

Nos. 15-17134 and 15-17453

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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KELI'I AKINA, ET AL.,  
*Plaintiffs-Appellants,*

v.

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

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KELI'I AKINA, ET AL.,  
*Plaintiffs-Appellants,*

v.

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

and

SAMUEL L. KEALOHA, JR., ET AL.,  
*Movants-Appellants.*

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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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**SUPPLEMENTAL BRIEF OF STATE DEFENDANTS-APPELLEES  
CERTIFICATE OF SERVICE**

DOUGLAS S. CHIN  
Attorney General of Hawai'i

DONNA H. KALAMA  
GIRARD D. LAU  
ROBERT T. NAKATSUJI  
Deputy Attorneys General  
Department of the Attorney General  
State of Hawaii  
425 Queen Street, Honolulu, Hawai'i 96813  
Telephone: (808) 586-1224  
Attorneys for State Defendants-Appellees

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State Defendants-Appellees<sup>1</sup> submit this supplemental brief pursuant to the Order filed May 10, 2016. (Dkt. 102). This appeal continues to be moot and should be dismissed.

**1. Status Update Regarding Election to Ratify Documents Drafted at the February Constitutional Convention**

State Defendants understand that the people who participated in the February 2016 ‘Aha drafted and approved a proposed constitution by a vote of 88 in favor, 30 against, and 1 abstention. See HawaiianNation, Frequently Asked Questions, <http://www.hawaiiannation.com/faqs/> (last visited May 13, 2016); HawaiianNation, Our Kumu Kānāwai, <http://www.hawaiiannation.com/constitution/> (last visited May 13, 2016).<sup>2</sup> Na‘i Aupuni has announced that it will not hold a ratification vote for the proposed constitution and will be returning any remaining grant moneys to the Office of Hawaiian Affairs. Na‘i Aupuni, Key Documents, <http://www.naiaupuni.org/news.html> (NewsRelease-NaiAupuni DecidesNoRatificationVote-031616.pdf) (last visited May 13, 2016). Moreover,

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<sup>1</sup> State Defendants-Appellees are the State of Hawai‘i, Governor David Y. Ige, the Commissioners of the Native Hawaiian Roll Commission (John D. Waihee III, Na‘alehu Anthony, Lei Kihoi, Robin Danner, and Mahealani Wendt), and the Executive Director of the Native Hawaiian Roll Commission (Clyde Namuo) in their official capacities. Collectively they are referred to in this brief as State Defendants.

<sup>2</sup> The proposed constitution can be accessed online at HawaiianNation, Our Kumu Kānāwai, <http://www.hawaiiannation.com/constitution/> (20160315\_Cxn\_wNames\_ForDigital Distribution.pdf) (last visited May 13, 2016).

**Na‘i Aupuni has been dissolved**, as noted on the State of Hawaii’s Department of Commerce and Consumer Affairs business registration web site. See Department of Commerce & Consumer Affairs – Business Registration Division, General Info – Na‘i Aupuni, <https://hbe.ehawaii.gov/documents/business.html?fileNumber=247054D2> (last visited May 13, 2016).

State Defendants further understand that there is an ongoing effort by a group of ‘Aha participants to organize a ratification vote for the proposed constitution, but that the timing and method of voting has not been determined. See HawaiianNation, Frequently Asked Questions, <http://www.hawaiian.nation.com/faqs/> (last visited May 13, 2016). State Defendants also understand that an effort is underway to raise private funds to hold a ratification vote. See AlohaLāhui, <http://www.alohalahui.com/> (last visited May 13, 2016). The entity accepting donations is the Tides Foundation. Id.

The Native Hawaiian Roll Commission is not planning, organizing, or holding a ratification vote for the proposed constitution, and neither is the Governor. Nothing in Act 195 or Chapter 10H, Hawaii Revised Statutes, authorizes them do so. It is unclear at the present time whether or to what extent or in what manner those persons attempting to organize a ratification vote for the proposed constitution may seek to utilize the Roll compiled by the Native

Hawaiian Roll Commission if a ratification vote is held.<sup>3</sup> It is also uncertain whether a vote will occur at all since there is no indication whether the funds necessary to carry out a ratification vote will be raised. Plaintiffs-Appellants will undoubtedly have ample time to file a lawsuit to challenge such a vote should one be scheduled if they believe grounds for a challenge exist, and to name the proper parties, whoever they may be.

**2. Status Update Regarding Other Relevant Developments**

State Defendants are not aware of any other relevant developments.

**3. This Appeal is Moot**

“A case is moot if the issues presented are no longer live and there fails to be a ‘case or controversy’ under Article III of the Constitution. The test for mootness on appeal is whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor.” EEOC v. Federal Express Corp., 558 F.3d 842, 846-47 (9th Cir. 2009) (citations omitted). It is clear this Court cannot give Plaintiffs the relief they seek in their appeal, No. 15-17134.

Plaintiffs described their request for relief on appeal as involving the selection of delegates for a convention:

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<sup>3</sup> Those organizers are not bound to use the Roll or to limit any ratification vote to those on the Roll. Moreover, the citizenship criteria set forth in the proposed constitution (Article 2) is not the same as the Roll’s certification criteria set forth in Hawaii Revised Statutes § 10H-3(a)(2). Those persons attempting to organize a ratification referendum may therefore decide that the Roll is not appropriate or is just one potential way to identify people to participate in a ratification vote.

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.

Dkt. 57, pages 9 and 62 (Opening Brief (OB) at 2 & 55).<sup>4</sup> Plaintiffs belatedly attempted to broaden the relief in their Reply Brief to include a ratification referendum by Appellees. Dkt. 84, page 32 (Reply Brief at 28).

