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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KELI'I AKINA, KEALII) CIVIL NO. 15-00322JMS-BMK
MAKEKAU, JOSEPH KENT,)
YOSHIMASA SEAN MITSUI,) Honolulu, Hawaii
PEDRO KANA'E GAPERO, and) October 23, 2015
MELISSA LEINA'ALA MONIZ,) 10:36 a.m.

Plaintiffs,)
vs.) ORAL RULING ON [47]
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

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; NA'ALEHU ANTHONY,
LEI KIHUI, ROBIN DANNER,
MAHEALANI WENDT,
Commissioners, Native
Hawaiian Roll Commission,
in their official
capacities; CLYDE W.
NAMU'O, Executive Director,
Native Hawaiian Roll
Commission, in his official
capacity; THE AKAMAI

1 FOUNDATION; and THE NA'I)
 2 AUPUNI FOUNDATION; and DOE)
 3 DEFENDANTS 1-50,)
 4 Defendants.)

5 TRANSCRIPT OF PROCEEDINGS
 6 BEFORE THE HONORABLE J. MICHAEL SEABRIGHT,
 7 UNITED STATES DISTRICT JUDGE

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21 Also Present, for
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1 Official Court
2 Reporter:

Cynthia Fazio, RMR, CRR
United States District Court
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Honolulu, Hawaii 96850

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19 Proceedings recorded by machine shorthand, transcript produced
20 with computer-aided transcription (CAT).

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1 FRIDAY, OCTOBER 23, 2015, 10:36 A.M.

2 THE CLERK: Civil Number 15-322JMS-BMK, Keli'i Akina,
3 et al., versus the State of Hawaii, et al.

4 This case has been called for an oral ruling on the
5 Motion for Preliminary Injunction.

6 Counsel, please make your appearances for the record.

7 MR. POPPER: This is Robert Popper for plaintiffs and
8 with me are Chris Fedeli and Eric Lee.

9 THE COURT: All right. Yes.

10 MR. COATES: This is Chris Coates for the plaintiffs.

11 THE COURT: All right. Yes, good morning.

12 MR. LILLY: Good morning, Your Honor. Michael Lilly
13 for plaintiffs.

14 THE COURT: All right.

15 MR. MEHEULA: Good morning, Your Honor. Bill Meheula
16 and David Minkin for Na'i Aupuni. And I'm also here for The
17 Akamai Foundation.

18 THE COURT: All right.

19 MR. KLEIN: Good morning, Your Honor. Robert Klein
20 representing OHA and the OHA defendants.

21 MR. NAKATSUJI: Good morning, Your Honor. Deputy
22 Attorney General Robert Nakatsuji on behalf of the State
23 defendants.

24 THE COURT: Yes. All right.

25 MR. SHANMUGAM: And this is Kannon Shanmugam and Ellen

1 Oiberwetter in Washington for the OHA defendants.

2 THE COURT: All right. Anybody else there?

3 MR. HIRSCH: Sam Hirsch of Department of Justice for
4 amicus U.S. Department of the Interior.

5 THE COURT: All right. And I did give permission to
6 for Mr. Hirsch to appear by phone as well since I invited the
7 amicus brief.

8 Okay. Yes, please be seated.

9 All right. Let me start off first by thanking the
10 parties for their cooperation in this matter and providing
11 top-notch briefing. I do very much appreciate the effort
12 everyone has put in and the time everyone has put in on both
13 sides on this complex matter.

14 Now, I want to start by explaining why I'm providing
15 an oral ruling today and what will follow next.

16 As we all know, the election is slated to begin on
17 November 1st. The lawsuit in this matter was filed on
18 August 13th and the Motion for Preliminary Injunction, the
19 motion we're here today to discuss, was filed on August 28,
20 leaving only 2 months between the filing of the motion and the
21 start of the election to do the following:

22 One, to get the briefing on these complex issues fully
23 completed. Two, to give me sufficient time to study these
24 matters. Three, to hold a hearing, including albeit not much
25 but some testimony. And then four, for me to consider all of

1 that and to reach a conclusion. In short, given the complex
2 nature of the issues before me, the time has been somewhat
3 short and we have had to expedite the matter to move forward so
4 that whatever the ruling, it would be sufficiently in advance
5 of the election so as not to be overly disruptive.

6 And I am now prepared to rule and believe it is in the
7 interest of justice to announce my decision now, as far in
8 advance of the election as possible. And that's why we're here
9 today. My oral pronouncement today is intended to be a summary
10 of a more comprehensive written order to follow. So given the
11 impending election and the heightened public interest in this
12 case, my intent today is to provide an overview, as I say, with
13 a written order to follow. The written order is intended, if
14 an appeal is taken from my ruling, to be in aid of the
15 appellate process. And I will work diligently to get the
16 written order filed as soon as I can.

17 And I have done some research and this process of an
18 oral ruling followed by a written order has been tested, and
19 cases discussing the rule can be found at *Inland Bulk Transfer*,
20 332 F.3d 1007, Sixth Circuit, 2003.

