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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KELIʻI AKINA, et al.,

Plaintiffs,

v.

THE STATE OF HAWAII, et al.,

Defendants.

CIVIL NO. 15-00322 JMS-BMK

BRIEF FOR THE UNITED STATES DEPARTMENT OF THE INTERIOR AS AMICUS CURIAE SUPPORTING DEFENDANTS; CERTIFICATE OF COMPLIANCE; EXHIBIT A (NOTICE OF PROPOSED RULEMAKING); CERTIFICATE OF SERVICE

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BRIEF FOR THE UNITED STATES DEPARTMENT OF THE INTERIOR AS AMICUS CURIAE SUPPORTING DEFENDANTS

This brief is submitted in response to this Court's invitation (Doc. No. 89).

INTEREST OF THE UNITED STATES

The United States has a special responsibility for the welfare of Native peoples throughout our Nation, including Native Hawaiians. Pursuant to that responsibility, Congress has enacted more than 150 statutes to benefit Native Hawaiians. Federal programs, services, and benefits specifically for Native Hawaiians run the gamut from education (20 U.S.C. §§ 7511-7517) to economic assistance (42 U.S.C. §§ 2991-2992) to health care (*id.* §§ 11701-11714).

The United States Department of the Interior ("Department") recently published a Notice of Proposed Rulemaking ("NPRM") titled "Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community," 80 Fed. Reg. 59113 (Oct. 1, 2015) [*attached as* Ex. A]. Because the public-comment period for the NPRM is still underway, the Department cannot speak with finality about the issues addressed in the NPRM. *See* 5 U.S.C. § 553; *Chamber of Commerce of U.S. v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980). Until the

Department has considered all timely public comments on the NPRM, the Department cannot state whether it will promulgate a final rule, or what the precise contents of any such rule might be.

INTRODUCTION

Defendant Nai Aupuni, a nonprofit corporation, is planning an election next month of delegates to an "Aha," a convention charged with considering paths for Native Hawaiian self-determination and potentially drafting a constitution for a Native Hawaiian government. Voting in this election will be limited to Native Hawaiians. Plaintiffs seek to preliminarily enjoin the election, primarily on the ground that excluding non-Natives violates the Federal Constitution. *See* Doc. No. 47, Mot. for Prelim. Inj. at 3.

While this case concerns the reorganization of a Native Hawaiian government, starting with the election of constitutional-convention delegates, the Department's NPRM focuses on a process that would commence only if a Native Hawaiian government is reorganized and then seeks a formal government-to-government relationship with the United States. The NPRM itself, and the criteria for entering into such a relationship that it proposes for public comment, are not at issue here and have only limited relevance to the issues presented by plaintiffs' motion.

But the premises underlying the NPRM are relevant here. As explained below, in accordance with Federal law, tribes in the continental United States routinely limit voting in tribal elections, including constitutional referenda, to members, while excluding non-Natives. There is no principled basis for treating the Native Hawaiian community differently.

BACKGROUND

A. The 2014 Advance Notice of Proposed Rulemaking

The Native Hawaiian community has one of the largest indigenous populations in the United States. But unlike more than 500 federally recognized Native communities on the continent, Native Hawaiians lack both an organized government and a formal government-to-government relationship with the United States. In response to requests from the Native Hawaiian community, as well as the Ninth Circuit's suggestion that the Department "appl[y] its expertise to ... determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis," *Kahawaiolaa* v. *Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004), the Department published an Advance Notice of Proposed Rulemaking. 79 Fed. Reg. 35296, 35296-303 (June 20, 2014). The ANPRM solicited public comment regarding whether the Department should facilitate (1) reorganization of a Native Hawaiian government and

(2) reestablishment of a formal government-to-government relationship with the Native Hawaiian community. *See id.* at 35297, 35302-03.

After applying its expertise in Native American affairs to evaluate more than 5,000 comments, the Department determined that it would not propose a rule presuming to reorganize a Native Hawaiian government or prescribing the form or structure of that government; the Native Hawaiian community itself should determine whether and how to reorganize a government. The Department would, however, propose a rule creating a process that the Secretary of the Interior would use to determine whether to reestablish a formal government-to-government relationship if the Native Hawaiian community forms a government that then seeks such a relationship with the United States.

