No. __-___

In the Supreme Court of the United States

KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ,
Applicants,

v.

THE STATE OF HAWAII, GOVERNOR DAVID Y. IGE, ROBERT K. LINDSEY JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, COLETTE Y. MACHADO, PETER APO, HAUNANI APOLIONA, ROWENA M.N. AKANA, JOHN D. WAIHE'E IV, CARMEN HULU LINDSEY, DAN AHUNA, LEINA'ALA AHU ISA, Trustees, Office of Hawaiian Affairs, KAMANA'OPONO CRABBE, Chief Exec. Officer, Office of Hawaiian Affairs, JOHN D. WAIHE'E III, Chairman, Native Hawaiian Roll Commission, NA'ALEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MAHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, CLYDE W. NAMU'O, Exec. Director, Native Hawaiian Roll Commission, THE AKAMAI FOUNDATION, and THE NA'I AUPUNI FOUNDATION,
Respondents.

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW

NECESSARY ACTION ON OR BEFORE NOVEMBER 30, 2015

Robert D. Popper, *Counsel of Record*
JUDICIAL WATCH, INC.
425 Third Street, SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Michael A. Lilly
NING LILLY & JONES
707 Richards Street, Suite 700
Honolulu, Hawaii 96813
(808) 528-1100
michael@nlilaw.com

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

William S. Consovoy
J. Michael Connolly
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard
Arlington, Virginia 22201
(703) 243-9423
will@consovoymccarthy.com

Attorneys for Applicants

Dated: November 23, 2015

Rule 29.6 Statement

Pursuant to Supreme Court Rule 29.6, Applicants each represent that they do not have any parent entities and do not issue stock.

Respectfully submitted,

Robert D. Popper

Robert D. Popper
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street, SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org
Attorney for Applicants

Dated: November 23, 2015

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To the Honorable Anthony Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Right now, the State of Hawaii is holding an election in which only "Native Hawaiians"—defined as blood descendants of the aboriginal inhabitants of the Hawaiian islands—are allowed to vote. On November 30, one week from today, the election will conclude and the votes will be counted. At that time, Applicants Joseph William Kent and Yoshimasa Sean Mitsui, two Hawaiian residents who cannot meet the racial criteria required by statute, will forever lose their right to participate in the political process and the State of Hawaii "will [have], by racial classification, [successfully] fence[d] out whole classes of its citizens from decisionmaking in critical state affairs." *Rice v. Cayetano*, 528 U.S. 495, 514, 519 (2000). This Court's intervention is urgently needed.

In 2011, the State of Hawaii enacted Act 195, which authorized the creation of a race-based voter roll to be used for an election of delegates to a Native Hawaiian convention. At the same time, Act 195 established another state agency, Respondent Native Hawaiian Roll Commission, as an administrative subdivision within the Office of Hawaiian Affairs, to oversee registration for the roll and to enforce its restrictions.

In December 2014, a non-profit entity, Respondent Na'i Aupuni, was established for the stated purpose of conducting the current election. Shortly after its formation and while the election was still being planned, Na'i Aupuni assured the Office of Hawaiian Affairs that it would use the racially exclusive registration list developed by the Native Hawaiian Roll Commission to conduct the election

desired by the State. Shortly thereafter, the Office of Hawaiian Affairs executed a number of contracts that transferred $2.6 million of government funds to Na'i Aupuni in order to hold the current election.

On October 23, 2015, the U.S. District Court for the District of Hawaii denied Applicants' motion for a preliminary injunction, and on November 19, 2015, the U.S. Court of Appeals for the Ninth Circuit issued a brief order denying Applicants' urgent motion for an injunction pending appeal.

The district court's ruling was flawed in at least two critical respects. First, the district court held that Na'i Aupuni is merely a private actor holding a private election and so those individuals excluded from voting in the election had no protection under the U.S. Constitution and federal law. App. 38a, 44a. But this election is permeated with state action: a Hawaii statute contemplated the election, the Office of Hawaiian Affairs, a state agency, created the race-based registration list, the election is being conducted pursuant to a government contract and is being paid for by government funds, and the election concerns hugely important questions of public policy. There is almost nothing "private" at all about this election.

