IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-17134

KELI'I AKINA, *et al.*,
Appellants,
v.

THE STATE OF HAWAII, *et al.*,
Appellees.

APPELLANTS' OPENING BRIEF ON APPEAL

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

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

LAW OFFICES OF H. CHRISTOPHER COATES
H. CHRISTOPHER COATES
934 Compass Point
Charleston, South Carolina 29412
Telephone: (843) 609-7080
Email: curriecoates@gmail.com

JUDICIAL WATCH, INC.
ROBERT D. POPPER
PAUL J. ORFANEDES
LAUREN M. BURKE
CHRIS FEDELI
425 Third Street, SW
Washington, DC 20024
Telephone: (202) 646-5172
Facsimile: (202) 646-5199
Email: rpopper@judicialwatch.org

Attorneys for Appellants

January 6, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS

STATE STATUTES AND CONSTITUTIONAL PROVISIONS

INTRODUCTION

Appellants ask this Court to enjoin an unconstitutional, racially-discriminatory state-sponsored electoral process currently taking place in Hawaii. Appellee Na'i Aupuni, acting in concert with the State of Hawaii, is in the process of conducting an election using a registration roll (the "Roll") prepared by two state agencies, Appellees the Office of Hawaiian Affairs ("OHA") and the Native Hawaiian Roll Commission. The Roll was prepared by these state agencies pursuant to the explicit direction of Act 195, a Hawaii state law passed in 2011. That statute provides that no one could register for the Roll who was not a "qualified Native Hawaiian," which is defined in relevant part as "a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitutes the State of Hawaii." HAW. REV. STAT. § 10H-3(a)(2)(A).

In other words, registration for the Roll was restricted by race. Appellee Na'i Aupuni has begun using that Roll to select delegates to a planned convention, the stated purpose of which is to determine the future relationship of a proposed Native Hawaiian entity to the governments of Hawaii and of the United States. ER 242, ¶ 14(f). Appellees have characterized that election as involving the public interest and as "historic." ER 112, 118.

The district court denied Appellants' request for an injunction, relying

primarily on a finding that Na'i Aupuni is a private entity conducting its own private business. The district court made this finding notwithstanding an abundance of evidence showing that Na'i Aupuni – which was formed at the suggestion of agents of OHA in order to insulate it from a lawsuit like this one – was conducting a public electoral process in collaboration with OHA, pursuant to contracts with OHA, while in receipt of millions of dollars of public funds from OHA, regarding a statutory mandate that applies to OHA.

Governing Supreme Court law does not tolerate electoral subterfuges like the one Na'i Aupuni and OHA are perpetrating right now. Appellants respectfully request that this Court reverse the district court's denial of preliminary injunction, and remand with instructions to issue a preliminary injunction, pending the outcome of this case, enjoining Appellees (1) from sending as delegates to any convention any individual selected based on his or her status as a delegate candidate, and (2) otherwise relying on the Native Hawaiian Roll Commission's Roll to select delegates for the convention.

JURISDICTIONAL STATEMENT

Appellants Keli'i Akina, Kealii Makekau, Joseph Kent, Yoshimasa Sean Mitsui, Pedro Kana'e Gapero, and Melissa Leina'ala Moniz ("Appellants") have

brought suit and seek to enjoin Appellees[1] from violating their rights under the First, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, under Section 2 of the Voting Rights Act of 1965, and under the Civil Rights Act of 1871.

The U.S. District Court for Hawaii ("the District Court") had jurisdiction over the matter pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 52 U.S.C. § 10101(d). On October 23, 2015, the district court issued an oral order denying Appellants' motion for a preliminary injunction. ER 68. Appellants filed a timely notice of appeal from the order on October 26, 2015. ER 104. This Court has jurisdiction pursuant to 28 U.S.C. § 1292. This Court is the proper venue because the order was issued in Hawaii. 28 U.S.C. § 1294(1).

STATEMENT OF THE ISSUES

1. Can the State of Hawaii and OHA use their governmental authority to provide the means and methods for administering a race-based electoral process through an allegedly private non-profit, Na'i Aupuni, which was organized just for that purpose?

[1] Appellees who are trustees and executives of the Office of Hawaiian Affairs are referred to herein as "OHA." Appellees the State of Hawaii, the Governor of Hawaii, and the commissioners and executives of the Native Hawaiian Roll Commission are referred to as "State Appellees." Appellees Na'i Aupuni and the Akamai Foundation are referred to herein as "Na'i Aupuni." Individual appellees are otherwise referred to by name.

2. Nai Aupuni has excluded from an electoral process voters and candidates who do not meet an ancestral blood standard for "Native Hawaiians" described in Hawaii law. Does the race-based restriction in that law violate the Fifteenth and Fourteenth Amendments to the U.S. Constitution, as well as Section 2 of the Voting Rights Act of 1965?

3. Participation in the election process is restricted (1) to those individuals willing to affirm a political statement written by state agents, or (2) to those who have been registered without their knowledge, on account of the fact that they are listed elsewhere as descendants of Native Hawaiians. Does this viewpoint restriction or, in the alternative, this forced registration, violate the First Amendment?

STATUTORY ADDENDUM

Haw. Rev. Stat. § 10H-1-5.

[§ 10H-1]. Statement of recognition

The Native Hawaiian people are hereby recognized as the only indigenous, aboriginal, maoli people of Hawaii.

[§ 10H-2]. Purpose

The purpose of this chapter is to provide for and to implement the recognition of the Native Hawaiian people by means and methods that will facilitate their self-governance, including the establishment of, or the amendment to, programs, entities, and other matters pursuant to law that relate, or affect ownership, possession, or use of lands by the Native Hawaiian people, and by further promoting their culture, heritage, entitlements, health, education, and welfare.

§ 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.

§ 10H-4. Notice of qualified Native Hawaiian roll

(a) The commission shall publish notice of the certification of the qualified Native Hawaiian roll, update the roll as necessary, and publish notice of the updated roll of qualified Native Hawaiians; provided that the commission shall not publish or release any verification documents of any qualified Native Hawaiian on the roll.

(b) The publication of the initial and updated rolls shall serve as the basis for the eligibility of qualified Native Hawaiians whose names are listed on the rolls to participate in the organization of the Native Hawaiian governing entity.

[§ 10H-5]. Native Hawaiian convention

The publication of the roll of qualified Native Hawaiians, as provided in section 10H-4, is 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.

STATEMENT OF THE CASE

I. Act 195 and the Native Hawaiian Roll Commission

The Office of Hawaiian Affairs (hereafter, "OHA") is a state agency established by Hawaii's Constitution. HAW. CONST. art. XII, §5. Among other things, OHA holds "title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians." *Id.* The Supreme Court has recognized that OHA is "an arm of the state." *Rice v. Cayetano*, 528 U.S. 495, 521 (2000).

In July 2011, Hawaii Governor Neil Abercrombie signed Act 195 into law. ER 234, ¶ 6. The Act's purpose "is to provide for and to implement the recognition of the Native Hawaiian people by means and methods that will facilitate their self-governance." HAW. REV. STAT. § 10H-2. To do so, the Act established a five-member Native Hawaiian Roll Commission within the OHA. *Id.* § 10H-3. The Native Hawaiian Roll Commission is responsible for, among other things, "[p]reparing and maintain[ing] a roll of qualified Native Hawaiians; certifying that the individuals on the roll of qualified Native Hawaiians meet the definition of qualified Native Hawaiians; … [and] receiving and maintaining documents that verify ancestry[.]" *Id.* § 10H-3. For purposes of establishing the roll, a "qualified Native Hawaiian" means an individual whom the Native

Hawaiian Roll 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.

Id. § 10H-3(a)(2).

Act 195 ordered the Native Hawaiian Roll Commission to publish a roll that would then "serve as the basis for the eligibility of qualified Native Hawaiians . . . to participate in the organization of the Native Hawaiian governing entity." *Id.* § 10H-4. The publication of this roll was "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." *Id.* § 10H-5.

