No. 15-17134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELI‘I AKINA, ET AL.,
Plaintiffs-Appellants,

v.

THE STATE OF HAWAI‘I, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Hawai‘i
Honorable J. Michael Seabright, United States District Judge
(Civil No. 15-00322 JMS-BMK)

ANSWERING BRIEF AND ADDENDUM OF DEFENDANTS-APPELLEES NA‘I AUPUNI AND THE AKAMAI FOUNDATION

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February 5, 2016

CORPORATE DISCLOSURE STATMENT

Pursuant to Federal Rules of Appellate Procedure ("FRAP") Rule 26.1, Defendant-Appellee Na‘i Aupuni hereby states that it has no parent corporation or public corporation that owns 10% or more of its stock.

Pursuant to FRAP Rule 26.1, Defendant-Appellee The Akamai Foundation hereby states that it has no parent corporation or public corporation that owns 10% or more of its stock.

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ANSWERING BRIEF OF DEFENDANTS-APPELLEES NA‘I AUPUNI AND THE AKAMAI FOUNDATION

In this matter, the district court denied Appellants' Motion for a Preliminary Injunction, filed on August 27, 2015 ("Injunction Motion") that would have halted Appellee Na‘i Aupuni's ("NA") private election of delegates to its own convention. Appellants appealed the district court's denial and, while this appeal was pending, NA terminated its election. The continued pursuit of this appeal is, thus, an undisguised request for a *new* injunction that Appellants never previously sought from the district court or this Court, and that Appellants unsuccessfully raised before the Supreme Court of the United States with their failed Motion for Contempt. With the cancellation of the election, this Court can no longer award appellants any effective relief, and the facts and any remaining legal issues have changed significantly such that this appeal is now moot.

Nevertheless, Appellants' attempt to discredit the district court's detailed factual findings and thorough legal analysis resulting in the denial of their Injunction Motion is, as detailed below, unavailing.

I. STATEMENT OF JURISDICTION

The United States District Court for the District of Hawai‘i had subject-matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 52 U.S.C. § 10101(d) as Appellants brought suit to enjoin Appellees from allegedly violating Appellants' rights under the U.S. Constitution, the Voting

Rights Act of 1965, and the Civil Rights Act of 1871. Excerpts of Record ("ER") 253-54 at ¶¶ 1, 3. The district court issued its oral ruling denying Appellants' Injunction Motion on October 23, 2015. ER 68. Pursuant to 28 U.S.C. § 1291, Appellants timely appealed to this Court on October 26, 2015.

However, and as discussed *infra* part VII.A of this brief, this appeal is moot as the Court cannot grant any effectual relief given NA's termination of its private election.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether this appeal is moot given NA's termination of its private election on December 15, 2015.

2. Whether the district court abused its discretion in denying Appellants' Injunction Motion.

III. STATUTORY AUTHORITIES

Pursuant to Ninth Circuit Rule 28-2.7, NA sets out the relevant constitutional provisions, statutes, and administrative rules in its separately-filed Addendum.

IV. STATEMENT OF THE CASE

A. Act 195 and the Native Hawaiian Roll Commission

Act 195, codified as Chapter 10H of the Hawaii Revised Statutes ("HRS"), established a five-member Native Hawaiian Roll Commission ("NHRC"). *See* HRS § 10H-3(a)(1). The NHRC was tasked to publish a roll of Native Hawaiians

(the "Roll") "intended to facilitate the process under which qualified Native Hawaiians may independently commence the organization of a convention of qualified Native Hawaiians, established for the purpose of organizing themselves." Na'i Aupuni's Supplemental Excerpts of Record ("NA Supp. ER") 76-77. Act 195 defined a "qualified Native Hawaiian" as an individual, age eighteen or older, who certifies that he or she (1) is "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," *and* (2) has "maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity." HRS § 10H-3(a)(2)(B). The NHRC asked registrants to make several declarations, including Declaration One, which provided: "I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance." ER 264-65 at ¶ 42; ER 229-32. The NHRC, however, accepted registration forms from individuals who satisfied the criteria of Act 195, but declined to affirm the unrelinquished sovereignty of the Native Hawaiian people. *See* NA Supp. ER 54-55 at ¶ 23.

Act 77 (2013) amended Act 195 to "precertify" registrants from multiple databases of verified Native Hawaiians, as maintained by the Office of Hawaiian

Affairs ("OHA"), for the Roll. ER 184.[1] Pursuant to Act 77, OHA sent electronic files to the NHRC that included the OHA registrants for inclusion in the Roll. NA Supp. ER 47-48 at ¶¶ 4, 6; ER 162 at ¶ 10; ER 170 at ¶ 15. While individuals registered through OHA needed to meet ancestry requirements to be included in OHA's databases, they did not need to make any of the declarations included in the NHRC's registration form. ER 167-68 at ¶¶ 7-11. In addition, individuals had the right to opt out of being registered for the Roll, and were repeatedly notified of such option. ER 168-69 at ¶¶ 12-14.

B. Na‘i Aupuni

NA, incorporated on December 23, 2014, is a non-profit corporation. ER 189 at ¶ 6. NA is comprised of Native Hawaiian directors who formed NA to provide a process for Native Hawaiians to further self-determination and self-governance. ER 174; ER 189-90 at ¶ 6. NA planned to hold an election for delegates to a proposed convention and, on February 26, 2015, discussed its plans to hold such an election in September of 2015. Dkt. Entry No. 19-3 at 5. NA anticipated that the convention of delegates would discuss and perhaps propose a recommendation on membership of a Native Hawaiian governing entity ("NHGE"), and NA decided, *on its own and as one of its initial decisions*, that

[1] Approximately 62 percent of the Roll is from OHA, and the other 38 percent is from the NHRC process. ER 61. Thus, at least 62 percent of the Roll did *not* affirm Declaration One. ER 12.

Native Hawaiian delegates should make that determination and that its election and convention process thus should be composed of Native Hawaiians. ER 194 at ¶ 13. Prior to entering into any formal relationship with OHA, NA informed OHA that it intended to use the Roll, but that it would also look into whether other available lists of Native Hawaiians could be used to form its voter list. *Id.* The NA directors did not view Act 195, OHA, or the State of Hawai‘i, as controlling their decision making. ER 21-22.

