g.*, 42 U.S.C. § 11701(17) (Congressional finding that "[t]he authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii"); 20 U.S.C. § 7512(12)(B) (Congressional finding that "Congress does not extend services to Native Hawaiians because

of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship"); 20 U.S.C. § 7512(12)(D) (Congressional finding that "the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives"); 20 U.S.C. § 7512(1) (Congressional finding that "Native Hawaiians are a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago"); 42 U.S.C. § 11701(1) (Congressional finding that "Native Hawaiians comprise a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778").

But another step is required before *Mancari* can apply to *state* laws -- that is, before such federal power would allow a state to treat Native Hawaiians differently under a "rationally related" test. This is a more difficult question. *Yakima Indian Nation*, reasons that a state has power if federal law *explicitly* gives a state authority. 439 U.S. at 501. The state law at issue in *Yakima Indian Nation* "was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians." *Id*. But it is unclear whether the specific type of alleged state actions at issue here (*e.g.*, creation of the Roll, facilitating Native Hawaiian self-governance) are encompassed within existing grants of federal authority. *Compare KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 19, 20 (1st Cir. 2012) (reasoning that "it is quite doubtful that *Mancari's* language can

be extended to apply to preferential *state* classifications based on tribal status" and questioning "whether the [Indian Gaming Regulatory Act] 'authorizes' the state's actions on the present facts") *with Greene v. Comm'r Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 727 (Minn. 2008) ("Generally, courts have applied rational basis review to state laws that promote tribal self-governance, benefits tribal members, or implement or reflect federal laws.") (citing *Yakima Indian Nation*, 439 U.S. at 500-01) (other citations omitted). The court will not, however, reach -- as the Supreme Court stated in *Rice* -- this "difficult terrain." 528 U.S. at 519. *Mancari* is not necessary if a strict scrutiny test can otherwise be satisfied to the specific actions at issue here.

d. Strict Scrutiny

Next, the court discusses whether -- again, assuming Nai Aupuni is involved in state action and/or that Act 195 implicates equal protection -- a strict scrutiny test could be met to justify the challenged actions under the Fourteenth Amendment. And, if it becomes necessary to reach this issue, the court's answer would be "yes." The court certainly recognizes that strict scrutiny is a difficult test to meet, and that this is a close question. But the court also recognizes that it faces a unique issue, one with a long history.

Act 195 and the upcoming election cannot be read in a vacuum. Both must be read in context of Hawaiian history and the State's trust relationship with Native Hawaiians. As explained in Act 195 § 1,

"[f]rom its inception, the State has had a special political and legal relationship with the Native Hawaiian people and has continually enacted legislation for the betterment of their condition." As the Department of the Interior's October 1, 2015 NPRM summarizes, the United States also has a history of recognizing through many laws of a "special political and trust relationship with the Native Hawaiian community." Doc. No. 93-1, 80 Fed. Reg. at 59116. *See also, e.g.*, *id.* at 59114-118 (providing background of the NPRM and recounting history of Congressional enactments supporting Native Hawaiians, and some efforts at self-determination).

As quoted above, in passing laws specifically to benefit Native Hawaiian healthcare, Congress found that "Native Hawaiians comprise a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778." 42 U.S.C. § 11701(1). It recognized that "[a]t the time of the arrival of the first nonindigenous people in Hawaii in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistence social system based on communal land tenure with a sophisticated language, culture, and religion." 42 U.S.C. § 11701(4). And Congress found that "[i]n 1898, the United States annexed Hawaii through the Newlands Resolution without the consent of or compensation to the indigenous people of Hawaii or their sovereign government who were thereby denied the mechanism for expression of their inherent sovereignty through self-government and self-

determination, their lands and ocean resources." 42 U.S.C. § 11701(11).

Similarly, Congress, in enacting laws specifically to benefit Native Hawaiian education, recognized and reaffirmed that "Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands." 20 U.S.C. § 7512(12)(A). Congress reaffirmed that "the aboriginal, indigenous people of the United States have . . . (i) a continuing right to autonomy in their internal affairs; and (ii) an ongoing right of self-determination and self-governance that has never been extinguished." 20 U.S.C. § 7512(12)(E). And Congress found that "[d]espite the consequences of over 100 years of nonindigenous influence, the Native Hawaiian people are determined to preserve, develop, and transmit to future generations their ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions." 20 U.S.C. § 7512(20).

Act 195 likewise acknowledges that "Native Hawaiians have continued to maintain their separate identity as a single, distinctly native political community through cultural, social, and political institutions and have continued to maintain their rights to self-determination, self-governance, and economic self-sufficiency." Act 195 § 1. The Hawaii Legislature thus found that "[t]he Native Hawaiian people are hereby recognized as the only indigenous,

aboriginal maoli people of Hawaii." HRS § 10H-1.[10] The Admissions Act itself, and other provisions of Hawaii law, require the "betterment of conditions of native Hawaiians . . . and Hawaiians." HRS § 10-3; Admission Act, Pub. L. No. 86-3 § 5(f), 73 Stat. 6 (1959).

It follows that the State has a compelling interest in bettering the conditions of its indigenous people and, in doing so, providing dignity in simply allowing a starting point for a process of self-determination. And there is a history of attempts at self-governance, as set forth in the Department of the Interior's NPRM, *see* 80 Fed. Reg. at 59117, and other sources. *See generally Native Hawaiian Law* ch. 5 at 271-79 (Melody Kapilialoha MacKenzie ed., 2015). Nevertheless, before any discussion of a "government-to government" relationship with any "Native Hawaiian governing entity" under the NPRM could even begin to take place, such an entity should reflect the "will of the Native Hawaiian community." 80 Fed. Reg. at 59130 (PR § 50.11). The State has a compelling interest in facilitating the organizing of

[10] *See also* HRS § 10H-8(b) ("Consistent with the policies of the State of Hawaii, the members of the qualified Native Hawaiian roll, and their descendants, shall be acknowledged by the State of Hawaii as the indigenous, aboriginal, maoli population of Hawaii."). This section is read in conjunction with § 10H-8(a) and restates the State's recognition in § 10H-1 that the Native Hawaiian people are "the only indigenous, aboriginal, maoli people of Hawaii." It does not mean, of course, that the members of the Roll are the *only* "indigenous, aboriginal, maoli population of Hawaii." It goes without saying that a person of Native Hawaiian ancestry does not, and cannot, lose their ancestry simply by not being included on the Roll.

the indigenous Native Hawaiian community so it can decide for itself, independently, whether to seek selfgovernance or self-determination, and if so, in what form.[11] The question of "Hawaiian sovereignty" -- which means different things to different people -- is not going to go away. So the State could be said to have a compelling interest in facilitating a forum that might result in a unified and collective voice amongst Native Hawaiians.[12] And, by definition, this is not possible without limiting such self-governance discussions to Native Hawaiians themselves. Stated differently, the restriction to Native Hawaiians is precisely tailored to meet that compelling interest. It would meet strict scrutiny for purposes of equal protection. "Purport[ing] to require the Native Hawaiian community to include non-Natives in organizing a government could mean in practice that a Native group could never organize itself, impairing its right to self-government[.]" Doc. No. 93, Amicus Br. at 20.