As Dr. James Kuhio Asam, President of Na'i Aupuni, has explained, the purpose of this process is to "establish a path to a possible reorganized Hawaiian government." ER 242, ¶ 14(b). That path has "three parts: an election, a convention . . . and a possible ratification vote" of whatever the convention decides. *Id*., ¶ 14(c). Delegates "will come from the certified list of Native Hawaiians kept by the" Native Hawaiian Roll Commission. *Id*., ¶ 14(d). The "purpose of the convention is to formulate 'governance documents' for a Hawaiian nation," which means that the "convention can be considered to be a constitutional convention." *Id*., ¶ 14(f). If the delegates recommend a "reorganized" Hawaiian government, "then a ratification or referendum vote will be held" in 20l6, restricted to those on the roll. *Id*., ¶ 14(g). Dr. Asam explained that the "entire process is concerned with 'possible nationhood' for Native Hawaiians." *Id*., ¶ 14(i). According to OHA, once Native Hawaiians "achieve self-governance," the "assets of OHA will be transferred to the new governing entity." Office of Hawaiian Affairs: Governance, *available at* http://www.oha.org/governance/. OHA's "aim" is "the legal transfer of assets and other resources to the new Native Hawaiian governing entity." *Id.*

Prospective voters were allowed to register online for the Roll starting in July 2012. ER 235, ¶ 22. In order to register, the Native Hawaiian Roll Commission's online voter registration process required applicants to make three

declarations: (1) that they affirm support for the "unrelinquished sovereignty of the Native Hawaiian people" and their "intent to participate" in "self-governance"; (2) that they have a "significant cultural, social, or civic connection to the Native Hawaiian community"; and (3) that they have the racial ancestry defined by the Act. *See* https://www.kanaiolowalu.org/registernow/; ER 75-76; ER 235, ¶ 13; ER 229. Unless an applicant affirmed all three declarations, that applicant could not register online for the Roll. *Id.*, ¶¶ 13-15. About 38% of those on the Roll were registered through this website. ER 12.

In May 2013, Act 77 became law. ER 182. It amended Act 195 to include on the Native Hawaiian Roll Commission's voter roll all persons who had "already registered with the State as verified Hawaiians or Native Hawaiians" through another registry of OHA. HAW. REV. STAT. § 10H-3(a)(4). It made no provision for notifying such persons in advance or for asking whether they wished to be registered on the Roll. The purpose of this law was probably to bolster the number registered by the Native Hawaiian Roll Commission. ER 236, ¶ 23. Therefore, in addition to those who deliberately registered and could meet the ancestry and viewpoint-based requirements of Act 195, other individuals who registered for other lists of Native Hawaiians had their names transferred to the Roll without their knowledge or consent. ER 76; ER 236, ¶¶ 23-24; ER 243, ¶ 14(j); ER 246, ¶¶ 4-5; ER 244, ¶ 5. About 62% of those on the Native Hawaiian Roll were registered in

this way. ER 12.

II. The Role of Na'i Aupuni.

To run the election, convention, and ratification process contemplated by Act 195, a nonprofit organization, Appellee Na'i Aupuni, was created and imbued (at least on paper) with a measure of independence. OHA and other state officials set up this arrangement because they believed that they could not lawfully conduct this process using the Roll given the Supreme Court's decision in *Rice v. Cayetano*, and they hoped that Na'i Aupuni could avoid or defeat litigation by claiming to be a "private actor" holding a private election. This reasoning was openly discussed at OHA trustee meetings. ER 158 ("Because the money is coming from OHA, a state entity, the entire process can be challenged under the US or state constitution . . . That is why they have to look at creating an independent process"); *id*. (the Board "must be very careful and not step over the line by directing Na'i Aupuni to do or desist from certain activities. . . . because it may subject us to a state action attack"); *see also* ER 243, ¶ 15(a) (getting money from OHA "with no strings attached . . . means the election process will withstand a Fourteenth Amendment challenge").

A. The Creation and Purpose of Na'i Aupuni.

According to its president, "Na'i Aupuni exists for one reason, which is to establish a path to a possible reorganized Hawaiian government." ER 242, ¶ 14(b).

Na'i Aupuni was formed in December 2014, more than three years after the passage of Act 195. Na'i Aupuni's own bylaws show that it was formed in order to achieve legislative purposes desired by OHA. ER 174 (Section 1.3) (OHA authorized funds "to enable Native Hawaiians to participate in a process through which a structure for a governing entity may be determined").

The minutes of an OHA trustees' meeting from January 2015 refer to a "Consortium, now calling themselves Na'i Aupuni," and add that OHA sits "as an *ex officio* member" of that Consortium. ER 155. In other words, a government agency, OHA, was at that time a member of Na'i Aupuni.[2]

From the time it was formed, Na'i Aupuni's Vice-President has been Pauline Namu'o. ER 155. Ms. Namu'o is married to Appellee Clyde Namu'o, who is the Executive Director of Appellee the Native Hawaiian Roll Commission, the state agency charged with creating the Roll. ER 162, ¶ 13.

B. The Advance Promise by Na'i Aupuni to Run a Racially Exclusive Election and Convention Process.

Na'i Aupuni's president stated that "[o]ne of the initial decisions" made by Na'i Aupuni's directors was that both voters and convention delegates "should be

[2] It is disputed whether OHA is still an *ex officio* member of Na'i Aupuni. At the hearing in this matter, Na'i Aupuni's counsel suggested that OHA was only an *ex officio* member of the consortium that "preceded Na'i Aupuni." ER 116. That is not what the minutes say, however, and unsworn arguments from counsel are not part of the evidentiary record. In any case, it remains undisputed that OHA was, at least for a time, an *ex officio* member of the organization that became Na'i Aupuni.

limited to Native Hawaiians." ER 194, ¶ 13; *see id.* (the "election and convention process [] should be composed of Native Hawaiians"). He also admitted that, "prior to entering into" any contract or grant agreement, "[Na'i Aupuni] informed OHA that it intended to use the [race-based] Roll," though it "might also look into" supplementing it with "other available lists of Native Hawaiians."[3] *Id.*; *see also* ER 171, ¶ 20 (OHA's Chief Executive recalling the same representations from Na'i Aupuni).

Any assessment of Na'i Aupuni's "independence" must take into account this advance representation to OHA by Na'i Aupuni of its intention to conduct a racially exclusive election and convention process using the Roll developed by the Native Hawaiian Roll Commission.

C. The Agreements Between OHA and Na'i Aupuni.

Commencing in the spring of 2015, representatives of OHA, the Akamai Foundation,[4] and Na'i Aupuni entered into an interrelated series of agreements, which were posted on Na'i Aupuni's website. ER 236-238, ¶¶ 26-30; ER 203; ER 206; ER 211; *see* http://www.naiaupuni.org/news.html ("Contracts and Agreements"). The purpose of these agreements was to delegate to Na'i Aupuni

[3] Of course, in "deciding" to use the Roll, Na'i Aupuni was only doing what Act 195 had always required. *See infra* at 14.

[4] Apparently the Akamai Foundation was included in order to take advantage of its tax-exempt status. ER 195, ¶ 15.

the running of an election, convention, and ratification process, and to provide it with millions of dollars of government funds in order to do so.

OHA's decisions regarding grants to and agreements with Na'i Aupuni are governed by State law. Hawaii law provides generally that all grants by OHA "shall be used for activities that are consistent with the purposes of this chapter." *Id*. § 10-17(a)(6). A "grant" is defined as "an award of funds by the office to a specified recipient to support the activities of the recipient that are consistent with the purposes of this chapter." *Id*. § 10-2. Further, Act 195 specifically requires that the rolls created by the Native Hawaiian Roll Commission "shall serve as the basis for the eligibility of qualified Native Hawaiians . . . to participate in the organization of the Native Hawaiian governing entity." HAW. REV. STAT. § 10H-4(b).

