

In the Supreme Court of the United States

KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ,

Applicants,

v.

THE STATE OF HAWAII, GOVERNOR DAVID Y. IGE, ROBERT K. LINDSEY JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, 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, KAMANA'OPONO CRABBE, Chief Exec. Officer, Office of Hawaiian Affairs, JOHN D. WAIHE'E III, Chairman, Native Hawaiian Roll Commission, NA'ALEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MAHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, CLYDE W. NAMU'O, Exec. Director, Native Hawaiian Roll Commission, THE AKAMAI FOUNDATION, and THE NA'I AUPUNI FOUNDATION, *Respondents.*

**REPLY IN SUPPORT OF EMERGENCY APPLICATION
FOR INJUNCTION PENDING APPELLATE REVIEW**

Michael A. Lilly
NING LILLY & JONES
707 Richards Street, Suite 700
Honolulu, Hawaii 96813
(808) 528-1100
michael@nljlaw.com

H. Christopher Coates
LAW OFFICES OF H. CHRISTOPHER COATES
934 Compass Point
Charleston, South Carolina 29412
(843) 609-7080
currieocoates@gmail.com

Robert D. Popper, *Counsel of Record*
JUDICIAL WATCH, INC.
425 Third Street, SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

William S. Consovoy
J. Michael Connolly
CONSOVOY McCARTHY PARK PLLC
3033 Wilson Boulevard
Arlington, Virginia 22201
(703) 243-9423
will@consovoymccarthy.com

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Attorneys for Applicants

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In *Rice v. Cayetano*, 528 U.S. 495, 499 (2000), this Court ruled that the Fifteenth Amendment prohibited the State of Hawaii from holding an election in which only Native Hawaiians could vote. Respondents have planned and organized the election from which Applicants have been excluded in order to circumvent that ruling. Indeed, the briefs of Respondent Office of Hawaiian Affairs (“OHA Br.”) and Respondents Na‘i Aupuni *et al.* (“Na‘i Aupuni Br.”) confirm that this process was engineered—both substantively and procedurally—to avoid judicial review at all costs. Substantively, despite the fact that the State has funded, organized, directed, and encouraged this election, Respondents claim the Fifteenth Amendment is inapplicable because the State has left the counting of the ballots to a private organization. But that is a state-run election under any test. Furthermore, there is no question that the election will decide important governmental policies.

Procedurally, Respondents argue that relief should be denied because of the case’s posture. But Respondents created this emergency by setting a timetable for the election that was designed to foreclose judicial review. Indeed, they admit to choosing an accelerated timetable in the hope of completing the election before it could be challenged. Respondents’ equitable arguments thus ring hollow. Emergency relief is needed for the same reason why Respondents rushed to hold the election: the harm Applicants will suffer by being denied the right to vote in this election cannot be remedied once the ballots are counted and the result is certified. Respondents should not be allowed to use gamesmanship to run out the clock. The Court should grant the application for an injunction pending appellate review.

I. RESPONDENTS' ARGUMENTS CAST NO DOUBT ON APPLICANTS' INDISPUTABLY CLEAR RIGHT TO RELIEF.

Applicants' constitutional challenge is likely to prevail if the Court grants the injunction needed in order to allow the case to be appealed in the ordinary course. Respondents have violated the Fifteenth Amendment because they are excluding Applicants from voting in a state election on the basis of their ancestry. *See* Application of Akina, *et al.* ("Akina Br.") 18-25. Respondents are also violating the Fourteenth Amendment because their decision to hold an election exclusively for Native Hawaiians is not narrowly tailored to further a compelling governmental interest. *See* Akina Br. 25-26. All of Respondents' arguments to the contrary fail.

As an initial matter, Respondents seek to make an easy question seem hard by burying it in a multi-pronged inquiry. *See* OHA Br. 11-18; Na'i Aupuni Br. 8-15. The Fifteenth Amendment question here is straightforward: Does the Fifteenth Amendment prevent Respondents from excluding Applicants from voting in a state-run election because of their ancestry? The answer is yes. That is why this Court, in *Rice*, struck down Hawaii's attempts to hold an election of OHA trustees in which only Native Hawaiians could vote. *Id.* at 499. The only difference between this case and *Rice* is an act of subterfuge—the State's decision to transfer its power to collect and tabulate the votes cast in an election to a non-profit organization. But this is not the first time the Court has faced an "extraordinary stratagem" by a recalcitrant State. *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). There is no doubt that this election would violate the Fifteenth Amendment if OHA were counting the votes. That should be the end of the matter.