21 All right. So that's the framework under which we're
22 working today.

23 Now, defendant Na'i Aupuni is conducting an election
24 of Native Hawaiian delegates to a proposed convention of Native
25 Hawaiians to discuss, and perhaps to organize, a "Native

1 Hawaiian governing entity." Delegate candidates have been
2 announced and voting, as I said, is to run during the month of
3 November. Plaintiffs have filed a Motion for Preliminary
4 Injunction essentially seeking to halt the election. I have
5 read all the briefings numerous times, heard the arguments and
6 the evidence and am now prepared to rule.

7 The voters and delegates in this election are based on
8 a "Roll" of qualified Native Hawaiians as set forth in Act 195
9 of the 2011 Hawaii Session Laws as amended. A "qualified
10 Native Hawaiian" is defined by Act 195 as an individual, age 18
11 or older, who certifies that they are, one, "a descendent of
12 the aboriginal peoples who, prior to 1778, occupied and
13 exercised sovereignty in the Hawaiian islands, the area that
14 now constitute the State of Hawaii," and two, "have maintained
15 a significant cultural, social or civic connection to the
16 Native Hawaiian community and wishes to participate in the
17 organization of the Native Hawaiian governing entity."

18 And through a registration process, the Native
19 Hawaiian Roll Commission asked or required prospective
20 registrants to the Roll to make three declarations as follows:

21 Declaration One: I affirm the unrelinquished
22 sovereignty of the Native Hawaiian people, and my intent to
23 participate in the process of self-governance.

24 Declaration Two: I have a significant cultural,
25 social or civic connection to the Native Hawaiian community.

1 And Declaration Three: I am a Native Hawaiian, and it
2 describes what that entails.

3 Separately, as required by an amendment to Act 195,
4 the Roll also includes as qualified Native Hawaiians, quote,
5 all individuals already registered with the State as verified
6 Hawaiians or Native Hawaiians through the Office of Hawaiian
7 Affairs. And those on the Roll through an OHA registry do not
8 have to affirm Declarations One or Two.

9 And at Tuesday's hearing the parties agreed that
10 approximately 62 percent of the Roll comes from an OHA
11 registry, leaving the other 38 percent to come directly through
12 the Roll Commission process, the initial process. It follows
13 that approximately 62 percent of those on the Roll did not have
14 to make an affirmation regarding sovereignty or significant
15 connections to the Native Hawaiian community. And although Act
16 195 requires that the Roll shall serve as the basis for
17 eligibility to participate in organizing a Native Hawaiian
18 entity, Na'i Aupuni decided on its own to use the Roll, as well
19 as to consider other sources of participants and delegates in
20 its election to supplement the Roll. Na'i Aupuni was not
21 precluded from including others -- that is, non-Native
22 Hawaiians and those who may refuse Declarations One and Two --
23 in its process, although it chose on its own to limit its
24 process to Roll members. Dr. Asam testified to this matter and
25 the Court found his testimony credible in this regard.

1 Now, plaintiffs' suit alleges that the restrictions on
2 registering for the Roll violate rights under the United States
3 Constitution and the Voting Rights Act of 1965. They allege
4 violations of, one, the Fifteenth Amendment; two, the Equal
5 Protection clause of the Fourteenth Amendment; and three, the
6 First Amendment. They allege that Na'i Aupuni is acting under
7 color of state law for purposes of 42 U.S.C. Section 1983 and
8 is acting jointly with other state actors. The complaint thus
9 seeks to enjoin defendants, quote, from requiring prospective
10 applicants for any voter roll to confirm Declaration One,
11 Declaration Two, or Declaration Three, or to verify their
12 ancestry, and to enjoin, quote, the use of the Roll that has
13 been developed using these procedures, and the calling,
14 holding, or certifying of any election utilizing the Roll.

15 And to that end, plaintiffs have moved for a
16 preliminary injunction seeking an order, quote, preventing
17 defendants from undertaking certain voter registration
18 activities and from calling or holding racially exclusive
19 elections for Native Hawaiians as explained in plaintiffs'
20 complaint, close quote. So, in essence, they seek to stop the
21 election of delegates and halt the proposed convention.

22 Now, let me state the obvious. In addressing a Motion
23 for Preliminary Injunction, I apply a four-part test set forth
24 by the Supreme Court in *Winter versus Natural Resources Defense*
25 *Council*, 55 U.S., 2008 case, Page 7. And under *Winter* a

1 plaintiff must show, one, that the plaintiff is likely to
2 succeed on the merits; two, that the plaintiff is likely to
3 suffer irreparable harm in the absence of a preliminary
4 injunction, that is in absence of the relief sought; three,
5 that the balance of equities tip in plaintiffs' favor; and
6 four, that an injunction is in the public interest.