The "Grant Agreement" is between OHA, the Akamai Foundation, and Na'i Aupuni. The "Whereas" clauses in that agreement expressly refer to "the purposes for which OHA has been established," and to goals described by Act 195, stating that "OHA has committed to allow the use of its grant" by the Akamai Foundation and Na'i Aupuni "to allow Hawaiians to pursue self-determination." ER 206. The Grant Agreement details the transfer from OHA to the Akamai Foundation, for use by Na'i Aupuni, of $2,598,000 of government funds, in order that Na'i Aupuni may "facilitate an election of delegates, election and referendum monitoring, a

governance ‘Aha [convention], and a referendum to ratify any recommendation . . .” *Id.* at 221. The agreement expressly provides that the election services it describes “will not exclude those Hawaiians who have enrolled and have been verified by the Native Hawaiian Roll Commission.” *Id.*

The Grant Agreement also includes a provision purporting to guarantee Na’i Aupuni’s autonomy, stating that “neither OHA nor [the Akamai Foundation] will directly or indirectly control or affect the decisions of [Na’i Aupuni],” that “[Na’i Aupuni] has no obligation to consult with OHA or [the Akamai Foundation] on its decisions,” and that its decisions “will not be directly or indirectly controlled or affected by OHA.” *Id.* It is this provision on which the district court ultimately relied in holding that Na’i Aupuni was not a state actor.

The “Letter Agreement” is also between OHA, the Akamai Foundation, and Na’i Aupuni, and it concerns the “method and timing of the disbursement of the approved grant funds by OHA” to the Akamai Foundation for the benefit of Na’i Aupuni. ER 203.

The “Fiscal Sponsorship Agreement” is technically between the Akamai Foundation and Na’i Aupuni although it provides in its first recital that the “grant agreement with OHA . . . is incorporated herein by reference.” ER 211. OHA is referred to throughout the agreement and is even accorded certain specific rights. *See id.* at 213 (OHA can require “timely reporting”); *id.* (termination shall occur

"[i]n consultation with OHA"); *id*. (OHA can require written acknowledgements); *id*. (unclaimed funds "returned to OHA").

Finally, a June 2015 contract between Na'i Aupuni and Election America, Inc., a private New York company, tasks that company with "providing advice and assistance in apportioning delegates, registering candidates, and conducting an election of delegate[s] who will [attend] the convention, or 'Aha; and potentially conducting a ratification vote." ER 224. That agreement acknowledges that the company will utilize "the Native Hawaiian Roll Commission's current certified registry of eligible Native Hawaiians." *Id.* It also sets forth a schedule of dates for the planned election of delegates. Pursuant to that schedule, ballots were mailed out on November 1, 2015, and returned ballots were to be tabulated on December 1, 2015.[5] ER 223, 226.

D. The Announcement of the 2015 Election.

Act 195 was passed in July 2011. Registration for the Native Hawaiian Roll Commission's voter roll was first opened in July 2012, then closed and reopened a few times. ER 235, ¶ 22.

[5] On November 30, 2015, Na'i Aupuni extended the deadline to return ballots by 21 days, apparently in response to the temporary injunction issued by Justice Kennedy. *See* http://www.naiaupuni.org/docs/NA-NR-NaiAupuniExtendsVotingDeadline-113015.pdf.

On July 5, 2015, four full years after Act 195 was passed, the election described in the complaint was publicly announced. As Plaintiff-Appellant Dr. Keli'i Akina explained, he first learned about it through a media report setting forth election-related dates. ER 236, ¶ 23. The election itself was scheduled to commence on November 1, 2015, a mere four months after that announcement. ER 223.

III. DOI's Proposed Administrative Process for Recognizing a Native Hawaiian Entity.

The U.S. Department of the Interior (DOI) issued a Notice of Proposed Rulemaking on September 29, 2015, during the pendency of this action before the district court, soliciting public comments within 90 days on a proposed rule concerning an administrative procedure by which Native Hawaiians might become a separate political entity. ER 121. The comment period ended on December 30, 2015.[6]

The proposed regulations imagine that the organization of a Native Hawaiian entity will take place in two stages. The first stage involves the drafting of a "governing document" for the planned entity, meaning a "written document (*e.g.*, constitution) embodying" its "fundamental and organic law." ER 137, ER 138 (proposed 43 C.F.R. §§ 50.4, 50.13). The regulations require that the "process for drafting the governing document must" be "based on meaningful input from

[6] *See* https://www.doi.gov/hawaiian/procedures.

representative segments of the Native Hawaiian community and reflect[] the will of the Native Hawaiian community." ER 138 (43 C.F.R. § 50.11). The regulations do not otherwise specify the process by which this document would come to exist.

The second stage clearly requires a racially restricted election. The proposed regulations provide for a mandatory "ratification referendum" of whatever governing documents may be created by the "Native Hawaiian community." ER 138-139 (43 C.F.R. § 50.14). The regulations further stipulate that such a referendum must be "open to all persons who were verified as satisfying the definition of a Native Hawaiian," but must "not include in the vote tallies votes cast by persons who were not Native Hawaiians." ER 139 (43 C.F.R. § 50.14(b)(5)(iii) and (iv)). The proposed rule adopts basically the same standard for ancestry as Act 195, defining a Native Hawaiian as a U.S. citizen who is a "[d]escendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." ER 137 (43 C.F.R. § 50.4). The regulations require that such ancestry be verified, and set forth ways in which this could be accomplished, including by means of a state-certified voter roll of Native Hawaiians. ER 138 (43 C.F.R. § 50.12(a), (b)).

In an *amicus* brief previously submitted to this Court by the United States, it confirmed that the process currently being run by Na'i Aupuni would, under DOI's

proposed rules, constitute the first step in an administrative process leading to the recognition of a Native Hawaiian entity. Dkt. Entry 21-1 at 5-6.

IV. Procedural History.

Plaintiffs Akina and Makekau are Native Hawaiians within the meaning of Act 195 who could not affirm the viewpoint-based requirement of Declaration One. ER 255, ¶¶ 6, 7; ER 265-66, ¶ 46. Plaintiffs Kent and Mitsui could not affirm connections to the Native Hawaiian community and the racial ancestry requirements of Declarations Two and Three. *Id.*, ¶¶ 8, 9, 47. Plaintiffs Gapero and Moniz objected to being placed on the Roll without their consent. *Id.*, ¶¶ 10, 11, 36. The complaint, filed August 13, 2015, alleged claims under the First, Fourteenth, and Fifteenth Amendments; under the Civil Rights Act of 1871; and under the Voting Rights Act of 1965. *Id.*, ¶¶ 79-137.

On August 28, 2015, the plaintiffs moved for a preliminary injunction in the district court. (Doc. 47.) On October 23, 2015, the district court issued an oral ruling and then a minute order denying the plaintiffs' motion for a preliminary injunction, and denying the plaintiffs' motion for an injunction pending appeal. ER 103; ER 68.[7] As discussed in greater detail below, the district court based its

[7] In that October 23, 2015, Order, Judge Seabright indicated that a written order would follow, which was "intended, if an appeal is taken from my ruling, to be in aid of the appellate process." ER 74, citing *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007 (6th Cir. 2003). His written order was issued October 29, 2015. ER 4.

decisions in that ruling primarily on the crucial finding that Na'i Aupuni was a private actor conducting a private election.

Appellants filed their Notice of Appeal on October 26, 2015. ER 104.

V. Facts and Procedure Postdating the Filing of the Notice of Appeal.

On October 29, 2015, Appellants filed an Urgent Motion for an Injunction While Appeal is Pending. Dkt. Entry 9-1. A motions panel for the Ninth Circuit denied that motion on November 19, 2015. ER 2. Appellants subsequently appealed to Justice Kennedy, seeking an injunction under the All Writs Act. *See* ER 1 (referring to appeal to Justice Kennedy).

On Friday, November 27, 2015, Justice Kennedy issued an order enjoining Appellees from counting the ballots and certifying the winners in the challenged election pending further order. *Akina v. Hawaii*, 193 L. Ed. 2d 420, 2015 U.S. LEXIS 7363 (Nov. 27, 2015). On Monday, November 30, 2015, citing that action, Na'i Aupuni announced that it was extending the deadline for casting ballots in that election to December 21, 2015. *See* http://www.naiaupuni.org/docs/NA-NR-NaiAupuniExtendsVotingDeadline-113015.pdf.