NA requested grant funds from OHA so that NA could conduct its election of delegates, convention and ratification vote process. ER 194-95 at ¶ 14. On April 27, 2015, at NA's request, OHA, Akamai Foundation ("Akamai"), and NA entered into a Grant Agreement whereby OHA provided $2,595,000 of Native Hawaiian trust funds to Akamai as a grant for the purpose of NA conducting an election of delegates, convention and ratification vote. *See* ER 206-10; ER 194-95 at ¶ 14.

The Grant Agreement contains the following autonomy clause:

> 3. Na‘i Aupuni's Autonomy. As set forth in the separate Fiscal Sponsorship Agreement, OHA hereby agrees that neither OHA nor AF will directly or indirectly control or affect the decisions of NA in the performance of the Scope of Services, and OHA agrees that NA has no obligation to consult with OHA or AF on its decision regarding the performance of the Scope of Services. NA hereby agrees that the decisions of NA and its directors, paid consultants, vendors, election monitors, contractors, and attorneys regarding the performance of the Scope of Services will not be directly or indirectly controlled or affected by OHA.

ER 207; ER 19; ER 171 at ¶¶ 19, 21.

An issue that the NA directors also discussed was the utility of available lists of adult Native Hawaiians *other than the Roll*. ER 196 at ¶ 18. After considering this issue for over two months, the NA directors determined that the Roll was the best available option because it was extraordinarily expensive and time consuming to compile a list of Native Hawaiians. *Id.* Thus, on June 1, 2015, the NA board decided, *on its own*, that it would use the certified Roll as supplemented by OHA's Hawaiian Registry program. *Id*.

NA understood that OHA's Hawaiian Registry process did not require attestation to Declaration One. ER 197 at ¶ 20. NA concluded, *on its own*, that having this alternative registration process was favorable because it provided Native Hawaiians who may take issue with Declaration One with the opportunity to participate in the NA process. ER 196-97 at ¶ 19. NA, thus, noted on its website that Native Hawaiians may register through the NHRC or OHA's Hawaiian Registry and provided links to both registration options. *Id.*

On June 18, 2015, NA and Election-America ("EA") entered into an Agreement for EA to provide services to conduct the delegate election. ER 197 at ¶ 21. NA subsequently requested that NHRC provide EA with its certified Roll in mid-July 2015; NHRC honored that request and periodically supplemented additional registrant information to EA. ER 197 at ¶ 22.

On August 3, 2015, EA sent to approximately 95,000 certified Native Hawaiians a notice of the election of delegates that included information about becoming a delegate candidate ("Notice"). ER 198-99 at ¶ 25. The Notice included key dates, including a transmittal of ballots to certified voters on November 1, 2015, and a deadline to vote of November 30, 2015. NA Supp. ER 62-64. NA, *on its own*, decided on these dates and deadlines and the election process set forth in the Notice. On September 30, 2015, EA announced the delegate candidates. NA Supp. ER 57-61; ER 200 at ¶ 27.

C. Procedural History

On August 13, 2015, Appellants filed their Complaint alleging that the "restrictions on registering for the Roll" violated the First, Fourteenth and Fifteenth Amendments of the U.S. Constitution and the Voting Rights Act, *see* ER 252-84, and sought to enjoin "the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll." ER 283.

On August 27, 2015, Appellants filed their Injunction Motion, which was initially set for hearing in the normal course on October 26, 2015 and seeking an order "preventing Defendant's from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians[.]" NA Supp. ER 125; NA Supp. ER 122.

After hearing the live testimony of witnesses and the oral arguments of the parties, and considering the arguments in the briefings and at its October 20, 2015 hearing, the district court denied Appellants' Injunction Motion. ER 95-96. When the court orally issued its ruling denying the Motion, Appellants orally moved for an injunction of the election pending their imminent appeal, which the court also denied. ER 98-99.

Appellants filed their Notice of Interlocutory Appeal on October 26, 2015. ER 104-06. Three days prior to the start of NA's election, on October 29, 2015, Appellants filed an Urgent Motion for an Injunction While Appeal is Pending ("Urgent Motion") before this Court, seeking to halt the counting of votes in NA's election. Dkt. Entry No. 9. A motions panel of this Court denied the Urgent Motion on November 19, 2015. ER 2-3.

NA's election began on November 1, 2015, when EA sent out approximately 89,000 ballots via mail and email to registered voters. *See* Dkt. Entry No. 23-2 at 1 (¶ 3). Candidates campaigned for a seat as a delegate to the convention. *Id.* Registered voters began voting for delegates. *Id.* at 2 (¶ 5).

On November 23, 2015, after they failed to obtain relief to stop the counting of ballots in NA's election, Appellants filed an Emergency Application for Injunction Pending Appellate Review ("Emergency Application") with the Supreme Court seeking to enjoin Appellees from "counting the ballots cast in and

certifying the winners of the election of delegates to the upcoming constitutional convention." Emergency App., No. 15A551, at 28 (U.S. Nov. 23, 2015). On November 27, 2015, Circuit Justice Anthony Kennedy issued an order enjoining Appellees from "counting the ballots cast in, and certifying the winners of, the election described in the application, pending further order of the undersigned or of the Court." Order, No. 15A551 (U.S. Nov. 27, 2015) (Kennedy, J.). NA thereafter extended the voting deadline from November 30, 2015 to December 21, 2015. *See* Na'i Aupuni, News Release, *Na'i Aupuni Extends Voting Deadline by Three Weeks*, *available at* www.naiaupuni.org/docs/NA-NR-NaiAupuniExtendsVotingDeadline-113015.pdf (Nov. 30, 2015). On December 2, 2015, a five-member majority of the Supreme Court granted Appellants' Emergency Application, enjoining the "counting [of] ballots cast in and certifying the winners of, the election described in the application, pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit." ER 1.