Second, the district court held that even if Na'i Aupuni is a state actor, the current election satisfies strict scrutiny because the State had "a compelling interest in bettering the conditions of its indigenous people" by "allowing a starting point for a process of self-determination." App. 55a-56a. This ruling is literally unprecedented. It is the first decision in American history (not subsequently vacated) to find a compelling justification for a State to prohibit individuals of a

certain race from voting in an election. Not only does this holding fly in the face of this Court's decision in *Rice v. Cayetano*, but it fails on its own terms. This election will express nothing meaningful about Hawaiian "indigenous people." The definition of "Native Hawaiian" that is used refers to any person with even a drop of Native Hawaiian blood and so is egregiously over-inclusive of the statute's stated goals. *See Rice*, 528 U.S. at 527 (Breyer, J., concurring in the result) (to define tribal membership "in terms of 1 possible ancestor out of 500 . . . goes well beyond any reasonable limit."). In addition, many individuals who met this definition of "Native Hawaiian" were prohibited from being listed on the voter roll unless they swore to having certain viewpoints, such as recognizing "the unrelinquished sovereignty of the Native Hawaiian people." And many others were transferred to the voter rolls without their knowledge. In the language of strict scrutiny, the conduct of this election cannot possibly be narrowly tailored to achieve any compelling purpose.

Injunctive relief under the All Writs Act is necessary to prevent irreparable harm to Applicants during the appellate process, and to preserve this Court's jurisdiction regarding the issues raised in this case. On Monday, November 30, 2015, this election will end, the votes will be counted, and the winners of the delegates to the constitutional convention will be certified on Tuesday, December 1, 2015. At that time, Applicants Joseph William Kent and Yoshimasa Sean Mitsui, along with several hundred thousand other residents of Hawaii, will forever lose their right to participate in this public policy determination in their State. *See Rice*,

528 U.S at 523 ("All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others."). The delegates to the planned convention will have been elected without any input whatsoever from these Applicants. In addition, the results of the election from which these Applicants were excluded will be publicized and touted as an expression of the popular will. Yet Applicants and many others will have had no say respecting the documents the delegates will create and the recommendations they will make respecting Native Hawaiian sovereignty.

If the U.S. Department of the Interior (DOI) has its way, Applicants will *never* have a say in whether a new Hawaiian governmental entity is formed. It would prefer that this election proceed so that DOI can advance the process of recognizing a Hawaiian native tribe without sufficient Congressional approval. On September 29, 2015, during the briefing of this matter in the district court, the DOI issued a Notice of Proposed Rulemaking commencing the 90-day comment period on a rule that would allow the United States to use this election to formally recognize certain "Native Hawaiians" on a "formal government-to-government relationship." In other words, this election will lead to the formation of a new Hawaiian nation limited by race and recognized as an independent government—and Applicants and countless others will have played no part in this important process *solely* because of their race.

Accordingly, Applicants respectfully ask the Court to enter an injunction against Respondents under the All Writs Act during the pendency of this appeal

enjoining them from counting the ballots cast in and certifying the winners of the election of delegates to the upcoming constitutional convention.

Finally, at a minimum, Applicants request a temporary injunction to allow for full briefing and consideration of this Application. *See, e.g., Wheaton College v. Burwell*, 134 S. Ct. 2898 (2014).

JURISDICTION

Applicants filed their complaint on August 13, 2015, challenging Act 195 and its race-based voting restrictions as violations of the First, Fourteenth, and Fifteenth Amendments, as well as the Voting Rights Act of 1965, 52 U.S.C. § 10301 and 42 U.S.C. § 1983. App. 147a. On August 28, 2015, Applicants filed a motion for a preliminary injunction. Dkt. 47. The district court had jurisdiction over Applicants' lawsuit under 28 U.S.C. §§ 1331 and 1336 and had authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202.

The district court denied Applicants' motion for an injunction at an oral hearing on October 23, 2015. Subsequently, the district court followed the oral order with a written decision on October 29, 2015, and Applicants' timely filed their notice of appeal to the Ninth Circuit that same day. App. 67a. The Ninth Circuit had jurisdiction over the appeal under 28 U.S.C. § 1292(a). The Ninth Circuit denied Applicants' motion for an injunction pending appeal on November 19, 2015. App. 1a.