But even if the Fifteenth-Amendment inquiry is as complex as Respondents claim, Respondents' arguments still fall short. Respondents claim that in order to prevail under the Fifteenth Amendment, Applicants must show both that "state action" has occurred and that the election will either "determine governmental policies" or "select public officials." OHA Br. 11-18; Na'i Aupuni Br. 10. Setting aside that the Court's decisions nowhere require Applicants to meet *two* different tests for determining whether this is a state-run election (one of which itself has two alternative tests), neither is a barrier to injunctive relief. As explained below, Applicants clearly pass both tests.

First, Applicants have demonstrated sufficient "state action" under both the "public function" and the "joint action" tests. As an initial matter, it is important to retrace the facts of this case. As the briefing makes clear, the following facts are undisputed:

- To "facilitate the process" of forming a "convention of qualified Native Hawaiians, established for the purpose of organizing themselves," HAW. REV. STAT. § 10H-5, the State of Hawaii enacted Act 195. This law created the Native Hawaiian Roll Commission, *id.* § 10H-3; directed the new commission to develop a roll containing "qualified Native Hawaiians" defined by ancestry, *id.*; and then ordered that the roll "shall serve as the basis of eligibility" to "participate in the organization of [a] Native Hawaiian governing entity," *id.* §§ 10H-3(2)(A), 10H-4(b).
- After Act 195 was passed, a new organization, Na'i Aupuni, was created "for one reason ... to establish a path to a possible reorganized Hawaiian government." Appendix ("App.") 412a. Na'i Aupuni was created in consultation with members of OHA's Board, who openly expressed their desire to allow these elections to take place while avoiding a lawsuit. App. 325a-328a.
- After its creation, Na'i Aupuni informed OHA that it intended to use the voter roll developed by the Native Hawaiian Roll Commission to run an election. *See* Na'i Aupuni Br. 14.

- After providing such assurances, Na'i Aupuni entered into a series of contracts both directly and indirectly (by incorporation) with OHA in which the contracts' stated purpose was to effectuate Act 195. Pursuant to these contracts, Na'i Aupuni received \$2.6 million in government funds to run this election and the constitutional convention that would follow once the delegates were elected. *See* Akina Br. 11-13; App. 413a.
- The Native Hawaiian Roll Commission created an ancestry-based roll of Native Hawaiians and then provided that roll to Na'i Aupuni to be used in the election to choose delegates to the constitutional convention. *See* Akina Br. 11-13.¹
- At the forthcoming convention, the delegates will "formulate 'governance documents' for a Hawaiian nation," App. 412a, ¶ 14(f), and if the delegates recommend a "reorganized" Hawaiian government, hold a "ratification or referendum" in 2016, restricted to those Native Hawaiians on the roll. *Id.* ¶ 14(g).

These facts, which are all undisputed, *see generally* OHA Br. 3-7; Na'i Aupuni Br. 2-7, establish state action. As previously explained, *see* Akina Br. 22, the State's conduct constitutes a "public function" because this type of election would "traditionally [be] the exclusive prerogative of the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). In everything but name, the State of Hawaii is conducting this election—as it no doubt would have if not for *Rice*. At a minimum, then, this is a "state-regulated election." OHA Br. 14; Na'i Aupani Br. 10. Act 195 governs the qualifications of Native Hawaiian voters; creates an agency, the Native Hawaiian Roll Commission, charged with implementing and enforcing those qualifications;

¹ Act 195 provides that the roll "*shall* serve as the basis for the eligibility of qualified Native Hawaiians," Haw. Rev. Stat. § 10H-4(b) (emphasis added), and all grants by OHA "*shall* be used for activities that are consistent with the purposes of this chapter," *Id.* § 10-17(a)(6) (emphases added). Respondents thus could not have received grant money without complying with Act 195. To characterize Na'i Aupuni as having decided "on its own" to use the roll created by the Native Hawaiian Roll Commission, Na'i Aupuni Br. 4; OHA Br. 16, thus ignores reality.

and establishes the purposes of the election. This election is clearly regulated by the state.