7 All right. Before I get to Winter and the individual
8 counts and individual 1983 claims, I first want to address
9 briefly standing because defendants have challenged plaintiffs'
10 standing, at least as to some claims. I do conclude, however,
11 that there is standing to challenge Act 195 and the proposed
12 election, at least certainly at this stage. The case in this
13 respect is similar to the case we discussed on Tuesday, a
14 standing case, Davis versus Guam, 785 F.3d 1311, where the
15 Ninth Circuit found plaintiffs' allegations of injury in being
16 excluded on the basis of race from a Guam plebiscite vote that
17 could have led to a change in Guam's future political
18 relationship with the United States sufficient to confer
19 standing. All right. So I do find standing.

20 All right. So now I'm going to move to the
21 preliminary injunction standard and the Winter test and begin
22 with the Fifteenth Amendment and the Voting Rights Act, looking
23 at claims -- or Counts 1, 3, 5 and 6.

24 And I believe that the evidence demonstrates that the
25 Na'i Aupuni election is a private election and not a state

1 election. As a result, as to these claims plaintiffs have not
2 demonstrated a likelihood of success on the merits.

3 And this election is fundamentally different, in my
4 view, extremely fundamentally different than the elections at
5 issue in Rice versus Cayetano and Arakaki versus Hawaii, which
6 both found Fifteenth Amendment violations. Obviously Rice is a
7 Supreme Court case and Arakaki a Ninth Circuit case.

8 These opinions were based on a conclusion that OHA
9 elections are a, quote, state affair for, quote, public
10 officials for, quote, public office to a, quote, state agency
11 established by the state Constitution. Not so here. As set
12 forth in Terry versus Adams, 345 U.S. 461, the Fifteenth
13 Amendment precludes discrimination against voters in, quote,
14 elections to determine public governmental policy or to select
15 public officials, not in private elections to determine private
16 affairs. And the Voting Rights Act also applies only to votes
17 cast with respect to candidates for public or party office,
18 citing Chisom versus Roemer, 501 U.S. 380.

19 Now, certainly, we know this is not a state election
20 governed by Chapter 11 of the Hawaii Revised Statutes, or the
21 State's regulatory system covering public elections. It is not
22 an election run by the Hawaii Office of Elections for any
23 federal, state or county office, nor is it a general or special
24 election to decide any referendum, constitutional or ballot
25 question. No public official will be elected or nominated; no

1 matters of federal, state or local law will be determined
2 through this elective process by itself.

3 So what is this election and how do we best
4 characterize it? The Court concludes at this preliminary
5 injunction stage that this is an election for delegates to a
6 private convention among a community of indigenous people for
7 the purposes of exploring self-determination that will not and
8 cannot result by itself in any federal, state or local laws or
9 obligations. Stated differently, this election will not result
10 in any federal, state or county officeholder and will not
11 result by itself in any change in federal or state laws or
12 obligations. Although it might result in a constitution of a
13 Native Hawaiian governing entity, as OHA correctly argues on
14 Page 9 of its memorandum, quote, even if such a constitution is
15 ratified, the resulting Native Hawaiian self-governing entity
16 would have no official legal status unless it were otherwise
17 recognized by the state or federal government, close quote.

18 And as Na'i Aupuni recognizes on Page 28 of its
19 memorandum, even if the convention results in the formation of
20 a Native Hawaiian governing entity, that entity, quote, by
21 itself would not alter in any way how the State is governed,
22 close quote. Na'i Aupuni recognizes that "any such alteration
23 of government will require subsequent action, for example,
24 formal recognition, by the federal and possibly state
25 governments. Similarly, any alteration of intergovernmental

1 structure will require subsequent federal and state legislation
2 and/or executive action with respect to the entity. This
3 statement is absolutely true and critical to an understanding
4 of my ultimate conclusion in reference to this motion.

5 At Page 21 of its amicus brief, the Department of the
6 Interior observes that "this case is about Native Hawaiian
7 elections for Native Hawaiian delegates to a convention that
8 might propose a constitution or other governing document for
9 the Native Hawaiian community. This election has nothing to do
10 with the governing of the State of Hawaii."

11 Now, plaintiffs argue that this is an important
12 election about public issues and has the potential to be
13 historic, and thus must fall under the Fifteenth Amendment.
14 And plaintiff relies heavily on Terry versus Adams, case I
15 previously cited, a Supreme Court case invalidating elections
16 of the private Jaybird party that excluded African Americans
17 from primary elections that functioned essentially as a
18 nominating process for public primary elections for county
19 office. Specifically, plaintiffs rely on Terry's statement
20 that the Fifteenth Amendment, quote, includes any election in
21 which public issues are decided or public officials selected,
22 close quote. But this statement must be read in the specific
23 context addressed by the Supreme Court. Supreme Court stated
24 that, quote, the Jaybird primary has become an integral part,
25 indeed the only effective part, of the elective process that

1 determines who shall rule and govern in the county, close
2 quote. Thus, the racist selection of candidates strip African
3 Americans, quote, of every vestige of influence, close quote,
4 in selecting public county officials. And this Court simply
5 cannot read in context the statement that the Fifteenth
6 Amendment applies to an election to decide, quote, public
7 issues to apply to all elections let alone this private
8 election.