This Court has jurisdiction over this Application under 28 U.S.C. § 1254(1) and has authority to grant the relief that the Applicants request under the All Writs Act, 28 U.S.C. § 1651.

BACKGROUND AND PROCEDURAL HISTORY

A. 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.* This Court has recognized that OHA is "an arm of the state." *Rice*, 528 U.S. at 521.

In July 2011, Hawaii Governor Neil Abercrombie signed Act 195 into law. 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." App. 412a, ¶ 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 2016, 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. App. 404a, ¶ 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/; App. 77a-78a; App. 404a, ¶ 13, App.

397a. 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 for the current election were registered through this website. App. 78a.

In addition to those whose names were placed on the roll because they 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 advance knowledge or consent. *Id.*; App. 405a, ¶¶ 23-24; App. 413a, ¶ 14(j); App. 418a, ¶¶ 4-5; App. 415a, ¶ 5. An amendment to Act 195 authorized this tactic. HAW. REV. STAT. § 10H-3(a)(4). About 62% of those on the Native Hawaiian voter rolls were registered in this way. App. 78a.

OHA and other state officials set up this convoluted process because they believed that they could not lawfully conduct an election using the roll due to this Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000). Accordingly, Na'i Aupuni was created, and imbued, at least on paper, with a measure of independence, in order to allow it to run such an election as a "private actor." The hope was that this arrangement would avoid or defeat litigation. This reasoning was openly discussed at OHA trustee meetings. *See* App. 328a ("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* App. 413a, ¶ 15(a) (getting money from OHA "with no strings attached . . . means the election process will withstand a Fourteenth Amendment challenge").

B. The Formation 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." App. 412a, ¶ 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. App. 345a (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").

Further, 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. App. 325a. In other words, a government agency, OHA, was at that time a member of Na'i Aupuni.[1]

C. The Advance Promise by Na'i Aupuni to Run a Racially Exclusive Election

Respondents admit that, "prior to entering into" any contract or grant agreement, "[Na'i Aupuni] informed OHA that it intended to use the [race-based]

[1] 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." App. 425a. 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 Na'i Aupuni.

Roll" to conduct the planned election. App. 361a, ¶ 13. Na'i Aupuni also reports telling OHA "that it might also look into whether there are other available lists of Native Hawaiians." *Id.* What was absolutely clear was that the election would be restricted to those with Native Hawaiian ancestry. *See also* App. 341a, ¶ 20 (OHA's Chief Executive recalling the same representations from Na'i Aupuni).

Any assessment regarding Na'i Aupuni's "independence" from OHA must take into account this advance representation by Na'i Aupuni that it planned to use the racially exclusive Roll developed by the Native Hawaiian Roll Commission and that it intended to conduct a racially exclusive election.

D. The Election-Related Agreements Between OHA and Na'i Aupuni

Commencing in the spring of 2015, representatives of OHA, the Akamai Foundation,[2] and Na'i Aupuni entered into an interrelated series of agreements, which were posted on Na'i Aupuni's website. App. 405a-406a, ¶¶ 26-30; *see* http://www.naiaupuni.org/news.html ("Contracts and Agreements"). The purpose of these agreements was to delegate to Na'i Aupuni the running of the planned election, and to provide it with millions of dollars of government funds to conduct that election.

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

---

[2] Apparently the Akamai Foundation was included in order to take advantage of its tax-exempt status. App. 362a, ¶ 15.

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." 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. App. 370a.

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." App. 378a. OHA is referred to throughout the agreement and is even accorded certain specific rights. *See id.* at 216 (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 American, Inc., a private New York company, spells out dates and details for the election. App. 384a. That agreement acknowledges that the company will utilize "the Native Hawaiian Roll Commission's current certified registry of eligible Native Hawaiians." App. 391a. Pursuant to the schedule in that contract, ballots for the delegate election were mailed out on November 1, 2015 and will be tabulated December 1, 2015. App. 393a.