---

[11] And this is particularly true given that the undisputed evidence in the record before the court is that "Native Hawaiians' socio-economic status has steadily declined, and for the last several decades has been the lowest of any ethnic group residing in Hawaii." Doc. No. 83-1, Crabbe Decl. ¶ 23.

[12] This interest is far different than a right of "the Native Hawaiian people to reestablish an autonomous sovereign government," *State v. Armitage*, 132 Haw. 36, 56, 319 P.3d 1044, 1064 (2014), which the Hawaii Supreme Court held is not a fundamental right existing in the Hawaii Constitution. *Id.* at 56-57, 319 P.3d at 1064-65 ("Petitioners fail to establish that the right to form a sovereign native Hawaiian nation is a 'fundamental right.'"). It is simply an interest in facilitating discussions about self-determination amongst Native Hawaiians.

e. Plaintiffs Have Not Demonstrated a Likelihood of Success on Their First Amendment Claims.

Likewise, Plaintiffs have not demonstrated a likelihood of success on their claims under the First Amendment (Counts Four and Nine). In Count Four, Plaintiffs Akina and Makekau contend that their First Amendment rights were violated because conditions were placed on their registration for the Roll (*i.e.*, requiring Declaration One), which implicates rights under the First Amendment.

The evidence in this regard is mixed -- Defendants attest that Plaintiffs Akina and Makekau can (or could have) participated in the process without affirming Declaration One. *See, e.g.*, Doc. No. 80-1, Namuo Decl. ¶ 23; Doc. No. 104, Tr. (Oct. 20, 2015) at 15-17; Doc. No. 79-1, Asam Decl. ¶ 26 (providing newspaper editorial published purporting "to inform Plaintiffs [Akina and Makekau] and Native Hawaiians generally that they may register without making [Declaration One]" that explains that "[w]e understand that the Roll Commission has registered and certified voters -- and will continue to do so -- even if these voters refuse to agree to this declaration."). Indeed, Act 195 itself (as amended) *requires* OHA registrants to be included on the list, irrespective of Declaration One or Two. As explained above, if Plaintiffs Akina and Makekau, as Native Hawaiians as defined by Hawaii law, had registered under the OHA Hawaiian Registry, they would have been

included on the Roll (without making Declaration One or Two).

Both Akina and Makekau dispute that they had notice that they could have registered for the Roll without affirming Declaration One. See Doc. No. 91-2, Second Akina Decl. ¶ 4 ("Once I failed to confirm the statement and the principles asserted in Declaration One, I received no other information from the [commission] website suggesting that I could register without affirming the Declaration."); *id.* ¶ 6 ("To my knowledge, I never received any communications of any kind (prior to the filing of this lawsuit) from any source informing me that I did not have to affirm Declaration One."); Doc. No. 91-1, Second Makekau Decl. ¶ 4 ("At no time during the registration process was I given the option to avoid asserting Declaration One."); *id.* ¶ 8 ("I received no communication from any source telling me I did not have to confirm Declaration One to register.").

From the record as a whole, it certainly appears that if Akina and Makekau truly wanted to participate in Nai Aupuni's process they could have easily done so, but they chose not to.

In any event, given the focus at this preliminary injunction stage on the Roll's use in the election, the claim is not likely to succeed because the burdens that Akina and Makekau assert only apply if they concern a right to vote in a public election, and Nai Aupuni's election is private. They contend that their inability to register for the Roll (without affirming Declaration One's reference to

"unrelinquished sovereignty") deprives them of the right to participate in Nai Aupuni's process -- the vote for delegates, the ability to run as a delegate, participation in the convention. But again, Nai Aupuni's delegate election and proposed convention is a private matter, not involving state action.

In a different First Amendment theory, in Count Nine, Plaintiffs Gapero and Moniz contend that their inclusion on the Roll through an OHA registry violates a First Amendment right against compelled speech or a right not to register to vote. Doc. No. 47-1, Pls.' Mem. at 22 (citing *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 195 (1999) ("[T]he choice not to register implicates political thought and expression."). Count Nine alleges that "[f]orcibly registering an individual amounts to compelled speech," Doc. No. 1, Compl. ¶ 131, and that, where they do not agree with Declaration One, Plaintiffs Gapero and Moniz do not wish to bolster the legitimacy of the Roll." *Id.* ¶¶ 134, 136. "By registering Plaintiffs Gapero and Moniz without their consent and without notice to them, the [commission] compelled their speech and violated their First Amendment right to refrain from speaking." *Id.* ¶ 137. Plaintiff Gapero contends that such use provides an unauthorized assertion that he supports a position. Doc. No. 47-4, Gapero Decl. ¶ 7. Likewise, Plaintiff Moniz alleges that the use of her name on the Roll wrongly indicates that she supports the Roll and its purpose. Doc. No. 47-5, Moniz Decl. ¶ 9.

They, however, are unlikely to succeed on the merits of such claims. It is undisputed that

approximately 62 percent of the Roll comes from OHA registries, which, again, do not require affirmations of sovereignty or a civic connection to the Native Hawaiian community. Only 38 percent of the Roll has made those affirmations. These Plaintiffs are thus unlikely to prevail on a claim that inclusion on the Roll implies that they have certain views. Merely being on the Roll does not compel a statement as to sovereignty. Moreover, as already established, the Roll itself is not a voter-registration list. Gapero and Moniz cannnot be said to have been compelled to register to vote. Finally, the evidence establishes that Gapero and Moniz could have easily removed themselves from the Roll as early as 2013, if they did not want to remain on the list. Indeed, as OHA Defendants note, even if there were a First Amendment violation, the likely remedy would not be to halt the planned election -- it would be to remove them from the list. Doc. No. 83, OHA Defs.' Opp'n at 20 n.5. In short, simply being included on the Roll does not implicate the First Amendment.

Plaintiffs have thus failed to meet the first requirement for granting a preliminary injunction, and all four prongs of the *Winter* test must be met. "Because it is a threshold inquiry, when a plaintiff has failed to show the likelihood of success on the merits, [the court] need not consider the remaining three *Winter* elements." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citations and internal editorial marks omitted). Nevertheless, the court briefly explains why Plaintiffs also fail to meet *Winter's* other three prongs.

2. Irreparable Harm

Plaintiffs assert very generally that they will suffer irreparable harm because of "the various illegal activities to be carried out in the registration/election/convention process under Act 195." Doc. No. 47-1, Pls.' Mem. at 30. They refer to the right to vote and the principle that "an alleged constitutional infringement will often alone constitute irreparable harm." *Id.*

But there is no constitutional violation. Plaintiffs are not being deprived of a right to vote in a public election. There is no showing of a First Amendment violation. And the harm from being deprived of participation in Nai Aupuni's election and convention is speculative. *Winter* reiterated that "[a] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." 555 U.S. at 22 (citation and quotation marks omitted). In short, Plaintiffs have not demonstrated irreparable harm.

