IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-17134

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

v.

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,
Defendants-Appellees.

URGENT MOTION UNDER CIRCUIT COURT RULE 27-3(b)
PLAINTIFF-APPELLANTS' URGENT MOTION FOR AN INJUNCTION WHILE APPEAL IS PENDING

NECESSARY ACTION ON OR BEFORE NOVEMBER 30, 2015

On Appeal from the United States District Court
for the District of Hawaii
Civil No. 15-00322 JMS-BMK

NING LILLY & JONES
MICHAEL A. LILLY #1681
707 Richards Street, Suite 700
Honolulu, Hawaii 96813
Telephone: (808) 528-1100
Facsimile: (808) 531-2415
Email: Michael@nljlaw.com

JUDICIAL WATCH, INC
PAUL J. ORFANEDES
425 Third Street, SW
Washington, DC 20024
Telephone: (202) 646-5172
Facsimile: (202) 646-5199
Email: porfanedes@judicialwatch.org

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

This motion seeks to stop an unconstitutional, race-based, state-sponsored, Hawaiians-only election. On November 1, 2015, Defendant Na'i Aupuni ("NA") will mail out ballots for an election using a registration roll (the "Roll") prepared by two state agencies, Defendants the Office of Hawaiian Affairs ("OHA") and the Native Hawaiian Roll Commission ("NHRC"). At the close of the day on November 30, 2015 – the date on which a decision is respectfully requested for this motion – NA will count all ballots received in that election and certify the results. Plaintiffs respectfully request that the counting of those ballots be enjoined.

The Roll was prepared by these state agencies pursuant to the explicit direction of Act 195, a state law passed in 2011. That statute provides that no one could register for the Roll who was not a "qualified Native Hawaiian," which is defined in relevant part as "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)(A).

In other words, registration for the Roll was restricted by race. NA intends to use that race-qualified Roll to conduct an election of delegates to a planned convention, the stated purpose of which is to determine the future relationship of Native Hawaiians to the governments of Hawaii and the United States. Defendants have characterized that election as involving the "public interest" and as "historic."

Plaintiffs sued to enjoin that election alleging, among other things, a violation of the Fifteenth and Fourteenth Amendments. Yet the district court denied Plaintiffs' request for a preliminary injunction and ruled that the election based on the NHRC's race-based Roll can proceed. *See* Ex. B. The court held that Defendant NA – which, it is undisputed, was organized as a foundation in late 2014 for the *sole purpose* of carrying out the election contemplated by Act 195, and which was granted $2.6 million of government funds by OHA in order to do so – was a private actor holding a private election. Accordingly, the district court held that NA's conduct of the planned election was beyond the reach of the Fifteenth and Fourteenth Amendments and of the other constitutional and statutory provisions relied upon by Plaintiffs. The grounds advanced here were submitted to the district court.

Because the district court erred, as set forth herein, in its interpretation of the law regarding state action, this appeal is likely to succeed and Plaintiffs are likely to show that their Fifteenth and Fourteenth Amendment rights have been violated.

BACKGROUND FACTS

In July 2011, Act 195 was signed into law. Ex. D at 191, ¶ 6. The Act's 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. The "means and methods" it envisions are elections, in

which only those with Native Hawaiian ancestry ("descendant[s] of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands") may register to vote. HAW. REV. STAT. § 10H-3(a)(2)(A). Act 195 also requires that registrants must have "a significant cultural, social, or civic connection to the Native Hawaiian community" and must "wish[] to participate in organization of the Native Hawaiian governing entity." HAW. REV. STAT. § 10H-3(a)(2)(B). The "roll of qualified Native Hawaiians" is intended to result in "a convention of qualified Native Hawaiians, established for the purpose of organizing themselves." HAW. REV. STAT. § 10H-5.