E. DOI's Proposed Administrative Process

The U.S. Department of the Interior (DOI) issued a Notice of Proposed Rulemaking on September 29, 2015, during the pendency of this action, soliciting public comments on a proposed rule concerning an administrative procedure by which Native Hawaiians might become a separate political entity. App. 234a. That proposed rule adopts the same standard for Hawaiian ancestry as Act 195. App. 273a.

Further, the United States submitted an amicus brief at the Ninth Circuit confirming that this election will, under its proposed rules, constitute the first step in a process leading to a Native Hawaiian entity. App. 190a-191a. DOI intends to

allow Native Hawaiians to utilize the results of the ongoing election as part of an administrative procedure that would authorize "government-to-government" recognition of a Native Hawaiian entity. *Id.*

F. Procedural History

The complaint in this matter was filed on August 13, 2015. App. 146a. On August 28, 2015, the plaintiffs moved for a preliminary injunction in the district court. 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. App. 70a.[3]

Plaintiffs-Appellants filed their Notice of Appeal on October 26, 2015. App. 67a. On October 29, 2015, Plaintiffs-Appellants filed an Urgent Motion for an Injunction While Appeal is Pending. A motions panel for the Ninth Circuit denied that motion on November 19, 2015. App. 1a.

ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312

[3] 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." App. 76a, citing *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007 (6th Cir. 2003). His written order was issued October 29, 2015. App. 3a.

(1986) (Scalia, J., in chambers) (quoting *Fishman v. Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)). This "extraordinary" relief is warranted in cases involving the imminent and indisputable violation of voting 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); *Am. Trucking Assocs.* v. *Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers) (granting injunction); *Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (same).

Applicants present such a case.

I. APPLICANTS FACE CRITICAL AND EXIGENT CIRCUMSTANCES.

The right to vote is a "precious" and "fundamental" right. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (finding that the right to vote is "preservative of all rights"). "[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges [the right to vote.]" *Wesberry*, 376 U.S. at 17.

In seven days, Applicants Joseph William Kent and Yoshimasa Sean Mitsui—as well as countless other Hawaiian residents who cannot meet the racial criteria required by statute—will forever lose this fundamental right. On November

30, the polls will close, the votes will be counted, and the delegates will be chosen. These delegates will be charged with a historic task—drafting a new constitution to form a government that will represent a sizable section of the Hawaiian population.

Yet Applicants and others will be excluded from voting in this historic election—one that is guaranteed to affect their lives and the lives of everyone in their State—solely because of their race. Without a doubt, the loss of these constitutional rights constitutes irreparable harm warranting this Court's immediate intervention. *See Lucas*, 486 U.S. at 1305 (enjoining an election because "irreparable harm likely would flow from a denial of injunctive relief"); *see also, e.g., Elrod v. Burns*, 247 U.S. 347, 373 (1976).

This election is not, as the district court appeared to believe, a process with no consequences. The current election is a critical component of a preordained process that will lead to a constitutional convention, the drafting of documents and recommendations, and the subsequent ratification or rejection of these. Applicants' total exclusion from this process denies them the equal opportunity to participate in the entire political process. *See 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); *see also Romer v. Evans,* 517 U.S. 620, 633-34 (1996) (invalidating a state constitutional amendment that denied gays and lesbians equal 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 allocated government power in a racially discriminatory matter).

Nor are the results of this election merely symbolic. Enormous political, social, and economic consequences are at stake. The delegates chosen through this election will decide whether to adopt a new government that will affect every individual living in the State, as well as hundreds of thousands of individuals identified as Native Hawaiians. App. 275a. Moreover, OHA has announced its intention to convey the lands it currently holds in trust to the new entity created through this convention. And as the DOI has made clear, the United States is almost certain to formally recognize the new entity as the official government of Native Hawaiians. App. 190a-191a. It thus is no surprise that Respondents themselves have characterized this election as "historic" and critical to protecting the "public interest." App. 426a ("Your Honor, we stand on the cusp of a historic election."); *id.* ("[W]e're talking about a historic hundred-plus year opportunity that has finally come to the Hawaiian people."); *id.* at 424a (quoting Respondents on the public interests involved).