B. The 2015 Notice of Proposed Rulemaking

The NPRM proposes an administrative procedure, as well as criteria, for determining whether to reestablish a formal government-to-government relationship between the United States and the Native Hawaiian community. PR § 50.1.[1] The proposed rule explains that a formal

[1] This brief cites the NPRM's preamble, found at 80 Fed. Reg. 59113-28, as "NPRM [page number]." The proposed rule — the portion of the NPRM that, if finalized, would be codified in Title 43 of the Code of Federal Regulations — is found at 80 Fed. Reg. 59128-32 and is cited here as "PR § [section number]."

government-to-government relationship would allow the United States to more effectively implement and administer the special political and trust relationship that Congress has already established with the Native Hawaiian community by enacting more than 150 Federal statutes over the last century. PR § 50.1(a); *see* PR § 50.1(b) (listing Acts of Congress creating Federal programs, services, and benefits specifically for Native Hawaiians); *see also* NPRM 59114-18 (providing historical overview).

The Department's proposed rule contemplates a multistep process for a Native Hawaiian government to request a government-to-government relationship with the United States, if it chooses to do so. First, the Native Hawaiian community would draft a constitution or other governing document. PR § 50.11; *see* PR §§ 50.3, 50.10(a), (c), 50.13, 50.16(b), (d)-(f). The proposed rule places few conditions on the drafting of a governing document that might be presented to the Department in the process of reestablishing a government-to-government relationship, merely stating that the governing document should be "based on meaningful input from representative segments of the Native Hawaiian community and reflect[] the will of [that] community." PR § 50.11. The Native Hawaiian community would make the proposed constitution's text available to Native

Hawaiians and announce an upcoming ratification vote. PR § 50.14(b)(1)-(2).

The community would then vote on the constitution in a ratification referendum open to adult Native Hawaiian citizens (regardless of residency) but not to persons lacking Native Hawaiian descent. PR §§ 50.10(b), (d), 50.12, 50.14, 50.16(c), (e); *see also* PR § 50.16(g)-(h) (requiring specific evidence of broad-based community support); NPRM 59124-25. Consistent with Federal statutes and caselaw, the proposed rule's definition of "Native Hawaiian" is restricted to U.S. citizens who descend from the aboriginal people who occupied and exercised sovereignty in Hawaii prior to 1778, when the first Europeans arrived. PR § 50.4; *see* NPRM 59124 (citing Federal statutes using the same definition); NPRM 59119 (explaining the definition's roots in Supreme Court caselaw). The community could — but is not required to — use a roll certified by a state commission such as the Native Hawaiian Roll Commission as a basis for determining who may participate in the referendum, if the community conforms the roll to certain requirements in the proposed rule. PR § 50.12(b); *see* PR § 50.14(b)(5)(iii), (c); *see also* NPRM 59121.

If the constitution is approved, the community would hold elections to fill the offices it establishes. PR §§ 50.10(e), 50.15, 50.16(f). The newly

installed governing body could enact a resolution seeking a formal government-to-government relationship with the United States. PR § 50.10(f). Then the appropriate officer of the new government could prepare, certify, and submit to the Secretary of the Interior a request to reestablish that relationship. PR §§ 50.2, 50.10(g), 50.16(a), 50.20.

The public could comment on the Native Hawaiian government's request, the Native Hawaiian government could respond to comments, and the Secretary could seek additional information if needed. PR §§ 50.30, 50.31, 50.40. Applying specific criteria set forth in the proposed rule, the Secretary would decide whether to grant or deny the request. PR §§ 50.16, 50.40, 50.41. If the Secretary grants the request, a *Federal Register* notice would trigger the start of a new, formal government-to-government relationship. PR §§ 50.42, 50.43. The Native Hawaiian community's government-to-government relationship with the United States would then be the same under the U.S. Constitution and Federal law as that of any federally recognized tribe in the continental United States, and the Native Hawaiian government would be recognized as having the same inherent sovereign governmental authorities, subject to Congress's plenary authority. PR § 50.44(a)-(b); *see also* PR § 50.44(c)-(g).