As Dr. James Kuhio Asam, NA's President, has publicly explained, the purpose of this process is to "establish a path to a possible reorganized Hawaiian government." Ex. E at 187, ¶ 14(b). That path has "three parts: an election, a convention . . . and a possible ratification vote" concerning whatever the convention decides. *Id.*, ¶ 14(c). Delegates "will come from the certified list of Native Hawaiians kept by the" NHRC. *Id.*, ¶ 14(d). The "purpose of the convention is to formulate 'governance documents' for a Hawaiian nation," which means that the "convention can be considered to be a constitutional convention." *Id.*, ¶ 14(f). If it recommends a "reorganized" Hawaiian government, "then a ratification or referendum vote will be held" in 2016, restricted to those on the Roll. *Id.*, ¶ 14(g). Dr. Asam explained that the "entire process is concerned with

'possible nationhood' for Native Hawaiians." *Id.*, ¶ 14(i).[1]

Act 195 created Defendant NHRC as an administrative subdivision with Defendant OHA.[2] 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).

Prospective voters were allowed to register online for the Roll starting in July 2012. Ex. D at 192, ¶ 22. The NHRC's online voter registration process presented applicants with three declarations, requiring that they affirm: (1) the "unrelinquished sovereignty of the Native Hawaiian people" and their "intent to participate" in "self-governance;" (2) their "significant cultural, social, or civic connection to the Native Hawaiian community;" and (3) their racial ancestry as defined by the Act. *See* https://www.kanaiolowalu.org/registernow/[3]; Ex. B at 8-9; Ex. D at 192, ¶ 13, Ex. F at 197. Unless an applicant affirmed all three declarations, that applicant could not register online for the Roll. *Id.*, ¶¶ 13-15.

In addition to those whose names were placed on the Roll because they

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[1] None of these statements were disputed either by Defendants or by Dr. Asam, who subsequently submitted a declaration for NA and testified at the hearing.

[2] OHA is "an arm of the state." *See Rice v. Cayetano,* 528 U.S. 495, 521 (2000).

[3] 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*, 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).

deliberately registered and could meet the ancestry and viewpoint-based requirements of Act 195, other individuals who registered for other lists of Native Hawaiians had their names *transferred* to the Roll, without their advance knowledge or consent. Ex. B at 9; Ex. D at 193, ¶¶ 23-24; Ex. E at 188, ¶ 14(j); Ex. G at 181, ¶¶ 4-5; Ex. H at 183, ¶ 5. An amendment to Act 195 authorized this tactic. HAW. REV. STAT. § 10H-3(a)(4).

The district court accepted that about 100,000 people were currently registered on the Roll (Ex. B at 27); and that approximately 38% of these were registered through the NHRC's online process, while 62% were transferred from other racially exclusive lists. *Id.* at 9.

THE CREATION OF NA AND ITS CONNECTION WITH STATE AGENCIES OHA AND NHRC.

As is more or less freely admitted, OHA and other state officials believed that they could not lawfully conduct an election using the Roll. Accordingly, NA was created, and imbued, at least on paper, with a measure of independence, in order to allow it to run such an election as a "private actor." The hope was that this arrangement would avoid or defeat litigation. This reasoning was openly discussed at OHA trustee meetings. *See* Ex. K at 1114 ("Because the money is coming from OHA, a state entity, the entire process can be challenged under the US or state constitution . . . That is why they have to look at creating an independent process"); *id.* (the Board "must be very careful and not step over the line by

directing Na'i Aupuni to do or desist from certain activities. . . . because it may subject us to a state action attack"); *see also* Ex. E at 188, ¶ 15(a) (getting money from OHA "with no strings attached . . . means the election process will withstand a 14th Amendment challenge.").

The undisputed facts establish the connections, promises, and concerted actions relevant to the true relationship between NA and other state actors.

1. The Formation of NA.

Dr. Asam publicly stated that "Na'i Aupuni exists for one reason, which is to establish a path to a possible reorganized Hawaiian government." Ex. E at 187, ¶ 14(b). NA was formed in December 2014, more than three years after the passage of Act 195. NA's own bylaws show that it was formed in order to achieve legislative purposes desired by OHA. Ex. J at 644 (Section 1.3) (OHA authorized funds "to enable Native Hawaiians to participate in a process through which a structure for a governing entity may be determined").