On December 15, 2015, before the scheduled end of the voting period on December 21, 2015 and without consultation of OHA or the State, NA terminated the election. *See* Na'i Aupuni, News Release, *Na'i Aupuni Terminates Election Process*, *available at* www.naiaupuni.org/docs/NewsRelease-NaiAupuniTerminatesElectionProcess-121515.pdf (Dec. 15, 2015) ("Termination Press Release"). NA's decision to terminate the election marked a change of

course to avoid further delay in its organizational efforts, and to move forward with organizing a gathering of Native Hawaiians without engaging *at all* in the conduct that Appellants were challenging. This was a reasonable choice given the delay the litigation created, and to avoid a loss of momentum in the process of fostering a discussion among Native Hawaiians on the question of self-governance. One of the most difficult obstacles to organizing Native Hawaiians is that there are over 180,000 Native Hawaiian adults who reside in Hawai‘i and Native Hawaiians have been without an organized government since the Hawaiian Kingdom was overthrown in 1893. *See generally* NA Supp. ER 66-79. Thus, identifying an initial group that can create a procedural path to re-organizing Native Hawaiians is akin to the chicken and egg dilemma. NA decided that instead of waiting for this Court's decision and any further appeals, it would take a different approach. Rather than hold an election to select delegates to a constitutional convention, it would offer the former candidates the opportunity as a broader based *organizing* group to direct the path forward. *See* Termination Press Release. NA did not count ballots or certify winners of the election, and announced that it will never do so. Also on December 15, 2015, NA informed all of the 196 candidates of the election's termination, and announced that all of the candidates who stood for election would be invited to attend an ‘aha to be convened in February 2016. *See* Termination Press Release. On January 5, 2016, NA announced that 154 invitees

confirmed their intent to participate in the ʻaha.[2] *See* Naʻi Aupuni, *Naʻi Aupuni List of 154 Participants for February ʻAha, available at* www.naiaupuni.org/docs/NaiAupuniListOf154Participants-010616.pdf (Jan. 5, 2016).

In an attempt to halt the ʻaha from moving forward—relief that was never specifically sought in any court prior to then—Appellants filed a Motion for Civil Contempt with the Supreme Court on December 22, 2015. Appellants argued that the termination of the election and inviting all delegates to participate in an ʻaha violated the Supreme Court's order barring the counting of ballots or certification of the election results. The Supreme Court unanimously rejected Appellants arguments on January 19, 2016. *See* Supreme Court Order, No. 15A551, (U.S. Jan. 19, 2016). Appellants have not subsequently sought an order from the district court to enjoin the ʻaha from starting on February 1, 2016.

The ʻaha began on February 1, 2016.

V. SUMMARY OF ARGUMENT

The premise of Appellants' Injunction Motion, Urgent Motion, and Emergency Application were to halt either NA's election of delegates in its entirety or to prevent the certification of winners from NA's election. Because NA terminated its election, this Court cannot grant Appellants any relief sought, and,

[2] ʻAha is defined as a "meeting, assembly, gathering, convention, court, party." Ulukau Hawaiian Dictionary, *available at* http://wehewehe.org.

therefore, this appeal is moot. The claims asserted in the instant appeal do not fall under the "capable of repetition, yet evading review" exception to the mootness doctrine because the controversy here is not of "inherently limited duration" and there is no evidence that Appellants would be subjected to the same action in the future.

In the event that this Court determines that the appeal is not moot, the district court did not abuse its discretion in denying Appellants' Injunction Motion inasmuch as the election that NA conducted was a private election that, as the district court correctly found, did not amount to state action. Appellants also have not shown that the district court erred in concluding that Appellants would not suffer irreparable harm, and that the balance of interests and public interest tip in favor of Appellees.

VI. STANDARDS OF REVIEW

"Mootness is a jurisdictional issue, and federal courts have no jurisdiction to hear a case that is moot, that is, where no actual or live controversy exists. If there is no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction." *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (quotation marks and citations omitted).

A district court's decision regarding preliminary injunctive relief is subject to limited review. *See Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d

989, 993-94 (9th Cir. 2011). The district court should be reversed only if it abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See FTC v. Enforma Natural Products*, 362 F.3d 1204, 1211-12 (9th Cir. 2004).

VII. ARGUMENT

A. This Appeal is Moot As the Court Cannot Grant Any Effectual Relief

A federal court may not "give opinions upon moot questions or abstract propositions, or . . . declare principles or rules of law which cannot affect the matter in the issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). "For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Id.* (quoting *Mills*, 159 U.S. at 653). In this matter, events subsequent to the filing of the appeal have rendered the appeal moot as the issues presented are no longer live and the parties lack a legally cognizable interest in the outcome. *See Murphy v. Hunt*, 455 U.S. 478 (1982); *Protectmarriage.com v. Bowen* ("*Bowen*"), 752 F.3d 827, 836 (9th Cir. 2014) ("A federal court loses its jurisdiction to reach the merits of a claim when the court can no longer effectively remedy a present controversy between the parties." (citation omitted)).

On December 15, 2015, NA abandoned its election of delegates that was the crux of Appellants' Injunction Motion. Indeed, in filing their Injunction Motion, Appellants sought an order preventing Appellees "from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians, as explained in [Appellants'] Complaint." NA Supp. ER 125.

To be clear, Appellants never sought from the district court an injunction to stop NA's convention or an 'aha from occurring. Instead, Appellants premised their entire lawsuit on the alleged violation of federal elections law and precedent—all of which are wholly inapposite since NA abandoned its private election.[3] This Court, therefore, cannot reverse the district court and enjoin an election that will never occur.

Appellants instead try to salvage their appeal by bootstrapping relief that was not sought below, specifically, enjoining NA from "sending as delegates to any convention any individual selected based on his or her status as a delegate candidate" and "otherwise relying on the [NHRC's] Roll to select delegates for the convention." Notably, the new injunctive relief Appellants seek is impermissible because the record is devoid of any legal basis to support it. The premise of the

[3] Significantly, Appellants raised the issue of halting NA's 'aha for the first time through their Motion for Civil Contempt with the Supreme Court. Motion for Civil Contempt, No. 15A551 (U.S. Dec. 22, 2015). The Supreme Court unanimously denied the Contempt Motion, thereby signaling its disapproval of Appellants' flawed strategy of seeking a new injunction from an appellate court. Supreme Court Order, No. 15A551, (U.S. Jan. 19, 2016).

newly-requested injunction necessarily is that Appellants claim a right to participate in the February 2016 gathering of invited participants, as distinguished from an election. But Appellants' legal arguments in support of their various injunction motions before the district court, this Court, and the Supreme Court focused almost entirely on a claimed right to vote under the Fourteenth and Fifteenth Amendments. Appellants did not cite, and still do not cite, any legal support for the new underlying premise, that they are entitled as a matter of law to participate in some way in any convention or other gathering that NA has convened without an election of delegates. Consequently, not only are the legal questions not properly before this Court because they have not been argued or decided below, there is a complete absence of legal support to justify this new injunctive relief. *See Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998) ("We apply a 'general rule' against entertaining arguments on appeal that were not presented or developed before the district court." (citation omitted)).