9 In short, it appears that much more will need to
10 happen under any scenario before this election leads to any
11 public change at all. The entity may recommend change, but
12 cannot alter the legal landscape on its own.

13 And further, this is not a public election based on
14 Act 195 itself. The creation of a Roll of Native Hawaiians
15 does not mean its commissioners are conducting an election.
16 Act 195, although contemplating a convention of Hawaii's
17 indigenous peoples to participate in the organization of a
18 Native Hawaiian governing entity, does not mandate any
19 election. It doesn't impose, direct or suggest any particular
20 process. Under 10H-5, the Roll is intended to facilitate,
21 quote, an independent process for Native Hawaiians to organize
22 themselves. As an internal matter of self-governance by a
23 group of the Native Hawaiian community, it does not involve a
24 public election at all. At most, it facilitates private
25 self-determination, not governmental acts of organization.

1 So that covers the likelihood of success on the merits
2 as to the Fifteenth Amendment and the Voting Rights Act. Okay.

3 Fourteenth Amendment. I also find at this preliminary
4 injunction stage that the plaintiff has not shown a likelihood
5 of success on the merits that Na'i Aupuni's election or Act 195
6 itself is a violation of plaintiffs' equal protection rights
7 under the Fourteenth Amendment as asserted in Counts 2, 4, 7
8 and 8. Now, to state a cause of action under Section 1983 for
9 deprivation of a constitutional right, plaintiffs must
10 demonstrate that the deprivation occurs, quote, under color of
11 state law, close quote. That is, there must be state action.
12 This requirement excludes from 1983's reach merely private
13 conduct, no matter how discriminatory or wrongful. Citing
14 American Manufacturers Mutual Insurance case, 526 U.S. 40, four
15 zero. And determining whether there is state action is
16 necessarily a fact-bound inquiry, the Supreme Court said in
17 Brentwood Academy, 531 U.S. 288.

18 But, as established above, Na'i Aupuni's election is a
19 private election. It does not constitute state action and Na'i
20 Aupuni, a private entity, there's no question in and of itself
21 it's a private entity, is not a state actor for much the same
22 reason. Its election does not fit under the "public function"
23 test of state action which requires a private entity to be
24 carrying out a function that is "traditionally the exclusive
25 prerogative of the State." As the Supreme Court said in Flagg

1 Brothers versus Brooks, 436 U.S. 149, in the area of elections,
2 quote, the doctrine does not reach to all forms of private
3 political activity, but encompasses only state-regulated
4 elections or elections conducted by organizations which in
5 practice produce the uncontested choice of public officials.

6 Nor does the election fall under a "joint action"
7 test, which asks whether state officials and private parties
8 have acted in concert in effecting a particular deprivation of
9 a constitutional right. The evidence simply does not suggest
10 joint action here -- although certainly Na'i Aupuni obtained
11 significant funds through an OHA grant, it did so with a
12 specific autonomy clause whereby OHA agreed not to "directly or
13 indirectly control or affect the decisions of Na'i Aupuni."
14 All the evidence suggests that OHA has no control over Na'i
15 Aupuni, and that Na'i Aupuni is acting completely
16 independently. Dr. Asam testified to that, or Asam. As I
17 said, I found his testimony credible in that regard.
18 Plaintiffs have not met their burden to demonstrate otherwise.

19 And just the fact that OHA had a grant of funds
20 through The Akamai Foundation does not make this a public
21 election. Indeed, plaintiffs correctly admitted at the hearing
22 on Tuesday that public funding is a red herring. And this is
23 certainly true given cases such as Blum versus Y-A-R-E-T-S-K-Y,
24 Yaretsky, 457 U.S. 911, and San Francisco Arts & Athletics,
25 Inc., 483 U.S. 522, which explain that the government may

1 subsidize private entities without assuming constitutional
2 responsibility for their actions. So, for example, in
3 Rendell-Baker the Supreme Court found no relevant state action
4 by a private school even where public funds accounted for over
5 90 percent of its budget.

6 The Ninth Circuit has stated, quote, state action may
7 be found if, though only if, there is such a close nexus
8 between the State and the challenged action that seemingly
9 private behavior may be fairly treated as that of the State
10 itself. *Villegas, V-I-L-L-E-G-A-S, versus Gilroy Garlic*
11 *Festival*, 541 F.3d 950. And addressing that nexus, the inquiry
12 must begin by focusing on the "specific conduct of which the
13 plaintiff complains." *Caviness versus Horizon Community*
14 *Learning Center*, 590 F.3d 806, a 2010 case. And so, the Ninth
15 Circuit says, "an entity may be a state actor for some purposes
16 but not for others."