3. Balance of Equities

Plaintiffs must demonstrate that the balance of equities tips in their favor. Defendants argue that Plaintiffs waited too long to bring suit -- Act 195 was passed in 2011 and this suit was not filed until August 2015. But Plaintiffs respond by pointing out that the decisions regarding the election were not made until this year. Suit was filed within five weeks of when the election schedule was first reported. Plaintiffs could not have sued to enjoin an election that was not

scheduled. Thus, at least as to claims regarding the election itself, the timing of the suit does not affect the equities.

Nevertheless, Plaintiffs have not demonstrated that the equities tip in their favor. They have no right to participate in a private election. And Plaintiffs Akina and Makekau could have participated, as voters and/or candidates for delegates, even without making Declarations One and Two. They both qualify as Native Hawaiians to register on OHA's Hawaiian Registry. The evidence indicates that they could have participated if they wanted to do so, even if registration occurred after suit was filed. And Plaintiffs Gapero and Moniz could have easily removed (and may still remove) themselves from the Roll.

On the other hand, enjoining a private election process that has already begun – with candidates for delegate having registered, notices having been given, and campaign activities occurring -- would disrupt Native Hawaiian efforts to organize. In short, the equities do not tip in Plaintiffs' favor.

4. Public Interest

Finally, Plaintiffs have not demonstrated that the public interest would be served by a preliminary injunction. Plaintiffs are not likely to be deprived of any Constitutional rights. And granting an injunction now would potentially affect approximately 100,000 people who are on Nai Aupuni's voter list who might want to participate in a process of self-determination.

C. What the Court Is Not Deciding

The court pauses to emphasize the limited scope of this Order. To be clear, the court is tasked *only* with determining whether Plaintiffs have met their burden under *Winter* to obtain an injunction, "an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. The court, however, is not assessing the process itself. The court is *not* deciding whether this specific election will lead to an entity that reflects "the will of the native Hawaiian community" or whether it will be "fair and inclusive" such that the United States may then begin to negotiate on a "government-to-government" basis, as set forth in the Department of the Interior's NPRM, 80 Fed. Reg. at 59119. Nor is the court deciding whether any potential actions under Act 195 or the NPRM -- such as encouraging Native Hawaiian self-governance, or negotiating or engaging on a "government-to-government" basis with a "reorganized Native Hawaiian government" – reflect wise public policy. And the court is not deciding whether the Department of the Interior even has the Congressional authorization to facilitate the "reestablishment" of a government-to-government relationship with the Native Hawaiian community. The court has only addressed the legal considerations underlying the specific challenged actions, and has considered whether Plaintiffs have demonstrated that the proposed election, and challenged aspects of Act 195, are likely to be unconstitutional so as to require stopping the process now (at this preliminary injunction phase).

V. CONCLUSION

Act 195 is a unique law. It is both symbolic and remarkable. It reaffirms a delegation of authority in the Admissions Act from the United States to the State of Hawaii to address conditions of Hawaii's indigenous people. It declares that the Native Hawaiian people are Hawaii's only "indigenous, aboriginal, maoli people." It is meant -- in limited fashion -- to facilitate a possible mechanism of independent *self*-determination and *self*-governance of Hawaii's indigenous people. It facilitates -- simply by creating a Roll of qualified Native Hawaiians -- a possible process for the Native Hawaiian community to determine *for themselves* (absent any other involvement by the State of Hawaii) what collective action, if any, might be sought by that community.

Undoubtedly there is *some* "state action." But, based on the information presented at this preliminary injunction stage, Nai Aupuni's planned election of delegates is not; Nai Aupuni's determination of who may participate is not; the planned convention is not. And the state is not involved in whether this process is or will be "fair and inclusive" and "reflect the will of the Native Hawaiian community" for purposes of the Department of the Interior's NPRM.

The election will not result in any state officials, law, or change in state government. The election and convention might be a step towards self-governance by Native Hawaiians, or it might

accomplish nothing of substance. Even if, however, a self-proclaimed Native Hawaiian governing entity is created with a governing document or a constitution, the result would most certainly not be a state entity.

Plaintiffs have not met their burden of demonstrating that excluding them from this particular private election is unconstitutional, or will otherwise violate federal law. And that is the only question now before this court.

Plaintiffs' Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 29, 2015.

/s/ J. Michael Seabright
J. Michael Seabright
United States District
Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

No. 15-00322 JMS-RLP

Kealii Makekau, *et al.*,
Plaintiffs,
v.

The State of Hawaii, *et al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ, Plaintiffs in the above-captioned case, hereby file their appeal to the United States Court of Appeals of the Ninth Circuit from

> (1) this Court's Order Overruling Objections, and Adopting Findings and Recommendation to Deny Plaintiffs' Amended Motion for Attorneys' Fees and Related Non-Taxable Expenses, entered June 6, 2017 (Dkt. # 174); and
>
> (2) the Findings and Recommendation to Deny Plaintiffs' Amended Motion for Attorneys' Fees and Related Non-Taxable Expenses Under L.R. Civ. 54.3, entered by United States Magistrate Judge Richard L. Puglisi on February 24, 2017 (Dkt. # 165).

DATED: Washington, D.C., July 5, 2017.

/s/ Robert D. Popper
Robert D. Popper
Michael A. Lilly
Chris Fedeli
Lauren M. Burke
H. Christopher Coates

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

No. 15-00322 JMS-RLP

Kealii Makekau, *et al.*,

Plaintiffs,

v.

The State of Hawaii, *et al.*,

Defendants.

COMPLAINT

Plaintiffs, by their attorneys, bring this action for declaratory and injunctive relief and allege as follows:

INTRODUCTION

1. Plaintiffs are individual registered voters who seek declaratory and injunctive relief to enjoin race-based, viewpoint-based, and other restrictions and qualifications imposed by Hawaii law and enforced by agents of the State of Hawaii on those seeking to register as voters on a list (the "Roll") maintained by the defendants. Voters who are on the Roll will be entitled to vote for the delegates to a proposed constitutional convention, the intended purpose of which is to choose a form of government

under which Native Hawaiians would govern themselves. Plaintiffs allege that the restrictions on registering for the Roll violate the U.S. Constitution, including the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, the First Amendment, and the Due Process Clause of the Fourteenth Amendment; and federal law, including the Civil Rights Act of 1871, 42 U.S.C. § 1983, and Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301.

2. Plaintiffs seek (1) a declaratory judgment that these voting restrictions and qualifications violate their constitutional and federal statutory rights; (2) a permanent injunction against their further use or implementation; and (3) costs and attorneys' fees.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343, and 1357; 42 U.S.C. §§ 1983 and 1988; and 52 U.S.C. §§ 10301 and 10308. Furthermore, this Court has jurisdiction over Plaintiffs' request for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. Jurisdiction for Plaintiffs' claim for attorneys' fees is based on 42 U.S.C. § 1988(b) and 52 U.S.C. § 10310(e).

