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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ, Plaintiffs, vs.	CIVIL NO: 15-00322 BMK MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; (Caption continued on next page)

THE STATE OF HAWAII; GOVERNOR DAVID Y. IGE, in his official capacity; ROBERT K. LINDSEY JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, in his official capacity; COLETTE Y. MACHADO, PETER APO, HAUNANI APOLIONA, ROWENA M.N. AKANA, JOHN D. WAIHE'E IV, CARMEN HULU LINDSEY, DAN AHUNA, LEINA'ALA AHU ISA, Trustees, Office of Hawaiian Affairs, in their official capacities; KAMANA'OPONO CRABBE, Chief Executive Officer, Office of Hawaiian Affairs, in his official Capacity; JOHN D. WAIHE'E III, Chairman, Native Hawaiian Roll Commission, in his official Capacity; NĀ'ĀLEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MĀHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, in their official capacities; CLYDE W. NĀMU'O, Executive Director, Native Hawaiian Roll Commission, in his official capacity; THE AKAMAI FOUNDATION; and THE NA'I AUPUNI FOUNDATION; and DOE DEFENDANTS 1-50, Defendants.	DECLARATION OF KEALII MAKEKAU; DECLARATION OF YOSHIMASA SEAN MITSUI; DECLARATION OF PEDRO KANA'E GAPERO; DECLARATION OF MELISSA LEINA'ALA MONIZ; DECLARATION OF JOSEPH WILLIAM KENT; EXHIBIT "1"; DECLARATION OF DR. KELI'I AKINA; EXHIBITS "A" – "I"; CERTIFICATE OF COMPLIANCE PURSUANT TO L.R. 7.5(b)

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ ("Plaintiffs"), by their attorneys, respectfully move this Court for a Preliminary Injunction. Specifically, Plaintiffs seek the preliminary relief of an Order preventing Defendant's from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians, as explained in Plaintiffs' Complaint. *See* Doc. No. 1, p. 32, Prayer for Relief.

This Motion is made pursuant to Local Rule 10.2(g) and Fed. R. Civ. Pro. 65, and is based upon the following memorandum in support, the declarations, and exhibits attached thereto.

DATED: Honolulu, Hawaii, August 28, 2015.

/s/ Michael A. Lilly
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KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ,

Plaintiffs,

vs.

THE STATE OF HAWAII; GOVERNOR DAVID Y. IGE, in his official capacity; ROBERT K. LINDSEY JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, in his official capacity; COLETTE Y. MACHADO, PETER APO, HAUNANI APOLIONA, ROWENA M.N. AKANA, JOHN D. WAIHE'E IV, CARMEN HULU LINDSEY, DAN AHUNA, LEINA'ALA AHU ISA, Trustees, Office of Hawaiian Affairs, in their official capacities; KAMANA'OPONO CRABBE, Chief Executive Officer, Office of Hawaiian Affairs, in his official Capacity; JOHN D. WAIHE'E III, Chairman, Native Hawaiian Roll Commission, in his official Capacity; NĀ'ĀLEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MĀHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, in their official capacities; CLYDE W. NĀMU'O, Executive Director, Native Hawaiian Roll Commission, in his official capacity; THE AKAMAI FOUNDATION; and THE NA'I AUPUNI FOUNDATION; and DOE DEFENDANTS 1-50,

Defendants.

CIVIL NO: 15-00322 BMK

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs respectfully submit this memorandum in support of their motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65.

I. INTRODUCTION AND FACTUAL BACKGROUND

In July 2011, then-Hawaii Governor Neil Abercrombie signed Act 195 into law. Akina Decl., ¶ 6. The Act states that its purpose "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. As clearly explained by those charged with implementing the Act, the "means and methods" it envisions are elections – in which only Native Hawaiians who hold particular views may register and vote – to select delegates to a convention, which would then draft the "governance documents" of a Native Hawaiian entity. Kent Decl., ¶¶ 12-14. In this way, the "roll of qualified Native Hawaiians" will result in "a convention of qualified Native Hawaiians, established for the purpose of organizing themselves." HAW. REV. STAT. § 10H-5.

This civil action is brought by five citizens and residents of the State of Hawaii who are registered to vote in elections in Hawaii, and by one citizen and resident of the State of Texas. Compl. at ¶¶ 6-11. Plaintiffs Keli'i Akina and Kealii Makekau are descendants of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in Hawaii, and they therefore satisfy Act 195's

race-based ancestry requirement. However, these Plaintiffs cannot register to vote in elections to be held under Act 195 because they cannot affirm certain viewpoint-based positions that are required by Defendants' registration process and that pertain to whether they favor Native Hawaiian sovereignty and self-governance becoming a part of Hawaii law. Akina Dec., ¶¶ 7, 11-15; Makekau Decl., ¶¶ 3, 6-10.

Plaintiffs Joseph Kent and Yoshimasa Sean Mitsui are citizens and residents of the State of Hawaii who are registered to vote in Hawaii. These Plaintiffs are not descendants of the aboriginal people who occupied and exercised sovereignty in Hawaii prior to 1778. They are therefore prevented from registering to vote in elections held under Act 195 because of the race-based ancestry requirements of the Act and other restrictions and qualifications imposed and enforced by Defendants. Kent Dec., ¶¶ 2-8; Mitsui Decl., ¶¶ 2-7.

Plaintiff Pedro Kana'e Gapero is a citizen, resident and registered voter of the State of Hawaii. Plaintiff Melissa Leina'ala Moniz is a citizen and resident of the State of Texas. Plaintiffs Gapero and Moniz are descendants of the aboriginal people of Hawaii, and both have been registered to vote in elections to be held under Act 195 without their knowledge or consent. Gapero Dec., ¶¶ 2-4; Moniz Decl., ¶¶ 2, 4-6.