17 And there is no such close nexus here between the
18 State and this particular election that would make it a public
19 election. An OHA grant was not for the purpose of a public
20 election. And even if OHA -- certainly considered a state
21 actor after *Rice* -- desires or agrees with some of Na'i
22 Aupuni's choices it makes in conducting the election of
23 delegates and holding a convention, the Supreme Court has held
24 that "action taken by private entities with the mere approval
25 or acquiescence of the State is not state action." And that's

1 Sullivan, 526 U.S. at Page 52.

2 Likewise, although Act 195 itself and the Roll
3 Commission's action in creating the Roll, certainly constitute
4 state action, this does not mean such action is an equal
5 protection violation. The Court finds merit in the defendants'
6 argument that the Roll itself is simply a list of people with
7 Native Hawaiian ancestry who may or may not have declared that
8 they have a civic connection to the Hawaiian community or
9 believe in unrelinquished sovereignty. The Roll is essentially
10 a classification, and as the Supreme Court noted in Nordlinger
11 versus Hahn, 505 U.S. at Page 10, "the equal protection clause
12 does not forbid classifications." Instead, it is directed at
13 unequal treatment. It is the use of the Roll that plaintiffs
14 complain about. But Act 195's creation of the Roll Commission
15 and a Roll does not actually treat persons differently.
16 Nothing in Act 195 calls for a vote. And even if it
17 contemplates or encourages a convention, it simply calls for a
18 chance for certain Native Hawaiians to independently organize
19 themselves without involvement from the State.

20 I did not intend this to be so long when I first
21 started out. I have a ways to go.

22 The Court also finds some merit in defendants'
23 argument that Brentwood Academy allows for a type of exception
24 or consideration for "unique circumstances" where that action
25 raises some "countervailing reason against attributing activity

1 to the government." And Act 195 is a unique law -- its stated
2 purpose is meant to facilitate self-governance in the
3 organizing of the State's indigenous people independently and
4 amongst themselves. By definition then, such organizing must
5 occur among Native Hawaiians -- that is, a "countervailing
6 reason against attributing activity to the government."

7 Further, I do find some force to the argument that
8 forcing Na'i Aupuni to associate with non-Hawaiians in its
9 convention would implicate Na'i Aupuni's own First Amendment
10 rights of association, citing *Single Moms, Inc. versus Montana*
11 *Power*, 331 F.3d 743. That in and of itself can be a
12 countervailing reason under *Brentwood*.

13 All right. I now want to turn to the secondary
14 arguments that have been made. I don't need to do so, but I
15 think in recognition that there may be an appeal to the Ninth
16 Circuit and to make the record as full as I can based on my
17 views I will cover this. So this assumes Na'i Aupuni is a
18 state actor, what happens under the Fourteenth Amendment.

19 And so the Court addresses the defendants' secondary
20 arguments. First, that is, assuming Na'i Aupuni is a state
21 actor and that Act 195's Roll otherwise implicates equal
22 protection under 1983, under *Morton versus Mancari* unequal
23 treatment would only need to be rationally related to some
24 legitimate governmental purpose.

25 I do recognize that this secondary analysis may not be

1 necessary, as I said, given my ruling already. But I do think
2 it's important to reach some of these secondary questions to
3 help explain, as I said, my ultimate conclusion.

4 And in this regard, even without Native Hawaiians
5 being formally classified as a "tribe," defendants have made a
6 strong argument that Morton versus Mancari can justify
7 congressional action to support Native Hawaiians as indigenous
8 people. But as we discussed at some length in the hearing,
9 another step is required before Morton can apply to state laws.
10 That is, before such federal power would allow a state to treat
11 Native Hawaiians differently under a "rationally related" test.
12 And this, in my view, is a much more difficult question.

13 Washington versus Confederated Bands and Tribes of
14 Yakima Indian Nation, a Supreme Court case, reasons that a
15 state has power if federal law explicitly gives a state
16 authority. But it is unclear whether the specific types of
17 actions at issue in this case, creation of the Roll and
18 facilitating Native Hawaiian self-governance, are encompassed
19 within existing grants of federal authority. So I will not at
20 this time, as the Supreme Court stated in Rice, reach this
21 "difficult terrain." I will leave that to the side.

22 I then turn to strict scrutiny. Of course Morton
23 would not be necessary if a strict scrutiny test could be
24 satisfied. Again, this is assuming state action, something I
25 have not found. So the Court discusses whether -- again,

1 assuming Na'i Aupuni is involved in state action -- whether the
2 strict scrutiny could be met. And if it becomes necessary to
3 reach this issue I think the answer is yes. I certainly
4 recognize that strict scrutiny is a difficult test to meet, and
5 that this is a close and complex question. But the Court also
6 recognizes that it faces a unique issue, one with a very long
7 history.

8 Act 195 and the upcoming election cannot be read in a
9 vacuum. Both must be read in the context of Hawaiian history
10 and the State's trust relationship with Native Hawaiians. As
11 explained in Section 1 of Act 195, quote, from its inception,
12 the State has had a special political and legal relationship
13 with the Native Hawaiian people and has continually enacted
14 legislation for the betterment of their condition, close quote.
15 And as the Department of Interior's October 1st, 2015, Notice
16 of Proposed Rulemaking summarizes, the United States also has a
17 history of recognizing through many laws of a "special
18 political and trust relationship" with that community.