Further, the minutes of an OHA trustees' meeting from January 2015 refer to a "Consortium, now calling themselves Na'i Aupuni," and add that OHA sits "as an *ex officio* member" of that Consortium. Ex. K at 1111. In other words, a government agency, OHA, is a member of NA.[4]

[4] At the hearing in this matter, NA's counsel suggested that OHA was only an ex officio member of the consortium that "preceded Na'i Aupuni." Ex. B at 83. That is not what the minutes say, however, and unsworn arguments from counsel should

Finally, it is noteworthy that, from the time it was formed, NA's Vice-President has been Pauline Namu'o. Ex. K at 1111. Ms. Namu'o is married to Defendant Clyde Namu'o, Executive Director of Defendant the NHRC, which is the state agency charged with creating the Roll. Ex. I at 1093, ¶ 13.

2. The Advance Promise by NA to Run a Racially Exclusive Election.

Defendants' own declarations clearly establish that, "prior to entering into" any contract or grant agreement, "NA informed OHA that it intended to use the [race-based] Roll" to conduct the planned election. Ex. L at 585, ¶ 13. NA also reports telling OHA "that it might also look into whether there are other available lists of Native Hawaiians." *Id.* What was absolutely clear was that the election would be restricted to those with Native Hawaiian ancestry. *See also* Ex. M at 971, ¶ 20 (OHA's Chief Executive recalling the same representations from NA).

Any assessment regarding NA's "independence" from OHA must take into account this advance representation by NA that it planned to use the racially exclusive Roll developed by the NHRC and that it intended to conduct a racially exclusive election.

3. Election-Related Agreements Between OHA and NA.

Commencing in the spring of 2015, representatives of OHA, the Akamai

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not be credited as evidence. In any case, it remains undisputed that OHA was, at least for a time, an *ex officio* member of NA.

Foundation ("AF"),[5] and NA entered into an interrelated series of agreements, which were posted on NA's website. Ex. D at 193-94, ¶¶ 26-30; Exs. O, P, Q; *see* http://www.naiaupuni.org/news.html ("Contracts and Agreements"). The purpose of these agreements was to delegate to NA the running of the planned election, and to provide it with millions of dollars of government funds to conduct that election.

The "Grant Agreement" is between OHA, AF, and NA. The "Whereas" clauses in that agreement expressly refer to "the purposes for which OHA has been established," and to goals described by Act 195, stating that "OHA has committed to allow the use of its grant" by AF and NA "to allow Hawaiians to pursue self-determination." Ex. P at 220. The Grant Agreement details the transfer from OHA to AF, for use by NA, of $2,598,000 of government funds, in order that NA may "facilitate an election of delegates, election and referendum monitoring, a governance 'Aha [convention], and a referendum to ratify any recommendation . . ." *Id.* at 221. The agreement expressly provides that the election services it describes "will not exclude those Hawaiians who have enrolled and have been verified by the Native Hawaiian Roll Commission." *Id.*

The Grant Agreement also includes a provision purporting to guarantee NA's autonomy, stating that "neither OHA nor AF will directly or indirectly control or affect the decisions of NA," that "NA has no obligation to consult with

[5] Apparently AF was included in order to take advantage of its tax-exempt status. Ex. L at 586, ¶ 15.

OHA or AF on its decisions," and that its decisions "will not be directly or indirectly controlled or affected by OHA." *Id.* It is this provision on which the district court ultimately relied in holding that NA was not a state actor.

The "Letter Agreement" is also between OHA, AF, and NA, and it concerns the "method and timing of the disbursement of the approved grant funds by OHA" to AF for the benefit of NA. Ex. Q at 225.

The "Fiscal Sponsorship Agreement" is technically between AF and NA, although it provides in its first recital that the "grant agreement with OHA . . . is incorporated herein by reference." Ex. O at 214. OHA is referred to throughout the agreement and is even accorded certain specific rights. *See id.* at 216 (OHA can require "timely reporting"); *id.* (termination shall occur "[i]n consultation with OHA"); *id.* (OHA can require written acknowledgements); *id.* (unclaimed funds "returned to OHA").

Finally, a June 2015 contract between NA and Election American, Inc. ("EAI"), a private New York company, spells out particular dates and details for the planned election. Ex. N. That agreement acknowledges that EAI will utilize "the Native Hawaiian Roll Commission's current certified registry of eligible Native Hawaiians." *Id.* at 209. Pursuant to the schedule in that contract, ballots for the delegate election will be mailed out on November 1, 2015 and will be tabulated December 1, 2015. *Id.* at 211.