On December 2, 2015, the full Supreme Court granted Appellants' motion, issuing an order enjoining Appellees "from counting the 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, Na'i Aupuni issued a press release in which it claimed to have "terminated the Native Hawaiian election process," though it also stated that it would "go forward with a four-week-long 'Aha in February." *See* Dkt. Entry 47-2 (first page); http://www.naiaupuni.org/docs/NewsRelease-NaiAupuniTerminatesElectionProcess-121515.pdf. Na'i Aupuni added that "[a]ll 196 Hawaiians who ran as candidates will be offered a seat as a delegate to the 'Aha to learn about, discuss and hopefully reach a consensus on a process to achieve self-governance." *Id*. In other words, all candidates were effectively declared winners. Necessarily, these candidates come from the Native Hawaiian Roll Commission's race-qualified Roll.[8]

On December 22, 2015, Appellants filed a motion for civil contempt with the Supreme Court on the ground that Na'i Aupuni was certifying the winners of the election in violation of the Court's prior injunction. That motion is pending.

[8] Only qualified Native Hawaiians on the Roll could run as candidates or serve as delegates to a convention. ER 194, ¶ 13; ER 242, ¶ 14(d); *see* http://www.naiaupuni.org/docs/Naiaupuni_NomNotice_hires.pdf at 3. This is consistent with Act 195. *See* HAW. REV. STAT. § 10H-4 (the roll will "serve as the basis for the eligibility of qualified Native Hawaiians" to "participate in the organization of the Native Hawaiian governing entity."); § 10H-5 (referring to "a convention of qualified Native Hawaiians").

SUMMARY OF ARGUMENT

The district court committed a clear error of law in holding that Na'i Aupuni was not a state actor. Na'i Aupuni is a state actor as a matter of law under both the public function test, because it is conducting an important electoral process regarding public issues, and under the joint action test, because of its many, significant ties to the state agent that created it. The lower court's conclusion that Appellants are unlikely to succeed on the merits is based primarily on this legal error. Appellants are therefore entitled to preliminary injunction, and this Court should reverse.

Once Na'i Aupuni is properly determined to be a state actor, Appellants are overwhelmingly likely to succeed on the merits of their claims. Appellees, including the State of Hawaii, are engaged in a racially exclusive political process, in violation of the Fifteenth and Fourteenth Amendments and Section 2 of the Voting Rights Act. Appellants are also likely to succeed on their claims that Appellees are burdening their right to free speech, both by compelling speech in order to register, and by engaging in compulsory registration.

The other relevant factors strongly support the issuance of a preliminary injunction. The district court clearly erred in ruling that Appellants, who face a deprivation of the most fundamental rights protected by the Constitution, are not likely to suffer irreparable harm, and in failing to find both that the balance of

equities tips in Appellants' favor and that an injunction would be in the public interest.

STANDARD OF REVIEW

Courts may enter a preliminary injunction if a movant shows: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *Accord, M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012) (quoting *Winter*). In the alternative, a movant is entitled to interim relief if his claims raise "serious questions" as to the merits and the hardships tip sharply toward the moving party (and the other two *Winter* tests are satisfied). *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2010).

In reviewing denial of a motion for a preliminary injunction, the Court applies both deferential and non-deferential standards to different parts of the district court's decision. The Court reviews the district court's legal conclusions *de novo*. *M.R. v. Dreyfus*, 663 F.3d 1100, 1107 (9th Cir. 2011). The Court reviews the district court's factual conclusions for clear error. *Id.* Finally, the Court reviews the district court's weighing of the four preliminary injunction factors for abuse of discretion. *Id*., quoting *Alliance for the Wild Rockies*, 632 F.3d at 1131. When reviewing the district court's weighing of the factors, a "district court by

definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996) (citation omitted); *Strauss v. Comm'r of the Soc. Sec. Admin.*, 635 F.3d 1135, 1137 (9th Cir. 2011); *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) ("A district court abuses its discretion when it makes an error of law, or when its discretion was guided by erroneous legal conclusions") (citing *Koon*); *see also Fox v. Vice*, 131 S. Ct. 2205, 2216-17 (2011) (recognizing trial court has wide discretion "when, but only when, it calls the game by the right rules").

ARGUMENT

I. Na'i Aupuni is an Organ of the State Government of Hawaii, Acting for the Interests of the State Agencies OHA and the Native Hawaiian Roll Commission.

The lynchpin of the district court's ruling denying Appellants' motion for a preliminary injunction was the holding that Na'i Aupuni is conducting a private election. The district court erred by failing to rule, as a matter of law, that on the undisputed facts before it Na'i Aupuni was both engaged in a public function and in joint action with Hawaiian government agencies. These legal conclusions must be reversed, which should result in a complete reversal of the denial of Appellants' request for a preliminary injunction.

A. Na'i Aupuni is Engaged in a Public Function by Holding an Election to Influence Future Inter-Governmental Relations Affecting All Hawaiians.

Na'i Aupuni is engaged in state action. Private entities or persons engage in "state action" for the purposes of a constitutional analysis if they are performing a "public function." *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013). This doctrine "treats private actors as state actors when they perform a task or exercise powers traditionally reserved to the government." *Id.* "While the Constitution protects private rights of association and advocacy with regard to the election of public officials, our cases make it clear that the conduct of the elections themselves is an exclusively public function." *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

Given the fact that it is conducting a highly important public election, Na'i Aupuni must be deemed to be a state actor performing a "public function." The supposedly private character of Na'i Aupuni, as a private nonprofit entity, is irrelevant to this determination. Indeed, the Supreme Court has never relied on the trappings or form of an entity to determine whether it is performing a public function. Rather, it has emphasized the substance of an arrangement, and will "nullif[y] sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 274 (1939).

A perfect example of this approach is afforded by *Terry v. Adams*, 345 U.S.

461 (1953). In that case, membership in a "Texas county political organization called the Jaybird Democratic Association or Jaybird Party" was open only to the white residents of the county. *Id.* at 462-63. It was "run like other political parties." *Id.* at 463. Its expenses were not paid by government revenue but "by the assessment of candidates for office in its primaries." *Id.* While there was "no legal compulsion on successful Jaybird candidates to enter Democratic primaries, they have nearly always done so and with few exceptions" they won the subsequent Democratic primaries and general elections. *Id.* Unlike Na'i Aupuni, which only has existed for a little more than a year and which was created solely to run the current election/convention/ratification process, the Jaybird Party had existed since 1889. *Id.* Accordingly, the Jaybirds responded to a Fifteenth Amendment challenge by arguing that it "applies only to elections or primaries held under state regulation," and that the Jaybirds' "association is not regulated by the state at all," but was "a self-governing voluntary club." *Id.*

Labeling such responses "formalistic arguments," the Supreme Court observed that "the constitutional right to be free from racial discrimination in voting '. . . is not to be nullified by a State *through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.*'" *Id.* at 466, citing *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (emphasis added). In consequence, it "violates the *Fifteenth Amendment* for a

state" to "permit within its borders the use of any device that produces an equivalent of the prohibited election." *Id.* at 469.

The *Terry* Court would have had no trouble seeing through Appellees' arrangements. OHA knew that it would violate the Constitution if it utilized the Native Hawaiian Roll Commission's race-based and viewpoint-qualified Roll for any significant purpose. Accordingly, OHA collaborated in the creation of Na'i Aupuni and gave it millions of public dollars to do what OHA wanted to do. Appellees cannot circumvent constitutional protections by these means.

The district court wrongly concluded that Na'i Aupuni's process for selecting delegates was not a public function, but a private affair for exclusively private matters, as if it were a vote for leaders of a local chapter of the Kiwanis Club. The court was persuaded by the argument that "this election will not result in any federal, state or county officeholder and will not result by itself in any change in federal or state laws or obligations." ER 80. The court held that while the election "might result in a constitution of a Native Hawaiian governing entity," further state or federal action would be needed before that entity attained any lawful status. *Id.* "The entity may recommend change, but cannot alter the legal landscape on its own." *Id.* at 15.