19 And I believe the State has a compelling interest in
20 bettering the conditions of its indigenous people and in doing
21 so, providing dignity to them -- a dignity in simply allowing a
22 starting point for a process and discussion of
23 self-determination. And there is a history of attempts at
24 self-governance, as set forth in the Department of Interior's
25 Notice, and other sources. But before any discussion of a

1 "government-to-government" relationship with any "Native
2 Hawaiian governing entity" could even begin to take place, such
3 an entity should reflect, as the proposed rule says, the "will
4 of the Native Hawaiian community."

5 The State thus has a compelling interest in
6 facilitating the organizing of the indigenous Hawaiian
7 community, Native Hawaiian community so it can decide for
8 itself independently whether to seek self-governance or
9 self-determination, and if so, in what form and when. The
10 question of sovereignty is not going to go away. So the State
11 has a compelling interest in facilitating a forum that might
12 result in a unified collective voice amongst Native Hawaiians.
13 And this is not possible without limiting such self-governance
14 discussion to Native Hawaiians themselves. Stated differently,
15 the restriction to Native Hawaiians is precisely tailored to
16 meet the State's compelling interest. And as the Department of
17 Interior puts it on Page 20 of its amicus brief, purporting to
18 recognize the Native Hawaiian community to include non-natives
19 in organizing a government could mean in practice that a native
20 group could never organize itself, impairing its right to
21 self-government.

22 So I find as to the Fourteenth Amendment, equal
23 protection claim, plaintiffs have failed to show a likelihood
24 of success on the merits.

25 Let me move now to the First Amendment claims. And I

1 likewise find that plaintiffs have not demonstrated a
2 likelihood of success on their First Amendment claims, Counts 4
3 and 9. In Count 4, Plaintiffs Akina and Makekau contend that
4 the First Amendment rights were violated -- or their First
5 Amendment rights were violated because conditions were placed
6 on their registration for the Roll, i.e., Declaration One,
7 which implicates First Amendment rights. The evidence here is
8 mixed. Defendants attest that Akina and Makekau could have
9 participated in the process without affirming to Declaration
10 One. And Act 195 itself, as amended, requires OHA registrants
11 to be included, which does not require either Declaration One
12 or Two. It certainly appears that if Akina or Makekau truly
13 wanted to participate in Na'i Aupuni's process, they could have
14 easily done so. But they chose not to.

15 But in any event, the burdens that they assert only
16 apply if they burden a right to vote in a public election. And
17 as I've already said, I see this much more akin to a private
18 election. They contend that their inability to register for
19 the Roll, without affirming "unrelinquished sovereignty,"
20 deprives them of the right to participate in Na'i Aupuni's
21 process -- that is, the vote for delegates, the ability to run
22 as a delegate and participation in the convention. But again,
23 the delegate election and proposed convention is a private
24 matter, not involving state action.

25 Now, Count 9 has a different First Amendment theory.

1 The Plaintiffs Gapero and Moniz contend that their inclusion on
2 the Roll through an OHA registry violates a First Amendment
3 right against compelled speech or a right not to register to
4 vote. They, however, are unlikely to succeed on the merits of
5 such a claim. It's clear that approximately 62 percent of the
6 Roll comes from OHA registries -- which, again, do not require
7 Declaration One or Two. Only 38 percent of the Roll has --
8 makes up those who have made these affirmations. These
9 plaintiffs are thus unlikely to prevail on a claim that
10 inclusion on the Roll implies that they have certain views.
11 Merely being on the Roll does not compel a statement as to
12 sovereignty. Moreover, as already established, the Roll itself
13 is not a voter registration list. They cannot be said to have
14 been compelled to register to vote. Finally, the evidence
15 establishes that they could have easily removed themselves from
16 the Roll as early as 2013 if they did not want to remain on the
17 list.

18 Indeed, as the OHA defendants note, even if there was
19 a First Amendment violation, the likely remedy would not be to
20 halt the planned election, it would be to remove them from the
21 list. In short, simply being included on the Roll does not
22 implicate the First Amendment.

23 So that covers all the merits in my finding that the
24 plaintiffs have not proven a likelihood of success on the
25 merits. I'll briefly discuss the other prongs.

1 Plaintiffs assert very generally at Page 30 of their
2 motion that they will suffer irreparable harm because of the
3 illegal activities. They refer to the right to vote and the
4 principle that "an alleged constitutional infringement will
5 often alone constitute irreparable harm."

6 That may be true, but here I find no constitutional
7 violations. They are not being deprived of a right to vote in
8 a public election. There is no showing of a First Amendment
9 violation. And the harm at this point in my view is
10 speculative. Winter explains that "a preliminary injunction
11 will not be issued simply to prevent the possibility of some
12 remote future injury." Plaintiffs have not demonstrated
13 irreparable harm.

14 As to the balancing of equities, plaintiffs must
15 demonstrate that the balancing of equities tips in their favor.
16 Defendants argue the plaintiffs waited too long to bring suit.
17 But given the timing of the election, it would have been
18 difficult for plaintiffs to have sued earlier and to challenge
19 an election when it was not scheduled. So the timing doesn't
20 in and of itself affect the equities.