Defendants are the State of Hawaii, its governor and various other state officials in their official capacities, and two private organizations that are now involved in the registration/election/convention process[1] under Act 195.

Act 195

The Act created within Defendant-Office of Hawaiian Affairs ("OHA") an administrative subdivision that is Defendant-Native Hawaiian Roll Commission ("NHRC"). Act 195 makes the NHRC responsible 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).

Act 195 provides that a "qualified Native Hawaiian" is an individual whom the NHRC has determined to meet the criteria of eligibility established by the Act. HAW. REV. STAT. § 10H-3(a)(2). The first criterion is based upon ancestry. It defines a qualified Native Hawaiian as a person who is "a descendant of aboriginal peoples who, prior to 1778, occupied or exercised sovereignty in the Hawaiian islands"; who was eligible in 1921 for a Hawaiian Homes Commission Act

[1]The term "registration/election/convention process" will be used in this memorandum to refer to all of the activities that are being taken to implement Act 195, which include the registration of Native Hawaiians on the Roll, the holding of an election to select delegates to the constitutional convention, the holding of the convention, and the holding of a referendum election to approve or disapprove the recommendations of the convention.

("HHCA")[2] lease, or is a descendant of such a person; or who satisfies the "ancestry requirements of Kamehameha Schools or of any Hawaiian registry program of the office of Hawaiian affairs." HAW. REV. STAT. § 10H-3(a)(2)(A). In addition, the Defendants' registration process under Act 195 provides that in order to be placed on the Roll, an otherwise qualified individual must have "maintained a significant cultural, social, or civic connection to the Native Hawaiian community," and the person must also "wish[] to participate in organization of the Native Hawaiian governing entity." HAW. REV. STAT. § 10H-3(a)(2)(B).

The Registration Process for the Roll

Prospective voters were allowed to begin registering online for the Roll in July 2012. Akina Decl., ¶ 22. Registration has been closed and reopened since then. *Id.* Registration is presently available online. Compl., ¶ 39; *see* https://www.kanaiolowalu.org/registernow/. [3] In addition to the individuals whose

[2] The 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 defines "Native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands prior to 1778." Compl., ¶ 21.

[3] It is well-settled that courts may judicially notice facts on a government website as self-authenticating. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009) (judicial notice of facts on DOJ website); *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2690 (2013) (Maine's website); *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (school websites);

names have been placed on the Roll because they satisfied the ancestry and viewpoint-based requirements of Act 195, tens of thousands of people whose names appeared on other lists of Native Hawaiian – two of whom are Plaintiffs Gapero and Moniz – were subsequently registered for the Roll *without* their knowledge or consent. Akina Decl., ¶¶ 23-24 & Ex. B; Kent Decl., ¶ 14(j); Gapero Decl., ¶¶ 4-5; Moniz Decl., ¶ 5.

During the online voter registration process available on the NHRC's website, applicants are presented with three Declarations that require they affirm: (1) the "unrelinquished sovereignty of the Native Hawaiian people" and their "intent to participate in the process of self-governance;" (2) that they have a "significant cultural, social, or civic connection to the Native Hawaiian community;" and (3) that they satisfy the Native Hawaiian race-based ancestry requirement. Akina Decl, ¶ 13 & Ex. A; Kent Decl., ¶¶ 4, 6, 9. Unless an applicant can affirm all three Declarations, that applicant cannot register for the Roll. Akina Decl, ¶¶ 13-15 & Ex. A; Kent Decl., ¶ 8.

In addition, the President of the Board of Na'i Aupuni has explained that any person who hopes to be a delegate to the planned convention must be registered for the Roll. Kent Decl., ¶ 14(d). In consequence, delegates to the convention

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United States v. Head, 2013 U.S. Dist. LEXIS 151805, at *7 n.2 (E.D. Cal.) ("may take judicial notice of information posted on government websites as it can be 'accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'").

necessarily will have had to affirm the truth of the same three declarations that all other registrants for the Roll had to affirm.

Plaintiffs Akina and Makekau could not affirm the viewpoint-based requirement asserted in Declaration One, and Plaintiffs Kent and Mitsui could not affirm the connections to the Native Hawaiian community and the ancestry requirements in Declarations Two and Three. Akina Decl, ¶ 12; Makekau Decl., ¶ 8; Kent Decl., ¶¶ 4-8; Mitsui Decl., ¶¶ 3-7.

The Joint Conduct of OHA, NHRC, AF and NAF

Commencing in the spring of 2015, representatives of OHA and the Akamai Foundation ("AF") and Na'i Aupuni Foundation ("NAF"), two private nonprofit organizations, entered into an interrelated series of four agreements, which have been posted on NAF's website. Akina Decl., ¶¶ 26-30 & Exs. C, D, E, and F.[4]

The "Grant Agreement" is between OHA, AF, and NAF. It details the transfer from OHA to AF, for use by NAF, of $2,598,000 of government funds, in order that NAF may "facilitate an election of delegates, election and referendum monitoring, a governance ʻAha [convention], and a referendum to ratify any

[4] Statements by OHA trustees and by NAF's President confirm that the intention of this web of arrangements was to defeat any Fourteenth Amendment litigation, presumably by allowing the argument that AF and NAF are not "state actors." Compl., ¶ 58; Akina Decl., ¶ 31 & Ex. G; Kent Decl., ¶ 15(a). As set forth below at point II.B.8, this argument does not come close to working. Under applicable case law, Defendants cannot avoid liability for their constitutional and statutory violations by contracting with private parties, such as AF and NAF, to carry out their election-related duties.

recommendation of the delegates arising out of the 'Aha." Akina Decl., ¶ 29 & Ex. E. The "Letter Agreement" is also between the same three parties, and it concerns the "method and timing of the disbursement of the approved grant funds by OHA" to AF for the benefit of NAF. Akina Decl., ¶ 30 & Ex. F.

