

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

KELI'I AKINA, *et al.*,

Plaintiffs,

vs.

THE STATE OF HAWAII, *et al.*

Defendants.

No. 15-17134

**Appeal from Case No. 1:15-cv-00322-
JMS-BMK, District of Hawaii**

**APPELLANTS' SECOND MOTION
TO EXTEND TIME FOR FILING
BRIEF ON ACCOUNT OF
EXTRAORDINARY
CIRCUMSTANCES**

Pursuant to Federal Rule of Appellate Procedure 26(b) and Ninth Circuit Rule 31-2.2(b), Appellants respectfully move for a fourteen (14) day extension of time, from December 23, 2015, to and including January 6, 2016, in which to file their opening brief and excerpts of record in the above-captioned appeal, on account of the extraordinary circumstances set forth below. Appellants respectfully request that all other current briefing deadlines likewise be extended. This is Appellants' second request for an extension of the briefing schedule.

This extension is requested to allow Appellants time to respond appropriately to the fact that on Tuesday, December 15, 2015, Appellee Na'i Aupuni issued a press release stating that "it has terminated the Native Hawaiian election process" that is a subject of the underlying lawsuit and this appeal. Ex. A at 1. That same press release announced that Na'i Aupuni "will go forward with a

four-week-long ‘Aha [convention] in February” and 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. The same day, counsel for Appellants were contacted by counsel for Na‘i Aupuni, who asked whether Appellants would consent to a stipulation of dismissal of the litigation without prejudice.

Appellants are very mindful of the December 15, 2015, Order of this Court providing that “[a]ny further written motions for extensions of time to file briefs are strongly disfavored and will not be granted absent a showing of extraordinary circumstances.” Dkt. 46. Appellants respectfully submit that the foregoing facts constitute such extraordinary circumstances.

These developments, arising roughly a week before Appellants’ opening brief is due, alter the basic set of facts that the parties have litigated and briefed since August 2015. This factual development will, at a minimum, require Appellants to make alterations to their brief. Moreover, this factual development may change the litigation in ways more fundamental than alteration of briefs. In particular, possible responses and outcomes range from seeking further injunctive relief from the Supreme Court to dismissal of the appeal and/or the litigation. Determining the appropriate course of action will require (and already has required) time-consuming and substantive consultations between and among

counsel and their clients. The requested extension will afford Appellants the time necessary to resolve these issues and, ultimately, ensure that judicial and party resources are not wasted.

Appellants believe that the proper course of action will be determined within the next two weeks. Accordingly, Appellants respectfully request the two-week extension set forth herein, for these reasons and for the reasons set forth in the attached declaration.

Counsel for Appellees have been contacted regarding this motion. Counsel for Appellees Na'i Aupuni and the Akamai Foundation have stated that they do not oppose this motion. Counsel for the State Appellees have stated that they take no position on this motion. Counsel for the OHA Appellees have not responded one way or the other.

DATED this 17th day of December, 2015.

Respectfully submitted,

/s/ Robert D. Popper

ROBERT D. POPPER

Attorney for Appellants

DECLARATION OF ROBERT D. POPPER

Robert D. Popper, for his declaration, pursuant to 28 U.S.C. § 1746, states as follows:

1. I am over the age of 18 and I am of sound mind and am fully competent and authorized to make this declaration.
2. I am an attorney at Judicial Watch representing the Appellants in the above-captioned matter. In accordance with Ninth Circuit Rule 31-2.2(b), I submit this declaration in support of Appellants' Second Motion to Extend Time for Filing Brief On Account Of Extraordinary Circumstances.
3. This case concerns the claim that agents of the State of Hawaii are conducting a racially exclusive and viewpoint restricted election, in violation of the First, Fourteenth, and Fifteenth Amendments, the Voting Rights Act of 1965, and the Civil Rights Act of 1871. After Appellants' moved for a preliminary injunction, the district court denied Appellants' motion, along with Appellants' separate motion for an injunction pending appeal, in an oral ruling issued October 23, 2015. Appellants filed a timely notice of appeal on October 26, 2015. The District Court's written order embodying its oral ruling was issued on October 29, 2015. Appellants filed their urgent motion for an injunction pending appeal in accordance with Ninth Circuit Rule 27-3(b) that same day.

4. Appellants' brief was initially due November 23, 2015. Appellants filed a previous motion for a thirty-day extension of their time in which to file their opening brief in order to seek a temporary injunction from the Supreme Court of the United States. Dkt. 31-1. That motion was granted and Appellants' time to file an opening brief was extended to December 23, 2015. Dkt. 32.

5. Appellants request a two-week extension of their time to file an opening brief, through and including January 6, 2016.

6. Appellants' request is based on the changed facts asserted in a press release issued two days ago by Na'i Aupuni. Annexed hereto as Exhibit A is a true and correct copy of that press release, entitled "Na'i Aupuni Terminates Election Process," which was issued by Appellee Na'i Aupuni on December 15, 2015.

7. In that press release, Na'i Aupuni stated that "it has terminated the Native Hawaiian election process" that is a subject of the underlying lawsuit and this appeal. Ex. A at 1. Na'i Aupuni also stated that it "will go forward with a four-week-long 'Aha [convention] in February" and 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.*

8. On December 15, 2015, counsel for Appellants were contacted by counsel for Na'i Aupuni, who asked whether Appellants would consent to a stipulation of dismissal of the litigation without prejudice.