Significantly, although the proposed rule envisions that Native Hawaiians may choose to draft a governing document for a Native Hawaiian government (perhaps through a constitutional convention) and then to ratify that document, those steps would be taken by the Native Hawaiian community without Federal involvement. *See* NPRM 59123. If a Native Hawaiian government reorganizes, that government can decide whether or not to seek a formal relationship with the United States. *See id.* The Federal Government's role would be limited to determining, under criteria promulgated through the current notice-and-comment rulemaking, whether to reestablish a formal government-to-government relationship if it receives a request from a reorganized Native Hawaiian government. *See id.*

DISCUSSION

The NPRM is rooted in the congressional enactments for Native Hawaiians over the last century and draws from the wellspring of authority related to Congress's long history with Indians and tribal self-determination. That authority is relevant here for four reasons; together, they demonstrate that no preliminary injunction should issue.

First, Congress has exercised its broad plenary authority to recognize and implement special political and trust relationships with Native American communities; to promote their self-determination and self-governance; and to safeguard their inherent powers to determine their membership, to reorganize their governments, to ratify constitutions, and to conduct elections. Second, consistent with that body of Federal law, tribes traditionally have not included non-Natives in either membership or voting, a practice that Federal courts uniformly have upheld. Third, non-Natives are properly excluded from tribal elections, whether conducted by the tribe itself or by the Secretary of the Interior, because the exclusion is rationally designed to further Indian self-government. Fourth, with regard to these points, Federal law provides no reason to treat the Native Hawaiian community differently from any tribe in the continental United States.

A. Congress and the courts have long recognized Native communities' inherent powers to determine their membership, organize their governments, ratify constitutions, and conduct elections.

"The powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'" *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (citation and emphasis omitted). That sovereignty, however, is subject to Congress's exceptionally broad plenary power to regulate and modify the status of tribes. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014); *United States v. Lara*, 541 U.S. 193, 200 (2004); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); JUDGE WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 1 (6th ed. 2015). As the Supreme Court recently reaffirmed, "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Bay Mills*, 134 S. Ct. at 2039.

Since the beginning of our Republic, Congress has exercised its plenary authority to recognize and implement special political and trust relationships with hundreds of Native communities. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323-24 (2011). Among those is the Native Hawaiian community. *See, e.g.*, 42 U.S.C. § 11701(17); 20 U.S.C. § 7512(12); Pub. L. No. 106-569, 114 Stat. 2968-69 (2000).

Especially in the last 40 years, Congress has used its plenary authority to promote tribal self-determination and self-governance. *See, e.g.*, 20 U.S.C. § 7512(12)(E) (reaffirming that "the aboriginal, indigenous people of the United States have ... a continuing right to autonomy in their internal affairs; and ... an ongoing right of self-determination and self-governance that has never been extinguished"). Likewise, the Supreme Court has held that tribes are "'distinct, independent political communities, retaining their original natural rights in matters of local self-government,'" with the power to regulate "'their internal and social relations,' ... to make their own substantive law in internal matters," and "to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (citations omitted).

Congress has accordingly shown great deference, in scores of statutes, to tribes' definitions of their own membership. *See, e.g.*, 25 U.S.C. §§ 450b(d), 1801(a)(1), 1903(3), 3103(9), 4103(10). The Supreme Court has been similarly deferential: "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *see also Alto v. Black*, 738 F.3d 1111, 1115 (9th Cir. 2013) ("In view of the importance of tribal membership decisions and as part of the federal

policy favoring tribal self-government, matters of tribal enrollment are generally beyond federal judicial scrutiny."); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1011 (9th Cir. 2007). "Courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03[3], at 175 (2012 ed.).

Congress has also been highly protective of tribes' powers to organize or reorganize their own governments, to draft and ratify their own constitutions or other governing documents, and to conduct their own elections. *See, e.g.*, 25 U.S.C. §§ 476, 503, 677e, 903b; *see also id.* § 476(h)(1) ("each Indian tribe shall retain inherent sovereign power to adopt governing documents").

B. Consistent with Federal law, tribes traditionally have excluded non-Natives from both membership and voting, a practice that Federal courts uniformly have upheld.

Having worked on a government-to-government basis with more than 500 federally recognized Indian tribes in the continental United States, the Department recognizes that tribes traditionally have not included non-Natives as full members of their political communities or as voters in tribal elections, including constitutional ratification referenda. This fact is not surprising, since, by definition, non-Natives lack Native American descent

— which is essential to an aboriginal claim to sovereignty under the Constitution.