4. This Court has personal jurisdiction over the defendants, all of whom are officials, employees, or agents of the State of Hawaii, and all of whom are Hawaii residents.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

PARTIES

6. Plaintiff Keli'i Akina is a citizen and a resident of the State of Hawaii, and a registered voter. He is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands. Mr. Akina was prevented from registering as a voter on the Roll because of viewpoint-based and other restrictions and qualifications imposed and enforced by the defendants.

7. Plaintiff Kealii Makekau is a citizen and a resident of the State of Hawaii, and a registered voter. He is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands. Mr. Makekau was prevented from registering as a voter on the Roll because of viewpoint-based and other restrictions and qualifications imposed and enforced by the defendants.

8. Plaintiff Joseph Kent is a citizen and resident of the State of Hawaii, and a registered voter. Mr. Kent was prevented from registering as a voter on the Roll because of race-based and other restrictions and qualifications imposed and enforced by the defendants.

9. Plaintiff Yoshimasa Sean Mitsui is a citizen and resident of the State of Hawaii, and a

registered voter. Mr. Mitsui was prevented from registering as a voter on the Roll because of race-based and other restrictions and qualifications imposed and enforced by the defendants.

10. Plaintiff Pedro Kana'e Gapero is a citizen and resident of the State of Hawaii, and a registered voter. He is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands. Mr. Gapero was registered for the Roll without his knowledge or consent.

11. Plaintiff Melissa Leina'ala Moniz is a citizen and resident of the State of Texas. She is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands. Ms. Moniz was registered for the Roll without her knowledge or consent.

12. Defendant State of Hawaii is a sovereign state in the United States of America.

13. Defendant David Y. Ige is the Governor of the State of Hawaii, and is being sued in his official capacity as the State officer charged with responsibility for the faithful execution of the laws of Hawaii as well as those of the United States. The Governor resides at 320 South Beretania Street, Honolulu, Hawaii 96813.

14. Defendant Robert K. Lindsey Jr. is the Chairperson of the Board of Trustees of the Office of Hawaiian Affairs ("OHA"), and is being sued in his

official capacity. OHA is a department of the State of Hawaii, and has basic responsibilities relating to the maintenance of the Roll, including, but not limited to, responsibility for funding the Native Hawaiian Roll Commission and for cooperating with it in the performance of its duties. *See* Act 195, 2011 Legislative Session (codified in chapter 10H, Hawaii Revised Statutes) ("Act 195"), §§ 4, 5. OHA's principal place of business is 560 North Nimitz Highway, Honolulu, Hawaii 96817.

15. Defendants Colette Y. Machado, Peter Apo, Haunani Apoliona, Rowena M.N. Akana, John D. Waihe'e IV, Carmen Hulu Lindsey, Dan Ahuna, and Leina'ala Ahu Isa are the other Trustees of the Board of Trustees of OHA. Defendant Kamana'opono Crabbe is the Chief Executive Officer of OHA. These defendants are being sued in their official capacities.

16. Defendant John D. Waihe'e III is the Chairman of the Native Hawaiian Roll Commission (the "NHRC"), and is being sued in his official capacity. The NHRC was established by Act 195 to be the agency most directly responsible for preparing and maintaining the Roll and for certifying that voters who register for the Roll meet its requirements. HAW. REV. STAT. § 10H-3. The principal place of business of the NHRC is 1960 Naio Street, Honolulu, Hawaii, 96817.

17. Defendant Nā'ālehu Anthony is the Vice-Chairman and a Commissioner, and Defendants Lei Kihoi, Robin Danner, and Māhealani Wendt are the other Commissioners, of the NHRC. Defendant

Clyde W. Nāmu'o is the Executive Director of the NHRC. These defendants are being sued in their official capacities.

18. Defendant The Akamai Foundation ("AF") is, on information and belief, a 501(c)(3) nonprofit organization existing under the laws of the State of Hawaii, with its principal place of business at 1136 Union Mall, Honolulu, Hawaii 96813. AF has entered into contracts with OHA and The Na'i Aupuni Foundation pursuant to which OHA agreed to provide about $2.6 million to AF, which AF in turn agreed to grant to The Na'i Aupuni Foundation to conduct an election in which voters registered on the Roll will elect delegates to a constitutional convention.

19. Defendant The Na'i Aupuni Foundation ("NAF") is, on information and belief, a domestic, nonprofit organization, with its principal place of business at 745 Fort Street, Honolulu, Hawaii, 96813. On information and belief, NAF was created for the sole purpose of conducting an election in which those voters who are registered on the Roll will elect delegates to a constitutional convention.

20. Doe Defendants 1-50 are persons, partnerships, associations, companies, corporations, or entities whose names, identities, capacities, activities and/or responsibilities are presently unknown to Plaintiffs or their attorneys, except that Doe Defendants 1-50 were and/or are subsidiaries, servants, employees, representatives, co-venturers, associates, consultants, owners, lessees, lessors, guarantors, assignees, assignors, licensees, and/or

licensors of Defendants and were or are in some manner presently unknown to Plaintiffs or their attorneys engaged or involved in the activities alleged herein or responsible for the activities of which Plaintiffs complain, or should be subject to the relief Plaintiffs seek. Plaintiffs pray for leave to certify the true names, identities, capacities, activities and/or responsibilities of Doe Defendants 1-50 when, through further discovery in this case, the same are ascertained. Plaintiffs have made a good faith effort to identify said Doe Defendants prior to filing this Complaint, including interviewing witnesses and reviewing publicly available documents.

FACTUAL ALLEGATIONS

Background

21. The Hawaii Homes Commission Act ("HHCA") was enacted by Congress in 1920 to address concerns over poverty and population decline among the native population of Hawaii. H.R. Rep. No. 839, 66th Cong., 2nd Sess. at 4 (1920). The HHCA defined "Native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." The HHCA made about 200,000 acres of public lands available to lease to such native Hawaiians at nominal prices. HHCA §§ 201, 203.

22. When Hawaii was admitted as the fiftieth state in 1959, Congress granted the government of Hawaii title to certain lands previously held by the United States, including the lands set

aside by the HHCA. These lands were to be held in a "public trust" for certain specified purposes. Hawaii Statehood Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 ("Admission Act"); Intro., § 5(b).

23. One purpose was "the betterment of the conditions of native Hawaiians" as defined in the HHCA. Admission Act § 5(f). The other four purposes, which applied to all Hawaiians, were "the support of the public schools and other public educational institutions . . . the development of farm and home ownership on as widespread a basis as possible . . . the making of public improvements, and . . . the provision of lands for public use." Admission Act § 5(f).

24. In 1978, the Hawaii Constitution was amended to establish OHA. HAW. CONST. ART. XII, § 5. The Hawaii Constitution provides that OHA "shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians." *Id.* OHA has been granted statutory authority to administer 20% of all funds derived from the public land trust, exclusive of lands set aside pursuant to the HHCA. HAW. REV. STAT. §§ 10-3, 10-13.5.

25. The Hawaii Constitution provided that OHA's board of trustees shall be "elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians." HAW. CONST. ART. XII, § 5. "Hawaiian" is defined by Hawaii law as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty

and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." HAW. REV. STAT. § 10-2.

