December 30, 2015

VIA EMAIL

The Honorable Sally Jewell
Secretary
Department of the Interior
1849 C Street, NW
Room 7228
Washington, DC 20240

Re: Procedures for Establishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 80 Fed. Reg. 59113-32 (proposed Oct. 1, 2015) (to be codified at 43 C.F.R. pt. 50).

Dear Secretary Jewell:

On behalf of Judicial Watch, a 501(c)(3) educational organization, we submit the following comments concerning the proposed Procedures for Establishing a Formal Government-to-Government Relationship with the Native Hawaiian Community issued by the Department of the Interior on October 1, 2015.

Judicial Watch is a non-partisan educational organization that seeks to promote transparency, accountability, integrity in government and fidelity to the rule of law. Judicial Watch regularly files comments regarding proposed rules as a means to advance its public interest mission. By doing so, Judicial Watch seeks to represent its 400,000 active members, as well as countless other American citizens who support its aims.

In our opinion, the proposed rule would create classes of citizens based on race in the State of Hawaii, and would be unconstitutional. We urge you not to promulgate it.

Native Hawaiians are not a federally recognized tribe. Neither Congress nor the Executive Branch has ever recognized Native Hawaiians as a tribe with the legal status held by those sovereigns. In fact, the federal government has deliberately *not* recognized Native Hawaiians as a tribe, either by congressional statute or by executive action. *See*, *e.g.*, 25 C.F.R. § 83.1 *et seq*. (regulation promulgated in 1978 for the purpose of acknowledging American Indian Tribes excludes Native Hawaiians); Indian Reorganization Act 25 U.S.C. § 479 (does not include Native Hawaiians). *See also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273-74, 1281 (9th Cir. 2004) (noting Native Hawaiians' exclusion from Part 83, the Indian Reorganization Act, and the Indian Self-Determination and Education Assistance Act).

In a reversal of the United States' longstanding position, the Department now proposes that Native Hawaiians may ratify a constitution (or other document) establishing a Native Hawaiian government, and that that government could then seek a formal relationship with the United States. The proposed procedure would be constitutionally infirm in several respects.

The Proposed Regulations Would Sanction Unlawful Racial Discrimination.

Under its proposed rule, the Department of the Interior seeks to create a process by which Native Hawaiians would establish a new government and then seek a formal government-to-government relationship with the United States. The process described in the Department's regulations is racially discriminatory and would violate the Fourteenth and Fifteenth Amendment rights of Hawaiian citizens.

The proposed regulations imagine that the organization of a Native Hawaiian entity will take place in two stages. The first stage involves the drafting of a "governing document" for the planned entity, meaning a "written document (*e.g.*, constitution) embodying" its "fundamental and organic law." *See* 80 Fed. Reg. 59128-32 (Oct. 1, 2015) (to be codified at 43 C.F.R. pt. 50); proposed 43 C.F.R. §§ 50.4 (defining "governing document") and 50.13 (describing necessary elements of that document). The regulations require that the "process for drafting the governing document must" be "based on meaningful input from representative segments of the Native Hawaiian community and reflect[] the will of the Native Hawaiian community." *Id.* at 50.11. The regulations do not otherwise specify the process by which this document would come to exist.

The second stage clearly requires a racially restricted election. The proposed regulations provide for a mandatory "ratification referendum" of whatever governing documents may be created by the "Native Hawaiian community." *See* proposed 43 C.F.R. § 50.14 (describing ratification referendum). The regulations further stipulate that such a referendum must be "open to all persons who were verified as satisfying the definition of a Native Hawaiian," but must *not* "include in the vote tallies votes cast by persons who were not Native Hawaiians." Proposed 43 C.F.R. § 50.14(b)(5)(iii) and (iv). The regulations define a Native Hawaiians as a U.S. citizen who is a "[d]escendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." Proposed 50 C.F.R. § 50.4. The regulations require that such ancestry be verified in a way that is "rational and reliable," and set forth particular ways in which this may be accomplished, including by means of a state-certified voter roll of Native Hawaiians. *Id.* at § 50.12(a), (b).

These regulations are plainly defective in that they require a racially discriminatory election, which is both inequitable and certain to be invalidated by a future legal challenge. Indeed, the ancestry requirement set forth in the proposed regulations is virtually identical to ancestry requirements that have *twice* been enjoined by the Supreme Court in the context of elections—most recently just a few weeks ago. It is worth recounting the checkered legal history of the racial criterion incorporated in the Department's proposed rule.

In *Rice v. Cayetano*, 528 U.S. 495, 499 (2000), the plaintiff challenged a provision in the Hawaiian Constitution that limited the right to vote in elections for the board of the Office of Hawaiian Affairs. The statute at issue in *Rice* restricted the right to vote in such an election to those who were "Hawaiian," defined as a "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." *Id.* at 509.

This provision obviously implicated the Fifteenth Amendment, which provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race [or] color." U.S. Const. amend XV, §1. The Supreme Court observed that

> The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. . . . Fundamental in purpose and effect and self-executing in operation, the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race.

Id. at 511-12. The Supreme Court then found that Hawaii's use of an ancestry requirement was "a proxy for race" (*id.* at 514), and compared it to other invalid limitations on the right to vote. *Id.* at 512-14 (citing *e.g.*, *Guinn v. United States*, 238 U.S. 347, 363 (1915) (Oklahoma's grandfather clause); *Smith v. Allwright*, 321 U.S. 469 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953) (all-white primary cases)). In enjoining the use of that requirement as a violation of the Fifteenth Amendment, the Court noted that

> The ancestral inquiry mandated by the state implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

Id. at 517.