Moreover, excluding non-Natives from tribes' internal political processes fully comports with Federal law. *See, e.g.*, 25 U.S.C. §§ 476, 503, 677e, 903b. As the Supreme Court explained in *Rice v. Cayetano*, 528 U.S. 495 (2000), non-Indians lack the right to vote in tribal elections because "such elections are the internal affair of a quasi sovereign." *Id.* at 520.

Because tribes pre-date the Constitution and did not participate in the Constitutional Convention, they are not governed by "constitutional provisions framed specifically as limitations on federal or state authority," including the Bill of Rights and the Civil War Amendments. *Santa Clara Pueblo*, 436 U.S. at 56; *see Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008); *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896). Therefore, a tribe's decision to exclude non-Natives from its membership rolls or from its elections cannot violate the Fifteenth, Fourteenth, or First Amendment.

Likewise, the Voting Rights Act of 1965, as amended, 52 U.S.C. §§ 10301-10314, is directed only to a "State or political subdivision." *Id.* § 10301(a). So any Voting Rights Act claim against an Indian tribe must fail. *See, e.g., Gardner v. Ute Tribal Court Chief Judge*, 36 Fed. App'x 927,

928 (10th Cir. 2002); *Cruz v. Ysleta Del Sur Tribal Council*, 842 F. Supp. 934, 935 (W.D. Tex. 1993).

Tribes' exercise of sovereign governmental powers is constrained, however, by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304. ICRA guarantees most, but not all, of the protections for individual liberties similar to those found in the Bill of Rights and the Civil War Amendments, and makes them applicable to tribes. *See id.* § 1302(a). For example, ICRA expressly bars an Indian tribe from making or enforcing laws "abridging the freedom of speech," *id.* § 1302(a)(1), and from "deny[ing] to any person within its jurisdiction the equal protection of its laws," *id.* § 1302(a)(8). However, the Department is unaware of any court applying ICRA to invalidate a tribe's decision to exclude non-Natives from tribal elections. Indeed, these challenges have uniformly failed. *See, e.g.*, *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438, 439-41 (D.S.D. 1974); *see also Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1083 (8th Cir. 1975) (interpreting ICRA's equal-protection clause to require only that "a tribe treat equally votes cast by members of the tribe already enfranchised by the tribe itself," and not to allow claims seeking "to enfranchise a new class" of voters); *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899-900 (9th Cir. 1988) (describing ICRA standards).

More tellingly, Congress chose ***not*** to incorporate into ICRA a guarantee similar to the Fifteenth Amendment's prohibition against denying the "right ... to vote ... on account of race [or] color." U.S. CONST. amend. XV, § 1. Indeed, Congress consciously rejected the idea of incorporating a Fifteenth Amendment analogue into ICRA. *See Groundhog v. Keeler*, 442 F.2d 674, 681-82 (10th Cir. 1971).

An early draft of ICRA would have applied the Fifteenth Amendment to tribal elections. *See* S. 961, 89th Cong. (1965). Then-Solicitor of the Interior Frank J. Barry testified against this feature of the bill: "No doubt a tribe would want to restrict voting to members and to restrict membership to persons having a certain proportion of Indian blood." *Constitutional Rights of the American Indian: Hearings on S. 961-968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 18 (1965). Solicitor Barry added that a Federal statute requiring tribes to enfranchise non-Natives would not "be consistent at all with [our] system of Indian administration" and would effectively "abolish" tribal governments, subsuming them within state governments. *Id.* at 50. The Department proposed a substitute bill that selectively incorporated key constitutional protections while omitting any Fifteenth Amendment-like provision. *See id.* at 18-19. That proposal

became the model for the bill that Congress ultimately passed, deleting the Fifteenth Amendment analogue from the legislation and enacting ICRA with no restrictions against barring non-Natives from tribal elections. *See Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 89th Cong., Constitutional Rights of the American Indian: Summary Rep. of Hearings and Investigations Pursuant to S. Res. 194*, at 10, 25-26 (Comm. Print 1966).

C. Excluding non-Natives from tribal elections is also routine, and lawful, in tribal elections conducted by the Secretary of the Interior.