Moreover, Appellants' bootstrapped request for injunctive relief—to prevent the 'aha from occurring without their participation or input—rests on the implicit theory that Appellants have some enforceable right to participate, but Appellants have not stated the basis of any such right, and without such a right, the injunction they now seek would raise significant concerns under the Constitution's First Amendment, specifically related to NA's rights of association. The Supreme Court

has recognized that private expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980)); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("Implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

In connection with that private expressive activity, NA also has the right to choose whom to invite to participate in that discourse. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.") (citation omitted). Indeed, "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 622; *see also Affordable Housing Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1198 (9th Cir. 2006) (concluding that the exercise of First Amendment rights in pursuit of a political objective, including freedom of speech and freedom of association, "is not deprived of protection if the exercise is not politically correct and even if it is discriminatory against others"). Appellants have asserted no legal basis for their demand to participate in the 'aha, and none exists.

Appellants' only statement regarding mootness is that their claims are not moot "because they are capable of repetition while evading review." Appellants' Br. 44 n.16 (citation omitted). Appellants' scant argument, however, is misplaced. Under the "capable of repetition, yet evading review" exception to the mootness doctrine, a court will decline to dismiss an otherwise moot action if it finds: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Bowen*, 752 F.3d at 836. Notably, this exception is to be applied "sparingly, and only in 'exceptional situations.'" *Id.*

As to the first prong, "[f]or a controversy to be too short to be fully litigated . . . it must be of *inherently* limited duration . . . because the 'capable of repetition, yet evading review' exception is concerned not with particular lawsuits, but with classes of cases that, absent an exception, would *always* evade judicial review. *Id.* (citation omitted) (emphases in original). This is not a controversy that will "present a live action until a particular date," *see id.*, such as an abortion case, in which, regardless of any injunction that might issue, the dispute will cease once a woman's pregnancy ends. Here, and assuming arguendo that a future election is similar to NA's cancelled election, there would be sufficient time to resolve the dispute prior to an election occurring. Indeed, Appellants were able to obtain

review at all levels of the federal judicial system within a span of four months. Appellants, therefore, cannot satisfy the first prong of the exception. *See id.* at 837 ("Controversies that are not of 'inherently limited duration' do not create 'exceptional situations' justifying the rule's application, because, even if a particular controversy evades review, there is no risk that future repetitions of the controversy will necessarily evade review as well.").

As to the second prong, there is no reasonable expectation that Appellants will be subject to the same challenged activity. Here, there is no evidence that NA would be conducting another private election for delegates in the future. To the contrary, NA has cancelled its election and invited all the candidates for delegates to an 'aha that is currently underway. There is nothing to suggest that NA will now cancel the 'aha and revert to an election to hold yet another 'aha. In addition, there is no evidence that Appellants would be "subjected to the same action" in part because NA's independence allowed it, much like any other private organization, to make its own decisions on who can and cannot participate in its activities. As the Court has made clear, actions seeking to enjoin future conduct "become moot if the challenged conduct *actually occurs* and causes an injury that cannot be reversed." *Id.* (emphasis added). There is no evidence that an election of delegates will "actually occur[]."

Therefore, the "capable of repetition, yet evading review" exception to the mootness doctrine is not applicable, this appeal is moot, and this Court should dismiss the appeal.

B. The District Court Did Not Err in Concluding that Appellants Were Not Likely to Succeed on the Merits of Their Claims

Assuming that Appellants can overcome the significant mootness issue of their appeal, the district court, nevertheless, did not abuse its discretion in denying the Injunction Motion. A preliminary injunction is an extraordinary remedy and Appellants have the burden to prove by clear and convincing evidence that they are entitled to such relief. *See Winter* v. *Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). To obtain injunctive relief here, Appellants must demonstrate: (1) a likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest. *Id.* at 20. In order to show that they will succeed on the merits of the appeal of a motion for preliminary injunction, Appellants must show that the district court abused its discretion. A district court abuses its discretion when it does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. *See Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011); *Kode v. Carlson*, 596 F.3d 608, 612-13 (9th Cir. 2010) (per curiam) (requiring an appellate court to uphold a court determination that falls within a broad range of permissible conclusions). In this case, Appellants cannot

show that the district court abused its discretion because the district court did not err in concluding that Appellants cannot show a likelihood of success on the merits.

1. The District Court Did Not Clearly Err in Concluding that NA was Not Performing a Public Function

In their Opening Brief, Appellants take issue with the district court's determination that NA, for purposes of the Fourteenth and Fifteenth Amendments and Voting Rights Act, was conducting a private election.[4] However, as explained below, the district court did not clearly err in concluding that NA was not performing a public function because NA was not carrying out a function that was "traditionally the *exclusive* prerogative of the State," *see Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982), inasmuch as elections are regularly held by non-governmental entities. Indeed, it is well established that not all elections fall under the public function doctrine: "The doctrine does not reach to all forms of private political activity, but *encompasses only state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of*

[4] Appellants make this argument in attempting to show that NA is engaged in state action, but as the district court held, the fact that the NA election was a private election was an independent and dispositive reason for finding that the Fifteenth Amendment does not apply here. *See Terry v. Adams*, 345 U.S. 461, 467 (1953) (holding that the Fifteenth Amendment only precludes "discriminat[ion] against . . . voters in elections to determine public governmental policies or to select public officials, national, state, or local."). Appellants completely ignore this fatal flaw in their position.

public officials.'" *Flaggs Bros, Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (emphasis added and citations omitted); Exh. 1 at 42.[5]

First, the cancelled election was not a state-regulated election inasmuch as it was not subject to Hawai'i's election laws and is not being conducted by Hawai'i's Election Office, *see* HRS chapter 11; ER 40-41. Second, the cancelled election was not an election of public officials. As Appellants readily admitted, ". . . 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." Dkt. Entry No. 9 at 20. NA was simply pursuing Native Hawaiians' inherent right to self-determination without control by OHA and NHRC. Thus, because NA was not performing an exclusive state function, it was not a state actor. *See Johnson v. Knowles*, 113 F.3d 1114, 1118-19 (9th Cir. 1997); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 572-73 (2000).