Earlier this month, the Supreme Court again enjoined an election based on essentially the same ancestry requirement struck down in *Rice*. The statute at issue this time was Act 195, passed by the Hawaii legislature in 2011. HAW. REV. STAT. § 10H-1 *et seq*. That statute established the Native Hawaiian Role Commission (NHRC) and tasked it with compiling a list of those who qualify as a "Native Hawaiian," which it defined as "[a]n 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." HAW. REV. STAT. § 10H-3(a)(2).

It was intended that those Native Hawaiians registered by the NHRC would be permitted to participate in an election of delegates to a Native Hawaiian convention, at which "governance documents" for a Native Hawaiian entity would be drafted. Such documents were then to be submitted to a ratification referendum like the one described in the Department's proposed regulations, and approved or rejected by those same race-qualified voters. Consistent with this scheme, the NHRC only registered a person on its roll if he or she could demonstrate Native Hawaiian ancestry. Moreover, potential registrants were also screened for their political views: to register online with the NHRC, individuals had to affirm "the unrelinquished sovereignty of the Native Hawaiian people." S*ee* https://www.kanaiolowalu.org/registernow/ (describing registration requirements).

In response to a legal challenge under the Fourteenth and Fifteenth Amendments, the Supreme Court issued an emergency injunction to stop the counting of ballots in this election, *See Akina v. State of Hawaii*, 577 U.S. ___, 2015 U.S. Lexis 7672 (Dec. 2, 2015) (Order attached as Exhibit 1).[1] The action the Supreme Court took in this case is incredibly rare. *See Supreme Court Blocks Native Hawaiian Election Vote Count*, The Associated Press, Dec. 2, 2015, available at http://bigstory.ap.org (noting the "very unusual" injunction halting the counting of ballots following an election). An emergency injunction is an "extraordinary" remedy, and is warranted in cases involving the imminent and clear violation of rights. *See Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining election where applicants established likely violation of Voting Rights Act). Such an injunction is only issued upon the satisfaction of one of the most demanding standards known to law, *viz.*, where an applicant's right to relief is "indisputably clear." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman v. Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)).

In light of the decision in *Rice* and the recent injunction issued in *Akina*, it would be astonishing if the Department of the Interior now approved a rule incorporating the same race-based restriction in the context of an election. It would be just as extraordinary if the Department chose to recognize or use the racially exclusive electoral process initiated by Hawaii's Act 195 as the basis for organizing a Native Hawaiian entity. In particular, the Supreme Court's emergency injunction should caution any prudent public official to question the wisdom of using Hawaii's tainted registration roll for any administrative purpose whatsoever. We urge you and the administration not to insert yourselves into a political movement that would deprive citizens of the right to vote—and ultimately divide them—on the basis of race. The Department's recognition of the results of such an election would not only condone, but institutionalize, racial discrimination. It would not only be unlawful, it would be unconscionable for the Department of the Interior to use this election—or any process that similarly denies citizens the right to vote because of their lack of a particular bloodline—to advance an administrative agenda.

[1] Judicial Watch is acting as counsel to the plaintiffs in this lawsuit.

Aside from the Fifteenth Amendment, Hawaii's process of establishing a Native Hawaiian convention also would violate the Fourteenth Amendment. Under the Equal Protection Clause, "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted). "This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Id.* The electoral process that is rubber-stamped in the Department's proposed rule cannot satisfy this standard.

As an initial matter, there are serious questions as to whether the establishment of a sovereign Native Hawaiian government would qualify as a compelling state interest. However, even if a court accepted this dubious and novel premise, the means utilized by Hawaii (and at least implicitly approved by the Department's proposed regulation) are not narrowly tailored to achieve that interest, for three reasons. First, 38% of those on the NHRC voter roll registered through the Commission's website, which means that they had to positively affirm their belief in the "unrelinquished sovereignty of the Native Hawaiian people." Filtering the community of "indigenous people" through an ideological litmus test is not necessary to conduct an election, and all but guarantees that only those persons who adhere to that ideology will register to vote. That process cannot be used to represent a community. To the contrary, it picks and chooses only certain favored portions of an existing, true community.

Second, the remaining 62% of persons on the NHRC roll were transferred there from other governmental lists of Native Hawaiians, without their prior knowledge or agreement. Forcibly registering the members of an indigenous community is not a logical or appropriate way to gauge their views regarding their own community, or self-determination, or any other matter.[2] As a practical matter, many of those so registered may never learn of the fact that they are registered; while those who do learn that they were forcibly included without advance notice or consent may object on that basis, and refuse to participate.

Third, the "one drop of blood" rule employed by the NHRC is utterly arbitrary. As Justice Breyer opined in *Rice*, to define tribal membership "in terms of 1 possible ancestor out of 500 . . . goes well beyond any reasonable limit. It was not a tribe, but rather the State of Hawaii, that created this definition" and "it is not like any actual membership classification created by any actual tribe." 528 U.S. at 527 (Breyer, J., concurring in the result). No real community can be defined by such a tenuous link.

Such a voter registration process is not a narrowly tailored means to achieve any interest pertaining to Native Hawaiians. Hawaii's electoral process cannot satisfy strict scrutiny, and therefore it violates the Fourteenth Amendment.

[2] This voter registration process also violates the First Amendment because it compelled involuntary registration. *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999).

In sum, the Department-approved process used to create a Native Hawaiian government would amount to race-based discrimination and classification prohibited by the Fourteenth and Fifteenth Amendments. This process literally denies the right to vote to citizens based on their race. The Executive Branch should not sanction, engage in, or permit racial discrimination and voter disenfranchisement by using or recognizing the results of any election that qualifies voters in this illegal manner.[3]

The Department Of The Interior Lacks Constitutional Authority To Recognize A Tribe Where Congress Has Refused To Do So.