Unlike an Indian tribe, the Secretary of the Interior is constrained by the Federal Constitution. *See Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1088-89 (8th Cir. 1977). Under the Indian Reorganization Act, 25 U.S.C. § 476, and the Oklahoma Indian Welfare Act, 25 U.S.C. § 503, the Secretary conducts elections to ratify new tribal constitutions. Although these Secretarial elections are subject to the Constitution, the exclusion of non-Natives is routine, as the statutes are expressly designed to reorganize "Indians." 25 U.S.C. §§ 476, 503.

Part 81 of Title 25 of the Code of Federal Regulations governs these Secretarial elections to adopt a tribal governing document. One of the Department's responsibilities, through an election board chaired by a

Bureau of Indian Affairs employee, is to "compile" and "post[]" the "official list of registered voters." 25 C.F.R. § 81.12. The Part 81 regulations further provide that, when a tribe is considering whether to reorganize for the first time, "[a]ny duly registered adult member [of the tribe,] regardless of residence[,] shall be entitled to vote on the adoption of a constitution." 25 C.F.R. § 81.6(a)(1). A "member" is defined as "any ***Indian*** who is duly enrolled in a tribe [1] who meets a tribe's written criteria for membership or [2] who is recognized as belonging to a tribe by the local Indians comprising the tribe." *Id.* § 81.1(k) (emphasis added). So the right to vote in these Secretarial elections turns not on residence in the tribe's territory, but rather on membership in the tribe and Indian status. *See id.* § 81.6(a)(2) (permitting "registered adult nonresident members" to vote by absentee ballot); *see also* 79 Fed. Reg. 61021, 61029 (Oct. 9, 2014).

Like other tribal elections that include only Natives, these Secretarial elections, as well as the regulations authorizing them — which have now been in effect for more than a third of a century — have never been successfully challenged for excluding non-Natives. *See, e.g.*, *St. Germain v. U.S. Dep't of the Interior*, No. C13-945RAJ, 2015 WL 2406758, at *4-6 (W.D. Wash. May 20, 2015).

This fact is not surprising. Federal laws singling out Indians do not

offend the Constitution as long as the special treatment "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians" and "is reasonable and rationally designed to further Indian self-government." *Mancari*, 417 U.S. at 555; *see EEOC v. Peabody Western Coal Co.*, 773 F.3d 977, 987 (9th Cir. 2014). This standard reflects the settled principle — memorialized in an entire title of the U.S. Code (Title 25) — that Federal Indian laws regulate "once-sovereign political communities," not "a 'racial' group consisting of 'Indians.'" *United States v. Antelope*, 430 U.S. 641, 646 (1977) (citation and internal quotation marks omitted); *see id.* at 645-47; *Washington v. Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979); *Mancari*, 417 U.S. at 551-55; *see also Peabody*, 773 F.3d at 985-89.

D. Federal law provides no basis for treating the Native Hawaiian community differently from any tribe in the continental United States.

The principles of Federal law summarized above, developed largely in the context of Indian tribes in the continental United States, apply with equal force in the Native Hawaiian context. In enacting scores of Federal statutes directly affecting the Native Hawaiian community over the last century, Congress has exercised its Indian-affairs plenary power repeatedly — and often expressly. In 1920, Congress found constitutional precedent

for the Hawaiian Homes Commission Act, 42 Stat. 108 (1921), "in previous enactments granting Indians ... special privileges in obtaining and using the public lands." H.R. Rep. No. 66-839, at 11 (1920). In 1992, Congress stated that its constitutional authority "to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii." 42 U.S.C. § 11701(17). And in 2002, Congress "recognized and reaffirmed" that it "does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship." 20 U.S.C. § 7512(12)(B); *see* Pub. L. No. 106-569, § 512(13)(B), 114 Stat. 2968 (2000).

Congress's treatment of the Native Hawaiian community as a distinct indigenous group for which it may enact special legislation is manifestly reasonable. Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who once exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claim to its sovereignty. *See* Pub. L. No. 103-150, 107 Stat. 1510, 1512-13 (1993); NPRM 59114-18. *See generally United States v. Sandoval*, 231 U.S. 28, 46-47 (1913).