21 But the plaintiffs have failed -- I'm sorry, the
22 plaintiffs have not demonstrated or have failed to demonstrate
23 the equities tip in their favor. They have no right to
24 participate in a private election. Plaintiffs Akina and
25 Makekau could have easily participated, even without making

1 Declarations One and Two. And they both qualify as Native
2 Hawaiians to register on OHA's Hawaiian Registry. The evidence
3 indicates that they could have participated if they wanted to,
4 even if registration occurred after suit was filed.

5 And Plaintiffs Gapero and Moniz could have easily
6 removed, and presumably may still do so, themselves from the
7 Roll.

8 On the other hand, enjoining a private election
9 process that has already begun, with candidates for delegate
10 having registered, and notice of the vote having gone out and
11 the voting to occur soon, would disrupt this effort to
12 organize.

13 Finally, plaintiffs have not demonstrated that the
14 public interest would be served by a preliminary injunction.
15 Plaintiffs are not likely to be deprived of any constitutional
16 rights. Granting an injunction would now potentially affect up
17 to 100,000 people who are on this voter list and may want to
18 participate in this process of self-determination.

19 Now, honestly, I'm almost done.

20 I pause, I pause, not for long, but I pause because I
21 want to make clear particularly, I think the lawyers all
22 understand that, but for those who are here who don't
23 understand the legal process, what I'm not deciding today, I
24 want to make that clear today as well. So I want to emphasize
25 the limit and scope of this order.

1 I am tasked only with determining whether plaintiffs
2 have met their Winter burden to obtain an injunction. It's "an
3 extraordinary remedy never awarded as a matter of right."

4 I am not assessing the process itself. I am not
5 deciding whether this specific election will lead to an entity
6 that reflects "the will of the Native Hawaiian community" or
7 whether it is "fair and inclusive" such that the United States
8 may then begin to negotiate on a "government-to-government"
9 basis, as set forth in the Department of Interior's Notice.
10 Nor am I deciding whether any potential actions under Act 195
11 or the Notice, such as encouraging Native Hawaiian
12 self-governance, or negotiating or engaging on a
13 "government-to-government" basis with a "recognized Native
14 Hawaiian government," reflects public policy that is wise.
15 That's not my place. I'm not even deciding whether the
16 Department of Interior even has the power to facilitate the
17 reestablishment of a government-to-government relationship with
18 the Native Hawaiian people. That's not before me. I'm only
19 addressing the legal considerations underlying the specific
20 challenged actions, and consider whether plaintiffs have
21 demonstrated that the proposed election and challenged aspects
22 of Act 195 are likely to be unconstitutional so that the
23 process stops now.

24 So, for those reasons the Court is denying the Motion
25 for Preliminary Injunction. As I say, I will put out a more

1 detailed order. It's a little hard to understand how something
2 can get more detailed than that, but it will contain a little
3 bit more than that did. Okay? And I hope to do that, as I
4 say, as soon as possible.

5 All right. Anything else before we recess?

6 MR. SCHOETTLE: Your Honor, may I have 2 minutes?

7 MR. POPPER: Your Honor, this is Robert Popper for the
8 plaintiffs. I had a couple of brief matters.

9 THE COURT: All right. Mr. Popper, I'm having a
10 little trouble hearing you. So if you could speak up a little
11 bit I'd appreciate it.

12 MR. POPPER: Is this better, Your Honor?

13 THE COURT: That's a little better. I can also turn
14 our volume up a little here. Okay. Go ahead.

15 MR. POPPER: The first is that plaintiffs are
16 seriously considering and in fact I would say planning an
17 appeal. And so I thank the Court for ruling quickly, I think
18 we all needed to have that happen, and for stating that a
19 written order will issue shortly.

20 I was wondering perhaps whether just as a possibility
21 the Court might certify the transcript of the oral order just
22 issued and perhaps issue a minute order as well. That was the
23 first thing I wanted to raise with the Court.

24 THE COURT: Well, help me understand. So I've ruled.
25 What do you mean by certifying the transcript? I'm not sure

1 what that even means.

2 MR. POPPER: Well, as I understand it, if Your Honor
3 were to certify the transcript, then the transcript itself
4 would become a written ruling.

5 THE COURT: Well, no, that's not my intent. My intent
6 is to put out a written ruling. Now, if you have a right to
7 appeal today from this, if you believe you have a -- I am
8 denying the motion right now, to be clear. The motion is
9 denied, Mr. Popper. If you believe you can appeal from that,
10 so be it, that's fine. I have no problem with that.

11 What I was trying to point out is, if there is an
12 appeal, the Ninth Circuit very well may want to have the
13 benefit of my fuller written order. And the law does permit me
14 to rule from the bench in this manner, and then in aid of the
15 appellate process file a more detailed written order, which I
16 hope to have done within a week or so.