The district court erred in denying Appellants constitutional protections on these grounds. Its approach is flatly contradicted by *Davis v. Guam*, 785 F.3d

1311 (9th Cir. 2015), which illustrates how broadly this Court interprets the kind of elections that are subject to constitutional protections. That election was a proposed plebiscite restricted to Native Inhabitants of Guam, intended to elicit their views on Guam's relationship to the United States. *Id.* at 1313. The election would affect no laws and lead to no result other than a nonbinding recommendation. *Id.* Indeed, the election might never occur because registration goals might never be met. *Id.* at 1314. Even so, this Court reinstated constitutional claims dismissed by the district court, finding that "Guam's alleged denial of equal treatment to Davis is [] a judicially cognizable injury." *Id.* at 1315. In particular, this Court noted that "[i]f the plebiscite is held, this would make it *more likely* that Guam's relationship to the United States would be altered . . . This change will affect Davis, who doubtless has views as to whether a change is appropriate and, if so, what that change should be." *Id.* at 1315 (emphasis added).[9]

The election process at issue here is far more consequential than the contingent plebiscite at issue in *Davis v. Guam*, and far "more likely" to lead to a fundamental change in Hawaiian government. The delegates who attend the convention will draft "governance documents" for submission to DOI for federal

[9] The district court mentions *Davis* only to support its finding that Appellants here had standing. ER 78; ER 38-39. But *Davis* means much more than that. If it is a constitutional injury to be excluded from an electoral process that "make[s] it more likely" that a governance relationship will be altered, then the conduct of such a process must be deemed a "public function."

recognition of an all-Native Hawaiian sovereign entity. This would affect the legal, social, and financial relationships of all Hawaiians. In 2010 there were 1.36 million people in Hawaii.[10] DOI estimates that there are 527,000 Native Hawaiians in the United States, of whom 290,000 reside in Hawaii. ER 132. Placing between one-fifth and one quarter of Hawaii's population under the jurisdiction of a new governmental entity would change the lives of everyone in the State. Indeed, Appellees have characterized the elections as "historic" and as involving the public interest. ER 118 ("Your Honor, we stand on the cusp of a historic election."); *id.* ("we're talking about a historic hundred-plus year opportunity that has finally come to the Hawaiian people"); *id.* at 112 (quoting Appellees on the public interests involved).

The district court suggested that "even if [] a constitution is ratified, the resulting Native Hawaiian self-governing entity would have no official legal status unless it were otherwise recognized by the state or federal government." ER 41 (citation omitted). Yet DOI is now preparing to recognize a Native Hawaiian entity by means of a unilateral executive action. If it does so, there will be no subsequent state or federal election or ratification in which non-Native Hawaiians, like Appellants Yoshimasa Sean Mitsui and Joseph William Kent, will be allowed

[10] *See* U.S. Census Bureau, *State and County QuickFacts, Hawaii*, available at http://quickfacts.census.gov/qfd/states/15000.html (visited Nov. 16, 2015)

to have their say. They will have been successfully excluded from playing any role in this process. *See* ER 110 ("this may actually turn out to be the ball game. . . . there will be a Native Hawaiian governing entity and this will have been my plaintiffs' opportunity to say something about it and it will be gone.").

Terry indicated that the Fifteenth Amendment establishes a right "not to be discriminated against as voters in elections *to determine public governmental policies* or to select public officials," and protects "any election *in which public issues are decided* or public officials selected." 345 U.S. at 467, 468 (emphasis added). This language makes clear that constitutional protections apply, not just to elections of public officials, but also to elections concerning public "governmental policies" and "issues."

The district court sought to restrict the reach of this language, arguing that it

> must be read in the specific context addressed by the court – "[t]he Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county." *Id.* at 469. Thus, the racist selection of candidates stripped African-Americans "of every vestige of influence" in selecting public county officials. *Id.* at 470. This court simply cannot read, in context, the statement that the Fifteenth Amendment applies to an election to decide "public issues" to apply to this private election.

ER 43.

If the district court meant to imply that elections concerning "public policies" or "public issues," as opposed to elections of public officials, are never

subject to constitutional protections, it erred badly. To begin with, there is simply no reason to believe that the Supreme Court did not mean what it said. Further, it would make little sense if, say, public referenda or initiatives were deemed not to be covered by the Fourteenth and Fifteenth Amendments, while elections of public officials were. Any such distinction, moreover, was implicitly rejected by this Court in *Davis*, which concerned a (potential) plebiscite, and not an election of public officials. *See also Davis v. Commonwealth El. Comm'n*, 2014 U.S. Dist. LEXIS 69723, *1-2, *79 (D. N. Mar. I. 2014) (a race-based restriction on the right to vote on ballot initiatives concerning land ownership violated both the Fourteenth and the Fifteenth Amendments).

Na'i Aupuni is performing a public function in running the process for selecting delegates to the Native Hawaiian convention, both as a practical matter, and by the applicable standards of controlling Supreme Court and Ninth Circuit precedents.

B. Na'i Aupuni and OHA are Engaged in Joint Action to Hold a Racially Discriminatory Election.

Na'i Aupuni is also a state actor insofar as it is engaged in "joint action." Where a private entity is engaged in "joint action" with a government agent, it may be deemed to be a state actor for constitutional purposes. "'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party," or where it

has "so far insinuated itself into a position of interdependence" with a private actor "that it must be recognized as a joint participant in the challenged activity." *Ohno*, 723 F.3d at 996; *see Swift v. Lewis*, 901 F.2d 730, 732 n.2 (9th Cir. 1990) (private party who had contracted with state prison officials to do work relating to inmates had become "a willful participant in joint action with the state or its agents" and its actions were state action) (citation omitted); *Schowengerdt v. General Dynamics Corp*., 823 F.2d 1328, 1332 n.3 (9th Cir. 1987) (joint participation in a search by federal officials and a private actor was sufficient to establish that the latter's actions were state action).

The district court made clearly erroneous factual findings when it relied on the "autonomy" clause in the Grant Agreement, while ignoring other undisputed facts in the record, to conclude that Na'i Aupuni was not acting jointly with OHA. ER 84. In the court's view, this clause was convincing evidence that OHA had "no control" over Na'i Aupuni, which was "acting completely independently." *Id*.

Appellants submit that the district court's view is contradicted by a mass of evidence suggesting joint action, showing at times outright collusion between Na'i Aupuni and OHA. Na'i Aupuni was formed, three years after Act 195 was passed, for no other purpose than to hold the election that OHA could not constitutionally hold. Na'i Aupuni's own bylaws refer to OHA's legislative goals. OHA was, at least for a time, a member of Na'i Aupuni or its predecessor organization. Na'i

Aupuni's vice-president is married to the CEO of the Native Hawaiian Roll Commission, the organization created through Act 195 that is responsible for verifying the racial qualifications of those on the Roll. Na'i Aupuni was given millions of dollars of public money to hold an election described in a state law, Act 195, in a series of contracts with OHA, wherein OHA retains all sorts of special rights and privileges. Na'i Aupuni "decided" to use the race-based Roll the Native Hawaiian Roll Commission had been developing for years, and that OHA is statutorily required to use, and "decided" to hold a racially exclusive election.

Indeed, neither OHA nor Na'i Aupuni had the discretion to ignore the provisions of Act 195, which states that the rolls created by the Native Hawaiian Roll Commission "*shall* serve as the basis for the eligibility of qualified Native Hawaiians . . . to participate in the organization of the Native Hawaiian governing entity." Haw. Rev. Stat. § 10H-4(b) (emphasis added). The Act uses the mandatory "shall," not the precatory "may." Hawaii law further provides that all grants by OHA "shall be used for activities that are consistent with the purposes of this chapter." *Id.* § 10-17(a)(6). A "grant" is defined as "an award of funds by the office to a specified recipient to support the activities of the recipient that are consistent with the purposes of this chapter." *Id.* § 10-2. Thus, all of OHA's grants must further OHA's public purpose. The grant to Na'i Aupuni must do so as well. OHA would not be fulfilling its statutory obligations under Act 195 if it allowed

Na'i Aupuni to use its grant for wholly private purposes, or if it truly accorded Na'i Aupuni complete "autonomy" as to how to select delegates.

Finally, Na'i Aupuni's claimed autonomy in deciding how to conduct this election, which the district court credited in finding it to be a private actor, is in fact empty. The "autonomy clause" in the Grant Agreement must be understood in light of the crucial fact that OHA received advance assurances from Na'i Aupuni that it planned to use the race-based roll developed by the Native Hawaiian Roll Commission *before* OHA and Na'i Aupuni signed the Grant Agreement. This reveals the "autonomy clause" for what it is: a sham, inserted in the Grant Agreement for the sake of appearances in the event of anticipated litigation, rather than a bona fide grant of independence. Simply put, once OHA knew that Na'i Aupuni would use the Roll, inserting an "autonomy clause" became a meaningless gesture. OHA and Na'i Aupuni were, and are, acting in concert.