PROCEEDINGS IN THIS ACTION.

Plaintiffs Akina and Makekau are Native Hawaiians within the meaning of Act 195 who could not affirm the viewpoint-based requirement of Declaration One. Plaintiffs Kent and Mitsui could not affirm connections to the Native Hawaiian community and the racial ancestry requirements of Declarations Two and Three. Plaintiffs Gapero and Moniz objected to being placed on the Roll without their consent. The complaint, filed August 13, 2015, alleged claims under the First, Fourteenth, and Fifteenth Amendments; under the Civil Rights Act of 1871; and under the Voting Rights Act of 1965. *See* Ex. R (Complaint).

On August 28, 2015, Plaintiffs moved for a preliminary injunction. Following a hearing on October 20, 2015 (Ex. S), the district court issued an oral ruling denying Plaintiffs' motion on October 23, 2015. Ex. B. The court indicated that a written order would follow, which was "intended, if an appeal is taken from my ruling, to be in aid of the appellate process." *Id.* at 7, citing *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007 (6th Cir. 2003).

Plaintiffs filed their notice of appeal on October 26, 2015. While Plaintiffs have appealed from the district court's entire ruling, this particular motion is predicated solely on claims under the Fifteenth and Fourteenth Amendments, which constitute sufficient grounds for granting the requested injunction.

LEGAL STANDARD

An injunction pending appeal requires a party to show "either a combination of probable success on the merits and the possibility of irreparable harm or that serious questions are raised and the balance of hardships tips sharply in his favor." *See Alaska Conservation Council v. U.S. Army Corps of Eng'rs.*, 472 F.3d 1097, 1100 (9th Cir. 2006) (quotation marks omitted). *See also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) (reaffirming the alternative "serious questions" test formulation); *Haggard v. Curry*, 631 F.3d 931, 935 (9th Cir. 2010) (per curiam) (identifying "the most important factor" as whether the appealing party "has made a strong showing of likely success on the merits of its appeal of the district court's decision"). Both tests are satisfied here.

ARGUMENT

I. Plaintiffs Are Likely To Succeed On the Merits.

This Court reviews a "district court's denial of a preliminary injunction for an abuse of discretion." *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir. 1999). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996) (citation omitted); *Strauss v. Comm'r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1137 (9th Cir. 2011); *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) ("A district court abuses its discretion when it makes an error of law, or

when its discretion was guided by erroneous legal conclusions") (citing *Koon*); *see also Fox v. Vice*, 131 S. Ct. 2205, 2216-17 (2011) (recognizing trial court has wide discretion "when, but only when, it calls the game by the right rules").

The lynchpin of the district court's ruling denying Plaintiffs' motion for a preliminary injunction was the crucial finding that NA is conducting a private election next month. If NA is engaged in state action, then the race-based election is plainly proscribed by *Rice v. Cayetano*, 528 U.S. 495 (2000), and *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002). As set forth below, the district court erred (1) in finding that the impending election did not constitute state action because it did not alter existing laws or elect public officials, (2) in failing to rule, as a matter of law, that on the undisputed facts before it NA was engaged in joint action with government agencies that constituted state action, and (3) in finding that Defendants had shown a compelling justification under the Fourteenth Amendment for using the Roll.

A. By Holding this Election, NA is Engaging in a Public Function.

Private entities or persons will be found to be engaging in "state action" for the purposes of a constitutional analysis if they are performing a "public function." *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013). This doctrine "treats private actors as state actors when they perform a task or exercise powers traditionally reserved to the government." *Id.* The Supreme Court has noted that "[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).

The court below wrongly concluded that the impending election did not fall within this doctrine but was, instead, a private election. The court was persuaded by the argument that "this election will not result in any federal, state or county officeholder and will not result by itself in any change in federal or state laws or obligations." Ex. B at 13. While "it might result in a constitution of a Native Hawaiian governing entity," further state or federal action would be needed before that entity attained any lawful status. *Id.* "The entity may recommend change, but cannot alter the legal landscape on its own." *Id.* at 15.