Respondents' actions also satisfy the "joint action" test. *See Akina Br. 23-25.* Joint action exists where the government has "so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Auth.*, 365 U.S 715, 725 (1961). As explained above, Na'i Aupuni is conducting this election in name only. The State of Hawaii has "authorize[d], encourage[d], [and] facilitate[d]" Na'i Aupuni's conduct. *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982)). Indeed, in disputing whether Applicants have an equitable basis for injunctive relief, Respondents argue that the Court should not intervene because of the important role the State of Hawaii has played in the process. *See OHA Br. 22* (arguing that an injunction is not in the public interest because "the State Legislature has recognized the importance of this very process on an issue of distinct and unique local importance"). Respondents' equitable arguments are misplaced. But they are correct that the State of Hawaii has played an indispensable role here.

Not only do Applicants meet *both* tests for state action, this election also will clearly "determine public governmental policies." OHA Br. 12; Na'i Aupuni Br. 8-10. As an initial matter, this inquiry is part of the "public function" test, *see Akina Br. 22*, and therefore is satisfied for the reasons stated above, *see supra* 4. Moreover, this election will determine which delegates will attend a "historic"

convention to decide policies with massive social, political, and economic consequences. App. 426a. The delegates chosen will draft “governance documents,” App. 411a, and decide whether to form a new “nation” for Native Hawaiians. App. 275a. It is undeniable that the establishment of a new nation is an enormous change in government policies. Indeed, it is hard to imagine a more important governmental policy than the forming of a new sovereign. If recognized by DOI, the new nation will be entitled to a “government-to-government” relationship with the United States and with the State of Hawaii. *See* App. 234a. And OHA has already announced its intention to convey the lands it currently holds in trust to the new entity created through this convention. *See* Akina Br. 17. To say that this election will have a purely private impact—akin to a private Rotary club electing a chapter president, *see* OHA Br. 15—is untenable.

Finally, as it relates to Applicants’ Fourteenth Amendment claim, the State does not dispute that its actions would fail strict scrutiny. *See* OHA Br. 18. Respondent Na’i Aupuni, however, defends the district court’s decision, arguing that the State’s racial election categories satisfied a “compelling interest in facilitating the organizing of the indigenous Native Hawaiian community.” Na’i Aupuni Br. 16. The State’s unwillingness to defend the district court on these terms is understandable. The district court’s determination that the State had a valid justification to hold an election excluding everyone but Native Hawaiians is indefensible. *See* Akina Br. 25-26. “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people,” *Rice*, 528 U.S. at

517, and therefore “are contrary to our traditions and hence constitutionally suspect,” *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). No interest in promoting a “Native Hawaiian community” can justify such classifications. *See Rice*, 528 U.S. at 517.

II. RESPONDENTS CANNOT DENY THAT APPLICANTS WILL SUFFER IRREPARABLE HARM ABSENT THE COURT’S INTERVENTION.

Respondents’ sole argument for why Applicants will not suffer irreparable harm from being excluded from an election based on their ancestry is that it is not an election Applicants are entitled to vote in. *See* OHA Br. 18-19; Na’i Aupuni Br. 18-20. But that is merely an attempt to sidestep the issue. Respondents do not even attempt to dispute that Applicants will suffer irreparable harm if they are likely to succeed on the merits—*viz.*, that Applicants are being unconstitutionally denied the right to vote. That is a wise concession. *See* App. 15-18. Without a doubt, the requested injunction is needed to ensure that an election likely being conducted in violation of the Constitution is not certified.

Respondents attempt to sidestep this fatal concession by suggesting various ways Applicants can blunt the harm they will suffer from being denied the right to vote. They claim, for example, that Applicants could bring a legal challenge at some point in the future to a decision by Hawaii or the United States “to recognize a Native Hawaiian self-governing entity,” OHA Br. 24; that Applicants could “express their views through the political process as to what if any ‘public change’ should occur”; and that Applicants could submit comments “in the ongoing rulemaking

proceedings being conducted by the Department of the Interior,” OHA Br. 26. All of these arguments miss the point entirely, however.