II. Appellees' Electoral Process is Plainly Unlawful.

Once it is determined that Na'i Aupuni is engaged in state action, all of Appellees' defenses fail, and there can be no doubt that their use of the race-based Roll violates the Fifteenth Amendment, the Fourteenth Amendment, the Voting Rights Act, and the First Amendment. Accordingly, Appellants are likely to succeed on the merits of their claims.

A. The Racially-Discriminatory Voter Roll and Election Process Violate the Constitution and Federal Statutes.

1. Appellants Are Likely To Prevail On Their Fifteenth Amendment Claims.

Appellants' Fifteenth Amendment claim is controlled by the U.S. Supreme Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000). In *Rice*, the plaintiff challenged a provision in the Hawaiian Constitution that limited the right to vote in elections for OHA Board members to "Native Hawaiians," who were defined in almost the identical way that Native Hawaiians are defined in Act 195. *Id.* at 499. In striking down this voting limitation, the *Rice* Court elaborated on the meaning of the Fifteenth Amendment:

> The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. . . . Enacted in the wake of the Civil War, the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote . . . Vital as its objective remains, the Amendment goes beyond it. . . . [T]he Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment. The Amendment grants protection to all persons, not just members of a particular race.
>
> The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. . . . Fundamental in purpose and effect and self-executing in operation, the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race.

Id. at 511-12.

The Court then took note of the many decisions by the U.S. Supreme Court

that have struck down race-based limitations on the right to vote. *Id.* at 512-14, citing *e.g., Guinn v. United States*, 238 U.S. 347, 363 (1915) (Oklahoma's grandfather clause);[11] *Smith v. Allwright*, 321 U.S. 469 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953) (all-white primary cases). Justice Kennedy, writing for the majority, opined that the "Fifteenth Amendment was quite sufficient to invalidate a scheme which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise." *Rice,* 528 U.S. at 513. And the Court in *Rice* went on to reason that "[a]ncestry can be a proxy for race," *id.* at 514, and that in enacting this racial limitation on voting, the State of Hawaii "ha[d] used ancestry as a racial definition and for a racial purpose." *Id.* at 515.

> The ancestral inquiry mandated by the state implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

Id. at 517.

The Court in *Rice* addressed and rejected the State of Hawaii's argument that the exclusion of non-Native Hawaiians from voting in the elections for the

[11] In *Guinn,* the State of Oklahoma had enacted a literacy requirement for voting eligibility but exempted persons whose ancestors were entitled to vote on January 1, 1866 or any time prior to that date. 238 U.S. at 364-65. Before that date black persons were not allowed to vote in Oklahoma. *Id.*

OHA Board was permitted under precedents, such as *Morton v. Mancari*, 417 U.S. 535 (1974), allowing preferential treatment for members of some Indian tribes. *Id.* at 518-22. *Accord*, *Arakaki v. Hawaii*, 314 F.3d 1091, 1094-95 (9th Cir. 2002). Thus, Appellees here are precluded from successfully defending Act 195's challenged voting procedures on the grounds that the Indian tribe cases support the race-based ancestry voting requirement here. "The State's position rests . . . on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment." *Rice*, 528 U.S. at 523.

As long as Na'i Aupuni is a state actor, there is no principled way that the ruling in *Rice* can be distinguished from Appellants' Fifteenth Amendment challenge regarding the exclusion of non-Native Hawaiians from participating in this registration/election/convention process under Act 195.

To be a candidate, moreover, one must also be an eligible voter listed on the Roll. *See* ER 194, ¶ 13; ER 242, ¶ 14(d); http://www.naiaupuni.org/docs/Naiaupuni_NomNotice_hires.pdf at 3 (candidates must be eligible voters and be nominated by other eligible voters). This means that candidates must be qualified according to the same criteria applicable to registrants for the Roll, including its ancestry requirements. In *Arakaki*, a challenge was made to Hawaii's constitutional and statutory provisions requiring that all candidates for the OHA

Board of Trustees be Native Hawaiians, using essentially the same definition used in Act 195. 314 F.3d at 1093 & n.3. This Court held that *voters* were harmed when *candidates* faced racial barriers:

> Although the language of the Fifteenth Amendment does not explicitly extend its protections to the abridgement of the right to vote on account of race-based *candidate* qualifications, the Court has acknowledged that the disqualification of candidates on the basis of race implicates voters' Fifteenth Amendment rights. *See Hadnott* . . . Thus, a candidate restriction which directly and expressly excludes all non-[Native] Hawaiians from qualifying as a candidate for the office of OHA trustee, compels the conclusion that the candidate restriction abridges the right to vote and is thus prohibited by the Fifteenth Amendment.

314 F.3d at 1095. Thus, under the Fifteenth Amendment, Appellants are injured by the race-based candidate restrictions.[12]

2. Appellants Are Likely To Prevail On Their Fourteenth Amendment Equal Protection Claims.

Once Na'i Aupuni is conceded to be a state actor, Appellants are also likely to prevail on their claims for violations of the Fourteenth Amendment's Equal Protection Clause. That clause prohibits discrimination on the basis of race in voting. *See e.g.*, *Miller v. Johnson*, 515 U.S. 900, 905 (1995) (in the context of

[12] In *Arakaki,* this Court also refused to accept that Native Hawaiians have some special legal status or needs that justified excluding non-Hawaiians from service on the OHA Board of Trustees. *Id.* at 1094-95. The Court noted that all citizens have an interest in voting in selecting officials who will make policy choices that will affect them, "even if those policies will affect some groups more than others." *Id.* at 1095, citing *Rice,* 528 U.S. at 523.

redistricting, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"). Furthermore, the Equal Protection Clause prohibits *any* racial discrimination that denies a person an equal opportunity to participate in the political process. *See Romer v. Evans*, 517 U.S. 620, 633-34 (1996) (invalidating a state constitutional amendment that denied gays and lesbians equal access to government or the opportunity to pass laws to protect their interests); *Washington v. Seattle Sch. Dist. No.1*, 458 U.S. 457, 471-74 (1982) (nullifying an initiative that "uses the racial nature of an issue to define the governmental decisionmaking structure" placing burdens on racial and ethnic groups).

There is no question that the provisions of Act 195 involve the intentional creation of racial classifications that are intended to deny non-Native Hawaiians the right to participate in the planned registration/election/convention process. Under the Equal Protection Clause, racial classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). The district court, however, found that even if Na'i Aupuni were deemed to be a state actor, Hawaii "has a compelling interest in facilitating the organizing of the indigenous Hawaiian community," and that the "restriction to Native Hawaiians is precisely tailored to meet the State's compelling interest." ER 90.

By so holding, the district court issued the only extant decision in American law in which a compelling state interest justified a racially exclusive selection of delegates. The district court's ruling was clear error, however, because the process Na'i Aupuni is conducting is not "narrowly tailored" to uphold the identified state interest, for three reasons. First, 38% of those on the roll registered through the Native Hawaiian Roll Commission's website, which means that they had to positively affirm their belief in the "unrelinquished sovereignty of the Native Hawaiian people." Filtering the community of "indigenous people" for this (or any) viewpoint is simply not necessary to "allow[] a starting point for the process of self-determination." Indeed, enforcing such an ideological litmus test guarantees that only a *part* of the relevant community is being consulted.

Second, 62% of those on the roll were transferred there from other governmental lists of Native Hawaiians, without their prior knowledge or agreement. Forcibly registering members of an indigenous community is not a logical or appropriate way to gauge their views regarding their own community, or self-determination, or any other matter. Those who remain unaware that they have been placed on the roll will not participate, while those who learn that they were subject to compulsory registration may refuse to participate.

Third, the "one drop of blood" rule employed by Act 195 is utterly

arbitrary.[13] As Justice Breyer opined in *Rice*, to define tribal membership "in terms of 1 possible ancestor out of 500 . . . goes well beyond any reasonable limit. It was not a tribe, but rather the State of Hawaii, that created this definition" and "it is not like any actual membership classification created by any actual tribe." *Rice*, 528 U.S. at 527 (Breyer, J., concurring in the result). No real community can be defined by such a tenuous link.