Appellants' reliance on *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015), finding article III standing for plaintiffs excluded from a natives-only plebiscite, is misplaced. *Davis* speaks only to the question of when certain facts may satisfy the irreducible minimum "injury in fact" sufficient for standing. *Id.* at 1315. *Davis* says nothing about when such injury qualifies as substantial harm for preliminary

[5] Appellants misleadingly quote *Flagg Bros.* without referencing the above-quoted language, despite it being raised below and used by the district court in its analysis *denying* the Motion. *See, e.g.*, NA Supp. ER 98; NA Supp. ER 34; ER 45.

injunction purposes. Indeed, the *Davis* majority specifically declined to address the merits of the allegations and acknowledged that on the facts in that case there may have been no "tangible consequences" at all. *Id.* at 1315-16. *Davis* is also factually distinguishable. For example, unlike the cancelled election, the proposed plebiscite in *Davis* was created "[p]ursuant to a law passed by the Guam legislature[.]" *Id.* at 1313. In addition, noticeably absent from Appellants' discussion of *Davis*, was the fact that the majority relied in part on Guam's law requiring the plebiscite results be transmitted "to the President, Congress and the United Nations," *id.*, thereby increasing the plebiscite's impact on the relationship with the United States. Here, unlike in *Davis*, it is clear that the result of the gathering would *not* affect the current relationship between the Native Hawaiians and the federal and State governments. The resultant NHGE, if one is even created, would have no legal status unless and until the State and/or federal governments recognized it. *See* NA Supp. ER 113; NA Supp. ER 18; ER 121-40 (detailing the additional steps needed for federal recognition).[6] For this same reason, Appellants' reference to the Interior Department's NPRM and argument that the NA process will "be the ball game" is without merit. Clearly, the NPRM

[6] Appellants even acknowledge the uncertainty of the results of the now terminated election and convention. *See* Dkt. Entry No. 9 at 14-15 (acknowledging that the delegates "may" draft documents at the convention, that the delegates' decisions "could" affect all citizens, and that Native Hawaiians "might" become a separate political entity).

emphasizes additional steps need to be taken before a NHGE would be recognized. *See* ER 121-40. Accordingly, the district court did not clearly err in concluding that NA was *not* performing a public function.

2. The District Court Did Not Clearly Err in Concluding that NA is Not Engaged in Joint Action

Because NA's control over its election, including setting voter and delegate eligibility criteria, was NA's alone, without any control by NHRC or OHA, and because the decision by NA to enter into a Grant Agreement with OHA and to use NHRC's roll were NA's independent decisions, *see* ER 194 at ¶ 13, ER 196-97 at ¶ 19, ER 198-99 at ¶ 25; Dkt. Entry No. 9-20 at 41-42, NA, under the joint action test, was plainly not a state actor with respect to the election. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012).

Nevertheless, Appellants have tenuously pulled various allegations—and some outright falsehoods—to create their own narrative of NA and NA's private and now-cancelled election process. However, the district court properly sifted through these allegations, rejected them based upon a deferential credibility determination, and, did not clearly err in the conclusion that NA was not engaged in joint action.

First, with regard to the allegation that NA was formed in response to the passage of Act 195, the district court found credible the testimony of Dr. Asam, President of NA, who testified that NA was not "driven by Act 195 at all." ER 21-

22. Aside from their mere conclusory arguments, Appellants provide no evidence to the contrary.

Second, that NA's Bylaws reference the actions taken by OHA to allocate funds for the purpose of enabling Native Hawaiians to participate in self-governance says nothing as to OHA's control over NA's decisions in conducting its own election. Again, the district court found credible Dr. Asam and his testimony that NA acted independently: "We have maintained our autonomy and independence when it comes to decision-making. It's the responsibility of the directors to make those decisions." Dkt. Entry No. 9-20 at 50.

Third, OHA was never a member of NA. Indeed, section 1.3 of NA's Bylaws make clear that "six individuals" formed and led NA. ER 174. Furthermore, the Bylaws make no provision for "ex-officio" members of NA.[7] *See*

[7] Appellants continue to purposefully conflate NA with a "consortium" that was described in OHA's minutes even though NA's counsel clarified this point during oral argument. *See* Dkt. Entry No. 9-20 at 83-85. The evidence shows that OHA was *not* an ex-officio member and never controlled the decisions of NA. *See* ER 171 at ¶ 22; Dkt. Entry No. 9-20 at 50. Indeed, at a January 8, 2015 meeting, OHA's corporate counsel, Ernest Kimoto, advised OHA's Board that "they must be very careful and not step over the line by directing [NA] to do or desist from certain activities. They will have total discretion on how they will manage their task, as will be sounded in their contract." ER 158. The Grant Agreement, which was signed in April 2015 by Dr. Crabbe and Mr. Kimoto on behalf of OHA, sets forth in the autonomy clause that OHA would not "control or affect the decisions of NA" and that NA agreed that its decisions would not be "controlled or affected by OHA." ER 207, 209-10. Thus, after being told in early 2015 not to control NA, OHA entered into the Grant Agreement that expressly prohibited control over NA. Appellants, despite having both Dr. Crabbe and Dr. Asam to cross-examine at

ER 174-81. Again, there is no evidence that OHA was a member of NA.

Fourth, while it is true that NA's vice-president is married to the CEO of NHRC, Appellants fail to explain the relevance of this fact. There is absolutely no evidence that said marriage had an effect on NA's independence. To the contrary, Dr. Asam, who the court determined to be credible, testified that NA and its directors had the "responsibility, kuleana" to make their *own* decisions. *See* Dkt. Entry No. 9-20 at 50.