The "Fiscal Sponsorship Agreement" is technically between AF and NAF, although OHA is referred to throughout and is even accorded certain specific rights. For example, the "Termination" paragraph provides that, "In consultation with OHA, this Agreement shall terminate if and when Sponsor [AF] and OHA determine that the objectives of the Project can no longer be reasonably accomplished . . ." Akina Decl., ¶ 28(b) & Ex. D. This Agreement also provides that AF is to act "as the fiscal sponsor of restricted funds" from OHA "pursuant to the grant agreement with OHA" that is "incorporated by reference." Akina Decl., ¶ 28(a) & Ex. D.

Finally, a June 2015 contract between NAF and Election American, Inc. ("EAI"), a private New York company, spells out particular dates and details for the planned election. Akina Decl., ¶ 27 & Ex. C. Pursuant to the schedule in that contract, ballots for the delegate election will be mailed out on November 1, 2015 and must be mailed back to Defendants by December 1. *Id.*

II. ARGUMENT

A. Legal Standard for Preliminary Relief.

Courts may enter a preliminary injunction if a plaintiff shows: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *Accord*, *M.R. v. Dreyfus*, 697 F.3d, 706, 725 (9th Cir. 2012) (quoting *Winter*); and *Guy v. County of Hawaii*, Civil No. 14-00400 SOM/KSC, 2014 U.S. Dist. LEXIS 132226 at *6 (D. Haw.).

In the alternative, a plaintiff is entitled to interim relief in the Ninth Circuit if he shows that plaintiff's claims raise "serious questions" as to the merits and the hardships tip sharply toward the moving party (and the other two *Winter* tests are satisfied). *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2010). *See also Keyoni Enterprises, LLC v. Cnty. of Maui*, Civil No. 15-00086 DJW-RLP, 2015 U.S. Dist. LEXIS 40740 at * 7 (D. Haw. 2015). As set forth below, Plaintiffs submit that they should prevail under both the *Winter* standard and the modified preliminary injunction test in *Alliance for the Wild Rockies*.

B. Plaintiffs Are Likely to Succeed on the Merits.

Plaintiffs are likely to succeed on all nine of their Counts alleged in their complaint.

1. Plaintiffs Are Likely to Succeed on Their Claim that Act 195's Requirement that Voters Have Native Hawaiian Ancestry Violates the Fifteenth Amendment (Count 1).

Plaintiffs' Fifteenth Amendment claim in Count 1 is controlled by the U.S. Supreme Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000). In *Rice*, the plaintiff challenged a provision in the Hawaiian Constitution that limited the right to vote in elections for OHA Board members to "Native Hawaiians," who were defined in almost the identical way that Native Hawaiians are defined in Act 195. *Id.* at 499. In striking down this voting limitation, the *Rice* Court elaborated on the meaning of the Fifteenth Amendment:

> The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. . . . Enacted in the wake of the Civil War, the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote . . . Vital as its objective remains, the Amendment goes beyond it. . . . [T]he Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment. The Amendment grants protection to all persons, not just members of a particular race.
>
> 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 Court then took note of the many decisions by the U.S. Supreme Court that have struck down race-based 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);[5] *Smith v. Allwright*, 321 U.S. 469 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953) (all-white primary cases). Justice Kennedy, writing for the majority, opined that the "Fifteenth Amendment was quite sufficient to invalidate a scheme which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise." *Rice,* 528 U.S. at 513. And the Court in *Rice* went on to reason that "[a]ncestry can be a proxy for race," *id.* at 514, and that enacting this racial limitation on voting, the State of Hawaii "ha[d] used ancestry as a racial definition and for a racial purpose." *Id.* at 515.

> 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.

The Court in *Rice* addressed and rejected the State of Hawaii's argument that the exclusion of non-Native Hawaiians from voting in the elections for the OHA Board was permitted under precedents, such as *Morton v. Mancari*, 417 U.S.

[5] In *Guinn*, the State of Oklahoma had enacted a literacy requirement for voting eligibility but exempted persons whose ancestors were entitled to vote on January 1, 1866 or any time prior to that date. 238 U.S. at 364-365. Before that date black persons were not allowed to vote in Oklahoma. *Id.*

535 (1974), allowing preferential treatment for members of some Indian tribes. *Id.* at 518-22. *Accord*, *Arakaki v. Cayetano*, 314 F.3d 1091, 1094-95 (9th Cir. 2002). Thus, Defendants here are precluded from successfully defending Act 195's challenged voting procedures on the grounds that the Indian tribe cases support the race-based ancestry voting requirement here. Quite simply, in the context of Native Hawaiians that argument has been made and rejected by the Supreme Court. "The State's position rests . . . on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment." *Rice*, 528 U.S. at 523.

There is no principled way that the ruling in *Rice* can be distinguished from the Fifteenth Amendment challenge made in Count 1 regarding the exclusion of non-Native Hawaiians from participating in this registration/election/convention process under Act 195. Therefore, Plaintiffs are likely to prevail on this claim.

2. Plaintiffs Are Likely to Succeed on Their Claim that Act 195's Requirement that Voters Have Native Hawaiian Ancestry Violates the Equal Protection Clause of the Fourteenth Amendment (Count 2).