Applicants are not primarily basing their claim of irreparable injury on the actions a “self-governing” nation of Native Hawaiians may take in the future. They are claiming irreparable injury based on being denied the right to vote on whether there will be a “self-governing” nation of Native Hawaiians in the first place. This is a paradigmatic claim of disenfranchisement. The election will determine which delegates will attend a “historic” convention to decide policies with massive social, political, and economic consequences. App. 426a. The Fifteenth Amendment entitles Applicants the opportunity to vote on whom those delegates will be. It is no remedy to say that Applicants can someday challenge the delegates’ decisions. Under Respondents’ theory, a state could deny a certain racial group the right to vote for the governor in a state election and a court could refrain from enjoining the state’s actions because those individuals could one day bring a lawsuit to challenge the governor’s policies. That is unthinkable.

To be sure, though, DOI’s impending rulemaking adds special urgency to this Application. As Applicants explained, the denial of Applicants’ constitutional rights can never be undone because “[u]nder the DOI’s administrative process, the agency can accept this election as the will of Hawaiians—even if this election is some day recognized as being unconstitutional.” Akina Br. 17. In other words, as soon as the votes are counted and the winners are announced, effective judicial relief may become impossible. The new delegates will meet, they will form a constitution, and

the federal government will formally recognize them as a new sovereign nation. Indeed, Respondents *never deny* that Applicants will be powerless to stop the federal government from recognizing the results of this election. *See generally* OHA Br. 18-26; Na'i Aupuni Br. 18-20.

This silence is telling. Respondents know that the results of this election will be irreversible. That is why they rushed to hold it. In a moment of candor, Na'i Aupuni explained that it was rejecting a “longer timetable” because “delaying this process” will help those who want “to delay the election of delegates and the convening [of] an ‘Aha or … stop[] them from proceeding altogether.’” Na'i Aupuni, Frequently Asked Questions, *available at* <http://www.naiaupuni.org/faq.html>. Na'i Aupuni thus adopted an election timetable for the express purpose of “reduc[ing] the risk that the process may be stopped.” *Id.* Respondents’ plan has worked so far. Without this Court’s intervention, Applicants will forever lose their constitutional right to vote. This should not stand.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST SUPPORT A TEMPORARY INJUNCTION.

Respondents’ claims as to why granting the requested injunction would be inequitable to them or would harm the public all miss the mark. Here too, all of Respondents’ arguments presume the correctness of its position on the merits. OHA Br. 20 (arguing that “enjoining a private election process” and “interfering with someone else’s expressive activity” would be inequitable) (citation and quotations omitted); OHA Br. 21 (arguing that Na'i Aupuni would be harmed based on interference with “core First Amendment rights” of a private organization). As

explained above, however, that is just an attempt to sidestep evaluation of the equitable factors on their own terms. *See supra* at 7. Respondents have offered no persuasive explanation for why granting the appellate injunction would harm them or the public independent of their merits arguments.

Nor could they. Unlike Applicants, who will be irreparably harmed if they are excluded from voting for delegates in violation of the Constitution, the only harm Respondents will suffer is a delay of their plans for a short period of time while this appeal is adjudicated. Respondents offer no explanation why mere delay will cause them harm comparable to—let alone greater than—the serious harm Applicants will undoubtedly suffer. That is because the only harm Respondents will suffer is the one they have tried to avoid all along: timely judicial review of an unconstitutional election scheme.

Respondents wrongly contend that an injunction will “sow confusion among voters who have not yet voted,” “cast[] into doubt the election’s accuracy,” and interfere with an “election that is already underway.” OHA Br. 20-21. But these arguments depend on a misrepresentation of the nature of the injunction requested. Applicants do not ask the Court to enjoin conduct of the election. Voting will continue unabated and all Hawaiians who have been allowed to participate in this election, and want to cast a ballot, can do so. There will be no confusion, doubt, or interference. As Respondents are well aware, Applicants ask only that the Court enjoin “counting the ballots cast in and certifying the winners of the election of delegates to the upcoming constitutional convention.” Akina Br. 28. Indeed,

Applicants responsibly sought this relief precisely to avoid the kind of harms Respondents invoke.