Fifth, the issue of OHA's funding is, as Appellants admitted, a "red herring." Dkt. Entry No. 9-20 at 126-27 ("[I]t's not public action because it's public[ly] funded. Defendants amply demonstrate that that's not the test. We never said it was the test, we never will say it's the test."). Such an admission is, as the district court concluded, *see* ER 46-47, consistent with established law. *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 544 (1987); *Rendell-Baker*, 457 U.S. at 832 (concluding that there was no relevant state action by a private school where public funds accounted for at least ninety percent of the budget).

Finally, Appellants argue that the "autonomy clause" is a "sham" because NA had already informed OHA of its decision to use the NHRC's list prior to entering the Grant Agreement. Appellants' Br. 34. But, as the district court found,

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the hearing, have provided no evidence to show that OHA was an ex-officio member of NA.

NA decided on its own to use NHRC's list prior to entering the Grant Agreement. ER 20-21 (citing ER 171 at ¶ 20; ER 194 at ¶ 13). Dr. Asam detailed why NA chose to use NHRC's list, including because of its methodology, it was verifiable, it was comprehensive, it was compiled by a staff that had funding, and it was well known in the community. *See* Dkt. Entry No. 9-20 at 46. Dr. Asam also emphasized that OHA had no say in NA's determination to use NHRC's list. *See* Dkt. Entry No. 9-20 at 50:4-10. Appellants' arguments are without merit. They have, thus, not come close to showing that the district court clearly erred in determining that there was no joint action.

3. The District Court Properly Concluded that Countervailing Reasons Counsel Against Finding State Action

In this case, the district court properly concluded that there were countervailing reasons against finding NA to be a state actor. ER 48-50 (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001) (acknowledging an exception to state action for "unique circumstances" that raise "some countervailing reasons against attributing activity to the government")). First, NA's February 2016 gathering is a process whereby Native Hawaiians are pursuing their inherent right to self-determination and should not be considered state action inasmuch as the potential outcome of the process is the creation of a sovereign entity, *separate and distinct* from the State. *See Polk Cnty. v. Dodson*, 454 U.S. 312, 320-21 (1981) (finding countervailing reasons to

conclude that a government-paid public defender was not a state actor). Moreover, and as the district court found, another countervailing reason against finding state action here is that NA is engaging in its protected first amendment right of association, activity that is inherently private and *not* state action. *See* ER 49-50; *Single Moms, Inc. v. Mont. Power Co.*, 331 F.3d 743, 748-49 (9th Cir. 2003) (holding that first amendment action is a countervailing reason against finding state action); *Dale*, 530 U.S. at 648 ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.") (citation omitted); *see also* NA Supp. ER 102-07.

4. The Restriction on Voting to Native Hawaiians is Narrowly Tailored to Meet the State's Compelling Interest in Facilitating the Organizing of the Indigenous Native Hawaiian Community

Even if Appellants can show that the district court clearly erred in determining that NA was not a state actor, which they cannot, Appellants still cannot show a likelihood of success on the merits because the court correctly determined that the State has a compelling interest in facilitating the organizing of the indigenous Native Hawaiian community so it can decide for itself, independently, whether to seek self-governance or self-determination.[8]

[8] For all the reasons set forth in NA's briefing below and in the State's Answering Brief, which is incorporated by reference hereto, NA believes that the *Mancari* doctrine applies to Native Hawaiians and allows the minimal State

Significantly, Appellants do not specifically challenge the district court's detailed rationale for finding that the restriction on voters to Native Hawaiians satisfied strict scrutiny. *See* ER 53-58. Instead, Appellants argue that the election was not narrowly tailored because the voting restrictions (1) "pre-screen" registrants for their political views, and (2) are inconsistent with Justice Breyer's concurrence in *Rice*. Appellants' Br. 40-41. Appellant's arguments, however, are without merit as they again misconstrue the facts.

Appellants' pre-screening argument is belied by the facts. The NHRC list also includes, since passage of Act 77 in 2013, those Native Hawaiians whose names were transferred from OHA's various registration efforts. ER 168 at ¶¶ 9-12. OHA's registration processes did not require an attestation to Declaration One. ER 168 at ¶ 9. Thus, there was a viable alternative for Native Hawaiians who disagreed with Declaration One to register for the process.

As to Appellants' second point, the NHRC list is restricted to Native Hawaiians, regardless of blood quantum, who *also* "maintain[] a significant cultural, social, or civic connection to the Native Hawaiian community and wish[] to participate in the organization of the Native Hawaiian governing entity." HRS § 10H-3(a)(2)(B). This restriction is distinct from the "one drop of blood" rule that concerned Justice Breyer. The compelling interest of limiting the electorate to

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involvement here. NA Supp. ER 107-11.

Native Hawaiians (regardless of blood quantum) is to facilitate reorganization of that specific community, which both the federal and State governments have repeatedly engaged.[9] While Appellants consider the "one drop of blood" rule "utterly arbitrary[,]" both the federal and State governments have time and again acknowledged, reaffirmed, and codified their support of programs that benefit Native Hawaiians—regardless of blood quantum. *See supra* note 9.

Moreover, the inclusion of non-Natives in this election, as Appellants suggest, would render meaningless an election for Native Hawaiian *self*-determination. ER 58 ("Purport[ing] 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."). Because Appellants claims are without merit, they have failed to show that the district court clearly erred in determining that the election satisfied strict scrutiny, even if it constituted state action.