In addition to their Fifteenth Amendment claim, Plaintiffs also challenge Act 195's exclusion of non-Native Hawaiians from voting under the Fourteenth Amendment's Equal Protection Clause. It is axiomatic that the Equal Protection Clause prohibits discrimination on the basis of race in voting. *See e.g.*, *Miller v.*

Johnson,[6] 515 U.S. 900, 905 (1995) (in the context of redistricting, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"); *Rogers v. Lodge*, 458 U.S. 613, 617 (1882) (intentional racial purpose underlying the enactment or maintenance of an at-large method of election violates the Equal Protection Clause).

There is no question that the provisions of Act 195 that exclude non-Native Hawaiian from voting, on their face and as enforced by Defendants' implementing procedures, involve the intentional creation of racial classifications that are intended to be used to deny non-Native Hawaiian the right to participate in the registration/election/convention process under Act 195. Defendants will not be able to demonstrate that this race-based denial of the right to vote "is narrowly tailored to achieve a compelling state interest," *Miller*, 515 U.S. at 920, because race discrimination in voting does not further any compelling state interest, only the interests of the perpetrators of the discrimination. Accordingly, Plaintiffs are likely to prevail on this claim as well.

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[6] *Miller* stated that the Equal Protection Clause's prohibition against racial discrimination applies "regardless of 'the race of those burdened or benefited by a particular classification,'" quoting *Richmond v. J.A Croson Co*., 488 U.S. 469, 494 (1989). In other words the important inquiry under an equal protection analysis is whether racial discrimination has occurred and not what racial group was the perpetrator or the victim of the discriminatory conduct.

3. Plaintiffs Are Likely to Succeed on Their Claim that Act 195's Requirement that Candidates Have Native Hawaiian Ancestry Violates the Fifteenth Amendment (Count 5).

The President of NAF's Board has stated that any delegates to the planned convention will be drawn from those who are registered for the Roll. Kent Decl., ¶ 14(d). This means that candidates will be qualified according to the same criteria applicable to registrants for the Roll. In particular, it means that candidates will have to meet the ancestry requirements that govern the Roll.

Plaintiffs are likely to prevail on their claim that such a candidate restriction based on race violates the Fifteenth Amendment. The claim in Count 5 is controlled by the Ninth Circuit ruling in *Arakaki v. Cayetano*. In *Arakaki*, a challenge was made to Hawaii's constitutional and statutory provisions requiring that all candidates for the OHA Board of Trustees be Native Hawaiians. 314 F.3d at 1093. The definition used to define "Native Hawaiian" at issue in *Arakaki* was essentially the same definition used in Act 195 and at issue in *Rice*. *Id.* at 1093, n.3.

The State of Hawaii argued in *Arakaki* that the plaintiffs were not harmed by the requirement that all candidates for the OHA Board be Native Hawaiian in light of the ruling in *Rice* that non-Native Hawaiians could vote for members of the OHA Board. *Id.* at 1094. However, relying upon the ruling in *Hadnott v. Amos*, 394 U.S. 358, 364 (1969), a case decided on Fifteenth Amendment grounds, the

court of appeals in *Arakaki* held that *voters* were harmed when *candidates* faced racial barriers:

> Although the language of the Fifteenth Amendment does not explicitly extend its protections to the abridgement of the right to vote on account of race-based *candidate* qualifications, the Court has acknowledged that the disqualification of candidates on the basis of race implicates voters' Fifteenth Amendment rights. *See Hadnott* . . . Thus, a candidate restriction which directly and expressly excludes all non-[Native] Hawaiians from qualifying as a candidate for the office of OHA trustee, compels the conclusion that the candidate restriction abridges the right to vote and is thus prohibited by the Fifteenth Amendment.

Arakaki, 314 F.3d at 1095. Therefore, under *Arakaki* all Plaintiffs, as voters, are injured by the candidate restrictions at issue here.

Significantly, the Ninth Circuit in *Arakaki* refused to accept the State of Hawaii's argument that Native Hawaiians, like members of Indians tribes, have special needs that justify excluding non-Hawaiians from service on the OHA Board of Trustees. *Id.* at 1094-95. Relying upon the ruling on the same issue in *Rice*, the court in *Arakaki* noted that the Supreme Court had rejected the State's attempt "to set apart the elections based on the special purpose of OHA or the status of native Hawaiians and Hawaiians as special beneficiaries of its programs." *Id.* at 1095. The Court of Appeals went on to hold that all citizens have an interest in voting in elections that select officials who will make policy choices that will affect them, "even if those policies will affect some groups more than others." *Id.*, citing *Rice*, 528 U.S. at 523.

In the registration/election/convention process under Act 195, recommendations are likely to be made concerning the profoundly important issue of whether Hawaii law should be altered to provide sovereignty and self-government for Native Hawaiian. In these circumstances, it is manifestly obvious that non-Native Hawaiian citizens of the State have real and weighty interests in the outcome of this political process that has the potential for altering the way in which their State is governed. The candidate restriction on non-Native Hawaiians running for the delegate position directly abridges non-Native Hawaiians' right to vote guaranteed by the Fifteenth Amendment. *Arakaki*, 314 F.3d at 1095.

There is no principled way that the ruling in *Arakak*i can be distinguished from the Fifteenth Amendment challenge made here in Count 5 to the exclusion of non-Native Hawaiians candidates from running for the position of delegate under Act 195. Therefore, Plaintiffs are likely to prevail on this Fifteenth Amendment claim as well.

4. Plaintiffs Are Likely to Succeed on Their Claim that Act 195 Violates Section 2 of the Voting Rights Act by Requiring that Voters and Candidates Have Native Hawaiian Ancestry (Counts 3 and 6).