The Department's proposal to "facilitate the reestablishment of a formal government-to-government relationship with the Native Hawaiian community" is an attempt to grant tribal status to Native Hawaiians through the Executive Branch's administrative process. This is constitutionally unsound, and violates separation-of-powers principles. The fact that the Department has issued such a proposal indicates that it is confused about how the United States lawfully recognizes tribes, or that the Executive Branch has determined to override the will of Congress and simply circumvent Article I, or possibly both. Regardless, the proposed regulatory action is unlawful.

Congress is vested with the authority to regulate commerce with Indian tribes. U.S. Const. art. I, § 8. The Supreme Court has described Congress's authority with respect to Indian tribes as "plenary." *Morton v. Mancari*, 417 U.S. 535, 551-52 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself"); see also *Norton*, 386 F.3d 1271 at 1276 ("Congress has the power, both directly and by delegation to the President, to establish the criteria for recognizing a tribe") (citing *Miami Nation v. United States Dep't of Interior*, 255 F.3d 342, 345 (7th Cir. 2001)). Moreover, while the federal government may "recognize" Indian tribes, it does not *create* them. *See* 25 U.S.C. § 479. *See also* Declaration of Gail Heriot, dated October 8, 2015 (attached as Exhibit 2); U.S. Civil Rights Commissioners Letter of Sept. 16, 2013 (attached as Exhibit 3); U.S. Senators Letter of Aug. 1, 2014 (attached as Exhibit 4).[4]

[3] It is worth noting that the *Akina* plaintiffs also have asserted claims under (1) the federal Voting Rights Act of 1965, and (2) the First Amendment, for viewpoint discrimination because many registrants were forced to affirm a particular statement, and for compelled speech because of the aforementioned compulsory registration. While these claims have yet to be adjudicated, they raise serious issues and are potential, independent grounds for invalidating any process involving the NHRC's roll.

[4] As these authorities discuss, one of the insuperable obstacles to "recognizing" a Native Hawaiian entity is that Hawaii had a polyglot, multicultural, and modern society *before* it ever became a United States territory or state. There is not, then, the kind of continuous, insular, or cohesive community ordinarily required of a tribal entity. *See* Exhibit 1, ¶ 9; Exhibit 3 at 1-2; *see also* 25 C.F.R. § 83.7 ("The mandatory criteria" for recognition of Indian tribe include being "identified as an American Indian entity on a substantially continuous basis since 1900," having

The tribes that are federally recognized were granted that status by a process set forth in congressional statute, not by unilateral executive action. *See* 25 U.S.C. § 461 et seq.; *see also Norton*, 386 F.3d at 1273-74 (discussing history of Indian Reorganization Act, and creation of American Indian Policy Review Commission). Thus, there is no existing pathway under federal law by which Native Hawaiians might become a federally recognized tribe.[5] Without proper statutory authorization by Congress, a regulatory scheme promulgated by an executive agency to grant tribal status to Native Hawaiians would violate fundamental separation-of-powers principles. Several members of the United States Senate have written to you to express that concern: "Congress has repeatedly refused to adopt legislation that would recognize a Native Hawaiian government or reestablish an administrative path for doing so. As such, any unilateral efforts by the Department to move forward administratively are unlawful." Exhibit 4 at 1; Exhibit 1, ¶ 13.

Despite this constitutional hurdle, the Department has forged ahead in its effort to grant tribal status to Native Hawaiians through regulatory action. The Department's explanation of the legality of its procedure, as set forth in its responses to comments to the ANPRM, is a bizarre attempt to justify this end-run around Congress. First, the Department acknowledges that Congress has "plenary power" to deal with Indian tribes, but simultaneously disregards the fact that Congress repeatedly has refused to grant tribal status to Native Hawaiians. Not only does the Department fail to acknowledge that fact, it twists logic further to claim that "Congress has already exercised [its] plenary power to recognize Native Hawaiians[.]" 80 Fed. Reg. at 59121. This assertion is disconnected from reality.

It is well-known that Senator Akaka of Hawaii spent a dozen years attempting to push the Native Hawaiian Government Reorganization Act, popularly known as the "Akaka Bill," through Congress in one form or another. The Akaka Bill would have granted Native Hawaiians a pathway to federal tribal status, but each attempt to pass the bill ultimately failed. *See, e.g.*, John Files, *Senate Blocks Bill to Convey Special Status for Hawaiians*, New York Times, June 9, 2006; Janis Magin, *Hawaiians Weigh Options as Native-Status Bill Stalls*, New York Times, June 11, 2006; Editorial, *Aloha, Segregation*, Wall Street Journal, Dec. 17, 2009; Gail Heriot and Peter Kirsanow, Op-Ed., *Congress Tries to Break Hawaii in Two*, Wall Street Journal, Feb. 28, 2010.

Given Congress's repeated, well-publicized rejections of the Akaka Bill, it is puzzling that the Department of the Interior takes the position that "Congress has already exercised [its] plenary power to recognize Native Hawaiians." Under this revisionist version of history, the Department now tells the public that it simply "proposes to better implement [the government's]

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a "predominant portion of the petitioning group" exist "as a distinct community from historical times until the present," and "maintain[ing] political influence or authority over its members as an autonomous entity from historical times until the present.").

[5] "[B]y its terms, the Indian Reorganization Act did not include any native Hawaiian group." *Norton*, 386 F.3d at1280.

relationship . . . with a native community that has already been recognized by Congress." 80 Fed. Reg. at 59121.