26. In 2000, the United States Supreme Court struck down Hawaii's requirement that only "Hawaiians," as defined by Hawaii law, could vote for the trustees of OHA, on the ground that this voting restriction violated the Fifteenth Amendment to the U.S. Constitution. *Rice v. Cayetano*, 528 U.S. 495, 524 (2000). In the course of that ruling, the Court observed that "[a]lthough it is apparent that OHA has a unique position under state law, it is just as apparent that it remains an arm of the State." *Id.* at 521. The Court also observed that Hawaii's law used "ancestry" as "a proxy for race." *Id.* at 514.

27. In 2002, the United States Court of Appeals for the Ninth Circuit struck down Hawaii's requirement that candidates for OHA be "Hawaiians," as defined by Hawaii law, as a violation of the Fifteenth Amendment of the U.S. Constitution and of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. *Arakaki v. State of Hawaii*, 314 F.3d 1091, 1098 (9th Cir. 2002).

Act 195

28. In July 2011, Hawaii Governor Neil Abercrombie signed Act 195 into law.

29. Act 195 provides that the "purpose of this chapter is to provide for and to implement the recognition of the Native Hawaiian people by means

and methods that will facilitate their self-governance . . ." HAW. REV. STAT. § 10H-2.

30. Act 195 establishes the NHRC as a subdivision within OHA for administrative purposes, and charges it with responsibility for "[p]reparing and maintaining a roll of qualified Native Hawaiians" and "[c]ertifying that the individuals on the roll of qualified Native Hawaiians meet the definition of qualified Native Hawaiians." HAW. REV. STAT. § 10H-3(a).

31. Act 195 states that the "the roll of qualified Native Hawaiians . . . is intended to facilitate the process under which qualified Native Hawaiians may independently commence the organization of a convention of qualified Native Hawaiians, established for the purpose of organizing themselves." HAW. REV. STAT. § 10H-5.

32. Act 195 provides that a "qualified Native Hawaiian" means an individual whom the NHRC has determined to meet certain criteria of eligibility established by the Act. The first criterion is based on ancestry, and defines a qualified Native Hawaiian as one who is "a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitutes the State of Hawaii"; one who was eligible in 1921 for an HHCA lease, or is a descendant of such a person; or one who meets "the ancestry requirements of Kamehameha Schools or of any Hawaiian registry program of the office of Hawaiian affairs."

33. Act 195 further specifies that a "qualified Native Hawaiian" must have "maintained a significant cultural, social, or civic connection to the Native Hawaiian community"; and must also "wish[] to participate in the organization of the Native Hawaiian governing entity."

The Process of Registering for the Roll

34. Starting in July 2012, prospective voters could register for the Roll.

35. On information and belief, many tens of thousands of registrants currently on the Roll were placed there without their knowledge or consent, when their names were transferred from other lists containing the names of Native Hawaiians.

36. Plaintiffs Gapero and Moniz were placed on and registered for the Roll without their knowledge or consent.

37. On information and belief, registration was closed and subsequently reopened one or more times since July 2012.

38. Registration for the Roll is at present open.

39. Registration is available online at http://www.kanaiolowalu.org/. The screen at that website has a clickable area labeled "REGISTER." Placing the cursor over that area reveals two options,

"REGISTER (HAWAIIANS)" and "SIGN THE PETITION (EVERYONE)."

40. Selecting "SIGN THE PETITION (EVERYONE)" does not allow the option of registering for the Roll, but only allows one to express support for the Roll, for "the efforts of the Native Hawaiian people to restore self-governance to the Hawaiian Nation," for "the unrelinquished sovereignty of the indigenous people of Hawai'i," for the "commitment to bring recognition to the indigenous people of Hawai'i," and for "the movement to restore self-governance to the Hawaiian Nation."

41. Selecting "REGISTER (HAWAIIANS)" returns a single screen, entitled "REGISTER NOW." That screen contains three declarations; information boxes requesting name, birth information, and contact information; checkboxes requesting "Verification of Native Hawaiian Ancestry," and a clickable area labeled "CONFIRM INFO."

42. The three declarations, which all prospective applicants must confirm, read as follows:

> Declarations
>
> - **Declaration One**. I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance.
> - **Declaration Two**. I have a significant cultural, social or civic connection to the

Native Hawaiian community.

- **Declaration Three**. I am a Native Hawaiian: a lineal descendant of the people who lived and exercised sovereignty in the Hawaiian islands prior to 1778, or a person who is eligible for the programs of the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that person.

43. The area labeled "Verification of Native Hawaiian Ancestry" reads as follows:

> **Verification of Native Hawaiian Ancestry**
> Please check all applicable categories. (at least one is required)
> □ My birth certificate lists (Part) Hawaiian
> □ One of my parents birth certificate lists (Part) Hawaiian
> □ Other official certificate/registry listing (Part) Hawaiian
> □ Attended The Kamehameha Schools
> □ Department of Hawaiian Home Lands lessee, renter, or wait list (verified)
> □ Operation Ohana
> □ Kau Inoa (ancestry confirmed)
> □ Kamehameha Schools Hoʻoulu Hawaiian Data Center
> □ Hawaiian Registry at OHA
> □ None of these fit but I can prove ancestry through another ancestor

44. There is no way to register for the Roll without confirming the information, including the declarations and the verification checkboxes, contained on the page entitled "REGISTER NOW."

45. Those plaintiffs who deliberately tried to register for the Roll were unable to confirm the truth of one or more of the declarations contained on the screen entitled "REGISTER NOW."

46. Plaintiffs Akina and Makekau could not confirm the principles enunciated in Declaration One, although they could confirm their ties to the Native Hawaiian community (Declaration Two) and their Native Hawaiian ancestry (Declaration Three). Further, they could have provided information sufficient to satisfy the verification-of-ancestry checklist.

47. Plaintiffs Kent and Mitsui could not confirm any of the declarations, nor could they have supplied information sufficient to satisfy the verification-of-ancestry checklist.

48. As a result, none of these plaintiffs were able to register for the Roll.

The Joint Conduct of OHA, NHRC, AF, and NAF

49. In the period from about April 27, 2015, to about May 4, 2015, representatives of OHA, AF, and NAF signed an agreement entitled "Grant Agreement Between the Akamai Foundation and the Office of Hawaiian Affairs for the Use and Benefit of

Na'i Aupuni" ("Grant Agreement"). In sum and substance, the Grant Agreement authorizes the transfer from OHA to AF, for the use by NAF, of a grant in the total amount of $2,598,000.00. The Grant Agreement provides that "AF will direct the use of the grant to [NAF] so it may facilitate an election of delegates, election and referendum monitoring, a governance 'Aha [constitutional convention], and a referendum to ratify any recommendation of the delegates arising out of the 'Aha ('Scope of Services')."

50. On or about April 27, 2015, AF, as "Fiscal Sponsor," and NAF, as "Client," signed a "Fiscal Sponsorship Agreement Between Akamai Foundation and Na'i Aupuni" ("Sponsorship Agreement"), which sets forth, among other things, the "Na'i Aupuni Projected Budget," describing relevant election-related tasks and describing the use of the entire grant amount described in the Grant Agreement.