5. The District Court Did Not Err in Concluding that Appellants Were Not Likely to Succeed on Their First Amendment Claims

Appellants also challenge the district court's conclusion that they were not

[9] *See* 42 U.S.C. § 11701(17); Pub. L. No. 108-199, Division H, § 148, 118 Stat. 445; 20 U.S.C. § 7512(12)(B); Pub. L. No. 106-569, 114 Stat. 2968-69 (2000); *see also Doe v. Kamehameha Schools Bernice Pauahi Bishop Estate*, 470 F.3d 827, 850 (9th Cir. 2006) (Fletcher, J. concurrence) (". . . Native Hawaiians constitute a unique population that has a special trust relationship with the United States. Congress has repeatedly affirmed, acknowledged, reaffirmed, and recognized that relationship." (quotation marks and citations omitted)).

likely to succeed on the merits of their First Amendment claims. First, Appellants appear to take issue with the district court's credibility determination and factual finding that "[f]rom the record as a whole, it certainly appears that if Akina and Makekau truly wanted to participate in [NA's] process they could have easily done so, but they chose not to." *See* ER 60. The district court, however, did not clearly err in determining that Appellants Akina and Makekau could have participated, but chose not to do so because there were newspaper publications informing the community about the ability to register in the process through the OHA Hawaiian Registry, s*ee* ER 196-97 at ¶19; ER 199-200 at ¶ 26. *See Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014) ("Clear error results from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." (quotation marks and citation omitted)). Furthermore, and as discussed *supra*, the district court properly concluded that Appellants Akina's and Makekau's claims were nevertheless without merit because NA's election was a private election.

Second, the district court did not clearly err in concluding that Appellants Gapero and Moniz were not likely to succeed on the merits of their First Amendment claims relating to compelled speech. As the district court aptly concluded, "[m]erely being on the Roll does not compel a statement as to sovereignty[,]" and the Roll is not a voter registration list. ER 61. In addition, the

district court's finding that Appellants Gapero and Moniz could have removed themselves from the Roll, but chose not to, was not illogical or inconsistent with the record. Indeed, the record shows that both Gapero and Moniz were included on a mailing list in which, on three separate occasions, they were notified that their names would be transferred to NHRC pursuant to Act 77. ER 168 at ¶ 12. Furthermore, the record shows that the OHA registrants were informed of their right to complete and submit an opt-out form. ER 169 at ¶¶ 13-14. Accordingly, the district court did not err in concluding that Appellants were not likely to succeed on the merits of the claims.

C. Appellants Cannot Demonstrate Irreparable Harm and Cannot Show that the Balance of Equities and Public Interest Tip in Their Favor

Given that NA has cancelled its private election, review of the district court's conclusion that Appellants did not satisfy the remaining three requirements for a preliminary injunction is purely academic and belies the current status of the dispute. By cancelling the election, Appellants have no election to participate in, are not being denied a right to vote, and therefore have no injury. Relatedly, because the election has been cancelled, there are no equities to balance and no public interest to consider. Thus, reviewing the district court's determination regarding irreparable harm, balancing of equities, and public interest, in the narrow context of an injunction—based on a now cancelled election—is an exercise in frivolity.

Nevertheless, Appellants argue that they will suffer irreparable harm solely because they are not allowed to participate in NA's "registration/election/ convention referendum process under Act 195." Appellants' Br. 51. In other words, and regardless of the vast expansion of the relief sought below,[10] Appellants would have this Court believe that finding a constitutional violation in and of itself automatically triggers a finding of irreparable harm. Such an argument is legally flawed because the Court must still independently assess whether irreparable injury is likely to occur. *See Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466 (9th Cir. 1984) (denying a preliminary injunction in part on a failure to prove irreparable injury); *see also Herb Reed Enters., LLC v. Fla. Enter. Mgm't, Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013) (holding that a presumption of irreparable injury from a satisfaction of the likelihood of success impermissibly "collapses the likelihood of success and the irreparable harm factors").

As the district court correctly determined, "[Appellants] are not being deprived of a right to vote in a public election[,]" ER 63, and, as the election has been recently terminated, can, therefore, show *no* irreparable harm. *See Winter*, 555 U.S. at 22 ("A preliminary injunction will not be issues simply to prevent the possibility of some remote future injury." (citation and quotation marks omitted)).

[10] Again, it is important to highlight that Appellants have bootstrapped new relief on appeal. Instead of merely seeking to stop the election of delegates, Appellants are now seeking to stop NA's "registration/election/convention/ referendum process[.]"

Moreover, Appellants' failure to challenge the 'aha in the district court negates any claim that the 'aha, absent any election process, irreparably harms them.

Significantly, NA and the Native Hawaiian people would suffer immeasurable and irreparable harm were this Court to issue an injunction outside the scope of the relief sought below and enjoin NA from conducting any of its activities. For an injunction would obviously prevent, or—at minimum—delay, their ability to achieve a measure of self-governance. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001) (noting that the "prospect of significant interference with [tribal] self-government" is "irreparable injury"). Such delay in achieving self-governance is irreparable, as no future ability to self-govern can make up for the loss of self-governance in the interim period.

As to the balance of equities, enjoining NA from conducting its 'aha would infringe on NA's First Amendment right to invite whomever it wishes to participate in its private gathering, *see Roberts*, 468 U.S. at 622 ("Implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). Enjoining NA's 'aha would also infringe on NA's First Amendment right to exclude people from its association, *see Dale*, 530 U.S. at 648 ("The forced inclusion of an unwanted

person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

Moreover, Appellants have not—still to this day—sought an injunction of the 'aha in the district court or in a new lawsuit. Appellants' tactical decisions and failure to take appropriate action below should not be rewarded. Indeed, Appellants have known from the inception of its litigation that a gathering or convention would commence after the election of delegates. Thus, the equities tip sharply in favor of Appellees.

An injunction of the 'aha would also not be in the public interest. As the district court concluded, there is public interest in fostering discussions on self-determination. ER 63; *see Prairie Band*, 253 F.3d at 1253 (holding that "tribal self-government" is "matter of public interest"). In addition, the public interest in allowing Hawai'i's indigenous people to pursue their inherent right to self-determination is greater than non-Hawaiian Appellants' interest in participating in a Native Hawaiian *self*-governance process where Congress, in the Apology Resolution § 1 (1) and (2), acknowledged "the suppression of the inherent sovereignty of the Native Hawaiian people" and "commended the efforts of reconciliation initiated by the State of Hawaii," and the Interior Department recently proposed an administrative rule that acknowledged this past history and

the importance of a roadmap for potential recognition, *see* ER 121-40, and encouraged the reorganization of a NHGE.

VIII. CONCLUSION

For the foregoing reasons, this Court should dismiss the instant appeal or, in the alternative, affirm the judgment.