Despite its many references to a "special political and trust relationship" between the United States and Native Hawaiians, the fact remains that the federal government has never recognized Native Hawaiians as a sovereign entity like other Indian tribes. **If it had, there would have been no need for the Akaka Bill.** The Department's claim that Congress has "already" recognized Native Hawaiians as a tribe defies both fact and reason. If that is the case, one must wonder: what exactly was the point of the Akaka Bill? And why did members of Congress spend political energy for more than a decade trying to pass it? If Congress has "already exercised [its] plenary power to recognize Native Hawaiians," as the Department contends, then why did Congress decline to pass the Akaka Bill, not once, but repeatedly? The Department's proposal is based on a fiction and ignores the obvious: **Native Hawaiians have not been granted federal tribal status because Congress does not support the effort to do so**.[6] The Department's proposed rule is a transparent attempt to implement the failed Akaka Bill through executive action. Without statutory authorization, it would be unlawful to promulgate this regulation.[7]

No case has ever held that a "special" or "trust" relationship or status can take the place of actual, congressional recognition of an Indian tribe so as to justify voting restrictions based on race. Nevertheless, the Department maintains that the proposed regulation is lawful because Congress has "recognized" Native Hawaiians by enacting statutes that provide "special Federal programs and services" to them. 80 Fed. Reg. at 59123. If that is the basis for granting tribal status, the Department should be prepared to recognize several more sovereign nations in the United States. In addition to Native Hawaiians, Congress has enacted statutes providing special services for a number of other groups. Should those groups also be granted federal tribal status? For example, the Appalachian Regional Development Act of 1965 created the Appalachian Regional Commission (ARC) to provide federal funding for a variety of services to the people of Appalachia. Presidents John F. Kennedy and Lyndon Johnson sought to target federal aid and support for economic development in the poverty-stricken region, which is defined as those who reside in West Virginia and particular counties across twelve other states. *See* 40 U.S.C. §

[6] In 1993, Congress did pass what is commonly known as the "Apology Resolution," expressing regret for the treatment of the Kingdom of Hawaii and in support of reconciliation efforts. *See* Pub. L. 103-150, 107 Stat. 1513. However, the Supreme Court has held that "[t]he Apology Resolution reveals no indication – much less a 'clear and manifest' one – that Congress intended to amend or repeal the State's rights and obligations under the Admission Act (or any other federal law)." *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175-76 (2009).

[7] Indeed, the DOI's actions in proposing the NPRM amount to an attempt to end-run Congress – an effort which bears a close resemblance to the Executive Branch's similar recent attempt to circumvent Congress' constitutional authority over the immigration laws, an attempt which has since been enjoined by a U.S District Court in Texas. *Texas v. United States*, Case B-14-254, Feb. 16, 2015 (S.D. Tex.), *stay of injunction denied*, No. 15-40238, May 26, 2015 (5th Cir.).

14507. The ARC currently funds hundreds of projects that cover a wide spectrum of the community's needs: highways and transportation, infrastructure, health, education, business and trade development, and energy are just some of the areas identified for aid. *See, e.g.*, Appalachian Regional Commission Program Areas, available at http://www.arc.gov/program_areas/index.asp.

The federal government has also acted specifically to provide benefits to African Americans. For example, over a century ago, the second Morrill Act of 1890 established the black land-grant universities. *See* 7 U.S.C. § 321. Since then, Historically Black Colleges and Universities (HBCUs) have received federal support and funding from Congress. *See, e.g.*, Higher Education Act of 1965, Pub. L. No. 89–329; Higher Education Opportunity Act of 2008, Pub. L. No. 110-315. The Executive Branch also targets federal support for African Americans through programs such as the White House Initiative on Educational Excellence for African Americans, Exec. Order, July 26, 2012, and the My Brother's Keeper Initiative, President's Memorandum -- Creating and Expanding Ladders of Opportunity for Boys and Young Men of Color, Feb. 27, 2014). *See also* Exec. Order No. 12320 (1981) (White House Initiative on Historically Black Colleges and Universities); Exec. Order 12677 (1989) (Presidential Advisory Board on Historically Black Colleges and Universities).

Given this directed, specialized support for African Americans as a group, could they seek tribal status by holding an election in which only persons who have the requisite African American blood are permitted to vote? Congress has created a commission to fund programs for the people of Appalachia; has Congress therefore "recognized" them? If Appalachians held an election in which only persons of a particular ancestry could vote, and then formed their own government, would the Department of the Interior promulgate regulations to recognize that government as a sovereign entity? The suggestion may seem preposterous, but the proposed regulations contemplate that the federal government can recognize such a "tribe" based on race and a history of targeted federal benefits and programs. If promulgated, this administration would condone the division of Hawaiian citizens based on their race, and set a "dangerous precedent" for further race-based divisions by other groups in other states. *See* Exhibit 2, ¶ 11.

Conclusion.

The proposed rule is an ill-advised attempt to recognize a group of individuals as a "tribe" based solely on their race and without authorization by Congress. The Department of the Interior may not force the terms of the Akaka Bill on the citizens of Hawaii after Congress has specifically declined to enact that legislation. Such political, executive overreach would unlawfully intrude on Congress's authority under Article I. Worse, it would allow Hawaiian citizens to be disenfranchised at the most basic level of the democratic process because of their race. This is fundamentally at odds with the Constitution and the protections it secures for all persons, regardless of race. The proposed rule, if enacted, would permit the classification and, ultimately, the segregation of American citizens based on race. This would set a dangerous precedent. History has shown how damaging such government-sanctioned divisions, and the mindset that creates them, can be. The citizens of Hawaii and the United States will not be

served by taking a backward step into race-based division and classification. We strongly urge you to take no further action with respect to this proposed rule.

Sincerely,

Thomas J. Fitton
President

Robert D. Popper
Director, Election Integrity Project

Exhibit 1

(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.