51. On or about May 7 and 8, 2015, OHA, AF, and NAF signed an agreement entitled "Letter Agreement Between Office of Hawaiian Affairs, Na'i Aupuni, and Akamai Foundation" ("Letter Agreement"), which provides, among other things, for an initial payment under the Grant Agreement.

52. In the period from about June 18, 2015, to June 22, 2015, NAF and Election America, Inc. ("EAI"), a private company with its principal place of business in Mineola, New York, signed a contract whereby EAI would perform certain services relating

to the Roll and the planned election for a constitutional convention, for a total compensation of $177,208. That contract referred to the following schedule:

> **Tentative Project Timeline**
> E-A [EAI] will mail or email Notice of Election to known electorate…….July 15, 2015
> Deadline for submitting Delegate candidate Applications……..September 15, 2015
> Deadline for E-A to determine eligibility of Delegate Candidates…….September 30, 2015
> Deadline for additions to electorate……..October 15, 2015
> Ballots mailed and/or emailed to known electorate……..……November 1, 2015
> Deadline for ballots to be received……December 1, 2015

53. In an article in the HONOLULU STAR ADVERTISER, dated July 5, 2015, and written by Christine Donnelly, apparently based on conversations with representatives of NAF, the following schedule was made public:

> » Late July or early August: Notices sent to certified voters explaining the apportionment of delegates, how to file as a delegate candidate and the voting process. . . .
> » Late July or early August: Application

> available for delegate candidates.
> » Mid-September: Deadline to file as a delegate candidate.
> » End of September: List of qualified delegate candidates announced.
> » Mid-October: Voter registration closes.
> » Early November: Voting begins.
> » Early December: Voting ends.
> » Day after voting ends: Election results announced publicly.
> » Between February and April 2016: ʻAha held on Oahu over the course of eight consecutive weeks (40 work days, Monday through Friday).
> » Two months after ʻaha concludes: If delegates recommend a form of Hawaiian government, a referendum will be held among all certified Native Hawaiian voters.

54. On information and belief, OHA and the NHRC attempted to shield themselves from legal responsibility for setting up race-based, viewpoint-based, and other restrictions on voters and candidates in the proposed election based on the Roll by contracting with AF and NAF.

55. In a letter dated July 14, 2015, the NHRC informed plaintiffs' counsel that OHA stopped funding the NHRC on June 30, 2015.

56. On information and belief, some or all of the funds OHA previously allotted to the NHRC have been transferred instead to AF and NAF.

57. Legal tasks NHRC previously was responsible for have been transferred to AF and NAF.

58. As reflected in the written minutes of OHA's Board of Trustees' meeting of February 26, 2015, "Trustee Ahu Isa questioned the legality and allowability of using trust monies to fund Kana'iolowalu [the election effort based on the Roll]." Trustee Hulu Lindsey then asked how OHA will be able to monitor the use of their funds. After a few further comments, Mr. Meheula of NAF stated that "once a fiscal sponsor is identified [AF eventually was so identified], they will execute a three-party agreement between OHA, the fiscal sponsor, and Na'i Aupuni. That agreement will spell out some of OHA's concerns, but will also give Na'i Aupuni autonomy to decide on their own." At that point, "Trustee Apo" stated that he "believes that this is a very tricky navigation required. He is overly cautious [sic] that if we keep tying ourselves to this, we are going to get sued. He believes OHA has to stop talking about making people accountable to us." On information and belief, OHA's trustees intended to achieve the goals of Act 195 but planned to use nonprofit surrogates in order to do so.

59. Under the relevant law, AF and NAF are both state actors. The State of Hawaii cannot avoid liability for its constitutional and statutory transgressions by the simple trick of contracting with nonprofits.

60. OHA is a state agent defined in the

Hawaii Constitution, and has been expressly found by the Supreme Court to be "an arm of the State" (*Rice v. Cayetano*, 528 U.S. at 521).

61. The NHRC was established under Hawaii law by Act 195 for a public purpose, and received its funding from OHA (Act 195, Section 4). The NHRC equally is a state actor.

62. OHA actively favors and is pursuing the purposes set forth in Act 195, and specifically, the intent to utilize a list of "qualified Native Hawaiians" to select delegates to a constitutional convention that would establish rules for Native Hawaiians' self-governance.

63. For example, on OHA's website at http://www.oha.org/, a clickable area reads as follows:

> GOVERNANCE
> Laying the foundation for building a new Hawaiian governing entity
>
> Our focus on governance involves facilitating a process for Native Hawaiians to form a governing entity. A recognized governing entity would solidify Native Hawaiians as a political rather than racial group, safeguarding trusts, programs, and funding sources serving Native Hawaiians. A governing entity could advocate and negotiate greater self-sufficiency and autonomy for Native Hawaiians.

64. Upon selecting that area, another screen appears containing, in relevant part, the following text (emphasis added):

> Governance
> Strategic Priority: Ea [sovereignty]
>
> To restore pono and ea, Native Hawaiians will achieve *self-governance, after which the assets of OHA will be transferred to the new governing entity*.
>
> Why is this important?
>
> Native Hawaiian self-governance is of utmost importance to our organization's efforts to improve conditions for Native Hawaiians. *A key goal of our efforts is to facilitate a process that gives Hawaiians the opportunity to re-develop a government that reaffirms Native Hawaiians as a political rather than racial group*.
>
> The benefit of such a Native Hawaiian government is its ability to provide Native Hawaiians with greater control over their destiny as they *move toward self-determination* and self-sufficiency. Native Hawaiian programs and assets that benefit Native Hawaiians can be attacked in federal courts if political recognition from the federal government is not extended to Native Hawaiians.
> * * *
>
> *What is our aim?*
>
> *The transfer of assets to a new governing entity*

Adoption by the Board of Trustees of a Transition Plan that includes the legal transfer of assets and other resources to the new Native Hawaiian governing entity.

* * *

OHA's goal is *for all Native Hawaiians* to participate in the nation-building process and allow them to decide what form a Hawaiian nation will take and what sort of relationships it will seek with other government [sic].

The emergence of a Native Hawaiian government is extremely important to the Office of Hawaiian Affairs.

For that reason, *OHA is putting a lot of effort into encouraging Native Hawaiians to participate in the process* to ensure their voices are heard.

In March 2014, OHA's Board of Trustees made public the agency's commitment to helping smooth the way for Native Hawaiians to build a government.

Since then, OHA has launched an outreach campaign aimed at informing the public about the nation-building process. The campaign featured 20 town hall-style meetings across the state as well as canvassing in Hawaiian homestead communities, where volunteers knocked on doors to familiarize Native Hawaiians with this new opportunity to better manage their future.

65. The website contains other information and videos supporting the same goals.

66. The NHRC actively favors and is pursuing the purposes set forth in Act 195.

67. On the NHRC website, virtually every page contains some expression of support for the purposes of Act 195.

68. Private actors who perform a public function at the direction or request of state actors thereby become state actors.