Finally, and of critical importance, Applicants will have no remedy if the votes in this election are counted and the results certified. This election cannot be undone. Under the DOI's administrative process, the agency can accept this election as the will of Hawaiians—even if this election is some day recognized as being unconstitutional. In other words, if the DOI proceeds as it has indicated, there will be no subsequent state or federal election or ratification in which non-

Native Hawaiians, like Applicants, will be allowed to have their say. This is no doubt why Respondents have moved as fast as they can to complete this election before judicial intervention can occur. *See* Na'i Aupani, Frequently Asked Questions, *available at* http://www.naiaupuni.org/faq.html ("After careful consideration of a longer timetable, Na'i Aupuni does not believe delaying this process will improve the outcome as there will always be people seeking to delay the election of delegates and convening an 'Aha or merely stopping them from proceeding altogether. Na'i Aupuni wants to keep to the current timetable to reduce the risk that the process may be stopped.").

The only way to ensure that this does not happen is to issue the injunction Applicants request. *See, e.g., Lucas*, 486 U.S. at 1305. This injunction would allow both the Ninth Circuit and this Court, if necessary, to review the actions of Respondents and address the harms suffered by Applicants. This injunction should be issued.

II. APPLICANTS HAVE AN INDISPUTABLY CLEAR RIGHT TO RELIEF.

A. Na'i Aupuni Is Clearly a State Actor And Its Conduct Violates the Fifteenth Amendment.

In *Rice v. Cayetano*, 528 U.S. 495 (2000), 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, this 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.

This Court recognized 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); *Smith v. Allwright*, 321 U.S. 469 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953) (all-white primary cases)). The Court reasoned that "[a]ncestry can be a proxy for race," *id.* at 514, and that by 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 Court found:

> 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 same considerations apply to the similar provisions of Act 195. The only meaningful distinction between the instant case and *Rice* identified by the district court was Respondents' claim that Na'i Aupuni is a private actor, in which case the election at issue can be considered a private election not covered by the U.S. Constitution. App. 38a, 44a. The district court was persuaded by the provisions in Na'i Aupuni's contracts with OHA that accorded Na'i Aupuni autonomy in its conduct of the disputed election. App. 45a. The district court erred.

When it comes to voting rights, this Court has shown no patience for any kind of subterfuge and has applied the Fifteenth Amendment to "nullif[y] sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 274 (1939). This Court consistently has conducted clear-eyed and practical analyses of electoral arrangements, emphasizing substance rather than form to detect unlawful racial discrimination.

For example, in *Terry v. Adams*, 345 U.S. 461, 462-63 (1953), membership in a Texas "political organization called the Jaybird Democratic Association or Jaybird Party" was open only to the white residents of the county. 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 [had] nearly always done so and with few exceptions" they won the subsequent Democratic primaries and general elections. *Id.* In response to a Fifteenth Amendment challenge, the Jaybirds argued that it "applies only to elections or primaries held under state regulation, that their association is not regulated by the state at all, and that it is . . . a self-governing voluntary club." *Id.*

In rejecting such "formalistic arguments," this 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)). As a result, 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.

Respondents here likewise hope that a "formalistic" view of their institutional arrangements will obscure the obvious purpose of their arrangements. Indeed, Respondents arguments below parallel those asserted by the defendants in *Terry*. But the reality of what is happening in this case is simple. Respondents knew that it would violate the Constitution if OHA conducted an election using the race-based voter roll. Accordingly, Respondents gave public money to an ostensibly private organization, Na'i Aupuni, to conduct the election that OHA wished to conduct, while using the very same race-based roll created by the State. Respondents should not be permitted to circumvent constitutional protections by these means.

Under the applicable legal standards, Na'i Aupuni must be deemed to be a state actor.

1. Na'i Aupuni Is Engaged in a Public Function.

State action is "present in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (citing, *inter alia*, *Nixon v. Condon*, 286 U.S. 73 (1932) ("election") and *Terry* ("election")); *see Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 158 (1978) ("[W]ith regard to the election of public officials, our cases make it clear that the conduct of the elections themselves is an exclusively public function.").