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KELI'I AKINA, *et al.*, *Plaintiffs*, *v.* THE STATE OF HAWAII, *et al.* *Defendants*.	Civil Action No.: 15-00322

DECLARATION OF GAIL HERIOT

Gail Heriot, for her declaration, pursuant to 28 U.S.C. § 1746, states as follows:

1. I am over the age of 18 and I am fully competent and authorized to make this declaration.
2. I am a citizen and resident of the State of California.
3. I am Professor of Law at the University of San Diego School of Law, where I teach and publish in the area of civil rights law.
4. I have been a Commissioner of the United States Commission on Civil Rights ("USCCR") since 2007.
5. I sit on the board of directors of the National Association of Scholars and the California Association of Scholars. My scholarly work on civil rights has been published in legal journals such as the Michigan Law Review, the Virginia Law Review, and the Harvard Journal on Legislation. My writing frequently appears in magazines and newspapers, including the Wall Street Journal, the National Review, the Los Angeles Times, and the San Diego Tribune.

6. I have testified on civil rights issues related to Native Hawaiians before the United States Commission on Civil Rights.

7. Attached as Exhibit A is a true and correct copy of my CV, which describes in fuller detail the information I provided above.

8. On September 16, 2013, I, along with three other members of the USCCR, sent a letter to President Obama advising the President against implementing provisions of the proposed Native Hawaiian Government Reorganization Act (also known as the "Akaka bill") through executive action. This letter is attached hereto as Exhibit B. I stand by the contents of that letter and incorporate those comments as part of my declaration.

9. In that letter, I and my colleagues explained that neither Congress nor the President has the power to create a tribal entity anew, vesting it with attributes of sovereignty, when that entity either never existed or else has ceased to exist as a polity. The only types of tribes Congress may recognize (not create) are existing tribes defined by a political structure and the maintenance of a separate society. A tribe may not be recognized or established based on an assessment of a common bloodline of a group of individuals. Federal regulations defining Indian tribes do not award tribal status based on the quantum of Indian blood possessed by any particular group of individuals; rather, the regulations focus on the cohesiveness of the group, and evidence of a functioning polity of long duration to establish that a tribe exists.

10. The effort to have Native Hawaiians designated as an Indian tribe amounts to an attempt to create a tribe out of race. The Native Hawaiian Roll Commission ("NHRC") was created by the Hawaii legislature in an attempt to identify Native Hawaiians to register to vote in an election. The fact that this event was not a spontaneous effort by Native

Hawaiians, but was instead an action by the state government of Hawaii, demonstrates that Native Hawaiians lack the cohesion and separate polity required to be recognized a tribe.

11. As noted, the efforts to create a Hawaiian tribe are in large part an effort to preserve unconstitutional race-based privileges for Native Hawaiians in the wake of the Supreme Court's decision in *Rice v. Cayetano*. However, these efforts are misguided. Rewriting history to create a tribe out of the Native Hawaiian race would create a dangerous precedent that could lead other groups of Americans to seek to separate themselves in some way from the rest of our society. For instance, Cajuns are an identifiable ethnic group in Louisiana who have had continuous presence there for over two hundred years. Their ancestors likely opposed Napoleon's sale of the lands of the Louisiana Purchase to the United States, and they had no opportunity to assert sovereignty. Should Cajuns be allowed to seek tribal status? Should the Amish of Pennsylvania or the Hasidic Jews of New York be allowed to seek tribal status? Both groups have far more cohesiveness as a group and evidence of a functioning polity than do Native Hawaiians.

12. On August 1, 2014, four sitting United States Senators wrote to Secretary Sally Jewell at the United States Department of the Interior in opposition to the Advanced Notice of Proposed Rulemaking regarding the reestablishment of government to government relations (the "Senate Letter"). The Senate Letter is attached hereto as Exhibit C.

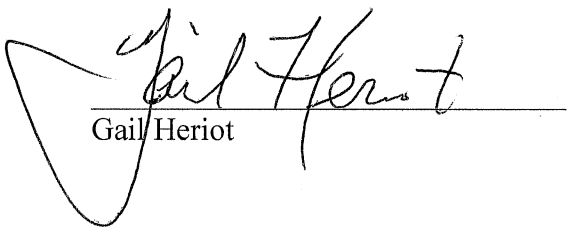
13. In the Senate Letter the Senators confirm that the creation or re-constitution of a tribal entity out of a racial group would be unconstitutional. They also state that even if one were to assume that Native Hawaiians could constitutionally qualify for recognition, the process for recognition is controlled by Congress, not by the Department of the Interior,

and "Congress has refused to adopt legislation that would recognize a Native Hawaiian government or reestablish an administrative path for doing so." Further, the Senate Letter reiterates the fact that Native Hawaiians are unlikely to satisfy the current test for federal tribal recognition. By using ancestry as a proxy for race in place of cohesiveness and polity, the Department of Interior is using a process "likely less stringent than" the process currently established to recognize Indian tribes.

14. I agree with the sentiments expressed by these Senators in paragraph 13.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 8, 2015



Gail Heriot

Exhibit 3

UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 PENNSYLVANIA AVENUE , NW, WASHINGTON, DC 20425 www.usccr.gov

September 16, 2013

Dear President Obama:

We write as four members of the eight-member U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. We are writing to address media reports that you are considering implementing provisions of the Native Hawaiian Government Reorganization Act (known as the Akaka bill) through executive action.[1] The Commission held a hearing regarding the Akaka bill in 2006 and issued a report recommending against passage.[2] We are writing to reiterate the Commission's recommendation. We believe that provisions of the Akaka bill are both unwise and unconstitutional. Executive action implementing provisions of the Akaka bill would be at least as unwise and unconstitutional.