The electoral process referenced in Plaintiffs' requested relief (the delegate election) was cancelled by Na'i Aupuni so there is no electoral process to enjoin. Even if Plaintiffs had sought to enjoin Na'i Aupuni from holding the 'Aha (which they did not), that relief is clearly moot because the 'Aha is already completed. Even if Plaintiffs had sought to enjoin Na'i Aupuni from holding a ratification vote for any documents that may have been approved at the 'Aha (which Plaintiffs did not), that relief is clearly moot because Na'i Aupuni will not be holding a ratification vote and is no longer in existence.

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<sup>4</sup> See also Dkt. 57, page 8 (OB at 1) (stating that Plaintiffs seek to enjoin an "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."). Likewise, every one of the issues identified in Plaintiffs' Statement of the Issues focused on the "electoral" or "election" process," i.e., the delegate election that Na'i Aupuni had planned but subsequently cancelled. Dkt. 57, pages 10-11 (OB at 3-4).

Neither the Native Hawaiian Roll Commission nor the Governor will be conducting a ratification vote. Nor were they ever going to do so, which is why Plaintiffs have always focused their arguments on Na‘i Aupuni’s actions.<sup>5</sup> See e.g., Dkt. 84, pages 10-15 (Reply Brief at 6-11).

Plaintiffs’ liability theory on appeal is that Na‘i Aupuni is a state actor, and therefore the delegate election, which the district court found to be a private election, is really a state election. Dkt. 57, page 31 (OB at 24). Although Plaintiffs’ theory is wrong, the theory – like the relief sought – no longer matters. Whether or not Na‘i Aupuni was a state actor when it commenced the voting process for the delegate election in November 2015, the delegate election has since been canceled and Na‘i Aupuni has now dissolved. It is impossible for Na‘i Aupuni to now hold this or any election or referendum using the Roll. Whether or not Na‘i Aupuni was a state actor when it invited all candidates to participate in an ‘Aha to discuss Native Hawaiian self-governance and suggest proposed governance documents, the ‘Aha is done. It cannot be enjoined. And Na‘i Aupuni, which has since been dissolved, certainly will not be (and cannot be) holding any ratification vote. Thus, there is no live controversy and no effective relief that can be provided by way of this preliminary injunction appeal. The appeal is therefore moot.

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<sup>5</sup> Plaintiffs put no evidence in the record to suggest that the Governor or the Native Hawaiian Roll Commission would themselves be conducting a ratification vote.



The “capable of repetition, yet evading review” exception to the mootness doctrine does not apply. “Capable of repetition” is defined as a “reasonable expectation that the same party will confront the same controversy again.” West Coast Seafood Processors Ass’n v. Natural Resources Defense Council, Inc., 643 F.3d 701, 704 (9th Cir. 2011). There is no possibility whatsoever, much less a reasonable expectation, that Plaintiffs will confront the same controversy – a delegate election or an ‘Aha or a ratification vote organized by Na‘i Aupuni – inasmuch as Na‘i Aupuni is dissolved.

There is also no basis to conclude that should a ratification vote be scheduled some day by a different group of people or another organization, Plaintiffs will not be able to seek appropriate judicial review. A potential ratification referendum of the document drafted at the ‘Aha cannot be said to be the type of injury that by its nature is too short in duration to escape judicial review. Plaintiffs have not demonstrated that a potential private referendum is in any way like a typical State or federal election with statutorily prescribed deadlines and set election days that recur at set schedules. The capable of repetition yet evading review exception does not apply.

Moreover, the contours of a possible ratification referendum (and the organizers of such a referendum) are not before the Court and are utterly speculative. It is not at all clear how such a referendum might be structured

(including what people will be eligible to vote), or how long voters would be given to vote, or whether a vote will take place at all. In addition, there are many impediments to such an undertaking, not the least of which are raising the necessary funds and mobilizing the necessary people. Given the complete lack of facts in the record, it is impossible for this Court to conclude that a potential future referendum may be unconstitutional.

In their reply brief, Plaintiffs for the first time contended the “voluntary cessation” exception to mootness also applies. It clearly does not. That is because that exception requires not only voluntary cessation, but also that there be a “reasonable expectation” that the alleged voluntarily abandoned conduct could “reasonably recur.” United States v. Brandau, 578 F.3d 1064, 1068 (9th Cir. 2009). As Defendants have already explained, it is “absolutely clear,” see id. at 1069, that the conduct will not recur. What’s more, it is now impossible for Na‘i Aupuni to resume any of the actions challenged by Plaintiffs in this appeal because Na‘i Aupuni is dissolved.

For the reasons and authorities set forth above and in the Office of Hawaiian Affairs’ answering brief filed in appeal No. 15-17453, which the State Defendants joined, the appeal of Proposed Intervenor in No. 15-17453 is also moot and should be dismissed.

### CONCLUSION

For all of the above reasons and for the reasons set forth in State Defendants' Answering Brief, Plaintiffs' and Proposed Intervenor's appeals should be dismissed on mootness grounds. In the alternative, the district court's rulings should be AFFIRMED.

DATED: Honolulu, Hawai'i, May 17, 2016.

s/ Donna H. Kalama  
DONNA H. KALAMA  
GIRARD D. LAU  
ROBERT T. NAKATSUJI  
Deputy Attorneys General

Attorneys for State Defendants-Appellees

### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed State Defendants-Appellees' Supplemental 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 May 17, 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: Honolulu, Hawai'i, May 17, 2016.

s/ Donna H. Kalama  
DONNA H. KALAMA  
GIRARD D. LAU  
ROBERT T. NAKATSUJI  
Deputy Attorneys General

Attorneys for State Defendants-Appellees