Plaintiffs are also likely to prevail regarding their claims that Act 195's exclusion of non-Native Hawaiians from voting in the impending elections (Count 3) and from running for delegate positions (Count 6) violate Section 2 of the Voting Rights Act. Section 2 proscribes the "denial or abridgement of the right of

any citizen of the United States to vote on account of race or color . . ." 52 U.S.C. § 10301(a). It provides that a violation

> is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected [against such denial or abridgement] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .

52 U.S.C. § 10301(b). Along with intentional discrimination, Section 2 proscribes "voting practices that 'operate, designedly or otherwise,'" to deny or abridge voting rights in contravention of the statute. *U.S. v. Charleston Cnty.*, 365 F.3d 341, 345 (4th Cir. 2004).

In this case, Defendants clearly *intended* to ensure that the political process leading to a convention was not "equally open" to non-Native Hawaiians and to guarantee that they could not "participate in" that process or "elect representatives of their choice." The blanket exclusion of non-Native Hawaiians also had that desired *result*. Thus, Section 2 was violated.[7]

[7] Note that at the time of the ruling in *Arakaki*, the exclusion of non-Native Hawaiians from voting in OHA trustee elections had already been struck down by the U.S. Supreme Court in *Rice* some two years earlier, which meant that the Ninth Circuit did not have to rule on that claim. Nevertheless, *Arakaki* is persuasive authority for the proposition that the Ninth Circuit would find Act 195's exclusion of non-Native Hawaiians from voting for delegates to be a violation of Section 2. As set forth in the text, the Ninth Circuit concluded in *Arakaki* that the exclusion of non-Native Hawaiians from running for the OHA Board violates Section 2. It

Further, in addition to its Fifteenth Amendment analysis, the Court of Appeals in *Arakaki* analyzed the candidate restriction for the OHA Board under the anti-race discrimination standard in Section 2. 314 F.3d at 1095-97. The Ninth Circuit pointed out that Section 2 prohibits voting practices that result in discrimination on account of race. *Id.* at 1096, citing *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). Applying the discriminatory result standard of Section 2 to the candidate exclusion of non-Native Hawaiians from the OHA Board, the court concluded that

> By systematically disqualifying all non-[Native] Hawaiians from running for the office of OHA trustee on the basis of their race alone . . . the trustee qualifications ensures that the "political processes leading to nomination or election in the State . . . are *not equally open* to participation" by citizens who are not [Native] Hawaiian.

Arakaki, 314 F.3d at 1096 (citations omitted).

There is no principled way that the ruling in *Arakak*i can be distinguished from Plaintiffs' Section 2 claim here in Count 6 concerning the exclusion of non-Native Hawaiians from running for delegates under Act 195. Therefore, Plaintiffs are likely to prevail on this Section 2 claim as well.

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stands to reason that it would most certainly have found that the exclusion of non-Native Hawaiians from voting under Act 195 is likewise a violation of Section 2.

5. Plaintiffs Are Likely to Succeed on Their Claim that The Requirements That an Applicant Affirm the Sovereignty of the Native Hawaiian People and Express an Intent to Participate in Self-Governance Violate the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (Count 4).

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of University of Virgina*, 515 U.S. 819, 828-29 (1995). Where government restrictions are placed on protected activities such as the right to vote, courts have analyzed the constitutional issues under both the First Amendment and the Equal Protection Clause. *See Police Dep't of Chicago v. Mosley*, 408, U.S. 92, 94-95, 100 (1972) (the city ordinance impermissibly prohibited First Amendment activity of picketing "in terms of subject matter" and therefore denied equal protection). Further, given the fundamental nature of the right to vote in a democratic society, restrictions on that right that are based upon content or viewpoint discrimination are subject to strict scrutiny, and are "presumptively invalid." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). *See also Angle v. Miller*,673 F.3d 1122, 1127-28, 1132 (9th Cir. 2012) (election limitations that impose severe burdens on the right to vote must pass strict scrutiny or be deemed in violation of the First Amendment); *Idaho Coalition United for Bears v. Cenarrusa*, 342 F.3d 1073, 1076 (9th Cir. 2003) (state law placing conditions on ballot-initiative process raised serious Equal Protection issues).

Plaintiffs Akina and Makekau are not able to register for the Roll because they are not able to affirm that they support the "unrelinquished sovereignty of the Native Hawaiian people" and that they intend "to participate in the process of self-governance" for Native Hawaiian people.[8] Not being on the Roll will deny them the right to participate in the registration/election/convention process under Act 195. These denials will occur even though both of these Plaintiffs satisfy the raced-based ancestry requirement of Act 195. This type of content or viewpoint discrimination can only be justified, if at all, by a showing that the affirmation requirements of Act 195 are "narrowly tailored and advance a compelling state interest." *Angle*, 673 F.3d at 1132. Defendants cannot meet this heavy burden.

The viewpoint discrimination enforced by Defendants demonstrates that they do not intend to get an accurate reading of the sentiments of all Native Hawaiians on the questions of sovereignty. Instead, the effect of this viewpoint discrimination is to limit the number of Native Hawaiians who can participate in the registration/election/convention process under Act 195 to those who favor altering Hawaiian law so as to provide for Native Hawaiian self-governance.

Native Hawaiians such as Plaintiffs Akina and Makekau who do not have the "preapproved" or "accepted" viewpoint are simply excluded from the entire

[8] Furthermore, Plaintiff Akina has stated that he would like to run to be a delegate to the planned convention. Akina Decl., ¶¶ 19-21. Accordingly, he also has standing as a potential candidate to challenge the viewpoint restriction.

process. There is no legitimate and compelling government interest in stacking the electoral deck in this fashion. Accordingly, Plaintiffs are likely to succeed on this claim.