Neither Congress nor the President has to power to create an Indian tribe or any other entity with the attributes of sovereignty. Nor do they have the power to reconstitute a tribe or other sovereign entity that has ceased to exist as a polity in the past. Tribes are "recognized," not created or reconstituted. The federal government may on appropriate occasions assist tribes in transforming their internal political structure, but they cannot bring into existence a tribe or other sovereign entity that has never existed or has ceased to exist as a separate polity.

Real tribes—the kind the Federal government may recognize—are defined by political structure and the maintenance of a separate society, not by bloodline.[3] A mere shared blood quantum among the members of a group is not sufficient for the federal government to recognize an Indian tribe. The regulations governing the recognition of an Indian tribe focus on the cohesiveness of the group and evidence of a functioning polity of long duration.[4] The regulations do not, for instance, establish what quantum of Indian blood must be possessed by each member of the tribe, although the rate of intermarriage

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[1] Valerie Richardson, *Obama urged to use executive order to recognize Native Hawaiians*, WASH. TIMES, Aug. 22, 2013, http://www.washingtontimes.com/news/2013/aug/22/obama-urged-to-use-executive-order-to-recognize-na/.

[2] U.S. Commission on Civil Rights, The Native Hawaiian Government Reorganization Act of 2005, at 15 (Jan. 20, 2006), http://www.usccr.gov/pubs/060531NatHawBriefReport.pdf.

[3] *See* 25 C.F.R. §§ 83.6-83.7.

[4] 25 C.F.R. § 83.7:

> The mandatory criteria [for recognition as an Indian tribe] are: (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900 . . . (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a distinct community from historical times until the present. . . . (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

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with persons outside the group is a factor in determining the cohesiveness of the group and whether it is functioning as a separate polity.[5]

The efforts to obtain federal recognition of native Hawaiians as an Indian tribe or other sovereign entity are attempts to create a tribe out of a race.[6] There is no native Hawaiian entity, let alone a governing body of such native Hawaiians, that has existed on anything approaching a continuous basis since 1900. There is no "present governing document including its membership criteria" because there is no tribe to govern.[7] The Native Hawaiian Roll Commission had to be created by the Hawaii legislature to attempt to find native Hawaiians to register. The fact that this step was taken by state government, and was not a spontaneous effort of native Hawaiians themselves, demonstrates that native Hawaiians lack the cohesion and separate polity required for tribal status.

There is no political unit presently governing Native Hawaiians, and judging from the response thus far to the state-sponsored enrollment process, there may be far less interest in creating one than the country has been led to believe. Additionally, the very high percentage of people reporting mixed-race ancestry as opposed to pure Native Hawaiian ancestry[8] indicates that a "predominant portion of the petitioning group" does *not* comprise a distinct community.[9]

The irony of the current demand to confer tribal sovereignty on members of the Native Hawaiian race is that the Kingdom of Hawaii, which is now pointed to as evidence that this racial group once functioned as a distinct and separate Native Hawaiian polity, was actually an impressively modern multi-racial society in which immigrants were not only welcome, they were sought after. The Hawaiian monarchs ruled over anyone who was a member of their political community, not merely Native Hawaiians.[10] Long before the overthrow of the monarchy, starting in the early 1800s, the Hawaiian royal family intermarried with British and American immigrants, and both immigrants and their mixed-race children held high positions in Hawaiian society. Non-native people began to serve in the King's cabinet and western-style parliament as early as the 1840s, including Keoni Ana, who was half-British and served as Kuhina Nui (co-regent)[11] beginning in

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[5] 25 C.F.R. § 83.7(b)(i).
[6] As Justice Kennedy has noted, such ancestral classifications are a proxy for racial classifications and implicate the same constitutional concerns. Rice v. Cayetano, 528 U.S. 495, 516-17 (2000).
[7] 25 C.F.R. § 83.7(d).
[8] Only 80,337 people reported Native Hawaiian ancestry alone, as opposed to 209,633 reporting mixed ancestry that includes Native Hawaiian ancestry.
[9] 25 C.F.R. § 83.7(b).
[10] Gail Heriot and Peter Kirsanow, *Congress Tries to Break Hawaii in Two*, WALL ST. J., Feb. 28, 2010, http://online.wsj.com/article/SB10001424052748703411304575093180795586118.html.
[11] *See* "Kuhina Nui, 1819-1864," Hawai'i State Archives, http://ags.hawaii.gov/archives/centennial-exhibit/kuhina-nui-1819-1864/.

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1845.[12] Hawaiian monarchs were hardly resistant to Western values; beginning fairly early in the century they were themselves Christians and tried to spread Christian and Western traditions to all those on the Islands.[13] Encouraging immigration from countries as diverse as China, Japan, Norway and Portugal was among their top priorities. King Kalakaua toured the world in large part to attract immigration to his Kingdom.[14]

If the Kingdom of Hawaii had been a kinship-based tribe rather than a modern multi-racial society, the Hawaiian monarchs would have had few people to rule by the time the monarchy was overthrown in 1893, and it is unlikely they would have been able to rule the entirety of the Hawaiian Islands. Native Hawaiians were a minority in 1893,[15] and in 1919 only numbered 22,600.[16] To reiterate, many members of the non-Hawaiian majority who lived in Hawaii were full members of the society governed by the monarchy. Hence, whatever the perceived or actual wrongs that were done to native Hawaiian rulers in the late nineteenth century, there was not then a distinct "tribe" of native Hawaiians living separately from the rest of society, and there certainly has not been any in the 120 years since.