Respondents' public-interest arguments fail for similar reasons. It is simply untrue that granting the injunction will cause lasting harm to the "Native Hawaiians who may wish to participate in the process of determining how to organize themselves and whether to seek recognition as a sovereign entity." OHA Br. 22. All such Hawaiians will be able to participate in that process and, in the unlikely event Respondents successfully defend against this challenge, their chosen delegates will be able to hold the convention. Like Respondents, the only harm that Native Hawaiians interested in declaring themselves to be a sovereign nation will suffer is temporary delay of that enterprise. That minimal delay pales in comparison to the strong public interest in protecting Applicants' legal rights and ensuring that all elections are conducted in conformity with the Constitution.

Finally, in a last-ditch effort, Respondents argue that the injunction should be denied because of Applicants' undue delay in seeking it. OHA Br. 25. The argument is factually inaccurate and legally meritless; Applicants moved expeditiously at all stages of this litigation. Respondents claim that Applicants should have filed suit in February 2015. *Id.* But Respondents fail to inform the Court that Na'i Aupuni did not announce the election timetable until July 5, 2015. App. 405a; *see also* App. 161a, 390a, 406a. Applicants could not have sought to enjoin an election that had not yet been scheduled. That is why the district court correctly rejected this very argument. App. 62a ("Suit was filed within five weeks of

when the election schedule was first reported. Plaintiffs could not have sued to enjoin an election that was not scheduled. Thus, at least as to claims regarding the election itself, the timing of the suit does not affect the equities.”); *see also* App. 95a.

Applicants expeditiously sought appellate review as well. On Friday, October 23, the district court issued its oral ruling denying the motion for a preliminary injunction. Applicants filed their notice of appeal on Monday, October 26—the next business day. The case was docketed on Tuesday, October 27 and Applicants filed their emergency motion for an injunction pending an appeal two days later. Applicants moved just as quickly to seek relief from this Court. On Thursday, November 19, the Ninth Circuit denied Applicants’ motion for a temporary injunction. On Monday, November 23—two business days after receiving the court’s decision—Applicants filed their Application in this Court.²

In the end, Applicants were always going to need to seek emergency appellate relief of this nature if the district court denied the preliminary-injunction request. Under no circumstances would it have been possible to obtain ordinary appellate

² Respondents criticize Applicants for seeking to extend the time to file their opening brief in the Ninth Circuit. OHA Br. 23-24; Na’i Aupuni Br. 17-18. In particular, they claim that the motion’s statement that the extension will not alter the available remedies undercuts the claim of irreparable harm. But Respondents have it backwards. If the Court denies this injunction, there may be *no* remedy available to Applicants that will protect the constitutional rights this election jeopardizes and, as a consequence, Applicants will have to seriously consider whether they can continue with this litigation. *See* ACRU Amicus Br. 3-7. In other words, that the available judicial remedies will be the same whether the Ninth Circuit briefing schedule is delayed a few weeks does not mean that those remedies will sufficiently protect Applicants’ legal rights. That concern, in addition to the resource constraints created by this simultaneous request, is why Applicants sought the short extension from the Ninth Circuit.

review from the Ninth Circuit and certiorari review from this Court of the district court's 63-page ruling between August and November. Whether Applicants filed suit one week after the election was announced or a few weeks later, or sought emergency relief one day after docketing their appeal or two, only an injunction pending an appeal from the Ninth Circuit or this Court would avert the irreparable injury they will suffer. But, of course, that was the point of selecting such an accelerated timetable. Respondents wanted to avoid judicial review at all costs. They should not be permitted to profit from such gamesmanship.

CONCLUSION

For all the foregoing reasons, Applicants respectfully ask the Court to enter an injunction against Respondents under the All Writs Act during the pendency of this appeal enjoining them from counting the ballots cast in and certifying the winners of the election of delegates to the upcoming constitutional convention.

Finally, at a minimum, Applicants request a temporary injunction to allow for full consideration of this Application.

Respectfully submitted,

Michael A. Lilly
NING LILLY & JONES
707 Richards Street, Suite 700
Honolulu, Hawaii 96813
(808) 528-1100
michael@nljlaw.com

Robert D. Popper
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street, SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

H. Christopher Coates
LAW OFFICES OF H. CHRISTOPHER COATES
934 Compass Point
Charleston, South Carolina 29412
(843) 609-7080
currieacoates@gmail.com

William S. Consovoy
J. Michael Connolly
CONSOVOY McCARTHY PARK PLLC
3033 Wilson Boulevard
Arlington, Virginia 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Applicants