9. These developments alter the facts that the parties have litigated and briefed since August 2015. This factual development will, at a minimum, require Appellants to make alterations to their brief. Further, Appellants have a range of possible responses, including seeking further injunctive relief from the Supreme Court to dismissal of the appeal and/or the litigation. Plaintiffs and their counsel have had to conduct considerable, substantive consultations as to the best course of action now, and will have to conduct further consultations – all at a time when counsel is preparing an opening brief attempting to incorporate these same changed facts.

10. Appellants are aware that a motion for an extension of time to file a brief should be filed at least seven days before the expiration of the time prescribed for filing the brief. Ninth Circuit Rule 31-2.2(b). However, good cause exists to grant it. Appellants only learned of the changed facts referred to herein on December 15, 2015, eight days before their brief was due, and were simply not able to conduct the deliberations necessary in order to decide to file a request for an extension by the close of business yesterday.

11. I contacted Appellees' counsel earlier today seeking their consent to this extension. Counsel for Appellees Na'i Aupuni and the Akamai Foundation have stated that they do not oppose this motion. Counsel for the State Appellees have

stated that they take no position on this motion. Counsel for the OHA Appellees have not responded one way or the other.

12. If the extension is granted, Appellants' opening brief will be filed within the time requested. If this matter goes forward, no significant delay will result from this extension.

13. To my knowledge the court reporter is not in default with regard to any designated transcripts in this case.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 17, 2015

s/ Robert D. Popper

Robert D. Popper

CERTIFICATE OF SERVICE

I, Robert D. Popper, hereby certify that on December 17, 2015, I filed and served the foregoing Appellants' Second Motion to Extend Time for Filing Brief On Account Of Extraordinary Circumstances, the attached Declaration of Robert D. Popper, and the attached Exhibit A, via the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ Robert D. Popper

Robert D. Popper

Exhibit A



NEWS RELEASE

FOR IMMEDIATE RELEASE

Tuesday, December 15, 2015

Media Contact: Lloyd Yonenaka
(808) 543-3554
info@naiaupuni.org

NA'I AUPUNI TERMINATES ELECTION PROCESS

'Aha Will Go Forward

*All Registered Candidates
Will Be Offered Seat As Delegates*

HONOLULU – Na'i Aupuni announced today that it has terminated the Native Hawaiian election process but will go forward with a four-week-long 'Aha in February. All 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.

Na'i Aupuni President Kuhio Asam said Na'i Aupuni's goal has always been to create a path so Native Hawaiians can have a formal, long-overdue discussion on self-determination.

"Our goal has always been to create a path so that Hawaiians can gather and have a serious and much-needed discussion about self-governance," Asam said. "We anticipated that the path would have twists and turns and even some significant obstacles, but we are committed to getting to the 'Aha where this long-overdue discussion can take place."

He said due to the delays caused by the ongoing litigation – that could continue for years – it was decided that the most effective route at this point would be to offer to convene all of the remaining delegate candidates and allow them to an opportunity to organize Hawaiians and achieve self-governance.

Na'i Aupuni said Election-America has been informed to stop the receipt of ballots, to seal ballots that have already been received, and to prevent anyone from counting the votes.

(more)

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Na'i Aupuni attorney William Meheula said consistent with offering to seat all candidates, Na'i Aupuni has decided that the election votes will never be counted. "Thus, the Akina litigation, which seeks to stop the counting of the votes, is moot, and Na'i Aupuni will take steps to dismiss the lawsuit," he said. "To be clear, Na'i Aupuni does not know and will never learn the election results."

Asam said Na'i Aupuni will manage the process of the 'Aha but not the substance of the discussions. "We have retained Peter Adler and Linda Colburn of The Mediation Center of the Pacific to serve as facilitators to lead the instruction week and to thereafter assist in organizing the delegates," he said. "They will contact the candidates who decide to participate in the 'Aha."

The confirmation deadline to participate in the 'Aha is Dec. 22, 2015. An email will request that the candidates confirm whether they intend to accept the terms and attend the 'Aha that runs the month of February 2016 and will be held at a meeting facility in Kailua, Oahu. On Dec. 23, 2015, Na'i Aupuni will post the list of delegates on its website.

Asam said a key component of the 'Aha is the education and information the delegates will receive during the first week regarding constitution building, federal Indian law, international law regarding de-occupation, decolonization, the rights of indigenous people, U.S. Constitution issues that relate to Native Hawaiian self-governance, the ceded lands claim, background on Hawaiian Home Lands, Kingdom Law and constitutions drafted by sovereignty groups.

About Na'i Aupuni

Na'i Aupuni is an independent organization made up of a volunteer board of directors from the Hawaiian community. It exists solely to help establish a path to an 'Aha, or constitutional convention, where Hawaiians can discuss and explore various options of self-determination. Na'i Aupuni was formed in December 2014 and is separate and independent from the Office of Hawaiian Affairs and the State of Hawaii. For further information about Na'i Aupuni and a list of the 196 candidates who will be seated as delegates can be found at <http://www.naiaupuni.org/>.

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