The means employed by Hawaii in registering voters for this election were not narrowly tailored to achieve the interest identified by the district court. Appellees' actions fail strict scrutiny. Accordingly, Appellants are likely to prevail on the merits of their Fourteenth Amendment claims.[14]

---

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

[14] Appellants are also likely to prevail on their Fourteenth Amendment claims that all three declarations constitute invalid burdens on their fundamental right to vote. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (courts "must weigh the character and magnitude of the asserted injury . . . against the precise interests put forward by the State as justifications for the burden"); *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 666-67 (1966) (Equal Protection Clause prohibits states from fixing voter qualifications that invidiously discriminate); *Bennett v. Yoshina*, 140 F.3d 1218, 1226, 1228 (9th Cir. 1998) (holding that election requirements deny substantive due process when they are "fundamentally unfair" and that states may not require voters, as a prerequisite to voting, "to *espouse positions they do not support*," quoting *Burdick*) (emphasis added).

3. Appellants Are Likely To Prevail On Their Claims Under the Voting Rights Act.

Appellants are also likely to prevail regarding their claims that Act 195's discrimination against non-Native Hawaiians violates Section 2 of the Voting Rights Act. Section 2 proscribes the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . ." 52 U.S.C. § 10301(a). A violation is established if "it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members" of a protected class in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

Appellees here intended that the political process leading to a convention would not be "equally open" to non-Native Hawaiians and that they would not be able to "participate in" that process or "elect representatives of their choice." This establishes a violation of Section 2. Further, the race-based candidate restrictions constitute a separate violation of Section 2. *See Arakaki,* 314 F.3d at 1096 (a race-based "trustee qualification ensures that the 'political processes leading to nomination or election in the State . . . are *not equally open* to participation' by citizens who are not Hawaiian") (citation omitted).

4. Facts Postdating the Filing of this Appeal Will Not Change Appellants' Likelihood of Prevailing on the Merits.

On December 15, 2015, Na'i Aupuni claimed to have "terminated" the election for delegates. It claimed to have halted the counting of ballots and to have offered a seat at the convention to all candidates, and it stated its intention to move forward with the planned convention.[15] None of these developments will alter Appellants' likelihood of success on any of the foregoing claims.

First, Na'i Aupuni has still used the race-based Roll to conduct an election, and has declared winners – even if they are not those who received the most votes, but are instead all candidates. There was still a discriminatory election that violated the Fifteenth Amendment, the Fourteenth Amendment, and the Voting Rights Act. And the candidates for that election were still restricted on the basis of race, in a manner that also violates those same provisions.

Second, even if it were determined that Na'i Aupuni's actions in seating all candidates at the planned convention is not part of an "election" as such, it still constitutes a political process infected by racial discrimination. Appellants were not able to participate equally in that process on account of their race, which establishes a violation of the Fourteenth Amendment. The end result of that process, moreover, is likely to be the establishment by DOI of a Native Hawaiian

[15] *See* Dkt. Entry 47-2 (first page); http://www.naiaupuni.org/docs/NewsRelease-NaiAupuniTerminatesElectionProcess-121515.pdf.

political entity, without any input from or participation by Appellants.[16]

B. The Electoral Process Violates Appellants' Free Speech Rights.

Na'i Aupuni's electoral process involved unconstitutional viewpoint discrimination in violation of the First Amendment. **"**It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of University of Virgina*, 515 U.S. 819, 828-29 (1995). In addition, "[g]overnment discrimination among viewpoints – or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker' – is a 'more blatant' and 'egregious form of content discrimination.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (citing *Rosenberger*). Given the fundamental nature of the right to vote in a democratic society, restrictions on that right that are based upon content or viewpoint discrimination are subject to strict scrutiny and are "presumptively invalid." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). *See also Angle v. Miller*, 673 F.3d 1122, 1127-28, 1132 (9th Cir. 2012) (election limitations that impose severe burdens on the right to vote must pass strict scrutiny or be deemed in violation of the First Amendment).

[16] In addition, regardless of whatever changes in the process Appellees have made or will make, the claims in this case would not be moot because they are capable of repetition while evading review. *See Davis v. FEC*, 554 U.S. 724, 735 (2008).

Appellants Akina and Makekau were not able to register for the Roll because they could not in good conscience agree with Declaration One, which required that they affirm the "unrelinquished sovereignty of the Native Hawaiian people." Not being on the Roll will deny them the right to participate in the registration/election/convention/referendum process under Act 195. There is no legitimate or compelling government interest in excluding Native Hawaiians, such as Appellants Akina and Makekau, because they do not share a "preapproved" or "accepted" viewpoint.

The district court stated that the evidence on this claim was "mixed." ER 58. Appellees Na'i Aupuni and the Native Hawaiian Roll Commission asserted that registration could be accomplished without affirming Declaration One, and that those who were forcibly registered because they were on other lists of Native Hawaiians were not confronted by Declaration One. ER 59. But Appellants Akina and Makekau indicated that they never received any notification that they could avoid Declaration One while registering. ER 59-60. Ultimately, the district court based its conclusion that this claim had not been established on its finding that Na'i Aupuni was a private actor. ER 60.

The district court erred in this determination. It ignored the basic, undisputed fact that the Native Hawaiian Roll Commission deliberately included Declaration One on its website. (Where it remains to this day. *See*

https://www.kanaiolowalu.org/registernow/.) Even if it did not insist on approval of this declaration (which fact is disputed), including the declaration on its website, without any accompanying indication that it was optional, suggested to registrants that it was mandatory. The fact that registrants had a potential "backdoor," via joining other lists of Native Hawaiians where Declaration One was not enforced, is hardly the same as an open statement that it was optional. Most importantly, the district court's reliance on the finding that Na'i Aupuni was a private actor is belied by all of the evidence discussed in prior sections.

Finally, Appellants Gapero and Moniz had their First Amendment rights violated by compelled speech. These Appellants satisfy the race-based ancestry requirement of Act 195, but they did not wish (and made no effort) to be placed on the Roll. Their names were placed on the Roll, however, without their knowledge or consent. ER 256, ¶ 10-11.

Courts have indicated that an individual's decisions whether to register and vote are political expressions worthy of First Amendment protection. In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court addressed, *inter alia*, a challenge to a state requirement that persons who circulate petitions seeking to have an initiative placed on a referendum ballot must, themselves, be registered voters. The Court took note of trial testimony that some initiative-petition circulators were not registered to vote as a form of protest

against what they believed to be an unresponsive "political process." *Buckley*, 525 U.S. at 196. The Court then concluded that "the choice not to register implicates political thought and expression," which choice was unduly burdened by the voter registration requirement. *Id*.; *see Dixon v. Maryland*, 878 F.2d 776, 782 (4th Cir. 1989) ("surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable"); *American Ass'n of People with Disabilities v. Herrera* (Part 2), 690 F. Supp. 2d 1183, 1216 (D.N.M. 2010) ("the choice not to register to vote also conveys political expression" and is therefore constitutionally protected); *Wrzeski v. City of Madison, Wis.*, 558 F. Supp. 664, 667 (W.D. Wis. 1983) (the First Amendment protects the right of a city council member not to vote on a proposed ordinance because it protects "both the right to speak freely and the right to refrain from speaking at all"), quoting *Wooley v. Maynard*, 430 U.S. 705 (1977).

The district court did not find this claim compelling because (1) being on the Roll did not necessarily imply a particular belief – since most of those on the Roll did not know they had been placed there; and (2) they easily could have removed themselves – once they found out they were on the Roll. ER 61-62. Both of these points slight the fact that Appellants Gapero and Moniz were placed on the Roll without their knowledge, and that their presence was used, along with the presence of tens of thousands of other unknowing participants, to bolster Appellees' claims

about the number registered. Their First Amendment rights should not be made contingent on Appellants' more or less accidental discovery that they were registered, and on their having to take action to have their names removed. Appellants' First Amendment rights not to participate are worth more than that.

III. All Other Applicable Factors Support the Issuance of an Injunction.

As explained in section II above, Appellants are likely to succeed on the merits of each of their claims. Moreover, the other three factors supporting preliminary injunction also favor Appellants.