69. The conduct of elections is exclusively a public function.

70. By seeking to conduct, and by conducting, an election based on the Roll, AF and NAF have become state actors subject to the restraints of federal constitutional and statutory law.

71. Joint action exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party.

72. By signing, and by paying for, agreements with AF and NAF to carry out the very purposes that OHA has expressly stated it wants to achieve, OHA has affirmed, authorized, encouraged, and facilitated the wrongful action that is the subject of this lawsuit, thereby rendering AF and NAF state actors subject to the restraints of federal

constitutional and statutory law.

73. State compulsion exists where a state has exercised coercive power or has provided such significant encouragement, either overt or covert, that the private actors' choices are deemed to be those of the State.

74. By signing, and by paying for, agreements with AF and NAF, OHA provided such covert encouragement that AF's and NAF's choices should be deemed those of the State of Hawaii.

75. A private party acts under color of state law if there is a sufficiently close nexus between the State and the challenged action, so that the action of the private party may be fairly treated as that of the State itself.

76. The detailed, written agreements, paid for by OHA, to accomplish the very purposes OHA has expressly sought to achieve, establish a close nexus between OHA and AF and NAF, such that their actions should be treated as state action.

The Need for Section 3(c) Relief

77. This is the third lawsuit, following *Rice v. Cayetano* and *Arakaki v. State of Hawaii*, arising out of an attempt by Hawaiian officials to use race-based qualifications to restrict who may register and vote, and who may run for office, for particular Hawaiian elections. In this case, moreover, trustees of OHA expressly discussed the possibility of being

sued for their actions, while seeking to accomplish their discriminatory goals by using contractually bound nonprofit organizations as surrogates.

78. In the absence of relief under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c), Hawaii will continue to violate the Voting Rights Act and the voting guarantees of the Fourteenth and Fifteenth Amendments.

CLAIMS

Claims Alleging Race-Based Restrictions and Qualifications Relating to Voting

COUNT 1: Violation of the Fifteenth Amendment and 42 U.S.C. § 1983.

79. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

80. Act 195 and the registration process used by the defendants restrict who may register for the Roll on the basis of individuals' Hawaiian ancestry.

81. The defendants fully intended to restrict who may register for the Roll on the basis of ancestry, as shown by the plain text of Act 195 as well as the text of the online registration procedures, and as shown by numerous public statements by the defendants, including those made on their registration website.

82. Ancestry, in the context of Act 195 and the defendants' registration procedures, is a proxy for race.

83. The registration process used by the defendants is conduct undertaken under color of Hawaii law, and, specifically, under Act 195.

84. Act 195 and the defendants' registration procedures deny and abridge the rights of Plaintiffs Kent and Mitsui to vote on account of race, in violation of the Fifteenth Amendment.

COUNT 2: Violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

85. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

86. Act 195 and the registration process used by the defendants discriminate against Plaintiffs Kent and Mitsui on account of the fact that they are not Native Hawaiians, as defined by their ancestry.

87. Accordingly, Act 195 and the registration process used by the defendants discriminate against Plaintiffs Kent and Mitsui on account of their race.

88. The registration process used by the defendants is conduct undertaken under color of

Hawaii law, and, specifically, under Act 195.

89. Act 195 and the registration process used by the defendants violate the rights of Plaintiffs Kent and Mitsui under the Fourteenth Amendment to the equal protection of the laws.

COUNT 3: Violation of Section 2 of the Voting Rights Act.

90. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

91. Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, proscribes any "qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."

92. Act 195 and the registration process used by the defendants restrict who may register for the Roll on the basis of individuals' Hawaiian ancestry, which is a proxy for race.

93. The defendants fully intended to restrict who may register for the Roll on the basis of race.

94. Act 195 intentionally discriminates, and has the result of discriminating, against Plaintiffs Kent and Mitsui on the basis of their race, in violation of Section 2 of the Voting Rights Act.

Claims Alleging Viewpoint-Based Restriction Relating to Voting

COUNT 4: Violations of the First Amendment, Fourteenth Amendment, and 42 U.S.C. § 1983.

95. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

96. Declaration One, which is part of the registration process available on the NHRC's website, requires an applicant to confirm this statement: "I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance."

97. It is not possible to register for the Roll without confirming this statement.

98. As a practical matter, requiring confirmation of this statement will stack the electoral deck, guaranteeing that Roll registrants will support the outcome favored by the defendants in any subsequent vote.

99. Requiring agreement with Declaration One in order to register for the Roll is conduct undertaken under color of Hawaii law.

100. By conditioning registration upon agreement with Declaration One, the defendants are compelling speech based on its content.

101. Requiring agreement with Declaration One in order to register for the Roll discriminates against those who do not agree with that statement, including Plaintiffs Akina and Makekau.

102. Forbidding those who do not agree with Declaration One, including Plaintiffs Akina and Makekau, to register for the Roll amounts to viewpoint discrimination.

103. There is no compelling justification for requiring applicants to confirm their agreement with Declaration One.

104. Forbidding those who do not agree with Declaration One to register for the Roll is a blatant violation of the rights of Plaintiffs Akina and Makekau under the First Amendment.

105. Forbidding those who do not agree with Declaration One to register for the Roll is a classification based on speech, in violation of the rights of Plaintiffs Akina and Makekau under the Fourteenth Amendment to the equal protection of the laws.

Claims Alleging Race-Based Restrictions on Candidates

COUNT 5: Violation of the Fifteenth Amendment and 42 U.S.C. § 1983.

106. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

107. Act 195 states in part that its purpose is to "facilitate the process under which qualified Native Hawaiians may independently commence the organization of a convention *of qualified Native Hawaiians* . . ." HAW. REV. STAT. § 10H-5 (emphasis added).

108. The June 2015 contract between NAF and Election America, Inc., specifies as part of its Tentative Project Deadline the following item:

> Deadline for E-A to determine eligibility of Delegate Candidates…….September 30, 2015

109. On information and belief, the process for determining who may be a candidate for the proposed constitutional convention restricts candidacy to Native Hawaiians, as defined by Hawaii law.

110. On information and belief, the nominating process for candidates is structured to ensure that only Native Hawaiians will become candidates.

111. The disqualification of candidates based on race is conduct undertaken under color of Hawaii law.

112. The disqualification of candidates based on race violates the Fifteenth Amendment rights of all Hawaii voters, including Plaintiffs Akina, Makekau, Kent, Mitsui, and Gapero.

COUNT 6: Violation of Section 2 of the Voting Rights Act.

113. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

114. The disqualification of candidates based on race ensures that the political processes leading to nomination or election in the State are not equally open to participation by citizens who are not Hawaiian.

115. The disqualification of candidates based on race results in a discriminatory abridgement of the right to vote.

116. The disqualification of candidates based on race is a violation of Section 2 of the Voting Rights Act.

Claim Alleging Unjustified Qualification Based on Community Ties

COUNT 7: Violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

117. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

118. Declaration Two, which is part of the registration process available on the NHRC's website, requires an applicant to confirm this statement: "I have a significant cultural, social or civic connection

to the Native Hawaiian community."