In *Terry,* the Court held that the Fifteenth Amendment established a right "not to be discriminated against as voters in elections *to determine public governmental policies* or to select public officials." 345 U.S. at 467 (emphasis added). Accordingly, "the Amendment includes any election *in which public issues are decided* or public officials selected." *Id.* at 468 (emphasis added). The election at issue here may lead to a decision to alter the status of hundreds of thousands of Hawaiians, perhaps by placing between one-fifth and one quarter of the population under the jurisdiction of a new governmental entity. *See, e.g., Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015) ("If 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."). This clearly is an election "to determine public governmental policies" and "to decide public issues."

2. Na'i Aupuni Is Engaged in Joint Action With OHA.

There is joint action where "state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights" or where "the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party." *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013) (citations omitted); *see Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) (it enough that a private actor "is a willful participant in joint activity with the State or its agents") (internal quotation marks omitted) (citation omitted).

Every fact relevant to the authorization for and conduct of this election shows that Na'i Aupuni is acting jointly with OHA. Na'i Aupuni was formed, three years after Act 195 was passed, for no other purpose than to hold this election. Na'i Aupuni's bylaws refer to OHA's legislative goals. OHA was, at least for a time, an *ex officio* member of Na'i Aupuni. 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 numerous special rights and privileges.

Na'i Aupuni's supposed 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 future litigation, rather than a bona fide grant of independence. Simply put, once OHA knew that Na'i Aupuni would use the roll, including the "autonomy clause" became a meaningless gesture. OHA and Na'i Aupuni were, and are, acting in concert.

Indeed, neither OHA nor Na'i Aupuni has the discretion to ignore the provisions of Act 195. The Act 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 discretion as to how to conduct the election.

Under the "public function" test, the "joint action" test, and the practical, commonsense analysis this Court applies to racial restrictions relating to voting, it is clear that Na'i Aupuni is a state actor. In consequence, its use of the race-based

roll supplied by the Native Hawaiian Roll Commission violates Applicants' Fifteenth Amendment rights.

B. The Challenged Election Could Not Satisfy Strict Scrutiny.

Under the Equal Protection Clause of the Fourteenth Amendment, "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted). "This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Id.*

The district court found that even if Na'i Aupuni's conduct of the election were deemed to be state action 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." App. 92a. By so holding, the district court issued the only extant decision in American law in which a compelling state interest justified a racially exclusive election. The district court's ruling was clearly incorrect, however, because the election Na'i Aupuni is holding 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 the 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. At the most basic, practical level, 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.[4] 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 was not narrowly tailored to achieve the interest identified by the district court. Respondents' actions fail strict scrutiny.

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[4] 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").

III. INJUNCTIVE RELIEF WOULD AID THIS COURT'S JURISDICTION.

An injunction under the All Writs Act would be "in aid of" this Court's certiorari jurisdiction. *See* 28 U.S.C. § 1651(a). The Court's authority under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). The Court may issue a writ to maintain the status quo and take action "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan v. Carland*, 217 U.S. 268, 280 (1910); *New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) ("Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals would be to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals.").

As set forth above, once this election is finished and certified the damage has been done. Every step in the process (of which this election is but a single part) inflicts a new injury on Applicants by denying them the equal opportunity to participate in the political process. Every subsequent step—the convention, the creation of documents and recommendations, and the ratification of the delegates' actions—eliminates the Court's ability to return to the *status quo ante*. Indeed, even a subsequent decision to invalidate the elections or to order new elections will not matter if DOI chooses to honor the results of the current election in its administrative process. The Court must act now or it will lose the ability to effectively review this case.

CONCLUSION

For all the foregoing reasons, Applicants respectfully ask the Court to enter an injunction against Respondents under the All Writs Act during the pendency of this appeal enjoining them from counting the ballots cast in and certifying the winners of the election of delegates to the upcoming constitutional convention.

Finally, at a minimum, Applicants request a temporary injunction to allow for full briefing and consideration of this Application.

Respectfully submitted,

Robert D. Popper
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street, SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Michael A. Lilly
NING LILLY & JONES
707 Richards Street, Suite 700
Honolulu, Hawaii 96813
(808) 528-1100
michael@nlilaw.com

William S. Consovoy
J. Michael Connolly
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard
Arlington, Virginia 22201
(703) 243-9423
will@consovoymccarthy.com

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

Attorneys for Applicants