The district court erred in denying Plaintiffs constitutional protections on these grounds. It's approach is flatly contradicted by *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015), which illustrates how broadly courts interpret the kind of elections that are subject to constitutional protections. That election was a proposed plebiscite restricted to Native Inhabitants of Guam, intended to elicit their views on Guam's relationship to the United States. *Id.* at 1313. The election would affect no laws and lead to no result other than a nonbinding recommendation. *Id.* Indeed, the election might never occur because registration goals might never be met. *Id.* at 1314. Even so, the Ninth Circuit reinstated constitutional claims dismissed by the district court, noting that "[i]f the plebiscite

is held, this would make it *more likely* that Guam's relationship to the United States would be altered . . . This change will affect Davis, who doubtless has views as to whether a change is appropriate and, if so, what that change should be." *Id.* at 1315 (emphasis added).

The election at issue here is far more consequential than any plebiscite. The delegates who win will attend a convention at which they may draft "governance documents" for an all-Native Hawaiian entity. Their decisions could affect the legal, social, and financial relationships of huge numbers of Americans. In 2010 there were 1.36 million people in Hawaii.[6] The Department of the Interior estimates that there are 527,000 Native Hawaiians in the United States, of whom 290,000 reside in Hawaii. Ex. T at 743. Indeed, Defendants themselves characterized the elections as "historic" and as involving the "public interest." Ex. B at 108 ("Your Honor, we stand on the cusp of a historic election."); *id.* ("we're talking about a historic hundred-plus year opportunity that has finally come to the Hawaiian people"); *id.* at 71 (quoting Defendants on the public interests involved). Like the plaintiffs in *Guam*, Plaintiffs here have "views as to whether a change is appropriate and, if so, what that change should be." 785 F.3d at 1315. They should not be shut out because they are the wrong race.

As a final point, the U.S. Department of the Interior (DOI) issued a Notice of

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[6] *See* http://quickfacts.census.gov/qfd/states/15000.html.

Proposed Rulemaking on September 29, 2015, during the pendency of this action, soliciting public comments on a proposed rule concerning an administrative procedure by which Native Hawaiians might become a separate political entity. Ex. T. That proposed rule adopts the same standard for Hawaiian ancestry as Act 195. *Id.* at 741. Further, at the invitation of the district court, the DOI submitted an amicus brief. Ex. U. As it makes clear, the DOI intends to allow Native Hawaiians to utilize the results of the planned election as part of an administrative procedure that would authorize "government-to-government" recognition of a Native Hawaiian entity. *Id.* at 1170-1172.

In other words, if the DOI proceeds as it has indicated, *there will be no subsequent state or federal election or ratification* in which non-Native Hawaiians, like Plaintiffs Mitsui and Kent, will be allowed to have their say. To the contrary, the DOI appears ready to administratively approve a Native Hawaiian entity based on the results of the impending election. Ex. B at 67 ("this may actually turn out to be the ball game. . . . there will be a Native Hawaiian governing entity and this will have been my plaintiffs' opportunity to say something about it and it will be gone."). This makes Plaintiffs' request for an injunction even more urgent.

B. NA and OHA are Engaged in Joint Action.

Where a private entity is engaged in "joint action" with a government agent, it may be deemed to be a state actor for constitutional purposes. "'Joint action'

exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party," or where it has "so far insinuated itself into a position of interdependence" with a private actor "that it must be recognized as a joint participant in the challenged activity." *Ohno*, 723 F.3d at 996; *see Swift v. Lewis,* 901 F.3d 730, 732 n.2 (9th Cir. 1990) (private party who had contracted with state prison officials to do work relating to inmates had become "a willful participant in joint action with the state or its agents" and its actions were state action) (citation omitted); *Schowengerdt v. General Dynamics Corp.*, 823 F.3d 328, 1332 n.3 (9th Cir. 1987) (joint participation in a search by federal officials and a private actor was sufficient to establish that the latter's actions were state action).

The district court refused to find "joint action" between NA and OHA, citing the "autonomy" clause in the Grant Agreement. Ex. B at 17. In the court's view, "OHA has no control" over NA, who is "acting completely independently." *Id.*

Plaintiffs respectfully submit that the district court's view is contradicted by a mass of evidence suggesting joint action, bordering at times on outright collusion, between NA and OHA. NA was formed, three years after Act 195 was passed, for no other purpose than to hold the election that OHA could not. NA's bylaws refer to OHA's legislative goals. OHA was, at least for a time, a member of NA. NA's vice-president is married to the CEO of the NHRC. NA was given

millions of dollars of public money to hold an election described in a state law, Act 195, in a series of contracts with OHA, wherein OHA retains all sorts of special rights and privileges. NA "decided" to use the race-based Roll the NHRC had been developing for years, and that OHA is statutorily required to use,[7] and "decided" to hold a racially exclusive election.