First, the injury inflicted is severe. The Fifteenth Amendment guarantees that the right to vote "shall not be denied or abridged . . . on account of race [or] color," and the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XV, § 1, amend. XIV, § 1. Appellants Mitsui and Kent, who could not register for the Roll because they are not Native Hawaiians within the meaning of Act 195, face an imminent and irreparable deprivation of these fundamental constitutional rights. They – along with hundreds of thousands of other Hawaiians – will be barred from participating in an important electoral process solely because of their race. "The right to vote . . . is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). "An alleged constitutional

infringement will often alone constitute irreparable harm." *Goldie's Bookstore, Inc. v. Superior Court of Cal*, 739 F.2d 466, 472 (9th Cir. 1984). *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

The view that the Constitution protects the right to participate fully in a political process that can influence a final political result has been widely recognized in U.S. Supreme Court cases. *See, e.g., Allwright*, 321 U.S. at 663-66 (holding that exclusion of black Americans from a primary election denied them an equal opportunity to participate in the general election of officials); *Terry*, 345 U.S. at 468 (the Fifteenth Amendment is applicable to "any election in which public issues are decided or public officials selected."); *Morse v. Republican Party of Va.*, 517 U.S. 186, 198-200, 207-213 (1996) (nominating delegates is the "functional equivalent to the political primary" and exclusion from either that primary or a convention is exclusion from an "integral part" of the election process).

Here, the Hawaii Legislature has enacted legislation that uses public officials, and millions of dollars of public monies, to set up and implement a registration, election, and convention process. Under this process, the delegates elected to the constitutional convention are likely, at a minimum, to make recommendations to the State or federal government concerning the profoundly

important issue of whether the law should be altered to provide sovereignty and self-government to Native Hawaiians. Indeed, it is anticipated that those delegates may choose to do more than make recommendations.[17] Those who cannot register for the Roll will have lost the opportunity to participate fully in the registration/election/convention process.[18]

Non-Native Hawaiian citizens have real and weighty interests in the outcome of a process that could alter the way in which their State is governed. Appellants' exclusion from participation in the registration/election/convention/ referendum process under Act 195 will deny them the opportunity to participate fully in the controversy over Native Hawaiian sovereignty. Because this is so, that exclusion is prohibited by constitutional and statutory protections of the right to vote.

The deprivation of constitutional rights, even if for a brief period of time, constitutes irreparable injury. *See Elrod*, 427 U.S. at 373 (plurality opinion) ("The loss of First amendment freedoms, for even minimal periods of time,

[17] For example, representatives of Na'i Aupuni have stated, among other things, that the convention will be about "possible nationhood" for Native Hawaiians, that the purpose of the convention is to draft "governance documents," and even that convention delegates might take any plans they developed directly to the United Nations. ER 242, ¶¶ 14(f) & (i), ER 243, ¶ 15.

[18] Certainly Appellees suggest that the failure to participate has significant consequences. An OHA newsletter plainly indicated that the failure to register could lead to a loss of rights, or even property, in a future sovereign Native Hawaiian entity. ER 238-39, ¶ 32.

unquestionably constitutes irreparable injury."); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote . . . is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government"). As the Ninth Circuit has opined, "[a]n alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore, Inc.*, 739 F.2d at 472. *Accord*, *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009).

Appellants, along with many thousands of Hawaiian citizens, will suffer irreparable harm without a preliminary injunction enjoining the various illegal activities to be carried out in the registration/election/convention/referendum process under Act 195. The district court's contrary ruling – based as it was on plain legal error – was beyond its discretion.

Furthermore, the balancing of equities weighs in favor of an injunction. The balance of equities requires this Court to "balance the interests of all parties and weigh the damage to each[.]" *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). This Court should "identify the harms which a [preliminary injunction] might cause to defendants and weigh these against plaintiff's threatened injury." *Id.*

If Appellees are allowed to proceed with the challenged activities under Act 195, substantial harm will be done to the constitutional and statutory rights of Appellants, along with hundreds of thousands of other citizens of the State of

Hawaii. The deprivations involved, moreover, concern such fundamental constitutional guarantees as the First Amendment rights to freedom of speech and freedom from compelled speech, the Fourteenth Amendment rights to the equal protection of the laws and to due process, the Fifteenth Amendment right to vote free from denial or abridgment on account of race, and the basic antidiscrimination provisions of the Voting Rights Act of 1965.

On the other hand, the only plausible harm done to Appellees by the issuance of preliminary relief would be the loss of time in implementing their nation-building scheme while the matter is being litigated and the loss of public monies already spent. Given the fact that Appellees' project has no inherent deadline or timeframe – and that it might still be pursued in the interim in other, lawful ways – any loss of time is not a great harm to Appellees. As for the loss of public monies, this is lessened to the extent that expenditures are not irretrievably lost. For example, if the Roll were eventually upheld as lawful and constitutional, monies spent in registering voters and in publicizing the effort would not have been wasted. Furthermore, if Appellants are correct in some or all of their constitutional and statutory claims, the issuance of interim relief will in the long run actually benefit Appellees by enabling them to conduct a more careful and more lawful election in the future, the results of which might withstand subsequent legal challenge. Quite simply, the longer the State of Hawaii engages in the

practices challenged in this lawsuit and the more public monies it spends in doing so, the greater the loss will be to Appellees and to the public treasury of Hawaii when these practices are ultimately held to be illegal in a final judgment.

As this Court recently observed, "the balance of the equities favor[s] preventing the violation of a party's constitutional rights." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). Indeed, given the gravity of the deprivation of rights involved and the minimal potential loss to the State, the balance of hardships tips sharply in favor of Appellants. For this reason, a preliminary injunction is warranted even under the "sliding scale" test of *Alliance for the Wild Rockies*, 632 F.3d at 1134-35. Pursuant to that test, even if Appellants failed to show at the preliminary injunction stage that they were likely to prevail on the merits, this Court still should issue an injunction because Appellants have raised "serious questions" as to the merits while the balance of hardships tips sharply in their favor.

Consideration of the public interest also weighs in favor of a preliminary injunction. To determine whether the issuance of a preliminary injunction is in the public interest, this Court should look to the impact of the preliminary injunction on non-parties. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). *See Arizona Dream Act Coal.*, 757 F.3d at 1069. There is an extraordinary public interest in preventing

the right to vote from being denied or abridged. *See NAACP-Greensboro Branch v. Guilford County Bd. Of Elections,* 858 F. Supp. 2d 516, 529 (M.D.N.C. 1994) ("[T]he public interest in an election . . . that complies with constitutional requirements . . . is served by granting a preliminary injunction.").

As a final matter, it is highly significant that the Supreme Court issued an injunction pending the outcome of this appeal. ER 1. The action the Supreme Court took is rare. An emergency injunction is an "extraordinary" remedy, and is warranted in cases involving the imminent and clear violation of rights. *See Lucas v. Townsend,* 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining election where applicants established likely violation of Voting Rights Act). Such an injunction is only issued upon the satisfaction of one of the most demanding standards known to law, *viz*., where an applicant's right to relief is "indisputably clear." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n,* 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman v. Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)).

Appellants respectfully submit that the Supreme Court's ruling on this issue strongly suggests that the injunction Appellants seek is, in fact, warranted under the law.

CONCLUSION

Appellants respectfully request that this Court reverse the district court's denial of preliminary injunction, and remand with instructions to issue a preliminary injunction, pending the outcome of this case, enjoining Appellees (1) from sending as delegates to any convention any individual selected based on his or her status as a delegate candidate, and (2) otherwise relying on the Native Hawaiian Roll Commission's Roll to select delegates for the convention.

DATED this 23rd day of November, 2015.

/s/ Robert D. Popper

ROBERT D. POPPER
PAUL J. ORFANEDES
LAUREN M. BURKE
CHRIS FEDELI
CHRISTOPHER COATES
MICHAEL A. LILLY

Attorneys for Appellants

STATEMENT OF RELATED CASES

Under Circuit Rule 28-2.6, Appellants state that there are no known cases pending in this Court that are related to this action as defined under that Rule.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **12,592** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, namely, 14 point Times New Roman.

/s/ Robert Popper
Robert D. Popper

Counsel for Plaintiffs-Appellants

Dated: January 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** 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 January 6, 2016.

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

Dated: January 6, 2016

/s/ Robert D. Popper
Robert D. Popper