17 MR. POPPER: I see.

18 THE COURT: Okay?

19 MR. POPPER: Your Honor, the second matter would be
20 that pursuant to the requirements of Federal Rule of Appellate
21 Procedure 8, I would respectfully move now for an order
22 granting an injunction of -- pending an appeal of this matter
23 for the reasons stated in our Motion for Preliminary
24 Injunction.

25 THE COURT: All right. You lost me there. You're

1 asking for what?

2 MR. POPPER: Pursuant to Federal Rule of Appellate
3 Procedure (a) (1) (C).

4 THE COURT: 8 (1) (c)?

5 MR. POPPER: Yes.

6 THE COURT: Okay.

7 MR. POPPER: 8 (a) (1) (C).

8 THE COURT: 8 (a) (1) (C). Okay. Let me pull that up.
9 Counsel, do you have a book? I can give you one if
10 you don't have.

11 So you're asking me to essentially grant your motion
12 for injunction through Rule 8, is that what you're asking for?

13 MR. POPPER: No, Your Honor, because it wouldn't be
14 pending the outcome of the district court's ruling, it would be
15 pending the outcome of the appeal. But yes, the same
16 injunction.

17 THE COURT: So you're asking me for an order granting
18 the injunction while appeal is pending.

19 MR. POPPER: Yes, Your Honor.

20 THE COURT: All right. Now I understand.

21 Does anyone wish to be heard on that?

22 MR. MEHEULA: We oppose it, Your Honor, on the grounds
23 that you just stated.

24 THE COURT: Do you want to repeat those, Mr. Meheula?

25 MR. KLEIN: We also oppose it, Your Honor. You would

1 essentially be reversing yourself.

2 MR. NAKATSUJI: Yes, Your Honor, we object as well.
3 The standard is the same for this type of motion. So I believe
4 that for the reasons you've stated, the motion should be
5 denied.

6 THE COURT: All right. So I am denying your --

7 MR. SCHOETTLE: May I have 2 minutes, Your Honor?

8 THE COURT: I'm sorry?

9 MR. SCHOETTLE: May I have 2 minutes?

10 THE COURT: I'm not done talking to Mr. Popper.

11 MR. SCHOETTLE: I was -- you asked for if there's
12 anything else.

13 THE COURT: I haven't permitted your intervention in
14 this case. I'm not even sure why you're sitting at counsel
15 table.

16 All right. Mr. Popper, I'm going to deny that motion.
17 All right.

18 UNIDENTIFIED MALE: Shame on this court. This court
19 is incompetent. This court is incompetent. Shame on this
20 court. Shame.

21 THE COURT: All right.

22 MR. SCHOETTLE: May I have 1 minute, Your Honor?

23 THE COURT: All right. Get to a microphone though.
24 All right?

25 MR. SCHOETTLE: Your Honor's analysis of strict

1 scrutiny is precisely correct, except for one thing. This
2 election has nothing to do with Native Hawaiians. Native
3 Hawaiians are defined in the Constitution of the State of
4 Hawaii, they're defined in the Hawaiian Homes Commission Act,
5 and they're defined in 5(f) by reference to not less than
6 one-half part.

7 This election does not limit voting qualifications to
8 Native Hawaiians. It includes another hundred -- for a hundred
9 thousand other people. The purpose of this election is not to
10 elect a governing entity for Native Hawaiians. There already
11 exists governing entities that Native Hawaiians have created
12 for themselves, Ka Lahui being one of them. The State does not
13 want to recognize Ka Lahui because it represents Native
14 Hawaiians. The State wants an organization that it can give
15 \$500 million of OHA money that belongs to Native Hawaiians in
16 order for that organization to give up the rights of Native
17 Hawaiians in Hawaiian Homes and 5(f).

18 THE COURT: All right. Thank you.

19 MR. SCHOETTLE: That is state action.

20 THE COURT: All right. Thank you, sir.

21 All right. Anything else before we recess?

22 MR. MEHEULA: No, Your Honor.

23 MR. POPPER: Not from the plaintiffs, Your Honor.

24 THE COURT: If there is an appeal taken, it sounds
25 like there will be, I don't know if we just want to -- if

1 there's any discovery that needs to be had or anything of that
2 sort that could go forward pending the appeal or if everyone
3 just agrees to stay the case here to the extent I have -- where
4 I have remaining jurisdiction pending the appeal. But maybe
5 counsel can discuss that and figure out the best way to
6 proceed.

7 MR. MEHEULA: We will.

8 MR. KLEIN: We shall, Your Honor.

9 THE COURT: Okay?

10 MR. MEHEULA: Yes.

11 THE COURT: Mr. Lilly, you understand what I'm saying?
12 I mean if there's an appeal I just don't know if you folks
13 think anything should go forward as far as discovery or limited
14 matters that could go forward pending an interlocutory appeal
15 or if we should stay everything and see what happens.

16 MR. LILLY: I don't think there's anything more that
17 needs to be done pending appeal.

18 THE COURT: Okay. All right. All right. Very well.
19 All right. Court is in recess. Thank you.

20 (The proceedings concluded at 11:24 a.m.,
21 October 23, 2015.)

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