6. Plaintiffs Are Likely to Succeed on Their Claim that Defendants' Requirements, Including the Requirement that Voters Have Significant Ties to the Native Hawaiian Community, Are an Unjustified Restriction on the Fundamental Right to Vote In Violation of the Fourteenth Amendment (Counts 7 and 8).

Recognizing the precious nature of the fundamental right to vote, but also the need to establish reasonable rules for administering elections, the U.S. Supreme Court has developed a balancing test to determine whether administrative election rules violate the Fourteenth Amendment. *Anderson v. Celebrezze*, 460 U.S. 780,789 (1983); *Burdick v.Takushi*, 504 U.S. 428, 434 (1992). In *Burdick*, the Court stated:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule . . . .

504 U.S. at 434 (quotations omitted). Importantly, the *Burdick* balancing test does not look at the impact of the challenged election provision in isolation, but within the context of the election scheme as a whole. *Id.* at 438-39. *See also*, *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 666-67 (1966) (Equal Protection Clause prohibits the states from fixing voter qualifications that invidiously discriminate);

Bennett v. Yoshina, 140 F.3d 1218, 1226, 1228 (9th Cir. 1998) (holding that election requirements deny substantive due process when they are "fundamentally unfair" and that states may not require voters, as a prerequisite to voting, "to *espouse positions they do not support*," quoting *Burdick*) (emphasis added).

Declaration Two of the registration process implemented by Defendants under Act 195 requires that applicants for placement on the Roll must affirm that they "have a significant cultural, social or civic connection to the Native Hawaiian community." Kent Decl., ¶ 6. Plaintiffs Kent and Mitsui cannot affirm Declaration Two and have been denied the right to have their names placed on the Roll because of their inability to do so. *Id.*, ¶ 5; Mitsui Decl., ¶ 6. Further, all Plaintiffs who desire to register are improperly burdened by the three declarations required by the NHRC. These election requirements do not further any legitimate interest that the State of Hawaii has in the conduct of elections such as election integrity or administrative convenience. Instead, they are unnecessary and unjust burdens on Plaintiffs' right to vote, and therefore constitute violations of the Equal Protection and Due Process Clauses. *Burdick*, 504 U.S. at 438-39; *Bennett*, 140 F.3d at 1226.

Accordingly, Plaintiffs are likely to succeed on their Fourteenth Amendment claims in Counts 7 and 8.

7. Plaintiffs Are Likely to Succeed on Their Claim that Defendants' Placement of Their Names on the Registration Roll Without Plaintiffs' Consent Constitutes the Involuntary Registering of Persons in Violation of the First Amendment (Count 9).

Plaintiffs Gapero and Moniz satisfy the race-based ancestry requirement of Act 195, but they do not wish (and have made no effort) to be placed on the Roll. Their names were placed on the Roll, however, without their knowledge or consent. Compl. at ¶ 10-11.

Courts have indicated that an individual's decisions whether to register and vote are political expressions worthy of First Amendment protection. In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court addressed, *inter alia*, a challenge to a state requirement that persons who circulate petitions seeking to have an initiative placed on a referendum ballot must, themselves, be registered voters. The Court in *Buckley* took note of trial testimony that some initiative-petition circulators were not registered to vote as a form of protest against what they believed to be an unresponsive "political process." *Buckley*, 525 U.S. at 196. The Court then concluded that "the choice not to register implicates political thought and expression," which choice was unduly burdened by the voter registration requirement. *Id*.; *see Dixon v. Maryland*, 878 F.2d 776, 782 (4th Cir. 1989) ("surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable"); *American Ass'n of*

People with Disabilities v. Herrera (Part 2), 690 F. Supp. 1163, 1216 (D.N.M. 2010) ("the choice not to register to vote also conveys political expression" and is therefore constitutionally protected); *Wrzeski v. City of Madison, Wis.*, 558 F. Supp. 664, 667 (W.D. Wis. 1983) (the First Amendment protects the right of a city council member not to vote on a proposed ordinance because it protects "both the right to speak freely and the right to refrain from speaking at all"), quoting *Wooley v. Maynard*, 430 U.S. 705 (1977).

Accordingly, the involuntary registration of Plaintiffs on the Roll violates their First Amendment right *not* to register to vote, and therefore Plaintiffs are likely to succeed on this claim.

8. Defendants Cannot Avoid the Limitations Imposed by Constitutional and Federal Law by Contracting Government Functions Out to Private Parties.

In *Ohno v. Yasuma*, 723 F.3d 984, 995-96 (9th Cir. 2013), the Ninth Circuit stated that the U. S. Supreme Court has developed four tests for determining whether actions by non- government entities or persons amount to "state action" for the purposes of a constitutional analysis: "(1) the public function test;[9] (2) the joint action test;[10] (3) the state compulsion test;[11] and (4) the government nexus

[9] This test "treats private actors as state actors when they perform a task or exercise powers traditionally reserved to the government." *Id.* at 996.

[10] This test inquires into whether government officials and private actors have acted in concert in causing the deprivation of rights. *Id.* at 996.

test."[12] *Id.* at 995. As explained in *Ohno,* the public function and joint action tests "largely subsume the state compulsion and governmental nexus test because they address the degree to which the state is intertwined with the private actor or action." *Id.* at 995, n.13.

The applicable precedents in this area establish that all election-related activities by AF, NAF and their subcontractors should be deemed state action under the public function and joint action standards. As noted above, OHA has entered into a contractual arrangement with AF and NAF for these entities to carry out duties assigned to OHA and the NHRC under Act 195. In addition, NAF has entered into a contract with EAI related to the latter carrying out some of these duties. *Id.* As the Supreme Court has explained, "[o]ur cases make it clear that the conduct of the elections themselves is an exclusively public function." *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 158 (1978). Thus, Defendants cannot avoid constitutional restraints by attempting to transfer this "exclusively public function" to private parties.