Indeed, it is particularly telling that NA gave OHA assurances that it would use the race-based Roll to hold a race-based election *before* the two parties entered into contracts awarding NA millions of dollars to hold that election. Those promises make the "autonomy clause" in the Grant Agreement seem like a trick and make NA's vaunted independence seem like a sham. There is not genuine "autonomy" when one has an assurance as to how another party is going to act. That looks more like concerted action.

When it comes to voting rights, the Supreme Court has shown no patience for subterfuge, and has applied the Fifteenth Amendment to "nullif[y] sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 274 (1939). In *Terry v. Adams*, 345 U.S. 461 (1953), the Court warned that "the constitutional right to be free from racial discrimination in voting '. . . is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.'" *Id.* at 466,

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[7] HAW. REV. STAT. § 10H-4(b).

citing *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (emphasis added). Thus, it "violates the *Fifteenth Amendment* for a state" to "permit within its borders the use of any device that produces an equivalent of the prohibited election." *Id.* at 469.

C. There is No Compelling Justification for the Planned Election.

The district court held that, even if there were state action, Plaintiffs' Fourteenth Amendment claim fails because Hawaii "has a compelling interest in facilitating the organizing of the indigenous Hawaiian community," and that the "restriction to Native Hawaiians is precisely tailored to meet the State's compelling interest." Ex. B at 23.

In fact, the standard used to determine ancestry, and the viewpoint-qualified registration process, prove the opposite. The "one drop of blood" rule employed by Act 195 is utterly arbitrary.[8] As Mr. 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." *Rice*, 528 U.S. at 527 (Breyer, J., concurring in the result).

Further, the fact that those who registered on the NHRC's website – or 38% of those on the Roll – had to affirm Declaration One, a highly contentious political

[8] It also has an unfortunate resonance in American history. *See, e.g., Loving v. Virginia,* 388 U.S. 1, 5 n. 4 (1967) (discussing Virginia statute holding that "[e]very person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person").

statement written by a government official, guarantees that the Roll will not "represent" the Native Hawaiian community. Simply put, the registrants have been pre-screened for their political views. This process is not "narrowly tailored" to produce a true community.

Finally, the undersigned know of no case (not subsequently vacated) where racial discrimination in voting has survived strict scrutiny on account of a compelling justification. The district court's ruling in this regard appears to be totally unprecedented.

II. The Other Applicable Factors Support the Issuance of an Injunction.

The injury this election will inflict on Plaintiffs is severe. The Fifteenth Amendment guarantees that the right to vote "shall not be denied or abridged . . . on account of race [or] color," and the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XV, § 1, amend. XIV, § 1. Plaintiffs Mitsui and Kent, who could not register for the Roll because they are not Native Hawaiians within the meaning of Act 195, face an imminent and irreparable deprivation of these fundamental constitutional rights. Within days, an "historic" election concerning a matter of great "public interest" will commence, and it will conclude within a month. But Plaintiffs Mitsui and Kent – along with hundreds of thousands of other Hawaiians – will be barred from voting in that election solely because of their race.

"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). "An 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).

Any claim by Defendants of a legitimate interest in imposing a voting scheme that violates the Fifteenth and Fourteenth Amendments is untenable. Further, because this is not a regularly scheduled election, no current officeholder will have to be "held over," nor is there any risk a constituency will be left without representation in any existing legislative body. This election can be enjoined pending the outcome of this appeal without any harm to Defendants. Both the balance of equities and the public interest strongly favor the issuance of an injunction preventing the counting of ballots or the certifying of election results from the election scheduled for November.

CONCLUSION

Appellants respectfully request that this Court enjoin Appellees pending appeal.

DATED this 29th day of October, 2015.

/s/ Michael A. Lilly
MICHAEL A. LILLY
Attorney for Plaintiffs-Appellants