That history is why this Court, the Ninth Circuit, and the Hawaii

Supreme Court have all held that the Native Hawaiian community falls within the scope of Congress's Indian-affairs power. *See, e.g.*, *Naliielua v. State of Hawaii*, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990), *aff'd*, 940 F.2d 1535 (9th Cir. 1991) (table op.); *Rice v. Cayetano*, 146 F.3d 1075, 1082 (9th Cir. 1998) (citing *Mancari* and rejecting plaintiffs' Fourteenth Amendment claim), *vacated on other grounds*, 528 U.S. 495, 522 (2000); *Ahuna v. Dep't of Haw. Home Lands*, 64 Haw. 327, 339 (1982); *see also Kahawaiolaa*, 386 F.3d at 1278-79 (applying *Mancari*'s rational-basis review and distinguishing *Rice*, 528 U.S. at 519-22).

The fact that the Native Hawaiian community currently lacks an organized government does not preclude the application of principles of Native self-governance and self-determination. *See United States v. John*, 437 U.S. 634, 649-53 (1978) (upholding Congress's power to legislate for Indians who had no federally recognized tribal government); *see also Lara*, 541 U.S. at 203 (noting Congress's power to restore "previously extinguished tribal status — by re-recognizing a Tribe whose tribal existence it previously had terminated"). Any ruling that purports to require the Native Hawaiian community to include non-Natives in organizing a government could mean in practice that a Native group could never organize itself, impairing its right to self-government and frustrating

its eligibility for a government-to-government relationship with the United States.

Plaintiffs suggest (Doc. No. 47-1, Pls.' Br. at 9-11) that this case requires only a straightforward application of the Supreme Court's holding in *Rice v. Cayetano*, but they seek a decision reaching far beyond any issue resolved in *Rice*. The Court in *Rice* expressly reserved the question whether Congress generally "may treat the native Hawaiians as it does the Indian tribes," 528 U.S. at 518, and instead confined its holding to the specific Fifteenth Amendment context presented there: state elections for state officials responsible for administering state laws and for running a state agency established by the state constitution. *See id.* at 520-22. By contrast, this case is about Native Hawaiian elections for Native Hawaiian delegates to a convention that might propose a constitution or other governing document for the Native Hawaiian community. This election has nothing to do with governing the State of Hawaii.

Nor does the State's provision of assistance to the Native Hawaiian process of self-determination alter the legal analysis. On admitting Hawaii to the Union, Congress assigned to the State the day-to-day administration of key aspects of the Federal trust responsibility for Native Hawaiians. *See* Pub. L. No. 86-3, §§ 4-5, 73 Stat. 4, 5-6 (1959); *Ahuna*, 64 Haw. at 337-38;

see also 42 U.S.C. § 11701(16). Subsequently, Congress has often called upon the State to serve as the United States' partner in implementing the special political and trust relationship with the Native Hawaiian community: More than 30 sections of the U.S. Code expressly refer to the state agencies for Native Hawaiian affairs and homelands. *See, e.g.*, 42 U.S.C. §§ 2991b-1, 11711(7)(A)(ii). The programs the State administers with congressional authorization provide benefits to Native Hawaiians, and therefore necessarily entail identifying eligible Native Hawaiians — a function not unlike the one challenged in this litigation. *See, e.g.*, 42 U.S.C. §§ 2991b-1(a)(1)(A), 11709(a)(2), 11711(7)(A)(ii). Just as Federal assistance in a tribal election conducted under the Secretary's auspices does not divest a Native community's actions of their character as internal matters of self-governance, there is no reason to conclude that assistance from the State should have that effect here.

CONCLUSION

Though the Department's NPRM does not directly impact the issues presented in this preliminary-injunction proceeding, the NPRM is rooted in a century of congressional precedent treating the Native Hawaiian people as a distinct indigenous political community, just as Congress treats tribes in the continental United States. That treatment does bear on the issues

before the Court. As a political community entitled to self-determination, the Native Hawaiian people have the same fundamental rights of political liberty and local self-government as any Indian tribe. Native Hawaiians should not be relegated to second-class status among our Nation's indigenous peoples.

Accordingly, on this basis alone, plaintiffs' motion should be denied.

DATED: October 14, 2015, at Honolulu, Hawaii.

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