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[11] This test requires a showing that the state has "exercised coercive power or provided such significant encouragement, either overt or cover, that the [private actor's] choice must in law be deemed to be that of the State." *Id.* at 995, n.13, quoting *Johnson v. Knowles,* 113 F.3d 1114, 1119 (9th Cir. 1997).

[12] Under this test the private party's acts are deemed to be under color of state law if "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 995, n. 13.

In its analysis in *Flagg Brothers*, *id.* at 158, the Supreme Court relied upon the all-white primary cases of *Terry v. Adams*, 345 U.S. 461, 469-70, 484 (1953), and *Smith v. Allwright*, 321 U.S. 649 (1944). In those cases, the Supreme Court squarely rejected the argument by state officials that constitutional protections against racial discrimination in voting did not apply to primary elections conducted entirely by *private* political organizations. As *Terry, Allwright*, and *Flagg Brothers* establish, the public function of holding elections, which Act 195 assigned to government agencies OHA and the NHRC, cannot be immunized from constitutional scrutiny by the simple expedient of contracting with private parties. When AF, NAF and EAI seek to register voters and conduct delegate elections pursuant to Act 195, they are state actors.

The same result is reached under the joint action test. In *Swift v. Lewis*, 901 F.3d 730 (9th Cir. 1990), state prison officials had contracted with a private party to make recommendations concerning whether the plaintiff, an inmate, should be classified as a member of a religious group. *Swift*, 901 F.3d at 732 n.2. The plaintiff in *Swift* sued both the prison officials and the private contractor, alleging constitutional deprivation related to the conditions of his incarceration. The private contractor moved to have the constitutional claims against him dismissed on the grounds that his actions were not under color of state law. *Id.*

However, the Ninth Circuit determined that where state officials had contracted with a private party to do work relating to inmates, the private party had become "a willful participant in joint action with the state or its agents," and its actions were state action. *Swift*, 901 F.3d at 732, n 2, citing *Dennis v. Sparks*, 449 U.S. 24, 27-28(1980). *See also*, *Schowengerdt v. General Dynamics Corp*., 823 F.3d 328, 1332, n.3 (9th Cir. 1987) (joint participation in a search of a third party by federal officials and a private actor was sufficient to establish that the latter's actions were state action). In the same vein, the fact that AF and NAF have entered into contractual arrangements in which they spend government funds to do work relating to voting means that they are willful participants in joint action with OHA.

The election-related actions undertaken by AF, NAF and EAI at the contractual direction of OHA constitute state action under both the public function and the joint action tests.

9. Defendants Cannot Successfully Argue that the Election Inflicts No Present Injury on Non-Native Hawaiians.

Defendants might attempt to argue that the indeterminate nature of what the planned convention might do or recommend, or the fact that it does not have authority to pass laws, means that those who cannot register or vote for delegates,

or run as delegates, to that convention can claim no harm.[13]

The recent ruling in *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015) shows that this argument is unavailing. In *Davis*, the Guam Legislature had passed a law that provided for the holding of a plebiscite on Guam's future relationship with the United States. *Davis*, 785 F.3d at 1132. Non-native inhabitants of Guam were not allowed to register for, or vote in, that plebiscite. Despite the fact that the plebiscite had not even been scheduled, plaintiff filed suit seeking registration on the ground that the non-native inhabitant classification was an impermissible proxy for race. *Id.* at 1313-1314. The lower court dismissed on grounds of standing and ripeness. *Id.* On appeal the Ninth Circuit reversed and remanded for a ruling on the merits. *Id.* at 1316.

In reversing, the Court of Appeals concluded that the unequal treatment plaintiff was suffering was sufficient to establish both standing and ripeness. *Id.* at 1315. The Court noted that "[i]f the plebiscite is held, this would make it more likely that Guam's relationship to the United States would be altered to conform" to the preference favored in the plebiscite. *Id.*

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[13] Note that this argument can have no bearing on Plaintiffs' First Amendment claims, because the injuries at issue in those claims necessarily accrue at the time Plaintiffs' viewpoint is either burdened or compelled. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") Furthermore, this argument also should have no bearing on the claim that restricting candidates on the basis of race infringes voters' Fifteenth Amendment rights, as this injury logically occurs when those restrictions are imposed.

The view that the Constitution protects the right to participate fully in a political process that can influence a final political result has been widely recognized in U.S. Supreme Court cases. *See, e.g.*, *Smith v. Allwright*, 321 U.S. at 663-66 (holding that exclusion of black Americans from a primary election denied them an equal opportunity to participate in the general election of officials); *Terry v. Adams*, 345 U.S. 461, 468 (1953) (the Fifteenth Amendment is applicable to "any election in which public issues are decided or public officials selected.").