As we have noted before,[17] the efforts to create a tribe are in large part an effort to preserve unconstitutional race-based privileges for Native Hawaiians in the wake of *Cayetano v. Rice*. The theory is that if Native Hawaiians can be transformed into a tribe, these privileges can be preserved under *Morton v. Mancari*.[18] This is mistaken. Conferring tribal status on a racial group is itself a violation of the equal protection guarantees of the Constitution. As the Supreme Court recently reiterated in *Fisher v. University of Texas at Austin*, "'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people,' and therefore 'are contrary to our traditions and hence constitutionally suspect [citations omitted].'"[19] This is especially the case in our increasingly mixed-race society, of which Hawaii is a prime example. It can only sow bitterness and division for otherwise indistinguishable neighbors living

[12] *See* "Keoni Ana," Hawai'i State Archives, http://ags.hawaii.gov/archives/centennial-exhibit/keoni-ana/. Keoni Ana's niece Emma later became Queen Consort to King Kamehameha IV and Queen Liliuokalani married an American.
[13] *See generally* Hawaiian Constitution of 1840, *available at* http://ags.hawaii.gov/wp-content/uploads/2012/09/1840E.pdf (enshrining Christian and Western principles of government in the Constitution).
[14] *See, e.g.*, Ralph S. Kuykendall, II The Hawaiian Kingdom 1854-1874: Twenty Critical Years 177-96 (1953); Ralph S. Kuykendall, III The Hawaiian Kingdom 1874-1893: The Kalakaua Dynasty 116-85 (1967).
[15] Heriot and Kirsanow, *supra* note 10.
[16] 20 U.S.C. § 7512(7).
[17] *Id.*
[18] 417 U.S. 535 (1974).
[19] 133 S.Ct. 2411, 2418 (2013).

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side-by-side to be subject to different laws and different privileges because one has "one drop" of Native Hawaiian blood and the other does not.[20]

Rewriting history to create a tribe out of the Native Hawaiian race would open a Pandora's box for other groups to seek tribal status. Cajuns are an identifiable ethnic group in Louisiana who have had a continuous presence there for over two hundred years. Their ancestors may have been none too pleased when Napoleon sold the lands of the Louisiana Purchase to America, and they had no opportunity to assert sovereignty. Should Cajuns be allowed to seek tribal status? Should the Amish of Pennsylvania or the Hasidic Jews of New York be allowed to seek tribal status? Both groups have far more separation from mainstream society, much lower rates of intermarriage,[21] and all-encompassing rules governing the lives of members than do Native Hawaiians.[22] Both groups also have histories stretching far back.

Lastly, it is worth mentioning that the proponents of Hawaiian statehood were at pains to stress the state's multiracial character. Proponents emphasized that Hawaiians, regardless

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[20] This is particularly important to take into account given that racial tensions over the private Kamehameha Schools admissions policy have previously led to violence and threats against the disfavored race, *see* Doe v. Kamehameha Schools/Bernice Pauahai Estate, 596 F.3d 1036, at 1040-42, 1044-45 (9th Cir. 2010) (discussing threats made toward Doe children and their attorney, and severe physical violence inflicted by Native Hawaiian children upon non-Native Hawaiian classmates because of the latter's skin color), leading the U.S. Attorney for Hawaii to "[issue] a strongly-worded warning, reminding the public that threats based on race are a federal felony."

[21] *See* Joseph Berger, *Out of Enclaves, a Pressure to Accommodate Traditions*, N.Y. TIMES, Aug. 21, 2013, http://www.nytimes.com/2013/08/22/nyregion/hasidic-jews-turn-up-pressure-on-city-to-accommodate-their-traditions.html?pagewanted=all&_r=0:

> The latest population survey by the UJA-Federation of New York counted roughly 330,000 ultra-orthodox Jews, or 30% of the city's 1.1 million Jews, a figure that melds Hasidim with others who are as scrupulously observant but do not revere a particular grand rabbi. . . . [Eric Rassbach of the Becket Fund writes] "Because of differing birth and adherence rates, the future of Judaism in New York City increasingly appears to be Orthodox."

See also Colton Totland, *Amish enjoy unexpected boom in numbers: High birthrate and decline in defections spur growth*, WASH. TIMES, Aug. 9, 2012, http://www.washingtontimes.com/news/2012/aug/9/amish-enjoy-unexpected-boom-in-numbers/?page=all:

> A combination of high birthrates and falling defection rates among adults—more than 4 in 5 people raised in Amish homes now opt to stay within the community—has led demographers to predict that the number of Amish communities in the United States will double over the next 40 years.

[22] Xuanning Fu and Tim B. Heaton, *Status Exchange in Intermarriage Among Hawaiians, Japanese, Filipinos and Caucasians in Hawaii: 1983-1994*, 31 J. COMP. FAMILY STUDIES 45, 58 (2000):

> There are several important patterns of mate selection in Hawaii. First, ingroup marriage is the strongest norm, despite a long tradition of interracial marriage in the islands. . . . This tendency, however, is weaker for Hawaiians than for other groups of similar size, probably because Hawaiians (most of them Part-Hawaiians) have a family history of intermarriage . . . .

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of racial background, were Americans in spirit.[23] If native Hawaiians wished to receive tribal status, this was the time to raise the issue. Instead, 94.3 percent of all Hawaiians voted in favor of statehood—and they did so after their representatives rejected separate tribal enclaves in Hawaii that were being created at the same time in Alaska for the Inuit and other native Alaskans. Given the demographics of Hawaii at the time, "at least three-fifths of [Native Hawaiians] must also have voted for statehood with no separate rights for individuals of their ancestry."[24]

In closing, we must strongly advise against any attempt to recognize Native Hawaiian "tribal" claims via executive order. Congress might be granted somewhat more deference by the courts, but such action by Congress would also be unconstitutional. As unwise and as beyond the scope of Congress's powers as it would be for Congress to attempt to organize Native Hawaiians as a tribe, we believe it would be doubly so for you to attempt to do so by executive action.