119. Plaintiffs Kent and Mitsui cannot affirm this statement as they understand it.

120. Requiring Plaintiffs Kent and Mitsui to confirm this statement – and, in consequence, requiring them to have such connections to the Native Hawaiian community – is a burden on Plaintiffs Kent and Mitsui that is not required for the sake of election integrity, administrative convenience, or any other sufficient reason.

121. Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment.

122. Voting qualifications that inflict discriminatory burdens without justification are invalid under the Fourteenth Amendment.

123. Requiring Plaintiffs Kent and Mitsui to have particular connections with the Native Hawaiian community violates the rights of Plaintiffs Kent and Mitsui under the Fourteenth Amendment to the equal protection of the laws.

Claim Alleging Impairment of Fundamental Right to Vote

COUNT 8: Violation of the Due Process Clause of the Fourteenth Amendment and

42 U.S.C. § 1983.

124. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

125. Voting is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

126. By requiring Plaintiffs to confirm Declarations One, Two, and Three, the registration process used by the defendants will cause the planned election to be conducted in a manner that is fundamentally unfair.

127. By requiring Plaintiffs to confirm Declarations One, Two, and Three, the registration process used by the defendants burdens the right to vote of all Plaintiffs in violation of their constitutional rights to Due Process.

Claim Alleging Compelled Speech by Virtue of Involuntary Registration.

COUNT 9: Violation of the First Amendment and 42 U.S.C. § 1983.

128. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

129. The First Amendment protects both the right to speak freely and the right to refrain from speaking at all.

130. Voter registration is speech protected by the First Amendment.

131. Forcibly registering an individual amounts to compelled speech.

132. In addition, forcibly registering an individual under conditions that imply that that individual agrees with particular statements or opinions amounts to compelled speech.

133. The NHRC publishes and prominently displays the total number of individuals registered for the Roll on its website, as a way to bolster the legitimacy of the Roll.

134. Plaintiffs Gapero and Moniz do not wish to bolster the legitimacy of the Roll.

135. By publishing and displaying the total number of individuals registered for the Roll on its website, the NHRC implies that those individuals have agreed to Declaration One.

136. Plaintiffs Gapero and Moniz have not agreed, and do not agree, with Declaration One.

137. By registering Plaintiffs Gapero and Moniz without their consent and without notice to them, the NHRC compelled their speech and violated their First Amendment right to refrain from speaking.

PRAYER FOR RELIEF

Wherefore, plaintiffs respectfully pray that this Court:

1. Issue a declaratory judgment finding that the registration procedures relating to the Roll violate the U.S. Constitution and federal law, as set forth above;

2. Issue preliminary and permanent relief enjoining the defendants from requiring prospective applicants for any voter roll to confirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry;

3. Issue preliminary and permanent relief enjoining the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll;

4. Order Defendants to pay reasonable attorneys' fees incurred by Plaintiffs, including litigation expenses and costs, pursuant to 52 U.S.C. § 10310(e) and 42 U.S.C. § 1988;

5. Retain jurisdiction under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c), for such a period as the Court deems appropriate and decree that, during such period, no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force at the time this proceeding was commenced shall be enforced by Defendants unless and until the

Court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color;

6. Retain jurisdiction to issue any and all further orders that are necessary to satisfy the ends of justice; and

7. Award Plaintiffs any and all further relief that this Court deems just and proper.

DATED: Honolulu, Hawaii, August 13, 2015.

/s/ Michael A. Lilly
Michael A. Lilly
Attorney for Plaintiffs
Keli'i Akina, Kealii Makekau,
Joseph Kent, Yoshimasa Sean
Mitsui, Pedro Kana'e Gapero,
and Melissa Leina'ala Moniz

Excerpts from Na'i Aupuni Press Release, March 16, 2016

NA'I AUPUNI DECIDES NOT TO PURSUE RATIFICATION VOTE

Education and Ratification of Native Hawaiian Constitution Best Pursued by Broad-based Group

HONOLULU – Na'i Aupuni said today it would not be conducting a ratification vote on the proposed constitution produced by the recently completed 'aha. . . .

. . . .

Bill Meheula, legal counsel for Na'i Aupuni, reviewed the actions taken along the way due to legal challenges. "From the beginning, we anticipated potential legal challenges and we currently continue to defend against the Grassroot lawsuit that is now before the Ninth Circuit Court of Appeals," he added. "In addition, now that we cancelled the election and will not be conducting any ratification vote, Na'i Aupuni contends that the appeal is moot and we are hopeful that the case will be eventually dismissed."

Meheula also said that the estimated remaining grant funds of a little over $100,000, allocated to cover the cost of the ratification vote, would be returned to OHA. . . .

. . . .

Excerpts from Na'i Aupuni Press Release, December 15, 2015

NA'I AUPUNI TERMINATES ELECTION PROCESS

'Aha Will Go Forward

All Registered Candidates Will Be Offered Seat As Delegates

HONOLULU – Na'i Aupuni announced today that it has terminated the Native Hawaiian election process but will go forward with a four-week-long 'Aha in February. All 196 Hawaiians who ran as candidates will be offered a seat as a delegate to the 'Aha to learn about, discuss and hopefully reach a consensus on a process to achieve self-governance.

. . . .

[Na'i Aupuni President Kuhio Asam] said due to the delays caused by the ongoing litigation – that could continue for years – it was decided that the most effective route at this point would be to offer to convene all of the remaining delegate candidates and allow them to an opportunity to organize Hawaiians and achieve self-governance.

Na'i Aupuni said Election-America has been informed to stop the receipt of ballots, to seal ballots that have already been received, and to prevent anyone from counting the votes. Na'i Aupuni attorney William

Meheula said consistent with offering to seat all candidates, Na‘i Aupuni has decided that the election votes will never be counted. “Thus, the Akina litigation, which seeks to stop the counting of the votes, is moot, and Na‘i Aupuni will take steps to dismiss the lawsuit,” he said. “To be clear, Na‘i Aupuni does not know and will never learn the election results.”

. . . .

Excerpts from Na'i Aupuni Press Release, November 30, 2015

NA'I AUPUNI EXTENDS VOTING DEADLINE BY THREE WEEKS

HONOLULU – Na'i Aupuni, the Native Hawaiian organization with a mission to establish a path to Native Hawaiian self-determination, announced today it is extending the deadline to vote to December 21.

"Because voters may not have cast their ballots over concerns and questions on the recent U.S. Supreme Court's (SCOTUS) decision to temporarily stop the vote count, we are extending the voting deadline to December 21, midnight Hawaii time," said Bill Meheula, legal counsel for Na'i Aupuni.

The SCOTUS decision temporarily stayed the vote count and certification of the elected delegates, but did not stop voting.

"While we can immediately notify those who provided their email addresses to Election-America that the voting period is extended, it will take longer to effectively provide notice to mail-only voters, so we are extending the deadline by three weeks to provide time for voters to receive our notice and to vote," he said. "As we await a decision by SCOTUS, we strongly encourage those who have not yet voted to cast their ballots."

. . . .