Here, the Hawaii Legislature has enacted legislation that uses public officials, and millions of dollars of public monies, to set up and implement a registration, election, and convention process. Under this process, the delegates elected to the constitutional convention are likely, at a minimum, to make recommendations to the State or federal government concerning the profoundly important issue of whether the law should be altered to provide sovereignty and self-government to Native Hawaiians. Indeed, it is anticipated that those delegates may choose to do more than make recommendations.[14] Those who cannot register for the Roll will have lost the opportunity to participate fully in the

[14] For example, representatives of Na'i Aupuni have stated, among other things, that the convention will be about "possible nationhood" for Native Hawaiians, that the purpose of the convention is to draft "governance documents," and even that convention delegates might take any plans they developed directly to the United Nations. Kent Decl., ¶¶ 14(f) & (i), 15.

registration/election/convention process.[15]

In these circumstances, it is manifestly obvious that non-Native Hawaiian citizens of the State have real and weighty interests in the outcome of this issue that has the potential for altering the way in which their State is governed. Plaintiffs' exclusion from participation in the registration/election/convention process under Act 195 will deny them the opportunity to participate fully in the controversy over Native Hawaiian sovereignty. Because this is so, that exclusion is prohibited by constitutional and statutory protections of the right to vote. *See also Romer v. Evans*, 517 U.S. 620, 633-34 (1996) (invalidating a state constitutional amendment that denied gays and lesbians equal access to government or the opportunity to pass laws to protect their interests); *Washington v. Seattle Sch. Dist. No.1*, 458 U.S. 457, 471-74 (1982) (nullifying an initiative that allocated government power in a racially discriminatory matter).

Therefore, arguments by Defendants that no injury is inflicted on non-Native Hawaiians by the registration/election/convention process of Act 195 should be rejected.

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[15] Certainly Defendants suggest that the failure to participate has significant consequences. An OHA newsletter plainly indicated that the failure to register could lead to a loss of rights, or even property, in a future sovereign Native Hawaiian entity. Akina Decl., ¶ 32 & Ex. H.

C. Without a Preliminary Injunction, Plaintiffs Will Suffer Irreparable Harm.

"The right to vote . . . is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The deprivation of constitutional rights, even for a brief period of time, amounts to irreparable injury. *See Elrod*, 427 U.S. at 373 (plurality opinion) ("The loss of First amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). As the Ninth Circuit has opined, "[a]n alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore, Inc. v. Superior Court of Cal*, 739 F.2d 466, 472 (9th Cir. 1984). *Accord, Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009).

Plaintiffs, along with many thousands of Hawaiian citizens, will suffer irreparable harm without a preliminary injunction enjoining the various illegal activities to be carried out in the registration/election/convention process under Act 195. Accordingly, Plaintiffs can satisfy their burden of showing irreparable harm if the requested injunction does not issue.

D. The Balance of Equities Weighs In Favor of Granting the Requested Interim Relief.

In considering the balances of equities, this Court must "balance the interests of all parties and weigh the damage to each[.]" *Los Angeles Mem'l Coliseum*

Comm'n v. Nat'l Football League, 634 F.2d 1197, 1203 (9th Cir.1980). This Court should "identify the harms which a [preliminary injunction] might cause to defendants and weigh these against plaintiff's threatened injury." *Id.*

If Defendants are allowed to proceed with the challenged activities under Act 195, a great and substantial harm will be done to the constitutional and statutory rights of Plaintiffs and of hundreds of thousands of other citizens of the State of Hawaii. The deprivations involved, moreover, concern such fundamental constitutional guarantees as the First Amendment rights to freedom of speech and freedom from compelled speech, the Fourteenth Amendment rights to the equal protection of the laws and to due process, the Fifteenth Amendment right to vote free from denial or abridgment on account of race, and the basic antidiscrimination provisions of the Voting Rights Act of 1965.

On the other hand, the only plausible harm done to Defendants by the issuance of preliminary relief would be the loss of time in implementing their nation-building scheme while the matter is being litigated and the loss of public monies already spent in carrying out registration and election activities. Given that Defendants' project has no inherent deadline or timeframe – and also given the fact that it might still be pursued in the interim in other, lawful ways – any loss of time is not a great harm. As for the loss of public monies, this is lessened to the extent that expenditures are not irretrievably lost. For example, if the Roll were upheld as

lawful and constitutional, monies spent in registering voters and in publicizing the effort will not have been wasted. Furthermore, if Plaintiffs are correct in some or all of their constitutional and statutory claims the issuance of interim relief will in the long run actually benefit Defendants. Quite simply, the longer the State of Hawaii engages in the practices challenged in this lawsuit and the more public monies it spends in doing so, the greater the loss will be to Defendants and to the public treasury of Hawaii when these practices are ultimately held to be illegal in a final judgment.

As the Ninth Circuit recently observed, "the balance of the equities favor[s] preventing the violation of a party's constitutional rights." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). Indeed, given the gravity of the deprivation of rights involved and the minimal potential loss to the State, the balance of hardships tips sharply in favor of Plaintiffs. For this reason, a preliminary injunction is warranted even under the "sliding scale" test of *Alliance for the Wild Rockies*, 632 F.3d at 1134-35. Pursuant to that test, even if Plaintiffs failed to show at the preliminary injunction stage that they were likely to prevail on the merits, this Court still should issue an injunction because Plaintiffs have clearly raised "serious questions" as to the merits while the balance of hardships tips sharply in their favor.

Accordingly, the balance of the equities here clearly weighs in favor of

Plaintiffs and the granting of the preliminary injunction.

E. The Public Interest Will Be Served in the Event the Preliminary Injunction Issues.

To determine whether the issuance of a preliminary injunction is in the public interest, this Court should look to the impact of the preliminary injunction on non-parties. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 757 F.3d 755, 766 (9th Cir. 2014). *See Arizona Dream Act Coal.*, 757 F.3d *a*t 1069; *Guy v. County of Hawaii*, 2014 U.S. Dist. LEXIS 132226 at *13. There is an extraordinary public interest in preventing the right to vote from being denied or abridged. *See NAACP-Greensboro Branch v. Guilford County Bd. Of Elections*, 858 F. Supp. 2d 516, 529 (M.D.N.C. 1994) ("[T]he public interest in an election . . . that complies with constitutional requirements . . . is served by granting a preliminary injunction.").

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that their Motion for a Preliminary Injunction should be granted.

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