If you have any questions or if we can be of any assistance, please contact Commissioner Kirsanow's special assistant, Carissa Mulder, at cmulder@usccr.gov.

Sincerely,

Abigail Thernstrom
Vice Chair

Peter Kirsanow
Commissioner

Gail Heriot
Commissioner

Todd Gaziano
Commissioner

Cc: The Honorable Maria Cantwell, Chairwoman, Committee on Indian Affairs
The Honorable John Barrasso, Vice Chairman, Committee on Indian Affairs
The Honorable Doc Hastings, Chairman, Committee on Natural Resources
The Honorable Peter DeFazio, Ranking Member, Committee on Natural Resources

[23] Erica Little and Todd F. Gaziano, *Abusing Hawaiian History: Hawaiians Knew Their History in 1959*, The Heritage Foundation, June 8, 2006, http://www.heritage.org/research/reports/2006/06/abusing-hawaiian-history-hawaiians-knew-their-history-in-1959#_ftn4.
[24] *Id.*

Exhibit 4

United States Senate
WASHINGTON, DC 20510

August 1, 2014

The Honorable Sally Jewell
Secretary
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Dear Secretary Jewell:

We write in opposition to the Advanced Notice of Proposed Rulemaking (ANPRM) issued on June 20, 2014 regarding the reestablishment of a government-to-government relationship with the Native Hawaiian community, and we respectfully request that you take no further action on the proposal.

While we fully value and celebrate Native Hawaiian heritage, the reestablishment or formation of a free-standing Native Hawaiian government fails to pass constitutional muster. The Supreme Court has stated, "'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people,' … and therefore, 'are contrary to our traditions and hence constitutionally suspect.'"[1] Yet, that kind of distinction is precisely what the administration proposes to do here. By singling out a select group of citizens with shared ancestry, but no cohesive political organization since 1893,[2] the administration's proposal epitomizes the type of arbitrary race-based classification that the Supreme Court has found anathema to the Constitution.[3] Four Commissioners from the U.S. Commission on Civil Rights agree. In response to a similar proposal, they wrote, "Neither Congress nor the President has the power to create an Indian tribe or any other entity with the attributes of sovereignty. Nor do they have the power to reconstitute a tribe or other sovereign entity that has ceased to exist as a polity in the past."[4]

Even if you disagree that the reestablishment of a Native Hawaiian government would be patently unconstitutional, Congress has not enacted legislation authorizing the Department of the Interior (the "Department") to engage in such a rulemaking. In fact, Congress has repeatedly refused to adopt legislation that would recognize a Native Hawaiian government or reestablish an administrative path for doing so. As such, any unilateral efforts by the Department to move forward administratively are unlawful. Indeed, the Assistant Secretary for Indian Affairs, Kevin Washburn, testified to this effect in March of last year. He told the House Committee on Natural Resources that the Department does not "have the authority to recognize Native Hawaiians

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[1] *Fisher v. Univ. of Texas at Austin,* 133 S.Ct. 2411, 2418 (2013) (citations omitted).
[2] Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Community, 79 Fed. Reg. 35296, 35298 ("[T]here has been no formal, organized Native Hawaiian government since 1893….").
[3] *Cf. United States v. Sandoval*, 231 U.S. 28, 46 (1913) ("Of course, if it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe….") *cited by* Congressional Research Service, *What Does it Mean for an Indian Tribe to be Federally Recognized and How Does a Tribe Gain Federal Recognition* (Apr. 8, 2014).
[4] Letter from U.S. Civil Rights Commissioners Abigail Thernstrom, Peter Kirsanow, Gail Heriot, and Todd Gaziano to President Obama at 1 (Sept. 16, 2013).

through the Part 83 process."[5] Rather, Assistant Secretary Washburn asserted that legislation is necessary. The ANPRM represents a 180 degree pivot from the Department's earlier position. It embodies the administration's troubling reliance on executive fiat in any number of facets of public policy regardless of the Constitutional limits on executive power.

We are further driven to oppose the administration's proposal due to prudential concerns. By the administration's own admission, Native Hawaiians are unlikely to satisfy the current Part 83 process for federal recognition.[6] As a result, the administration is proposing a separate path for Native Hawaiians. A process different from (and likely less stringent than) that which is applicable to American Indians. Such arbitrary action to accommodate a select group cannot be seen as fair to those who have long sought recognition through the current administrative process.

What's more, creating a special process to access privileges not universally available to all Americans invites requests from other similarly situated groups. For example, some have suggested that there would be no way to credibly distinguish this proposal for special treatment of Native Hawaiians from possible requests by other groups, such as the Amish of Pennsylvania.[7] In fact, we agree with the Supreme Court that "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[8] The creation of a new race-based political entity whether Native Hawaiian, Amish, or another group fails to comport with the letter and the spirit of the Equal Protection Clause.

The action proposed in the ANPRM is at worst unconstitutional, and at best offensive to the character of a country devoted to the advancement of all its citizens regardless of race. We ask that you take no further action with regard to establishing a government-to-government relationship with the Native Hawaiian community.

Sincerely,

JEFF FLAKE
United States Senator

LAMAR ALEXANDER
United States Senator

TOM A. COBURN, M.D.
United States Senator

MIKE LEE
United States Senator

[5] *Authorization, Standards, and Procedures for Whether, How, and When Indian Tribes Should be Newly Recognized by the Federal Government: Perspective of the Department of the Interior*, 113th Cong. 29 (2013) (testimony of Kevin Washburn, Assistant Secretary for Indian Affairs).
[6] *See supra* notes 2 and 5.
[7] *See supra* note 4 at 4 ("Rewriting history to create a tribe out of the Native Hawaiian race would open a Pandora's box for other groups to seek tribal status.").
[8] *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).