Dated: February 5, 2016

Respectfully submitted,

/s/ DAVID J. MINKIN

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STATEMENT OF RELATED CASES

Pursuant to Circuit Court Rule 28-2.6, Defendants-Appellees Na‘i Aupuni and The Akamai Foundation state that they are unaware of any related cases pending before this Court.

Dated: February 5, 2016

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(B), that the attached Answering Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 8,471 words.

Dated: February 5, 2016

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CERTIFICATE OF SERVICE

I hereby certify that the attached ***Answering Brief and Addendum of Defendants-Appellees Na‘i Aupuni and The Akamai Foundation*** was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 5, 2016.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: February 5, 2016

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No. 15-17134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELI‘I AKINA, ET AL.,
Plaintiffs-Appellants,

v.

THE STATE OF HAWAI‘I, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Hawai‘i
Honorable J. Michael Seabright, United States District Judge
(Civil No. 15-00322 JMS-BMK)

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TABLE OF CONTENTS

Haw. Rev. Stat. § 10H-3. Native Hawaiian roll commission.

(a) There is established a five-member Native Hawaiian roll commission within the office of Hawaiian affairs for administrative purposes only. The Native Hawaiian roll commission shall be responsible for:

(1) Preparing and maintaining a roll of qualified Native Hawaiians;

(2) Certifying that the individuals on the roll of qualified Native Hawaiians meet the definition of qualified Native Hawaiians. For purposes of establishing the roll, a "qualified Native Hawaiian" means an individual whom the commission determines has satisfied the following criteria and who makes a written statement certifying that the individual:

(A) Is:

(i) An individual who is 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;

(ii) An individual who is one of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that individual; or

(iii) An individual who meets the ancestry requirements of Kamehameha Schools or of any Hawaiian registry program of the office of Hawaiian affairs;

(B) Has maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity; and

(C) Is eighteen years of age or older;

(3) Receiving and maintaining documents that verify ancestry; cultural, social, or civic connection to the Native Hawaiian community; and age from individuals seeking to be included in the roll of qualified Native Hawaiians. Notwithstanding any other law to the contrary, these verification documents shall be confidential; and

(4) Notwithstanding any other law to the contrary, including in the roll of qualified Native Hawaiians all individuals already registered with the State as verified Hawaiians or Native Hawaiians through the office of Hawaiian affairs as demonstrated by the production of relevant office of Hawaiian affairs

records, and extending to those individuals all rights and recognitions conferred upon other members of the roll.

(b) No later than one hundred eighty days after [July 6, 2011], the governor shall appoint the members of the Native Hawaiian roll commission from nominations submitted by qualified Native Hawaiians and qualified Native Hawaiian membership organizations. For the purposes of this subsection, a qualified Native Hawaiian membership organization includes an organization that, on [July 6, 2011], has been in existence for at least ten years, and whose purpose has been and is the betterment of the conditions of the Native Hawaiian people. In selecting the five members from nominations submitted by qualified Native Hawaiians and qualified Native Hawaiian membership organizations, the governor shall appoint the members as follows:

(1) One member shall reside in the county of Hawaii;

(2) One member shall reside in the city and county of Honolulu;

(3) One member shall reside in the county of Kauai;

(4) One member shall reside in the county of Maui; and

(5) One member shall serve at-large.

(c) A vacancy on the commission shall not affect the powers of the commission and shall be filled in the same manner as the original appointment.

(d) Members of the commission shall serve without compensation but shall be allowed travel expenses, including per diem in lieu of subsistence while away from their homes or regular places of business in the performance of services for the commission.

(e) The commission, without regard to chapter 76, may appoint and terminate an executive director and other additional personnel as are necessary to enable the commission to perform the duties of the commission.

(f) The commission may fix the compensation of the executive director and other commission personnel.

(g) The commission may procure temporary and intermittent services.

20 U.S.C. § 7512(12)(B). Findings.

Congress finds the following: . . . The United States has recognized and reaffirmed that . . . Congress 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[.]

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

28 U.S.C. § 1331. Federal question.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343. Civil rights and elective franchise.

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 11701(17). Findings.

The Congress finds that . . . The authority of the Congress under the United States Constitution 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.

52 U.S.C. § 10101(d). Voting rights.

Jurisdiction; exhaustion of other remedies. The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

Pub. L. No. 106-569, §§ 512(13)-(14), 114 Stat. 2968-69.

The Congress finds that . . .

(13) the United States has recognized and reaffirmed that--

(A) Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands;

(B) Congress 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;

(C) Congress has also delegated broad authority to administer a portion of the Federal trust responsibility to the State of Hawaii;

(D) the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives; and

(E) the aboriginal, indigenous people of the United States have--

(i) a continuing right to autonomy in their internal affairs; and

(ii) an ongoing right of self-determination and self-governance that has never been extinguished;

(14) the political relationship between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States as evidenced by the inclusion of Native Hawaiians in--

(A) the Native American Programs Act of 1974 (42 U.S.C. 2291 et seq.);

(B) the American Indian Religious Freedom Act (42 U.S.C. 1996 et seq.);

(C) the National Museum of the American Indian Act (20 U.S.C. 80q et seq.);

(D) the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.);

(E) the National Historic Preservation Act (16 U.S.C. 470 et seq.);

(F) the Native American Languages Act of 1992 (106 Stat. 3434);

(G) the American Indian, Alaska Native and Native Hawaiian Culture and Arts Development Act (20 U.S.C. 4401 et seq.);

(H) the Job Training Partnership Act (29 U.S.C. 1501 et seq.); and

(I) the Older Americans Act of 1965 (42 U.S.C. 3001 et seq.)[.]

Pub. L. No. 108-199, Division H, § 148, 118 Stat. 445. United States Office for Native Hawaiian relations.

(a) Establishment. The sum of $ 100,000 is appropriated, to remain available until expended, for the establishment of the Office of Native Hawaiian Relations within the Office of the Secretary of the Interior.

(b) Duties. The Office shall—

(1) effectuate and implement the special legal relationship between the Native Hawaiian people and the United States;

(2) continue the process of reconciliation with the Native Hawaiian people; and

(3) fully integrate the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people by assuring timely notification of and prior consultation with the Native Hawaiian people before any Federal agency takes any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands.