No. __-___

In the Supreme Court of the United States

KELI'I AKIN, 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.

APPENDIX

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Dated: November 23, 2015

Attorneys for Applicants

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KELI'I AKINA; et al., Plaintiffs - Appellants, v. STATE OF HAWAII; et al., Defendants - Appellees.	No. 15-17134 D.C. No. 1:15-cv-00322-JMS-BMK District of Hawaii, Honolulu ORDER

Before: W. FLETCHER, N.R. SMITH, and OWENS, Circuit Judges.

This is a preliminary injunction appeal. Appellants have filed an urgent motion to enjoin, pending disposition of this appeal, appellee N'ai Aupuni from counting votes in an election that concludes on November 30, 2015.[1]

[1] The November 5, 2015 submission by non-party American Civil Rights Union and the November 9, 2015 submission by non-party the United States are construed as requests for leave to file briefs in support of or in opposition to the urgent motion. So construed, the requests are granted. The respective briefs have been considered for purposes of disposition of the urgent motion only.

The court has received the November 9, 2015 "Notice of Absent Necessary and Indispensable Party" (the "Notice") filed by attorney Lanny Alan Sinkin on behalf of a non-party purporting to be the Kingdom of Hawai'i. To the extent the Notice seeks relief from this court, it is referred to the panel assigned to decide the merits of this appeal for whatever consideration the panel deems appropriate.

SLL/MOATT

To justify an immediate injunction pending appeal, appellants must establish (1) a likelihood of the success on the merits of the appeal; (2) that they are likely to be irreparably harmed if the vote counting is not enjoined pending disposition of the appeal; (3) that the balance of the equities tips in their favor; and (4) that it is in the public interest to issue an injunction pending disposition of the appeal. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). We conclude that, at this stage, appellants have not made the required showing. Accordingly, the urgent motion is denied.

The previously established briefing schedule remains in effect for this appeal. To the extent that any non-party seeks to file an amicus brief with respect to the merits of the preliminary injunction appeal, it shall comply with Federal Rule of Appellate Procedure 29.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KELII AKINA, et al.,	)	CIVIL NO. 15-00322 JMS-BMK
	)	
Plaintiffs,	)	ORDER DENYING PLAINTIFFS'
	)	MOTION FOR PRELIMINARY
vs.	)	INJUNCTION, DOC. NO. 47
	)	
THE STATE OF HAWAII, et al.,	)	
	)	
Defendants.	)	
_____	)	

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, DOC. NO. 47

I. INTRODUCTION

Defendant Nai Aupuni[1] is conducting an election of Native Hawaiian delegates to a proposed convention of Native Hawaiians to discuss, and perhaps to organize, a "Native Hawaiian governing entity." Delegate candidates have been announced, and voting is to run from November 1, 2015 to November 30, 2015.

[1] Nai Aupuni is "a Hawaii non-profit corporation that supports efforts to achieve Native Hawaiian self-determination." Doc. No. 79-1, James Asam Decl. ¶ 6.

Some names and Hawaiian language words use the diacritical markings "'okina" and "kahako" to indicate proper pronunciation or meaning. "The 'okina is a glottal stop, similar to the sound between the syllables of 'oh-oh.'. . . . The kahako is a macron, which lengthens and adds stress to the marked vowel." *See* https://www.hawaii.edu/site/info/diacritics.php (last accessed Oct. 27, 2015). But because different pleadings and sources use the markings inconsistently or improperly, this Order omits these diacritical marks for uniformity and to avoid compatibility issues between properly-used marks and electronic/internet publication.

Plaintiffs[2] have filed a Motion for Preliminary Injunction seeking, among other relief, to halt this election.

The voters and delegates in this election are based on a "Roll" of "qualified Native Hawaiians" as set forth in Act 195, 2011 Haw. Sess. Laws, as amended (the "Native Hawaiian Roll" or "Roll"). A "qualified Native Hawaiian" is defined as an individual, age eighteen or older, who certifies that they (1) are "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. ("HRS") § 10H-3(a)(2)(A), and (2) have "maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity." HRS § 10H-3(a)(2)(B).

Through a registration process, the Native Hawaiian Roll Commission (the "commission") asked or required prospective registrants to the Roll to make the following three declarations:

- Declaration One. I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance.

[2] The Plaintiffs are Kelii Akina, Kealii Makekau, Joseph Kent, Yoshimasa Sean Mitsui, Pedro Kanae Gapero, and Melissa Leinaala Moniz. Their backgrounds, as relevant to this suit, are discussed later in this Order.

- Declaration Two. I have a significant cultural, social or civic connection to the Native Hawaiian community.

- Declaration Three. I am a Native Hawaiian: a lineal descendant of the people who lived and exercised sovereignty in the Hawaiian islands prior to 1778, or a person who is eligible for the programs of the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that person.

Doc. No. 1, Compl. ¶ 42; Doc. No. 47-9, Pls.' Ex. A. Separately, the Roll also includes as qualified Native Hawaiians "all individuals already registered with the State as verified Hawaiians or Native Hawaiians through the office of Hawaiian affairs [("OHA")] as demonstrated by the production of relevant [OHA] records[.]" HRS § 10H-3(a)(4). Those on the Roll through an OHA registry do not have to affirm Declarations One or Two.

Plaintiffs filed suit on August 13, 2015, alleging that these "restrictions on registering for the Roll" violate the U.S. Constitution and the Voting Rights Act of 1965, 52 U.S.C. § 10301. Doc. No. 1, Compl. ¶ 1. As to the constitutional claims, they allege violations of (1) the Fifteenth Amendment; (2) the Equal Protection and Due Process clauses of the Fourteenth Amendment; and (3) the First Amendment. They further allege that Nai Aupuni is acting "under color of state law" for purposes of 42 U.S.C. § 1983, and is acting jointly

with other state actors.[3] *Id.* ¶¶ 59, 68, 70, 72, 74. The Complaint seeks to enjoin Defendants "from requiring prospective applicants for any voter roll to confirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry." *Id.* at 32, Prayer ¶ 2. The Complaint also seeks to enjoin "the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll." *Id*. ¶ 3.

To that end, Plaintiffs have moved for a preliminary injunction, seeking an Order preventing Defendants "from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians, as explained in Plaintiffs' Complaint." Doc. No. 47, Pls.' Mot. at 3. They seek to stop the election of delegates, and thereby halt the proposed convention.

The court heard Plaintiffs' Motion for Preliminary Injunction on October 20, 2015, and fully considered all written and oral argument, as well as

[3] In addition to Nai Aupuni, the Complaint names as Defendants: (1) the Akamai Foundation; (2) the State of Hawaii, Governor David Ige, the Commissioners of the Native Hawaiian Roll Commission (Chair John D. Waihee III, Naalehu Anthony, Lei Kihoi, Robin Danner, Mahealani Wendt), and Clyde W. Namuo, Executive Director, Native Hawaiian Roll Commission, all in their official capacities (collectively the "State Defendants"); and (3) OHA Trustees (Chair Robert Lindsey, Jr., Colette Y. Machado, Peter Apo, Haunani Apoliona, Rowena M.N. Akana, John D. Waihee, IV, Carmen Hulu Lindsey, Dan Ahuna, Leinaala Ahu Isa), and Kamanaopono Crabbe, OHA Chief Executive, all in their official capacities (collectively, the "OHA Defendants").

the evidence properly submitted in the record. The court issued an oral ruling on October 23, 2015, explaining much of the court's reasoning and analysis. This written ruling provides further background and explanation, but is substantively the same as the oral ruling.[4] Based on the following, Plaintiffs' Motion is DENIED.

II. BACKGROUND

A. Act 195 and the Native Hawaiian Roll

On July 6, 2011, then-Governor Neil Abercrombie signed into law Act 195, which is codified in substantial part in HRS Chapter 10H. Act 195 begins by declaring that "[t]he Native Hawaiian people are hereby recognized as

[4] On October 26, 2015, Plaintiffs filed a Notice of Interlocutory Appeal of the court's ruling. Doc. No. 106. "The general rule is that once a notice of appeal has been filed, the lower court loses jurisdiction over the subject matter of the appeal." *Bennett v. Gemmill (In re. Combined Metals Reduction Co.)*, 557 F.2d 179, 200 (9th Cir. 1977). Nevertheless, even after an appeal has been filed, a district court "may act to assist the court of appeals in the exercise of its jurisdiction." *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982). And, as summarized in *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007 (6th Cir. 2003), a district court's written opinion memorializing a court's prior oral ruling can certainly be "in aid of the appeal." *Id*. at 1013 (citing cases). *See also In re Grand Jury Proceedings Under Seal*, 947 F.2d 1188, 1190 (4th Cir. 1991) (concluding that a district court's written order memorializing oral ruling aided an intervening appeal such that the notice of appeal did not divest the district court of jurisdiction to issue the written order). At the October 23, 2015 hearing, the court anticipated the present posture by announcing that its oral ruling "is intended to be a summary of a more comprehensive written order to follow [and] [t]he written order is intended, if an appeal is taken from my ruling, to be in aid of the appellate process." Doc. No. 105, Tr. (Oct. 23, 2015) at 7. That is, on October 23, 2015, the court gave a detailed oral ruling pursuant to Federal Rules of Civil Procedure 52(a)(1) & (2), and issues this substantively-identical written decision with further background and explanation.

the only indigenous, aboriginal, maoli people of Hawaii." HRS § 10H-1. The purpose of Act 195 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.

HRS § 10H-2.

Act 195 establishes a five-member commission, which is responsible for preparing and maintaining a roll of "qualified Native Hawaiians." HRS § 10H-3(a)(1). As summarized above, § 10H-3(a)(2) (as amended by Act 77, 2013 Haw. Sess. Laws), defines a "qualified Native Hawaiian" as

> 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 [OHA];
>
> (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[.]

HRS § 10H-3(a)(2).[5] Further, the commission is responsible for:

> including in the roll of qualified Native Hawaiians all individuals already registered with the State as verified Hawaiians or Native Hawaiians through the [OHA] as demonstrated by the production of relevant [OHA]

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[5] Elsewhere, Hawaii law defines "Hawaiian" and "Native Hawaiian" consistently with HRS § 10H-3(a)(2). Specifically, for purposes of OHA, HRS § 10-2 defines "Hawaiian" as:

> any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

And it defines "Native Hawaiian" as:

> any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

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

HRS § 10H-3(a)(4).

Under these provisions, persons who are included on the Roll through § 10H-3(a)(4) as having "already registered with the State" through OHA do not have to certify that they have "maintained a significant cultural, social, or civic connection to the Native Hawaiian community," nor that they "wish[] to participate in the organization of the Native Hawaiian governing entity" as set forth in § 10H-3(a)(2). And Nai Aupuni's President, Dr. James Asam, attests that:

> [Nai Aupuni] understood that OHA's Hawaiian Registry process did not require attestation of the "unrelinquished sovereignty of the Native Hawaiian people", and "intent to participate in the process of self-governance" ("Declaration One"). [Nai Aupuni] concluded, *on its own*, that having this alternate registration process was favorable because it provided Native Hawaiians who may take issue with Declaration One with the opportunity to participate in the [Nai Aupuni] process.

Doc. No. 79-1, Asam Decl. ¶ 19; *see also* Doc. No. 83-1, Kamanaopono Crabbe Decl. ¶ 11 ("[A]n OHA Database registrant may be transferred to the Roll Commission and included on the Roll without affirming the declarations required under Act 195."). Indeed, according to the Complaint, many of these OHA-registrants were placed on the Roll without their knowledge or consent. Doc. No.

1, Compl. ¶ 35.[6]

At the October 20, 2015 hearing, the parties stipulated that approximately 62 percent of the Roll comes from an OHA registry, and the other 38 percent come directly through the Roll commission process. *See* Doc. No. 104, Tr. (Oct. 20, 2015) at 57-58. It follows that approximately 62 percent of the Roll did not have to affirm Declarations One or Two. That is, approximately 62 percent of the Roll did not have to make an affirmation regarding sovereignty or significant connection to the Native Hawaiian community.[7]

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[6] OHA was established under 1978 Amendments to the Hawaii Constitution, and has its mission "[t]he betterment of conditions of native Hawaiians . . . [and] Hawaiians." HRS § 10-3.

> Implementing statutes and their later amendments vested OHA with broad authority to administer two categories of funds: a 20 percent share of the revenue from the 1.2 million acres of lands granted to the State pursuant to § 5(b) of the Admission Act, which OHA is to administer 'for the betterment of the conditions of native Hawaiians,' Haw. Rev. Stat. § 10-13.5 (1993), and any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" and/or "Hawaiians," Haw. Const., Art. XII, § 6. *See generally* Haw. Rev. Stat. §§ 10-1 to 10-16.

Rice v. Cayetano, 528 U.S. 495, 509 (2000). *Rice* held that OHA is a public state agency, responsible for "the administration of state laws and obligations," and that OHA elections are "the affair of the State of Hawaii." *Id.* at 520.

[7] The exact origin of Declaration One ("I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance") is not clear from the current record. When asked about Declaration One at the October 20, 2015 hearing, Roll commission executive director Clyde Namuo testified that "[t]he Akaka Bill had been around for at least 10 years by the time the Roll Commission started its work. The issue of (continued...)

Under Act 195, the Governor of Hawaii appointed the five members of the commission selected "from nominations submitted by qualified Native Hawaiians and qualified Native Hawaiian membership organizations," where "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." HRS § 10H-3(b). The commission is funded by OHA, Act 195 § 4, and is placed "within the [OHA] for administrative purposes only." HRS § 10H-3(a).

The commissioners are responsible for (1) "[p]reparing and maintaining a roll of qualified Native Hawaiians;" (2) "[c]ertifying that the individuals on the roll of qualified Native Hawaiians meet the definition of qualified Native Hawaiians;" and (3) "[r]eceiving 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." HRS § 10H-3(a).

The commission is required to "publish notice of the certification of

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[7](...continued)
unrelinquished sovereignty has been . . . included in every version of the Akaka Bill since its inception." Doc. No. 104, Tr. (Oct. 20, 2015) at 14. A full discussion of the "Akaka Bill" is well beyond the scope of this Order. A version of the Akaka Bill, known as "The Native Hawaiian Government Reorganization Act of 2009," H.R. 2314/S. 1011, 111th Cong. (2009), is discussed at Doc. No. 93-1, Amicus Br. Ex. A at 6 (80 Fed. Reg. at 59118).

the qualified Native Hawaiian roll, update the roll as necessary, and publish notice of the updated roll of qualified Native Hawaiians[.]" HRS § 10H-4(a). Under the Act,

> 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.

HRS § 10H-4(b). Further,

> 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.

HRS § 10H-5.[8]

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[8] Act 195 created the following other provisions regarding dissolution, effect, reaffirmation of delegation of federal authority, and severability:

> The governor shall dissolve the Native Hawaiian roll commission upon being informed by the Native Hawaiian roll commission that it has published notice of any updated roll of qualified Native Hawaiians, as provided in section 10H-4, and thereby completed its work.

HRS § 10H-6.

> Nothing contained in this chapter shall diminish, alter, or amend any existing rights or privileges enjoyed by the Native Hawaiian people that are not inconsistent with this chapter.

(continued...)

The commission "began accepting registrations for the Roll in July of 2012." Doc. No. 80-1, Clyde Namuo Decl. ¶ 3. Registration "has been closed at times in the past, but [at least as of September 30, 2015] it is presently open." *Id*. "Registrations can be done either online or by paper registration." *Id.* Further, from time to time after Act 195 was amended in 2013 to require the commission to include OHA registrants in 2013, Act 77, 2013 Haw. Sess. Laws, OHA has transmitted to the commission updated "lists of individuals registered through OHA's registries and verified by OHA as Hawaiian or Native Hawaiian." *Id.* ¶ 6.

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[8](...continued)
HRS § 10H-7.

> (a) The delegation by the United States of authority to the State of Hawaii to address the conditions of the indigenous, native people of Hawaii contained in the Act entitled "An Act to Provide for the Admission of the State of Hawaii into the Union", approved March 18, 1959 (Public Law 86-3), is reaffirmed.
>
> (b) Consistent with the policies of the State of Hawaii, the members of the qualified Native Hawaiian roll, and their descendants, shall be acknowledged by the State of Hawaii as the indigenous, aboriginal, maoli population of Hawaii.

HRS § 10H-8.

> If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act, which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Act 195 § 6 (uncodified).

The website of the "Kanaiolowalu" project of the commission lists 122,785 registered members on the Roll. *See* www.kanaiolowalu.org (last accessed Oct. 29, 2015).

Before OHA began transferring names of OHA registrants to the commission, the commission issued and distributed a press release on August 7, 2013 that, among other things, provided members on OHA lists a telephone number to call if they "[do] not wish to have their names transferred" to the Roll. Doc. No. 80-1, Namuo Decl. ¶ 5. On September 20, 2013, OHA transmitted an initial list of registrants to the commission that excluded approximately 36 persons who had requested that their names be withheld from the transfer. *Id.* ¶ 6.

On approximately October 10, 2013, the commission posted information on its website about removal from the Roll. It included a removal request form that could, and still can, be downloaded and sent to the commission. *Id.* ¶ 8. At various times in October to December of 2013, the commission also sent newsletters and emails to OHA registrants that included information on how to remove oneself from the Roll. *Id.* ¶¶ 9, 10. And from March 24, 2014 to April 4, 2014, the commission made available for public viewing (with binders in various locations, and on its website) a "pre-certified" list of individuals on the Roll. *Id.* ¶ 11. The purpose was, in part, to allow individuals to remove

themselves if they so chose. *Id.* ¶ 12.

Similarly, "[o]n at least three separate occasions in August, September, and October 2013, OHA provided public notice of the Act 77 transfer to OHA Database registrants[.]" Doc. No. 83-1, Crabbe Decl. ¶ 12. They "were informed of their right to complete and submit a short form . . . to opt-out of the Act 77 transfer." *Id.* ¶ 13. On August 14, 2013, "OHA sent email notification to OHA Database registrants regarding OHA's transfer of information to the Roll Commission pursuant to Act 77," *id.* ¶ 14, and that notification included information regarding such an "opt-out form." *Id.* OHA's chief executive, Dr. Crabbe, attests that this email was sent to an email address on file for Plaintiff Moniz. *Id.* When asked at the October 20, 2015 hearing about Plaintiff Gapero, Dr. Crabbe testified that he had no specific knowledge regarding Gapero, but he "[is] confident that [OHA] took the appropriate measures to inform all those who were on the [OHA] databases[.]" Doc. No. 104, Tr. (Oct. 20, 2015) at 22.

B. Nai Aupuni, the Akamai Foundation, and a Grant from OHA

As noted above, Nai Aupuni "is a Hawaii non-profit corporation that supports efforts to achieve Native Hawaiian self-determination." Doc. No. 79-1, Asam Decl. ¶ 6. It was incorporated on December 23, 2014, and was intended to be independent of OHA and the State of Hawaii. *Id.*; Doc. No. 79-6, Nai Aupuni

Ex. 4 (By-Laws) at 1. It "is comprised of five directors who are Native Hawaiian, [and] are active in the Native Hawaiian community[.]" Doc. No. 79-1, Asam Decl. ¶ 29. The current directors are James Kuhio Asam, Pauline Nakoolani Namuo, Naomi Kealoha Ballesteros, Geraldine Abbey Miyamoto, and Selena Lehua Schuelke. Nai Aupuni was formed "to provide a process for Native Hawaiians to further self-determination and self-governance for Native Hawaiians." *Id*.

OHA has a policy of supporting Native Hawaiian self-governance. Doc. No. 83-1, Crabbe Decl. ¶ 17. On October 16, 2014, the OHA Board of Trustees "realign[ed] its budget" -- consisting of trust funds under § 5(f) of the Admissions Act for its purpose of supporting the betterment of Native Hawaiians -- to "provide funds to an independent entity to formulate a democratic process through which Native Hawaiians could consider organizing, for themselves, a governing entity." *Id*. Nai Aupuni subsequently "requested grant funds from the OHA so that [it] may conduct its election of delegates, convention and ratification vote process." Doc. No. 79-1, Asam Decl. ¶ 14.

"On April 27, 2015, at [Nai Aupuni's] request," OHA, the Akamai Foundation ('Akamai') and Nai Aupuni entered into a Grant Agreement whereby OHA provided $2,595,000 of Native Hawaiian trust funds to Akamai as a grant for the purpose of [Nai Aupuni] conducting an election of delegates, convention and

ratification vote[.]" *Id.*; Doc. No. 79-2, Louis F. Perez III Decl.¶ 3. "Akamai is a non-profit Internal Revenue Code (IRC) Section 501(c)(3) organization incorporated in the State of Hawaii[.]" Doc. No. 79-2, Perez Decl. ¶ 2. "Akamai's mission and work is community development." *Id.*

The Grant Agreement contains the following autonomy clause:

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

Doc. No. 79-1, Asam Decl. ¶ 14. "Pursuant to the Grant Agreement, OHA is prohibited from exercising direct or indirect control over [Nai Aupuni]; provided only that [Nai Aupuni's] use of the grant does not violate OHA's fiduciary duty to allocate Native Hawaiian trust funds for the betterment of Native Hawaiians." Doc. No. 83-1, Crabbe Decl. ¶ 19. "Similarly, [Nai Aupuni] has no obligation under the Grant Agreement to consult with OHA." *Id.* ¶ 21. There is no evidence in the record that OHA in fact controlled or directed Nai Aupuni as to any aspect

of the Grant Agreement.

As referenced in the Grant Agreement clause, on April 27, 2015, Nai Aupuni and Akamai entered into a separate Fiscal Sponsorship Agreement. They did so "because [Nai Aupuni] does not have a 501(c)(3) exemption." Doc. No. 79-1, Asam Decl. ¶ 15; Doc. No. 79-2, Perez Decl. ¶ 4. And on May 8, 2015 "OHA, [Nai Aupuni] and Akamai entered into a Letter Agreement that addressed the timing and disbursement of the grant funds." Doc. No. 79-1, Asam Decl. ¶ 16; Doc. No. 79-2, Perez Decl. ¶ 6.

C. Nai Aupuni's Planned Election and Convention

Nai Aupuni's directors decided that "the voter[s] for election of delegates and the delegates should be limited to Native Hawaiians." Doc. No. 79-1, Asam Decl. ¶ 13. "While [Nai Aupuni] anticipated that the convention delegates will discuss and perhaps propose a recommendation on membership of the governing entity, [Nai Aupuni] decided, on its own, that Native Hawaiian delegates should make that determination and that its election and convention process thus should be composed of Native Hawaiians." *Id.* (emphasis omitted). "Prior to entering into the Grant Agreement, [Nai Aupuni] informed OHA that it intended to use the Roll but that it continued to investigate whether there are other available lists of Native Hawaiians that it may also use to form its voter list." Doc.

No. 83-1, Crabbe Decl. ¶ 20; *see also* Doc. No. 79-1, Asam Decl. ¶ 13. Both OHA and Nai Aupuni agree that "under the Grant Agreement, [Nai Aupuni] has the sole discretion to determine whether to go beyond the inclusion of the Roll in developing its list of individuals eligible to participate in Native Hawaiians' self-governance process." Doc. No. 83-1, Crabbe Decl. ¶ 20; Doc. No. 79-1, Asam Decl. ¶ 13.

"[Nai Aupuni] directors discussed . . . the utility of available lists of adult Native Hawaiians other than the [commission's] list. After considering this issue for over two-months, [Nai Aupuni] directors determined that the [commission's] list was the best available option because it is extraordinarily expensive and time consuming to compile a list of Native Hawaiians." Doc. No. 79-1, Asam Decl. ¶ 18 (emphasis omitted). "[O]n June 1, 2015, the [Nai Aupuni] board decided, on its own, that it would use the [commission's] certified list as supplemented by OHA's Hawaiian Registry program." *Id.* (emphasis omitted).

When asked at the October 20, 2015 hearing about Act 195, Dr. Asam testified credibly that "[t]here is no indication on my part or the board's part that [Nai Aupuni] needed to comply with Act 195." Doc. No. 104, Tr. (Oct. 20, 2015) at 41. That is, Dr. Asam indicated that he "didn't feel Act 195 controlled the decision-making of [Nai Aupuni]," and that it "could act independently of Act

195." *Id*. Nai Aupuni "[wasn't] driven by Act 195 at all." *Id*. at 42. The court finds this testimony credible, and accepts it as true.

"Although [Nai Aupuni] understood that unlike the [commission] process, [OHA's] Hawaiian Registry process . . . did not require registrants to declare 'a significant cultural, social or civic connection to the Native Hawaiian community,' ('Declaration Two'), [Nai Aupuni] believes that registering with OHA in and of itself demonstrates a significant connection." Doc. No. 79-1, Asam Decl. ¶ 20 (emphasis omitted). "[Nai Aupuni] believes that most of the OHA registrants have this connection because they either reside in Hawaii, are eligible to be a beneficiary of programs under the Hawaiian Homes Commission Act, participate in Hawaiian language schools or programs, attended or have family members who attend or attended Kamehameha Schools, participate in OHA programs, are members of Native Hawaiian organizations or are regarded as Native Hawaiian in the Native Hawaiian community." *Id*.

"On June 18, 2015, [Nai Aupuni] and Election-America ('EA') entered into an Agreement for EA to provide services to conduct the delegate election." *Id.* ¶ 21. On August 3, 2015, "EA sent to approximately 95,000 certified Native Hawaiians a Notice of the election of delegates that included information about becoming a delegate candidate." *Id*. ¶ 25; Doc. No. 79-14, Nai

Aupuni Ex. 12. The Notice included the following timeline for 2015 to 2016:

> | | |
> |---|---|
> | End of September: | List of qualified delegate candidates announced. |
> | October 15: | Voter registration by the Roll Commission closes. |
> | November 1: | Ballots will be sent to voters certified by the Roll Commission as of 10/15/15. |
> | November 30: | Voting ends. |
> | Day after voting ends: | Election results announced publicly. |
>
> After the election of delegates, the target dates for the Aha [(convention)] and any ratification vote are as follows:
>
> Between February and April 2016: Aha held on Oahu over the course of eight consecutive weeks (40 work days, Monday through Friday).
>
> Two months after the Aha concludes: If delegates recommend a governance document, a ratification vote will be held among all certified Native Hawaiian voters.

Doc. No. 79-14, Nai Aupuni Ex. 12.

According to Dr. Asam, "[Nai Aupuni], on its own, decided on these dates and deadlines, the apportionment plan and the election process set forth in the Notice." Doc. No. 79-1, Asam Decl. ¶ 25 (emphasis omitted). This statement

is consistent with evidence from the commission's executive director, Doc. No. 80-1, Namuo Decl. ¶ 22, and from OHA's chief executive. Doc. No. 83-1, Crabbe Decl. ¶ 22. "For purposes of determining who is eligible to vote in the November delegate election, [Nai Aupuni] will allow individuals that the [commission] has certified as of October 15, 2015." Doc. No. 79-1, Asam Decl. ¶ 25. And Dr. Asam attests that:

> [Nai Aupuni] intends to proceed with and support the delegate election in November, regardless of whether the Roll Commission has certified the final version of the Roll by that date. In February to April [2016], [Nai Aupuni] intends to proceed with and support the elected delegates [to] come together in a convention to consider matters relating to self-governance. In or about June 2016, or thereafter, [Nai Aupuni] intends to proceed with and support a ratification vote of any governing document that the delegates may propose.

Id. ¶ 32.

D. The Department of the Interior's Notice of Proposed Rulemaking

On October 1, 2015, the United States Department of the Interior ("Department") published a Notice of Proposed Rulemaking ("NPRM") titled "Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community." Doc. No. 93-1, Amicus Br. Ex. A (80 Fed. Reg. 59113 (Oct. 1, 2015)). The public comment period is open,

with comments on the proposed rule due by December 30, 2015. 80 Fed. Reg. at 59114. The Department has submitted an amicus brief that explains, as background information to the NPRM, some of the context for the actions of the Roll commission, OHA, and Nai Aupuni. *See* Doc. No. 93. As the Department describes it, the NPRM is based in part on the United States' "special political and trust relationship that Congress has already established with the Native Hawaiian community," Doc. No. 93, Amicus Br. at 5, as well as the suggestion by the Ninth Circuit in *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004), for the Department to apply its expertise to "determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis." 80 Fed. Reg. at 59117-18. A full description of this NPRM is not necessary here, and is well beyond the scope of current proceedings. Some aspects, however, are particularly relevant.

"The NPRM proposes an administrative procedure, as well as criteria, for determining whether to reestablish a formal government-to-government relationship between the United States and the Native Hawaiian community." Doc. No. 93, Amicus Br. at 4 (citing Proposed Rule ("PR") 50.1). It was issued after a 2014 Advance Notice of Proposed Rulemaking ("ANPRM"), which "solicited public comment regarding whether the Department should facilitate

(1) reorganization of a Native Hawaiian government and (2) reestablishment of a formal government-to-government relationship with the Native Hawaiian community." *Id.* at 3-4 (citing 79 Fed. Reg. 35297, 35302-03). After considering comment to the ANPRM, "the Department determined that it would not propose a rule presuming to reorganize a Native Hawaiian government or prescribing the form or structure of that government; the Native Hawaiian community itself should determine whether and how to reorganize a government." *Id.* at 4. Rather, "[t]he process of drafting a constitution or other governing document and reorganizing a government should be driven by the Native Hawaiian community, not by the United States." 80 Fed. Reg. at 59119. And, similar to Act 195's definition of a "qualified Native Hawaiian," the NPRM defines a "Native Hawaiian" as "any individual who is a: (1) Citizen of the United States; and (2) Descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." 80 Fed. Reg. at 59129 (PR § 50.4).

And so, "[t]he Department's proposed rule contemplates a multistep process for a Native Hawaiian government to request a government-to-government relationship with the United States, if it chooses to do so." Doc. No. 93, Amicus Br. at 5. It contemplates the use of the Native Hawaiian Roll for determining who

may participate in any referendum, but does not require such use. *Id.* at 6 (citing PR §§ 50.12(b), 50.14(b)(5)(iii), (c); and 80 Fed. Reg. at 59121). "T]he Secretary [of the Interior] [would, however,] reestablish a formal government-to-government relationship with only one sovereign Native Hawaiian government, which may include political subdivisions with limited powers of self-governance defined in the Native Hawaiian government's governing document." 80 Fed. Reg. at 59129 (PR § 50.3).

The NPRM would require "specific evidence of broad-based community support," Doc. No. 93, Amicus Br. at 6, and would require a Native Hawaiian governing entity to demonstrate that its governing document was "based on meaningful input from representative segments of the Native Hawaiian community and reflects the will of the Native Hawaiian community." 80 Fed. Reg. at 59130 (PR § 50.11); *see also* 80 Fed. Reg. at 59119 ("The process should be fair and inclusive and reflect the will of the Native Hawaiian community.").

E. The Legal Challenge

Plaintiffs' suit challenges the constitutionality of the Roll process and the election for delegates to Nai Aupuni's proposed convention on various grounds, with each of the six Plaintiffs having slightly different claims:

1. The Six Plaintiffs

As alleged in the Complaint and in his declaration, Plaintiff Kelii Akina is a Hawaii resident of Native Hawaiian ancestry. Doc. No. 1, Compl. ¶ 6. Doc. No. 47-8, Akina Decl. ¶¶ 7-8. He contends he was denied registration on the Roll because he would not affirm "the unrelinquished sovereignty of the Native Hawaiian people" in Declaration One, and objects to that statement. Doc. No. 47-8, Akina Decl. ¶¶ 11-12. He would like to register and vote in Nai Aupuni's election. *Id.* ¶ 16. He would also like to run for delegate to the convention, but cannot run because he claims he could not register. *Id.* ¶¶ 19-20. He contends he was discriminated against because of his viewpoint regarding Declaration One. *Id*. ¶ 18.

Plaintiff Kealii Makekau is a Hawaii resident of Native Hawaiian ancestry. Doc. No. 47-2, Makekau Decl. ¶¶ 2-3. He would like to register and vote in the election "that those on the Kanaiolowalu Roll are eligible to vote in," *id.* ¶ 12, and contends he was denied the right to vote because he objects to Declaration One -- he could not truthfully affirm that he supports "the unrelinquished sovereignty of the Native Hawaiian people." *Id*. ¶¶ 7-8. He contends he was discriminated against because of his viewpoint regarding Declaration One. *Id*. ¶ 14.

Plaintiff Joseph William Kent is a Hawaii resident of non-Hawaiian ancestry as defined in Act 195. Doc. No. 47-6, Kent Decl. ¶¶ 2, 5. He attempted to register on the Roll, but was denied registration because he could not affirm Hawaiian ancestry and did not have a "significant connection to the Native Hawaiian Community." *Id*. ¶¶ 6-7. He wants to "participate in the governance of my State through the democratic process," and "participate in the election that those on the Kanaiolowalu Roll will be able to participate in." *Id.* ¶ 10. He objects to the inability to "sign up for an election in the United States of America because of [his] race." *Id.* ¶ 11.

Plaintiff Yoshimasa Sean Mitsui is a Hawaii resident of Japanese ancestry. Doc. No. 47-3, Mitsui Decl. ¶¶ 2,5. He would like to register on the Roll and vote in the upcoming election of delegates, but could not truthfully affirm Native Hawaiian ancestry, or "significant connections to the Native Hawaiian community." *Id.* ¶¶ 4, 6-8. He contends he is "being denied the right to vote in that election because of [his] race." *Id.* ¶ 8.

Plaintiff Pedro Kanae Gapero is a Hawaii resident of Native Hawaiian ancestry. Doc. No. 47-4, Pedro Gapero Decl. ¶¶ 2-3. He claims he was registered on the Roll without his knowledge or consent. *Id*. ¶ 4. He objects to "the use of his name . . . without [his] free, prior and informed consent." *Id*. ¶ 6. He contends

that such use "violates [his] rights and provides an unauthorized assertion that [he] support[s] a position that [he] did not affirmatively consent to support." *Id.* ¶ 7.

Plaintiff Melissa Leinaala Moniz is a resident of Texas of Native Hawaiian ancestry. Doc. No. 47-5, Moniz Decl. ¶ 2, 4. She registered with Kau Inoa (an OHA registry). *Id*. ¶ 2. She attests that she was registered on the Roll without her permission. *Id*. ¶ 6. She believes that the Roll is "race-based and has caused great division among Hawaiians." *Id.* ¶ 8. She believes that the use of her name on the Roll without her permission "provides an unauthorized showing that [she] support[s] the Kanaiolowalu Roll and its purpose, which [she] [does] not." *Id*. ¶ 9.

2. The Complaint

Plaintiffs' Complaint alleges nine separate counts, as follows:

Count One (titled "Violation of the Fifteenth Amendment and 42 U.S.C. § 1983") alleges that "Act 195 and the registration process used by defendants restrict who may register for the Roll on the basis of individuals' Hawaiian ancestry." Doc. No. 1, Compl. ¶ 80. It alleges that "[t]he registration process used by the defendants is conduct undertaken under color of Hawaii law," *id*. ¶ 83, and that "Act 195 and the defendants' registration procedures deny and abridge the rights of Plaintiffs Kent and Mitsui to vote on account of race, in

violation of the Fifteenth Amendment." *Id.* ¶ 84.

Count Two (titled "Violation of the Equal Protection Clause of the Fourteen Amendment and 42 U.S.C. § 1983") alleges that "Act 195 and the registration process used by the defendants discriminate against Plaintiffs Kent and Mitsui on account of their race," *id*. ¶ 87, and thus "violate[s] the rights of Plaintiffs Kent and Mitsui under the Fourteenth Amendment to the equal protection of the laws." *Id.* ¶ 89.

Count Three (titled "Violation of Section 2 of the Voting Rights Act") alleges that "Act 195 intentionally discriminates, and has the result of discriminating, against Plaintiffs Kent and Mitsui on the basis of their race, in violation of Section 2 of the Voting Rights Act [(52 U.S.C. § 10301)]." *Id.* ¶ 94.

Count Four (titled "Violations of the First Amendment, Fourteenth Amendment, and 42 U.S.C. § 1983") alleges that "[i]t is not possible to register for the Roll without confirming [Declaration One]." *Id.* ¶ 97. It claims that "[a]s a practical matter, requiring confirmation of [Declaration One] will stack the electoral deck, guaranteeing that Roll registrants will support the outcome favored by the defendants in any subsequent vote." *Id*. ¶ 98. It alleges that "[r]equiring agreement with Declaration One in order to register for the Roll is conduct undertaken under color of Hawaii law," *id.* ¶ 99, and that "[b]y conditioning

registration upon agreement with Declaration One, the defendants are compelling speech based on its content." *Id.* ¶ 100. It contends that "[r]equiring agreement with Declaration One in order to register for the Roll discriminates against those who do not agree with that statement, including Plaintiffs Akina and Makekau." *Id*. ¶ 101. These practices are alleged violations of the First and Fourteenth Amendments. *Id.* ¶¶ 104-05.

Count Five (titled "Violation of the Fifteenth Amendment and 42 U.S.C. § 1983") alleges that "[o]n information and belief, the process for determining who may be a candidate for the proposed constitutional convention restricts candidacy to Native Hawaiians, as defined by Hawaii law." *Id.* ¶ 109. It contends that "[t]he disqualification of candidates based on race is conduct undertaken under color of Hawaii law," *id.* ¶ 111, and thus "violates the Fifteenth Amendment rights of all Hawaii voters, including Plaintiffs Akina, Makekau, Kent, Mitsui, and Gapero." *Id.* ¶ 112.

Count Six (titled "Violation of Section 2 of the Voting Rights Act") alleges that "[t]he disqualification of candidates based on race ensures that the political process leading to nomination or election in the State are not equally open to participation by citizens who are not Hawaiian," *id*. ¶ 114, and "results in a discriminatory abridgement of the right to vote." *Id.* ¶ 115. This violates Section 2

of the Voting Right Act. *Id.* ¶ 116.

Count Seven (titled "Violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983") challenges Declaration Two, which states "I have a significant cultural, social or civic connection to the Native Hawaiian community." *Id.* ¶ 118. It alleges that "Plaintiffs Kent and Mitsui cannot affirm this statement as they understand it." *Id.* ¶ 119. It contends that "[r]equiring Plaintiffs Kent and Mitsui to confirm this statement . . . is a burden on Plaintiffs Kent and Mitsui that is not required for the sake of election integrity, administrative convenience, or any other significant reason." *Id.* ¶ 120. It concludes that "[r]equiring Plaintiffs Kent and Mitsui to have particular connections with the Native Hawaiian community violates the rights of Plaintiffs Kent and Mitsui under the Fourteenth Amendment to the equal protection of the law." *Id.* ¶ 123.

Count Eight (titled "Violation of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983") contends that "[b]y requiring Plaintiffs to confirm Declarations One, Two, and Three, the registration process used by the defendants will cause the planned election to be conducted in a manner that is fundamentally unfair." *Id*. ¶ 126. It allegedly "burdens the right to vote of all Plaintiffs in violation of their constitutional rights to Due Process." *Id*. ¶ 127.

Finally, Count Nine (titled "Violation of the First Amendment and 42 U.S.C. § 1983") alleges that "[v]oter registration is speech protected by the First Amendment," *id*. ¶ 130, and that "[f]orcibly registering an individual amounts to compelled speech." *Id*. ¶ 131. It contends that Plaintiffs Gapero and Moniz do not wish to bolster the legitimacy of the Roll," *id*. ¶ 134, and "have not agreed, and do not agree, with Declaration One." *Id*. ¶ 136. Thus, "[b]y registering Plaintiffs Gapero and Moniz without their consent and without notice to them, the [commission] compelled their speech and violated their First Amendment right to refrain from speaking." *Id*. ¶ 137.

As summarized above, the Complaint asks the court to:

> 1. Issue a declaratory judgment finding that the registration procedures relating to the Roll violate the U.S. Constitution and federal law, as set forth above;
>
> 2. Issue preliminary and permanent relief enjoining the defendants from requiring prospective applicants for any voter roll to confirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry;
>
> 3. Issue preliminary and permanent relief enjoining the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll;
>
> 4. Order Defendants to pay reasonable attorneys' fees incurred by Plaintiffs, including litigation expenses and costs, pursuant to 52 U.S.C. § 10310(e) and 42 U.S.C.

> § 1988; [and]
>
> 5. Retain jurisdiction under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c), for such a period as the Court deems appropriate and decree that, during such period, no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force at the time this proceeding was commenced shall be enforced by Defendants unless and until the Court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color[.]

Id. at 31-32.

The Motion for Preliminary Injunction incorporates such relief by seeking "an Order preventing [Defendants] from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians, as explained in Plaintiffs' Complaint." Doc. No. 47, Pls.' Mot. at 3 (referring to "Doc. No. 1, p. 32, Prayer for Relief").

III. STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008) (citation omitted). It is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v.*

Brewer, 680 F.3d 1068, 1072 (9th Cir. 2012) (internal quotation marks and citation omitted).

To obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "[I]f a plaintiff can only show that there are 'serious questions going to the merits' -- a lesser showing than likelihood of success on the merits -- then a preliminary injunction may still issue if the 'balance of hardships tips sharply in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *Shell Offshore, Inc. v. Greenpeace, Inc*., 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)). "The elements . . . must be balanced, so that a stronger showing of one element may offset a weaker showing of another." *Lopez*, 680 F.3d at 1072. All four elements must be established. *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir. 2011).

IV. DISCUSSION

A. Plaintiffs Have Standing to Bring this Challenge

The court begins by addressing standing. The court has a duty to address jurisdiction and standing "even when not otherwise suggested." *Steel Co.*

v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (citation omitted); *see also Bernhardt v. Cty. of L.A.*, 279 F.3d 862, 868 (9th Cir. 2002) ("[F]ederal courts are required sua sponte to examine jurisdictional issues such as standing.") (citations omitted). And indeed Defendants have challenged Plaintiffs' standing, at least as to some claims, contending that they have not suffered a particularized injury. *See* Doc. No. 83, OHA Def.'s Opp'n at 14 ("[A] plaintiff lacks standing to challenge the mere fact of a classification itself.") (citing *Carroll v. Nakatani*, 342 F.3d 934, 946 (9th Cir. 2003)); Doc. No. 79, Nai Aupuni Opp'n at 29 (joining OHA's arguments regarding standing).

"Article III restricts federal courts to the resolution of cases and controversies." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732 (2008) (citation omitted). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). "[A] claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis*, 554 U.S. at 733 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). "[T]he injury required for standing need not be

actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Id*. at 734 (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

When determining Article III standing, courts "'accept as true all material allegations of the complaint' and 'construe the complaint in favor of the complaining party.'" *Davis v. Guam*, 785 F.3d 1311, 1314 (9th Cir. 2015) (quoting *Maya v. Centex Corp*., 658 F.3d 1060, 1068 (9th Cir. 2011)). "[S]tanding doesn't depend on the merits of the plaintiff's contention that particular conduct is illegal." *Id.* at 1316 (quotation marks and citation omitted).

The court concludes that there is standing to challenge Act 195 and the proposed election, at least at this preliminary injunction stage. Among other matters, Plaintiffs allege that Nai Aupuni is acting under color of law, and is holding a state election. Assuming those allegations are true, and without determining the merits of those allegations, at least some Plaintiffs are injured -- at minimum, if true on the merits, Plaintiffs Kent and Mitsui would be deprived of a right to vote in a public election. Further, for purposes of standing, this case is similar to *Davis*, where the Ninth Circuit found a plaintiff's allegations of injury in being excluded on the basis of race from a Guam plebescite vote that could have led to a change in Guam's future political relationship with the United States were

sufficient to confer standing. 785 F.3d at 1315. Moreover, generally, "[i]t is enough, for justiciability purposes, that at least one party with standing is present." *Kostick v. Nago*, 960 F. Supp. 2d 1074, 1089 (D. Haw. 2013) (citing *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999)); *see also Pickup v. Brown*, 740 F.3d 1208, 1224 n.2 (9th Cir. 2013) ("[T]he presence in a suit of even one party with standing suffices to make a claim justiciable.") (quoting *Brown v. City of Los Angeles*, 521 F.3d 1238, 1240 n.1 (9th Cir. 2008) (per curiam)).

B. The *Winter* Analysis for a Preliminary Injunction

The court now applies the four-part *Winter* test, beginning with a discussion of whether Plaintiffs can demonstrate a likelihood of success.

1. Likelihood of Success

a. Plaintiffs Have Not Demonstrated a Likelihood of Success on Their Fifteenth Amendment and Voting Rights Act Claims.

As to Plaintiffs' Fifteeth Amendment and Voting Rights Act claims -- Counts One, Three, Five, and Six -- the evidence demonstrates that Nai Aupuni's upcoming election is a private election, and not a State election. As a result, Plaintiffs have not demonstrated a likelihood of success on these claims.

This election is fundamentally different than the elections at issue in

Rice v. Cayetano, 528 U.S. 495 (2000), and in *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002), which found Fifteenth Amendment violations. Those opinions were based on a conclusion that OHA elections are an "affair of the State of Hawaii" for public officials for public office to a "state agency" established by the State Constitution. *See Rice*, 528 U.S. at 520-21, 525; *Arakaki*, 314 F.3d at 1095. Not so here. As set forth in *Terry v. Adams*, 345 U.S. 461 (1953), the Fifteenth Amendment precludes discrimination against voters in "elections to determine public governmental policies or to select public officials," *id.* at 467, not in private elections to determine private affairs. Similarly, the Voting Rights Act applies to "votes cast with respect to candidates for public or party office." *Chisom v. Roemer*, 501 U.S. 380, 391 (1991).

Certainly, this is not a state election governed by Chapter Eleven of the Hawaii Revised Statutes, or the State's regulatory systems covering public elections. It is not an election run by the State of Hawaii Office of Elections for any federal, state, or county office, nor is it a general or special election to decide any referendum, constitutional, or ballot question. No public official will be elected or nominated; no matters of federal, state, or local law will be determined. Rather, the evidence indicates it is an election conducted by Elections America, Inc. -- a private company -- with all decisions regarding the election made by Nai

Aupuni, not by any state actor or entity. There is no evidence before the court that any state official dictated or controlled the requirements for this election.

So what is this election? How is it best characterized? The court concludes -- at this preliminary injunction stage -- that this is an election for delegates to a private convention, among a community of indigenous people for purposes of exploring self-determination, that will not -- and cannot -- result in any federal, state, or local laws or obligations by itself. Stated differently, 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. Although it might result in a constitution of a Native Hawaiian governing entity, as OHA correctly argues, "even if such 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." Doc. No. 83, OHA Opp'n at 9.

And as Nai Aupuni recognizes, "even if the convention results in the formation of a Native Hawaiian governing entity, that [governing entity] *by itself* would not alter in any way how the State is governed." Doc. No. 79, Nai Aupuni Opp'n at 28. Nai Aupuni recognizes that "[a]ny such alteration of government will require subsequent action (*e.g.*, formal recognition) by the federal and possibly state governments. Similarly, any alteration of inter-governmental structure will

require subsequent Federal and State legislative and/or executive action with respect to the [entity]." *Id.* This statement is absolutely true, and critical to an understanding of the court's conclusion.

The court likewise agrees with the Department of the Interior's observation that "this case is about Native Hawaiian elections for Native Hawaiian delegates to a convention that might propose a constitution or other governing document for the Native Hawaiian community. This election has nothing to do with governing the State of Hawaii." Doc. No. 93, Amicus Br. at 21.

Plaintiffs argue that this is an important election about "public issues," and has the potential to be historic, and thus falls under the Fifteenth Amendment. They point to the Department of the Interior's October 1, 2015 NPRM as indicative of the election's importance -- it could conceivably lead to a "Native Hawaiian governing entity" that could eventually negotiate important questions on a "government-to-government" basis. But such potential is entirely speculative. Notably, the NPRM is just that -- proposed -- and has no force at all as of yet. Even if adopted in proposed form, many discretionary steps would be required before any proposed governing entity could even be recognized. *See* 80 Fed. Reg. at 59129-31 (explaining proposed "Criteria for Reestablishing a Formal Government-to-Government Relationship," PR §§ 50.11 to 50.16).

Plaintiffs rely heavily on *Terry v. Adams*, a case invalidating elections of the private "Jaybird party" that excluded African-Americans from primary elections that functioned essentially as a nominating process for public primary elections for county office. 345 U.S. at 463-64. Specifically, Plaintiffs rely on *Terry's* statement that the Fifteenth Amendment "includes any election in which public issues are decided or public officials selected." *Id.* at 468. But this statement 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.

In short, much more will need to happen under any scenario before this election leads to any public change at all. A Native Hawaiian governing entity may recommend change, but cannot alter the legal landscape on its own.

Morever, this is not a public election based on Act 195 itself. The creation of a Roll of Native Hawaiians does not mean its commissioners are conducting an election. Act 195, although it contemplates a convention of

Hawaii's indigenous peoples to participate in the organization of a Native Hawaiian governing entity, does not mandate any election. It doesn't impose, direct, or suggest any particular process. Under HRS § 10H-5, the Roll is intended to facilitate an *independent* process for Native Hawaiians to organize *themselves*. As an internal matter of self-governance by a group of the Native Hawaiian community, it does not involve a public election at all. At most, Act 195 facilitates *private* self determination, not governmental acts of organization.

b. Plaintiffs Have Not Demonstrated a Likelihood of Success on Their Fourteenth Amendment Claims.

Nor is Nai Aupuni's election, or Act 195 itself, a violation of Plaintiffs' equal protection or due process rights under the Fourteenth Amendment as asserted in Counts Two, Four, Seven, and Eight of the Complaint. To state a cause of action under 42 U.S.C. § 1983 for deprivation of a constitutional right, Plaintiffs must demonstrate that the deprivation occurs "under color of any statute, ordinance, regulation, custom, or usage of any State[.]" *Lugar v. Edmondson Oil Co., Inc*., 457 U.S. 922, 924 (1982). That is, there must be "state action." *Id*. at 935 n.18 ("[C]onduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law [under § 1983]."). This requirement "excludes from [§ 1983's] reach merely

private conduct, no matter how discriminatory or wrongful." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (quotation marks and citation omitted). And determining whether there is state action is a "necessarily fact-bound inquiry." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001).

But, because Nai Aupuni's election is a private election, Nai Aupuni is not a "state actor" for much the same reason. Its election does not fit under the "public function" test of state action, which requires a private entity to be carrying out a function that is "traditionally the *exclusive* prerogative of the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). In the area of elections, "[t]he doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials.'" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). And although *some* (even most) elections are "public functions," clearly not all elections are public.

Nor does Nai Aupuni's election fall under a "joint action" test, which asks "whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002) (quotation marks and citation omitted). The evidence does not

suggest joint action here -- although certainly Nai Aupuni obtained significant funds through an OHA grant, it did so with a specific autonomy clause whereby OHA agreed not to "directly or indirectly control or affect the decisions of [Nai Aupuni]." Doc. No. 79-1, Asam Decl. ¶ 14. All the evidence suggests that OHA has no control over Nai Aupuni, and that Nai Aupuni is acting completely independently. Plaintiffs have not met their burden to demonstrate otherwise.

That is, OHA's grant of funds to Nai Aupuni, through the Akamai Foundation, does not make this a public election. Indeed, Plaintiffs admitted at the October 20, 2015 hearing that public funding is a "red herring." Doc. No. 104, Tr. (Oct. 20, 2015) at 126-27 ("[I]t's not public action because it's public[ly] funded. Defendants amply demonstrate that that's not the test. We never said it was the test, we never will say it's the test."). And this admission was well-taken given cases such as *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), and *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 544 (1987), which explain that "[t]he Government may subsidize private entities without assuming constitutional responsibility for their actions." For example, in *Rendell-Baker* the Supreme Court found no relevant state action by a private school even where public funds accounted for at least 90 percent of its budget. 457 U.S. at 832. The "receipt of public funds does not make [the agency's] discharge decisions acts

of the State." *Id.* at 840.

Rather, "[s]tate action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 955 (9th Cir. 2008) (en banc) (citing *Brentwood Acad.*, 531 U.S. at 295). And in addressing that "nexus," the inquiry must begin by focusing on the "specific conduct of which the plaintiff complains." *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (quoting *Sullivan*, 526 U.S. at 51); *see also, e.g.*, *Barrios-Velasquez v. Asociacion de Empleados del Estado Libre Asociado de P.R.*, 84 F.3d 487, 490 n.1 & 493 (1st Cir. 1996) (finding no state action in private election of a quasi-public entity with several indicia of government control, emphasizing that the analysis focuses on "the government's connection to the complained-of action, not the government's connection to the [organization] itself"). Thus, "an entity may be a State actor for some purposes but not for others." *Caviness*, 590 F.3d at 812-13.

There is no such "close nexus" here between the State and this particular election that would make this a public election. An OHA grant was not for the purpose of a public election. And even if OHA -- certainly a "state actor" -- desires or agrees with some of Nai Aupuni's choices it makes in conducting the

election of delegates and holding a convention, the Supreme Court has held that "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Sullivan*, 526 U.S. at 52.

Likewise -- although Act 195 itself, and the commission's actions in creating the Roll, certainly constitute "state action" -- this does not mean such action is an equal protection violation. The court finds merit in Defendants' argument that the Roll itself is simply a list of people with Native Hawaiian ancestry who may or may not have declared that they have a civic connection to the Hawaiian community or believe in "unrelinquished sovereignty." *See* Doc. No. 83, OHA Defs.' Opp'n at 15-17; Doc. No. 80, State Defs.' Opp'n at 1. The Roll is essentially a classification, and as the Supreme Court stated in *Nordlinger v. Hahn*, "[t]he Equal Protection Clause does not forbid classifications." 505 U.S. 1, 10 (1992). Rather, it is directed at unequal *treatment*. *Id.* It is the *use* of the Roll that Plaintiffs attack. But Act 195's creation of the commission and a Roll does not actually *treat* persons differently. Nothing in Act 195 calls for a vote. Even if HRS § 10H-5 contemplates or even encourages a convention, it simply calls for a chance for certain Native Hawaiians to *independently* organize *themselves*, without involvement from the State.

The court also finds some merit in Defendants' argument that

Brentwood Academy acknowledged a type of exception or consideration (where state action might otherwise exist) for "unique circumstances" where that action raises "some countervailing reason against attributing activity to the government." 531 U.S. at 295-96. And Act 195 is certainly a unique law -- its stated purpose is meant to facilitate *self*-governance and the organizing of the State's indigenous people independently and amongst themselves. *See* HRS §§ 10H-2, 10H-5. By definition, then, such organizing (especially private organization as is at issue here) must occur amongst Native Hawaiians only -- and this is a "countervailing reason against attributing activity to the government."

Furthermore, forcing a private entity such as Nai Aupuni to associate with non-Native Hawaiians in its convention to discuss matters of potential self-governance could implicate Nai Aupuni's own First Amendment rights. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.") (citation omitted).[9] The Ninth Circuit explained in *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743 (9th

[9] This is a factor whether considered at this first prong of *Winter*, or when considering the balance of the equities at the third prong.

Cir. 2003), that such First Amendment rights can also be a "countervailing reason against attributing" even "significant government involvement in private action" to be state action. *Id.* at 748.

In short, Plaintiffs have not demonstrated a likelihood of success on their Fourteenth Amendment claims.

c. Morton v. Mancari, 417 U.S. 535 (1974).

The court next addresses the Defendants' secondary argument as to equal protection -- that is, *assuming* that Nai Aupuni is a state actor and that Act 195's Roll otherwise implicates equal protection under § 1983, under *Mancari*, unequal treatment need only be "tied rationally" to some legitimate governmental purpose. 417 U.S. at 555. That is, "legislative classifications are valid unless they bear no rational relationship to the State's [legitimate] objectives." *Wash. v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 502 (1979). The court recognizes that this secondary analysis may not be necessary, given the court's findings regarding a lack of state action and that Act 195 does not otherwise violate equal protection. Nevertheless, it is important to reach some of these secondary questions to help explain, and perhaps bolster, the court's ultimate conclusion.

"In *Mancari*, the Supreme Court upheld an employment preference

for Native Americans seeking positions in the Bureau of Indian Affairs ('BIA'). The class action plaintiffs, who were non-Indian applicants for BIA employment, argued that the preference amounted to invidious racial discrimination that violated their right to equal protection." *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 732 (9th Cir. 2003). *Mancari* "concluded that strict scrutiny did not apply because the preference for Indians relied on a political, rather than a racial, classification. The hiring preference was not directed toward 'a "racial" group consisting of "Indians"; instead, it applie[d] only to members of "federally recognized" tribes.'" *Id*. (quoting *Mancari*, 417 U.S. at 554 n.24).

In this regard, although Native Hawaiians have not been classified as a "tribe," Defendants and amicus have made a strong argument that *Mancari* can also apply to uphold Congressional action taken under its powers to support Native Hawaiians as indigenous people. *See, e.g.*, 42 U.S.C. § 11701(17) (Congressional finding that "[t]he authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii"); 20 U.S.C. § 7512(12)(B) (Congressional finding that "Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation

as to whom the United States has established a trust relationship"); 20 U.S.C. § 7512(12)(D) (Congressional finding that "the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives"); 20 U.S.C. § 7512(1) (Congressional finding that "Native Hawaiians are a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago"); 42 U.S.C. § 11701(1) (Congressional finding that "Native Hawaiians comprise a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778").

But another step is required before *Mancari* can apply to *state* laws -- that is, before such federal power would allow a state to treat Native Hawaiians differently under a "rationally related" test. This is a more difficult question. *Yakima Indian Nation*, reasons that a state has power if federal law *explicitly* gives a state authority. 439 U.S. at 501. The state law at issue in *Yakima Indian Nation* "was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians." *Id*. But it is unclear whether the specific type of alleged state actions at issue here (*e.g.*, creation of the Roll, facilitating Native Hawaiian self-governance) are encompassed within existing grants of

federal authority. *Compare KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 19, 20 (1st Cir. 2012) (reasoning that "it is quite doubtful that *Mancari's* language can be extended to apply to preferential *state* classifications based on tribal status" and questioning "whether the [Indian Gaming Regulatory Act] 'authorizes' the state's actions on the present facts") *with Greene v. Comm'r Minn. Dep't of Human Servs*., 755 N.W.2d 713, 727 (Minn. 2008) ("Generally, courts have applied rational basis review to state laws that promote tribal self-governance, benefits tribal members, or implement or reflect federal laws.") (citing *Yakima Indian Nation*, 439 U.S. at 500-01) (other citations omitted). The court will not, however, reach -- as the Supreme Court stated in *Rice* -- this "difficult terrain." 528 U.S. at 519. *Mancari* is not necessary if a strict scrutiny test can otherwise be satisfied to the specific actions at issue here.

d. Strict Scrutiny

Next, the court discusses whether -- again, assuming Nai Aupuni is involved in state action and/or that Act 195 implicates equal protection -- a strict scrutiny test could be met to justify the challenged actions under the Fourteenth Amendment. And, if it becomes necessary to reach this issue, the court's answer would be "yes." The court certainly recognizes that strict scrutiny is a difficult test to meet, and that this is a close question. But the court also recognizes that it faces

a unique issue, one with a long history.

Act 195 and the upcoming election cannot be read in a vacuum. Both must be read in context of Hawaiian history and the State's trust relationship with Native Hawaiians. As explained in Act 195 § 1, "[f]rom its inception, the State has had a special political and legal relationship with the Native Hawaiian people and has continually enacted legislation for the betterment of their condition." As the Department of the Interior's October 1, 2015 NPRM summarizes, the United States also has a history of recognizing through many laws of a "special political and trust relationship with the Native Hawaiian community." Doc. No. 93-1, 80 Fed. Reg. at 59116. *See also, e.g.*, *id.* at 59114-118 (providing background of the NPRM and recounting history of Congressional enactments supporting Native Hawaiians, and some efforts at self-determination).

As quoted above, in passing laws specifically to benefit Native Hawaiian healthcare, Congress found that "Native Hawaiians comprise a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778." 42 U.S.C. § 11701(1). It recognized that "[a]t the time of the arrival of the first nonindigenous people in Hawaii in 1778, the Native Hawaiian people lived in a

highly organized, self-sufficient, subsistence social system based on communal land tenure with a sophisticated language, culture, and religion." 42 U.S.C. § 11701(4). And Congress found that "[i]n 1898, the United States annexed Hawaii through the Newlands Resolution without the consent of or compensation to the indigenous people of Hawaii or their sovereign government who were thereby denied the mechanism for expression of their inherent sovereignty through self-government and self-determination, their lands and ocean resources." 42 U.S.C. § 11701(11).

Similarly, Congress, in enacting laws specifically to benefit Native Hawaiian education, recognized and reaffirmed that "Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands." 20 U.S.C. § 7512(12)(A). Congress reaffirmed that "the aboriginal, indigenous people of the United States have . . . (i) a continuing right to autonomy in their internal affairs; and (ii) an ongoing right of self-determination and self-governance that has never been extinguished." 20 U.S.C. § 7512(12)(E). And Congress found that "[d]espite the consequences of over 100 years of nonindigenous influence, the Native Hawaiian people are determined to preserve, develop, and transmit to future generations their ancestral

territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions." 20 U.S.C. § 7512(20).

Act 195 likewise acknowledges that "Native Hawaiians have continued to maintain their separate identity as a single, distinctly native political community through cultural, social, and political institutions and have continued to maintain their rights to self-determination, self-governance, and economic self-sufficiency." Act 195 § 1. The Hawaii Legislature thus found that "[t]he Native Hawaiian people are hereby recognized as the only indigenous, aboriginal maoli people of Hawaii." HRS § 10H-1.[10] The Admissions Act itself, and other provisions of Hawaii law, require the "betterment of conditions of native Hawaiians . . . and Hawaiians." HRS § 10-3; Admission Act, Pub. L. No. 86-3 § 5(f), 73 Stat. 6 (1959).

It follows that the State has a compelling interest in bettering the conditions of its indigenous people and, in doing so, providing dignity in simply

[10] *See also* HRS § 10H-8(b) ("Consistent with the policies of the State of Hawaii, the members of the qualified Native Hawaiian roll, and their descendants, shall be acknowledged by the State of Hawaii as the indigenous, aboriginal, maoli population of Hawaii."). This section is read in conjunction with § 10H-8(a) and restates the State's recognition in § 10H-1 that the Native Hawaiian people are "the only indigenous, aboriginal, maoli people of Hawaii." It does not mean, of course, that the members of the Roll are the *only* "indigenous, aboriginal, maoli population of Hawaii." It goes without saying that a person of Native Hawaiian ancestry does not, and cannot, lose their ancestry simply by not being included on the Roll.

allowing a starting point for a process of self-determination. And there is a history of attempts at self-governance, as set forth in the Department of the Interior's NPRM, *see* 80 Fed. Reg. at 59117, and other sources. *See generally Native Hawaiian Law* ch. 5 at 271-79 (Melody Kapilialoha MacKenzie ed., 2015). Nevertheless, before any discussion of a "government-to-government" relationship with any "Native Hawaiian governing entity" under the NPRM could even begin to take place, such an entity should reflect the "will of the Native Hawaiian community." 80 Fed. Reg. at 59130 (PR § 50.11). The State has a compelling interest in facilitating the organizing of the indigenous Native Hawaiian community so it can decide for itself, independently, whether to seek self-governance or self-determination, and if so, in what form.[11] The question of "Hawaiian sovereignty" -- which means different things to different people -- is not going to go away. So the State could be said to have a compelling interest in facilitating a forum that might result in a unified and collective voice amongst Native Hawaiians.[12] And, by definition, this is not possible without limiting such

[11] And this is particularly true given that the undisputed evidence in the record before the court is that "Native Hawaiians' socio-economic status has steadily declined, and for the last several decades has been the lowest of any ethnic group residing in Hawaii." Doc. No. 83-1, Crabbe Decl. ¶ 23.

[12] This interest is far different than a right of "the Native Hawaiian people to reestablish an autonomous sovereign government," *State v. Armitage*, 132 Haw. 36, 56, 319 P.3d 1044, 1064 (continued...)

self-governance discussions to Native Hawaiians themselves. Stated differently, the restriction to Native Hawaiians is precisely tailored to meet that compelling interest. It would meet strict scrutiny for purposes of equal protection. "Purport[ing] to require the Native Hawaiian community to include non-Natives in organizing a government could mean in practice that a Native group could never organize itself, impairing its right to self-government[.]" Doc. No. 93, Amicus Br. at 20.

e. Plaintiffs Have Not Demonstrated a Likelihood of Success on Their First Amendment Claims.

Likewise, Plaintiffs have not demonstrated a likelihood of success on their claims under the First Amendment (Counts Four and Nine). In Count Four, Plaintiffs Akina and Makekau contend that their First Amendment rights were violated because conditions were placed on their registration for the Roll (*i.e.*, requiring Declaration One), which implicates rights under the First Amendment.

The evidence in this regard is mixed -- Defendants attest that Plaintiffs Akina and Makekau can (or could have) participated in the process without affirming Declaration One. *See, e.g.*, Doc. No. 80-1, Namuo Decl. ¶ 23; Doc. No.

[12](...continued)
(2014), which the Hawaii Supreme Court held is not a fundamental right existing in the Hawaii Constitution. *Id.* at 56-57, 319 P.3d at 1064-65 ("Petitioners fail to establish that the right to form a sovereign native Hawaiian nation is a 'fundamental right.'"). It is simply an interest in facilitating discussions about self-determination amongst Native Hawaiians.

104, Tr. (Oct. 20, 2015) at 15-17; Doc. No. 79-1, Asam Decl. ¶ 26 (providing newspaper editorial published purporting "to inform Plaintiffs [Akina and Makekau] and Native Hawaiians generally that they may register without making [Declaration One]" that explains that "[w]e understand that the Roll Commission has registered and certified voters -- and will continue to do so -- even if these voters refuse to agree to this declaration."). Indeed, Act 195 itself (as amended) *requires* OHA registrants to be included on the list, irrespective of Declaration One or Two. As explained above, if Plaintiffs Akina and Makekau, as Native Hawaiians as defined by Hawaii law, had registered under the OHA Hawaiian Registry, they would have been included on the Roll (without making Declaration One or Two).

Both Akina and Makekau dispute that they had notice that they could have registered for the Roll without affirming Declaration One. See Doc. No. 91-2, Second Akina Decl. ¶ 4 ("Once I failed to confirm the statement and the principles asserted in Declaration One, I received no other information from the [commission] website suggesting that I could register without affirming the Declaration."); *id.* ¶ 6 ("To my knowledge, I never received any communications of any kind (prior to the filing of this lawsuit) from any source informing me that I did not have to affirm Declaration One."); Doc. No. 91-1, Second Makekau Decl. ¶ 4 ("At no time during

the registration process was I given the option to avoid asserting Declaration One."); *id*. ¶ 8 ("I received no communication from any source telling me I did not have to confirm Declaration One to register.").

From the record as a whole, it certainly appears that if Akina and Makekau truly wanted to participate in Nai Aupuni's process they could have easily done so, but they chose not to.

In any event, given the focus at this preliminary injunction stage on the Roll's use in the election, the claim is not likely to succeed because the burdens that Akina and Makekau assert only apply if they concern a right to vote in a public election, and Nai Aupuni's election is private. They contend that their inability to register for the Roll (without affirming Declaration One's reference to "unrelinquished sovereignty") deprives them of the right to participate in Nai Aupuni's process -- the vote for delegates, the ability to run as a delegate, participation in the convention. But again, Nai Aupuni's delegate election and proposed convention is a private matter, not involving state action.

In a different First Amendment theory, in Count Nine, Plaintiffs Gapero and Moniz contend that their inclusion on the Roll through an OHA registry violates a First Amendment right against compelled speech or a right not to register to vote. Doc. No. 47-1, Pls.' Mem. at 22 (citing *Buckley v. Am. Const. Law*

Found., 525 U.S. 182, 195 (1999) ("[T]he choice not to register implicates political thought and expression."). Count Nine alleges that "[f]orcibly registering an individual amounts to compelled speech," Doc. No. 1, Compl. ¶ 131, and that, where they do not agree with Declaration One, Plaintiffs Gapero and Moniz do not wish to bolster the legitimacy of the Roll." *Id*. ¶¶ 134, 136. "By registering Plaintiffs Gapero and Moniz without their consent and without notice to them, the [commission] compelled their speech and violated their First Amendment right to refrain from speaking." *Id*. ¶ 137. Plaintiff Gapero contends that such use provides an unauthorized assertion that he supports a position. Doc. No. 47-4, Gapero Decl. ¶ 7. Likewise, Plaintiff Moniz alleges that the use of her name on the Roll wrongly indicates that she supports the Roll and its purpose. Doc. No. 47-5, Moniz Decl. ¶ 9.

They, however, are unlikely to succeed on the merits of such claims. It is undisputed that approximately 62 percent of the Roll comes from OHA registries, which, again, do not require affirmations of sovereignty or a civic connection to the Native Hawaiian community. Only 38 percent of the Roll has made those affirmations. These Plaintiffs are thus unlikely to prevail on a claim that inclusion on the Roll implies that they have certain views. Merely being on the Roll does not compel a statement as to sovereignty. Moreover, as already

established, the Roll itself is not a voter-registration list. Gapero and Moniz cannnot be said to have been compelled to register to vote. Finally, the evidence establishes that Gapero and Moniz could have easily removed themselves from the Roll as early as 2013, if they did not want to remain on the list. Indeed, as OHA Defendants note, even if there were a First Amendment violation, the likely remedy would not be to halt the planned election -- it would be to remove them from the list. Doc. No. 83, OHA Defs.' Opp'n at 20 n.5. In short, simply being included on the Roll does not implicate the First Amendment.

Plaintiffs have thus failed to meet the first requirement for granting a preliminary injunction, and all four prongs of the *Winter* test must be met. "Because it is a threshold inquiry, when a plaintiff has failed to show the likelihood of success on the merits, [the court] need not consider the remaining three *Winter* elements." *Garcia v. Google, Inc*., 786 F.3d 733, 740 (9th Cir. 2015) (citations and internal editorial marks omitted). Nevertheless, the court briefly explains why Plaintiffs also fail to meet *Winter's* other three prongs.

2. Irreparable Harm

Plaintiffs assert very generally that they will suffer irreparable harm because of "the various illegal activities to be carried out in the registration/election/convention process under Act 195." Doc. No. 47-1, Pls.'

Mem. at 30. They refer to the right to vote and the principle that "an alleged constitutional infringement will often alone constitute irreparable harm." *Id.*

But there is no constitutional violation. Plaintiffs are not being deprived of a right to vote in a public election. There is no showing of a First Amendment violation. And the harm from being deprived of participation in Nai Aupuni's election and convention is speculative. *Winter* reiterated that "[a] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." 555 U.S. at 22 (citation and quotation marks omitted). In short, Plaintiffs have not demonstrated irreparable harm.

3. Balance of Equities

Plaintiffs must demonstrate that the balance of equities tips in their favor. Defendants argue that Plaintiffs waited too long to bring suit -- Act 195 was passed in 2011 and this suit was not filed until August 2015. But Plaintiffs respond by pointing out that the decisions regarding the election were not made until this year. Suit was filed within five weeks of when the election schedule was first reported. Plaintiffs could not have sued to enjoin an election that was not scheduled. Thus, at least as to claims regarding the election itself, the timing of the suit does not affect the equities.

Nevertheless, Plaintiffs have not demonstrated that the equities tip in

their favor. They have no right to participate in a private election. And Plaintiffs Akina and Makekau could have participated, as voters and/or candidates for delegates, even without making Declarations One and Two. They both qualify as Native Hawaiians to register on OHA's Hawaiian Registry. The evidence indicates that they could have participated if they wanted to do so, even if registration occurred after suit was filed. And Plaintiffs Gapero and Moniz could have easily removed (and may still remove) themselves from the Roll.

On the other hand, enjoining a private election process that has already begun -- with candidates for delegate having registered, notices having been given, and campaign activities occurring -- would disrupt Native Hawaiian efforts to organize. In short, the equities do not tip in Plaintiffs' favor.

4. Public Interest

Finally, Plaintiffs have not demonstrated that the public interest would be served by a preliminary injunction. Plaintiffs are not likely to be deprived of any Constitutional rights. And granting an injunction now would potentially affect approximately 100,000 people who are on Nai Aupuni's voter list who might want to participate in a process of self-determination.

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C. What the Court Is Not Deciding

The court pauses to emphasize the limited scope of this Order. To be clear, the court is tasked *only* with determining whether Plaintiffs have met their burden under *Winter* to obtain an injunction, "an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. The court, however, is not assessing the process itself. The court is *not* deciding whether this specific election will lead to an entity that reflects "the will of the native Hawaiian community" or whether it will be "fair and inclusive" such that the United States may then begin to negotiate on a "government-to-government" basis, as set forth in the Department of the Interior's NPRM, 80 Fed. Reg. at 59119. Nor is the court deciding whether any potential actions under Act 195 or the NPRM -- such as encouraging Native Hawaiian self-governance, or negotiating or engaging on a "government-to-government" basis with a "reorganized Native Hawaiian government" -- reflect wise public policy. And the court is not deciding whether the Department of the Interior even has the Congressional authorization to facilitate the "reestablishment" of a government-to-government relationship with the Native Hawaiian community. The court has only addressed the legal considerations underlying the specific challenged actions, and has considered whether Plaintiffs have demonstrated that the proposed election, and challenged aspects of Act 195, are likely to be

unconstitutional so as to require stopping the process now (at this preliminary injunction phase).

V. CONCLUSION

Act 195 is a unique law. It is both symbolic and remarkable. It reaffirms a delegation of authority in the Admissions Act from the United States to the State of Hawaii to address conditions of Hawaii's indigenous people. It declares that the Native Hawaiian people are Hawaii's only "indigenous, aboriginal, maoli people." It is meant -- in limited fashion -- to facilitate a possible mechanism of independent *self*-determination and *self*-governance of Hawaii's indigenous people. It facilitates -- simply by creating a Roll of qualified Native Hawaiians -- a possible process for the Native Hawaiian community to determine *for themselves* (absent any other involvement by the State of Hawaii) what collective action, if any, might be sought by that community.

Undoubtedly there is *some* "state action." But, based on the information presented at this preliminary injunction stage, Nai Aupuni's planned election of delegates is not; Nai Aupuni's determination of who may participate is not; the planned convention is not. And the state is not involved in whether this process is or will be "fair and inclusive" and "reflect the will of the Native Hawaiian community" for purposes of the Department of the Interior's NPRM.

The election will not result in any state officials, law, or change in state government. The election and convention might be a step towards self-governance by Native Hawaiians, or it might accomplish nothing of substance. Even if, however, a self-proclaimed Native Hawaiian governing entity is created with a governing document or a constitution, the result would most certainly not be a state entity.

Plaintiffs have not met their burden of demonstrating that excluding them from this particular private election is unconstitutional, or will otherwise violate federal law. And that is the only question now before this court.

Plaintiffs' Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 29, 2015.

/s/ J. Michael Seabright
J. Michael Seabright
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ, Plaintiffs, vs.	CIVIL NO: 15-00322 BMK NOTICE OF PRELIMINARY INJUNCTION APPEAL (Caption continued on next page)

THE STATE OF HAWAII; GOVERNOR DAVID Y. IGE, in his official capacity; ROBERT K. LINDSEY JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, in his official capacity; 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, in their official capacities; KAMANA'OPONO CRABBE, Chief Executive Officer, Office of Hawaiian Affairs, in his official Capacity; JOHN D. WAIHE'E III, Chairman, Native Hawaiian Roll Commission, in his official Capacity; NĀ'ĀLEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MĀHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, in their official capacities; CLYDE W. NĀMU'O, Executive Director, Native Hawaiian Roll Commission, in his official capacity; THE AKAMAI FOUNDATION; and THE NA'I AUPUNI FOUNDATION; and DOE DEFENDANTS 1-50,

Defendants.

NOTICE OF PRELIMINARY INJUNCTION APPEAL

Notice is hereby given that KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ, Plaintiffs in the above named case, hereby file their interlocutory appeal to the United States Court of Appeals of the Ninth Circuit, from the following Orders:

1) Oral Order Denying Plaintiffs' Motion for Preliminary Injunction (Dkt.#47) entered in this action on October 23, 2015 as detailed in the transcript of proceedings (Dkt.#105); and

2) Minute Order Denying Plaintiffs' Motion for Preliminary Injunction entered in this action on October 23, 2015 (Dkt.#103).

DATED: Honolulu, Hawaii, October 26, 2015.

/s/ Michael A. Lilly
MICHAEL A. LILLY
ROBERT D. POPPER
LAUREN M. BURKE
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Attorneys for Plaintiffs
KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ, Plaintiffs, vs. THE STATE OF HAWAII; GOVERNOR DAVID Y. IGE, in his official capacity; ROBERT K. LINDSEY, JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, in his official capacity; 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, in their official capacities; KAMANA'OPONO CRABBE, Chief Executive Officer, Office of Hawaiian Affairs, in his official capacity; JOHN D. WAIHE'E, III, Chairman, Native Hawaiian Roll Commission, in his official capacity; NA'ALEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MAHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, in their official capacities; CLYDE W. NAMU'O, Executive Director, Native Hawaiian Roll Commission, in his official capacity; THE AKAMAI	CIVIL NO. 15-00322JMS-BMK Honolulu, Hawaii October 23, 2015 10:36 a.m. ORAL RULING ON [47] PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

FOUNDATION; and THE NA'I AUPUNI FOUNDATION; and DOE DEFENDANTS 1-50,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J. MICHAEL SEABRIGHT,
UNITED STATES DISTRICT JUDGE

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Also Present, for Amicus U.S. Department of Interior:	SAM HIRSCH, ESQ. (Participating by phone) Principal Deputy Assistant Attorney General Environment and Natural Resources Division U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530-0001
Also Present, for Proposed Intervenor-Defendants Samuel L. Kealoha, Jr., Virgil E. Day, Josiah L. Hoohuli, Patrick L. Kahawaiolaa and Melvin Hoomanawanui:	WALTER R. SCHOETTLE, ESQ. Walter R. Schoettle, a Law Corp. 1088 Bishop Street, Suite 1304 P.O. Box 596 Honolulu, Hawaii 96809-0596

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Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

FRIDAY, OCTOBER 23, 2015, 10:36 A.M.

THE CLERK: Civil Number 15-322JMS-BMK, Keli'i Akina, et al., versus the State of Hawaii, et al.

This case has been called for an oral ruling on the Motion for Preliminary Injunction.

Counsel, please make your appearances for the record.

MR. POPPER: This is Robert Popper for plaintiffs and with me are Chris Fedeli and Eric Lee.

THE COURT: All right. Yes.

MR. COATES: This is Chris Coates for the plaintiffs.

THE COURT: All right. Yes, good morning.

MR. LILLY: Good morning, Your Honor. Michael Lilly for plaintiffs.

THE COURT: All right.

MR. MEHEULA: Good morning, Your Honor. Bill Meheula and David Minkin for Na'i Aupuni. And I'm also here for The Akamai Foundation.

THE COURT: All right.

MR. KLEIN: Good morning, Your Honor. Robert Klein representing OHA and the OHA defendants.

MR. NAKATSUJI: Good morning, Your Honor. Deputy Attorney General Robert Nakatsuji on behalf of the State defendants.

THE COURT: Yes. All right.

MR. SHANMUGAM: And this is Kannon Shanmugam and Ellen

OIberwetter in Washington for the OHA defendants.

THE COURT: All right. Anybody else there?

MR. HIRSCH: Sam Hirsch of Department of Justice for amicus U.S. Department of the Interior.

THE COURT: All right. And I did give permission to for Mr. Hirsch to appear by phone as well since I invited the amicus brief.

Okay. Yes, please be seated.

All right. Let me start off first by thanking the parties for their cooperation in this matter and providing top-notch briefing. I do very much appreciate the effort everyone has put in and the time everyone has put in on both sides on this complex matter.

Now, I want to start by explaining why I'm providing an oral ruling today and what will follow next.

As we all know, the election is slated to begin on November 1st. The lawsuit in this matter was filed on August 13th and the Motion for Preliminary Injunction, the motion we're here today to discuss, was filed on August 28, leaving only 2 months between the filing of the motion and the start of the election to do the following:

One, to get the briefing on these complex issues fully completed. Two, to give me sufficient time to study these matters. Three, to hold a hearing, including albeit not much but some testimony. And then four, for me to consider all of

that and to reach a conclusion. In short, given the complex nature of the issues before me, the time has been somewhat short and we have had to expedite the matter to move forward so that whatever the ruling, it would be sufficiently in advance of the election so as not to be overly disruptive.

And I am now prepared to rule and believe it is in the interest of justice to announce my decision now, as far in advance of the election as possible. And that's why we're here today. My oral pronouncement today is intended to be a summary of a more comprehensive written order to follow. So given the impending election and the heightened public interest in this case, my intent today is to provide an overview, as I say, with a written order to follow. The written order is intended, if an appeal is taken from my ruling, to be in aid of the appellate process. And I will work diligently to get the written order filed as soon as I can.

And I have done some research and this process of an oral ruling followed by a written order has been tested, and cases discussing the rule can be found at Inland Bulk Transfer, 332 F.3d 1007, Sixth Circuit, 2003.

All right. So that's the framework under which we're working today.

Now, defendant Na'i Aupuni is conducting an election of Native Hawaiian delegates to a proposed convention of Native Hawaiians to discuss, and perhaps to organize, a "Native

Hawaiian governing entity." Delegate candidates have been announced and voting, as I said, is to run during the month of November. Plaintiffs have filed a Motion for Preliminary Injunction essentially seeking to halt the election. I have read all the briefings numerous times, heard the arguments and the evidence and am now prepared to rule.

The voters and delegates in this election are based on a "Roll" of qualified Native Hawaiians as set forth in Act 195 of the 2011 Hawaii Session Laws as amended. A "qualified Native Hawaiian" is defined by Act 195 as an individual, age 18 or older, who certifies that they are, one, "a descendent of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitute the State of Hawaii," and two, "have 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 through a registration process, the Native Hawaiian Roll Commission asked or required prospective registrants to the Roll to make three declarations as follows:

Declaration One: I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance.

Declaration Two: I have a significant cultural, social or civic connection to the Native Hawaiian community.

And Declaration Three: I am a Native Hawaiian, and it describes what that entails.

Separately, as required by an amendment to Act 195, the Roll also includes as qualified Native Hawaiians, quote, all individuals already registered with the State as verified Hawaiians or Native Hawaiians through the Office of Hawaiian Affairs. And those on the Roll through an OHA registry do not have to affirm Declarations One or Two.

And at Tuesday's hearing the parties agreed that approximately 62 percent of the Roll comes from an OHA registry, leaving the other 38 percent to come directly through the Roll Commission process, the initial process. It follows that approximately 62 percent of those on the Roll did not have to make an affirmation regarding sovereignty or significant connections to the Native Hawaiian community. And although Act 195 requires that the Roll shall serve as the basis for eligibility to participate in organizing a Native Hawaiian entity, Na'i Aupuni decided on its own to use the Roll, as well as to consider other sources of participants and delegates in its election to supplement the Roll. Na'i Aupuni was not precluded from including others -- that is, non-Native Hawaiians and those who may refuse Declarations One and Two -- in its process, although it chose on its own to limit its process to Roll members. Dr. Asam testified to this matter and the Court found his testimony credible in this regard.

Now, plaintiffs' suit alleges that the restrictions on registering for the Roll violate rights under the United States Constitution and the Voting Rights Act of 1965. They allege violations of, one, the Fifteenth Amendment; two, the Equal Protection clause of the Fourteenth Amendment; and three, the First Amendment. They allege that Na'i Aupuni is acting under color of state law for purposes of 42 U.S.C. Section 1983 and is acting jointly with other state actors. The complaint thus seeks to enjoin defendants, quote, from requiring prospective applicants for any voter roll to confirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry, and to enjoin, quote, the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll.

And to that end, plaintiffs have moved for a preliminary injunction seeking an order, quote, preventing defendants from undertaking certain voter registration activities and from calling or holding racially exclusive elections for Native Hawaiians as explained in plaintiffs' complaint, close quote. So, in essence, they seek to stop the election of delegates and halt the proposed convention.

Now, let me state the obvious. In addressing a Motion for Preliminary Injunction, I apply a four-part test set forth by the Supreme Court in Winter versus Natural Resources Defense Council, 55 U.S., 2008 case, Page 7. And under Winter a

plaintiff must show, one, that the plaintiff is likely to succeed on the merits; two, that the plaintiff is likely to suffer irreparable harm in the absence of a preliminary injunction, that is in absence of the relief sought; three, that the balance of equities tip in plaintiffs' favor; and four, that an injunction is in the public interest.

All right. Before I get to Winter and the individual counts and individual 1983 claims, I first want to address briefly standing because defendants have challenged plaintiffs' standing, at least as to some claims. I do conclude, however, that there is standing to challenge Act 195 and the proposed election, at least certainly at this stage. The case in this respect is similar to the case we discussed on Tuesday, a standing case, Davis versus Guam, 785 F.3d 1311, where the Ninth Circuit found plaintiffs' allegations of injury in being excluded on the basis of race from a Guam plebiscite vote that could have led to a change in Guam's future political relationship with the United States sufficient to confer standing. All right. So I do find standing.

All right. So now I'm going to move to the preliminary injunction standard and the Winter test and begin with the Fifteenth Amendment and the Voting Rights Act, looking at claims -- or Counts 1, 3, 5 and 6.

And I believe that the evidence demonstrates that the Na'i Aupuni election is a private election and not a state

election. As a result, as to these claims plaintiffs have not demonstrated a likelihood of success on the merits.

And this election is fundamentally different, in my view, extremely fundamentally different than the elections at issue in Rice versus Cayetano and Arakaki versus Hawaii, which both found Fifteenth Amendment violations. Obviously Rice is a Supreme Court case and Arakaki a Ninth Circuit case.

These opinions were based on a conclusion that OHA elections are a, quote, state affair for, quote, public officials for, quote, public office to a, quote, state agency established by the state Constitution. Not so here. As set forth in Terry versus Adams, 345 U.S. 461, the Fifteenth Amendment precludes discrimination against voters in, quote, elections to determine public governmental policy or to select public officials, not in private elections to determine private affairs. And the Voting Rights Act also applies only to votes cast with respect to candidates for public or party office, citing Chisom versus Roemer, 501 U.S. 380.

Now, certainly, we know this is not a state election governed by Chapter 11 of the Hawaii Revised Statutes, or the State's regulatory system covering public elections. It is not an election run by the Hawaii Office of Elections for any federal, state or county office, nor is it a general or special election to decide any referendum, constitutional or ballot question. No public official will be elected or nominated; no

matters of federal, state or local law will be determined through this elective process by itself.

So what is this election and how do we best characterize it? The Court concludes at this preliminary injunction stage that this is an election for delegates to a private convention among a community of indigenous people for the purposes of exploring self-determination that will not and cannot result by itself in any federal, state or local laws or obligations. Stated differently, 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. Although it might result in a constitution of a Native Hawaiian governing entity, as OHA correctly argues on Page 9 of its memorandum, quote, even if such 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, close quote.

And as Na'i Aupuni recognizes on Page 28 of its memorandum, even if the convention results in the formation of a Native Hawaiian governing entity, that entity, quote, by itself would not alter in any way how the State is governed, close quote. Na'i Aupuni recognizes that "any such alteration of government will require subsequent action, for example, formal recognition, by the federal and possibly state governments. Similarly, any alteration of intergovernmental

structure will require subsequent federal and state legislation and/or executive action with respect to the entity. This statement is absolutely true and critical to an understanding of my ultimate conclusion in reference to this motion.

At Page 21 of its amicus brief, the Department of the Interior observes that "this case is about Native Hawaiian elections for Native Hawaiian delegates to a convention that might propose a constitution or other governing document for the Native Hawaiian community. This election has nothing to do with the governing of the State of Hawaii."

Now, plaintiffs argue that this is an important election about public issues and has the potential to be historic, and thus must fall under the Fifteenth Amendment. And plaintiff relies heavily on Terry versus Adams, case I previously cited, a Supreme Court case invalidating elections of the private Jaybird party that excluded African Americans from primary elections that functioned essentially as a nominating process for public primary elections for county office. Specifically, plaintiffs rely on Terry's statement that the Fifteenth Amendment, quote, includes any election in which public issues are decided or public officials selected, close quote. But this statement must be read in the specific context addressed by the Supreme Court. Supreme Court stated that, quote, the 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, close quote. Thus, the racist selection of candidates strip African Americans, quote, of every vestige of influence, close quote, in selecting public county officials. And this Court simply cannot read in context the statement that the Fifteenth Amendment applies to an election to decide, quote, public issues to apply to all elections let alone this private election.

In short, it appears that much more will need to happen under any scenario before this election leads to any public change at all. The entity may recommend change, but cannot alter the legal landscape on its own.

And further, this is not a public election based on Act 195 itself. The creation of a Roll of Native Hawaiians does not mean its commissioners are conducting an election. Act 195, although contemplating a convention of Hawaii's indigenous peoples to participate in the organization of a Native Hawaiian governing entity, does not mandate any election. It doesn't impose, direct or suggest any particular process. Under 10H-5, the Roll is intended to facilitate, quote, an independent process for Native Hawaiians to organize themselves. As an internal matter of self-governance by a group of the Native Hawaiian community, it does not involve a public election at all. At most, it facilitates private self-determination, not governmental acts of organization.

So that covers the likelihood of success on the merits as to the Fifteenth Amendment and the Voting Rights Act. Okay.

Fourteenth Amendment. I also find at this preliminary injunction stage that the plaintiff has not shown a likelihood of success on the merits that Na'i Aupuni's election or Act 195 itself is a violation of plaintiffs' equal protection rights under the Fourteenth Amendment as asserted in Counts 2, 4, 7 and 8. Now, to state a cause of action under Section 1983 for deprivation of a constitutional right, plaintiffs must demonstrate that the deprivation occurs, quote, under color of state law, close quote. That is, there must be state action. This requirement excludes from 1983's reach merely private conduct, no matter how discriminatory or wrongful. Citing American Manufacturers Mutual Insurance case, 526 U.S. 40, four zero. And determining whether there is state action is necessarily a fact-bound inquiry, the Supreme Court said in Brentwood Academy, 531 U.S. 288.

But, as established above, Na'i Aupuni's election is a private election. It does not constitute state action and Na'i Aupuni, a private entity, there's no question in and of itself it's a private entity, is not a state actor for much the same reason. Its election does not fit under the "public function" test of state action which requires a private entity to be carrying out a function that is "traditionally the exclusive prerogative of the State." As the Supreme Court said in Flagg

Brothers versus Brooks, 436 U.S. 149, in the area of elections, quote, the doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce the uncontested choice of public officials.

Nor does the election fall under a "joint action" test, which asks whether state officials and private parties have acted in concert in effecting a particular deprivation of a constitutional right. The evidence simply does not suggest joint action here -- although certainly Na'i Aupuni obtained significant funds through an OHA grant, it did so with a specific autonomy clause whereby OHA agreed not to "directly or indirectly control or affect the decisions of Na'i Aupuni." All the evidence suggests that OHA has no control over Na'i Aupuni, and that Na'i Aupuni is acting completely independently. Dr. Asam testified to that, or Asam. As I said, I found his testimony credible in that regard. Plaintiffs have not met their burden to demonstrate otherwise.

And just the fact that OHA had a grant of funds through The Akamai Foundation does not make this a public election. Indeed, plaintiffs correctly admitted at the hearing on Tuesday that public funding is a red herring. And this is certainly true given cases such as Blum versus Y-A-R-E-T-S-K-Y, Yaretsky, 457 U.S. 911, and San Francisco Arts & Athletics, Inc., 483 U.S. 522, which explain that the government may

subsidize private entities without assuming constitutional responsibility for their actions. So, for example, in Rendell-Baker the Supreme Court found no relevant state action by a private school even where public funds accounted for over 90 percent of its budget.

The Ninth Circuit has stated, quote, state action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself. Villegas, V-I-L-L-E-G-A-S, versus Gilroy Garlic Festival, 541 F.3d 950. And addressing that nexus, the inquiry must begin by focusing on the "specific conduct of which the plaintiff complains." Caviness versus Horizon Community Learning Center, 590 F.3d 806, a 2010 case. And so, the Ninth Circuit says, "an entity may be a state actor for some purposes but not for others."

And there is no such close nexus here between the State and this particular election that would make it a public election. An OHA grant was not for the purpose of a public election. And even if OHA -- certainly considered a state actor after Rice -- desires or agrees with some of Na'i Aupuni's choices it makes in conducting the election of delegates and holding a convention, the Supreme Court has held that "action taken by private entities with the mere approval or acquiescence of the State is not state action." And that's

Sullivan, 526 U.S. at Page 52.

Likewise, although Act 195 itself and the Roll Commission's action in creating the Roll, certainly constitute state action, this does not mean such action is an equal protection violation. The Court finds merit in the defendants' argument that the Roll itself is simply a list of people with Native Hawaiian ancestry who may or may not have declared that they have a civic connection to the Hawaiian community or believe in unrelinquished sovereignty. The Roll is essentially a classification, and as the Supreme Court noted in Nordlinger versus Hahn, 505 U.S. at Page 10, "the equal protection clause does not forbid classifications." Instead, it is directed at unequal treatment. It is the use of the Roll that plaintiffs complain about. But Act 195's creation of the Roll Commission and a Roll does not actually treat persons differently. Nothing in Act 195 calls for a vote. And even if it contemplates or encourages a convention, it simply calls for a chance for certain Native Hawaiians to independently organize themselves without involvement from the State.

I did not intend this to be so long when I first started out. I have a ways to go.

The Court also finds some merit in defendants' argument that Brentwood Academy allows for a type of exception or consideration for "unique circumstances" where that action raises some "countervailing reason against attributing activity

to the government." And Act 195 is a unique law -- its stated purpose is meant to facilitate self-governance in the organizing of the State's indigenous people independently and amongst themselves. By definition then, such organizing must occur among Native Hawaiians -- that is, a "countervailing reason against attributing activity to the government."

Further, I do find some force to the argument that forcing Na'i Aupuni to associate with non-Hawaiians in its convention would implicate Na'i Aupuni's own First Amendment rights of association, citing Single Moms, Inc. versus Montana Power, 331 F.3d 743. That in and of itself can be a countervailing reason under Brentwood.

All right. I now want to turn to the secondary arguments that have been made. I don't need to do so, but I think in recognition that there may be an appeal to the Ninth Circuit and to make the record as full as I can based on my views I will cover this. So this assumes Na'i Aupuni is a state actor, what happens under the Fourteenth Amendment.

And so the Court addresses the defendants' secondary arguments. First, that is, assuming Na'i Aupuni is a state actor and that Act 195's Roll otherwise implicates equal protection under 1983, under Morton versus Mancari unequal treatment would only need to be rationally related to some legitimate governmental purpose.

I do recognize that this secondary analysis may not be

necessary, as I said, given my ruling already. But I do think it's important to reach some of these secondary questions to help explain, as I said, my ultimate conclusion.

And in this regard, even without Native Hawaiians being formally classified as a "tribe," defendants have made a strong argument that Morton versus Mancari can justify congressional action to support Native Hawaiians as indigenous people. But as we discussed at some length in the hearing, another step is required before Morton can apply to state laws. That is, before such federal power would allow a state to treat Native Hawaiians differently under a "rationally related" test. And this, in my view, is a much more difficult question.

Washington versus Confederated Bands and Tribes of Yakima Indian Nation, a Supreme Court case, reasons that a state has power if federal law explicitly gives a state authority. But it is unclear whether the specific types of actions at issue in this case, creation of the Roll and facilitating Native Hawaiian self-governance, are encompassed within existing grants of federal authority. So I will not at this time, as the Supreme Court stated in Rice, reach this "difficult terrain." I will leave that to the side.

I then turn to strict scrutiny. Of course Morton would not be necessary if a strict scrutiny test could be satisfied. Again, this is assuming state action, something I have not found. So the Court discusses whether -- again,

assuming Na'i Aupuni is involved in state action -- whether the strict scrutiny could be met. And if it becomes necessary to reach this issue I think the answer is yes. I certainly recognize that strict scrutiny is a difficult test to meet, and that this is a close and complex question. But the Court also recognizes that it faces a unique issue, one with a very long history.

Act 195 and the upcoming election cannot be read in a vacuum. Both must be read in the context of Hawaiian history and the State's trust relationship with Native Hawaiians. As explained in Section 1 of Act 195, quote, from its inception, the State has had a special political and legal relationship with the Native Hawaiian people and has continually enacted legislation for the betterment of their condition, close quote. And as the Department of Interior's October 1st, 2015, Notice of Proposed Rulemaking summarizes, the United States also has a history of recognizing through many laws of a "special political and trust relationship" with that community.

And I believe the State has a compelling interest in bettering the conditions of its indigenous people and in doing so, providing dignity to them -- a dignity in simply allowing a starting point for a process and discussion of self-determination. And there is a history of attempts at self-governance, as set forth in the Department of Interior's Notice, and other sources. But before any discussion of a

"government-to-government" relationship with any "Native Hawaiian governing entity" could even begin to take place, such an entity should reflect, as the proposed rule says, the "will of the Native Hawaiian community."

The State thus has a compelling interest in facilitating the organizing of the indigenous Hawaiian community, Native Hawaiian community so it can decide for itself independently whether to seek self-governance or self-determination, and if so, in what form and when. The question of sovereignty is not going to go away. So the State has a compelling interest in facilitating a forum that might result in a unified collective voice amongst Native Hawaiians. And this is not possible without limiting such self-governance discussion to Native Hawaiians themselves. Stated differently, the restriction to Native Hawaiians is precisely tailored to meet the State's compelling interest. And as the Department of Interior puts it on Page 20 of its amicus brief, purporting to recognize the Native Hawaiian community to include non-natives in organizing a government could mean in practice that a native group could never organize itself, impairing its right to self-government.

So I find as to the Fourteenth Amendment, equal protection claim, plaintiffs have failed to show a likelihood of success on the merits.

Let me move now to the First Amendment claims. And I

likewise find that plaintiffs have not demonstrated a likelihood of success on their First Amendment claims, Counts 4 and 9. In Count 4, Plaintiffs Akina and Makekau contend that the First Amendment rights were violated -- or their First Amendment rights were violated because conditions were placed on their registration for the Roll, i.e., Declaration One, which implicates First Amendment rights. The evidence here is mixed. Defendants attest that Akina and Makekau could have participated in the process without affirming to Declaration One. And Act 195 itself, as amended, requires OHA registrants to be included, which does not require either Declaration One or Two. It certainly appears that if Akina or Makekau truly wanted to participate in Na'i Aupuni's process, they could have easily done so. But they chose not to.

But in any event, the burdens that they assert only apply if they burden a right to vote in a public election. And as I've already said, I see this much more akin to a private election. They contend that their inability to register for the Roll, without affirming "unrelinquished sovereignty," deprives them of the right to participate in Na'i Aupuni's process -- that is, the vote for delegates, the ability to run as a delegate and participation in the convention. But again, the delegate election and proposed convention is a private matter, not involving state action.

Now, Count 9 has a different First Amendment theory.

The Plaintiffs Gapero and Moniz contend that their inclusion on the Roll through an OHA registry violates a First Amendment right against compelled speech or a right not to register to vote. They, however, are unlikely to succeed on the merits of such a claim. It's clear that approximately 62 percent of the Roll comes from OHA registries -- which, again, do not require Declaration One or Two. Only 38 percent of the Roll has -- makes up those who have made these affirmations. These plaintiffs are thus unlikely to prevail on a claim that inclusion on the Roll implies that they have certain views. Merely being on the Roll does not compel a statement as to sovereignty. Moreover, as already established, the Roll itself is not a voter registration list. They cannot be said to have been compelled to register to vote. Finally, the evidence establishes that they could have easily removed themselves from the Roll as early as 2013 if they did not want to remain on the list.

Indeed, as the OHA defendants note, even if there was a First Amendment violation, the likely remedy would not be to halt the planned election, it would be to remove them from the list. In short, simply being included on the Roll does not implicate the First Amendment.

So that covers all the merits in my finding that the plaintiffs have not proven a likelihood of success on the merits. I'll briefly discuss the other prongs.

Plaintiffs assert very generally at Page 30 of their motion that they will suffer irreparable harm because of the illegal activities. They refer to the right to vote and the principle that "an alleged constitutional infringement will often alone constitute irreparable harm."

That may be true, but here I find no constitutional violations. They are not being deprived of a right to vote in a public election. There is no showing of a First Amendment violation. And the harm at this point in my view is speculative. Winter explains that "a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." Plaintiffs have not demonstrated irreparable harm.

As to the balancing of equities, plaintiffs must demonstrate that the balancing of equities tips in their favor. Defendants argue the plaintiffs waited too long to bring suit. But given the timing of the election, it would have been difficult for plaintiffs to have sued earlier and to challenge an election when it was not scheduled. So the timing doesn't in and of itself affect the equities.

But the plaintiffs have failed -- I'm sorry, the plaintiffs have not demonstrated or have failed to demonstrate the equities tip in their favor. They have no right to participate in a private election. Plaintiffs Akina and Makekau could have easily participated, even without making

Declarations One and Two. And they both qualify as Native Hawaiians to register on OHA's Hawaiian Registry. The evidence indicates that they could have participated if they wanted to, even if registration occurred after suit was filed.

And Plaintiffs Gapero and Moniz could have easily removed, and presumably may still do so, themselves from the Roll.

On the other hand, enjoining a private election process that has already begun, with candidates for delegate having registered, and notice of the vote having gone out and the voting to occur soon, would disrupt this effort to organize.

Finally, plaintiffs have not demonstrated that the public interest would be served by a preliminary injunction. Plaintiffs are not likely to be deprived of any constitutional rights. Granting an injunction would now potentially affect up to 100,000 people who are on this voter list and may want to participate in this process of self-determination.

Now, honestly, I'm almost done.

I pause, I pause, not for long, but I pause because I want to make clear particularly, I think the lawyers all understand that, but for those who are here who don't understand the legal process, what I'm not deciding today, I want to make that clear today as well. So I want to emphasize the limit and scope of this order.

I am tasked only with determining whether plaintiffs have met their Winter burden to obtain an injunction. It's "an extraordinary remedy never awarded as a matter of right."

I am not assessing the process itself. I am not deciding whether this specific election will lead to an entity that reflects "the will of the Native Hawaiian community" or whether it is "fair and inclusive" such that the United States may then begin to negotiate on a "government-to-government" basis, as set forth in the Department of Interior's Notice. Nor am I deciding whether any potential actions under Act 195 or the Notice, such as encouraging Native Hawaiian self-governance, or negotiating or engaging on a "government-to-government" basis with a "recognized Native Hawaiian government," reflects public policy that is wise. That's not my place. I'm not even deciding whether the Department of Interior even has the power to facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian people. That's not before me. I'm only addressing the legal considerations underlying the specific challenged actions, and consider whether plaintiffs have demonstrated that the proposed election and challenged aspects of Act 195 are likely to be unconstitutional so that the process stops now.

So, for those reasons the Court is denying the Motion for Preliminary Injunction. As I say, I will put out a more

detailed order. It's a little hard to understand how something can get more detailed than that, but it will contain a little bit more than that did. Okay? And I hope to do that, as I say, as soon as possible.

All right. Anything else before we recess?

MR. SCHOETTLE: Your Honor, may I have 2 minutes?

MR. POPPER: Your Honor, this is Robert Popper for the plaintiffs. I had a couple of brief matters.

THE COURT: All right. Mr. Popper, I'm having a little trouble hearing you. So if you could speak up a little bit I'd appreciate it.

MR. POPPER: Is this better, Your Honor?

THE COURT: That's a little better. I can also turn our volume up a little here. Okay. Go ahead.

MR. POPPER: The first is that plaintiffs are seriously considering and in fact I would say planning an appeal. And so I thank the Court for ruling quickly, I think we all needed to have that happen, and for stating that a written order will issue shortly.

I was wondering perhaps whether just as a possibility the Court might certify the transcript of the oral order just issued and perhaps issue a minute order as well. That was the first thing I wanted to raise with the Court.

THE COURT: Well, help me understand. So I've ruled. What do you mean by certifying the transcript? I'm not sure

what that even means.

MR. POPPER: Well, as I understand it, if Your Honor were to certify the transcript, then the transcript itself would become a written ruling.

THE COURT: Well, no, that's not my intent. My intent is to put out a written ruling. Now, if you have a right to appeal today from this, if you believe you have a -- I am denying the motion right now, to be clear. The motion is denied, Mr. Popper. If you believe you can appeal from that, so be it, that's fine. I have no problem with that.

What I was trying to point out is, if there is an appeal, the Ninth Circuit very well may want to have the benefit of my fuller written order. And the law does permit me to rule from the bench in this manner, and then in aid of the appellate process file a more detailed written order, which I hope to have done within a week or so.

MR. POPPER: I see.

THE COURT: Okay?

MR. POPPER: Your Honor, the second matter would be that pursuant to the requirements of Federal Rule of Appellate Procedure 8, I would respectfully move now for an order granting an injunction of -- pending an appeal of this matter for the reasons stated in our Motion for Preliminary Injunction.

THE COURT: All right. You lost me there. You're

asking for what?

MR. POPPER: Pursuant to Federal Rule of Appellate Procedure (a)(1)(C).

THE COURT: 8(1)(c)?

MR. POPPER: Yes.

THE COURT: Okay.

MR. POPPER: 8(a)(1)(C).

THE COURT: 8(a)(1)(C). Okay. Let me pull that up.

Counsel, do you have a book? I can give you one if you don't have.

So you're asking me to essentially grant your motion for injunction through Rule 8, is that what you're asking for?

MR. POPPER: No, Your Honor, because it wouldn't be pending the outcome of the district court's ruling, it would be pending the outcome of the appeal. But yes, the same injunction.

THE COURT: So you're asking me for an order granting the injunction while appeal is pending.

MR. POPPER: Yes, Your Honor.

THE COURT: All right. Now I understand.

Does anyone wish to be heard on that?

MR. MEHEULA: We oppose it, Your Honor, on the grounds that you just stated.

THE COURT: Do you want to repeat those, Mr. Meheula?

MR. KLEIN: We also oppose it, Your Honor. You would

essentially be reversing yourself.

MR. NAKATSUJI: Yes, Your Honor, we object as well. The standard is the same for this type of motion. So I believe that for the reasons you've stated, the motion should be denied.

THE COURT: All right. So I am denying your --

MR. SCHOETTLE: May I have 2 minutes, Your Honor?

THE COURT: I'm sorry?

MR. SCHOETTLE: May I have 2 minutes?

THE COURT: I'm not done talking to Mr. Popper.

MR. SCHOETTLE: I was -- you asked for if there's anything else.

THE COURT: I haven't permitted your intervention in this case. I'm not even sure why you're sitting at counsel table.

All right. Mr. Popper, I'm going to deny that motion. All right.

UNIDENTIFIED MALE: Shame on this court. This court is incompetent. This court is incompetent. Shame on this court. Shame.

THE COURT: All right.

MR. SCHOETTLE: May I have 1 minute, Your Honor?

THE COURT: All right. Get to a microphone though. All right?

MR. SCHOETTLE: Your Honor's analysis of strict

scrutiny is precisely correct, except for one thing. This election has nothing to do with Native Hawaiians. Native Hawaiians are defined in the Constitution of the State of Hawaii, they're defined in the Hawaiian Homes Commission Act, and they're defined in 5(f) by reference to not less than one-half part.

This election does not limit voting qualifications to Native Hawaiians. It includes another hundred -- for a hundred thousand other people. The purpose of this election is not to elect a governing entity for Native Hawaiians. There already exists governing entities that Native Hawaiians have created for themselves, Ka Lahui being one of them. The State does not want to recognize Ka Lahui because it represents Native Hawaiians. The State wants an organization that it can give $500 million of OHA money that belongs to Native Hawaiians in order for that organization to give up the rights of Native Hawaiians in Hawaiian Homes and 5(f).

THE COURT: All right. Thank you.

MR. SCHOETTLE: That is state action.

THE COURT: All right. Thank you, sir.

All right. Anything else before we recess?

MR. MEHEULA: No, Your Honor.

MR. POPPER: Not from the plaintiffs, Your Honor.

THE COURT: If there is an appeal taken, it sounds like there will be, I don't know if we just want to -- if

there's any discovery that needs to be had or anything of that sort that could go forward pending the appeal or if everyone just agrees to stay the case here to the extent I have -- where I have remaining jurisdiction pending the appeal. But maybe counsel can discuss that and figure out the best way to proceed.

MR. MEHEULA: We will.

MR. KLEIN: We shall, Your Honor.

THE COURT: Okay?

MR. MEHEULA: Yes.

THE COURT: Mr. Lilly, you understand what I'm saying? I mean if there's an appeal I just don't know if you folks think anything should go forward as far as discovery or limited matters that could go forward pending an interlocutory appeal or if we should stay everything and see what happens.

MR. LILLY: I don't think there's anything more that needs to be done pending appeal.

THE COURT: Okay. All right. All right. Very well. All right. Court is in recess. Thank you.

(The proceedings concluded at 11:24 a.m., October 23, 2015.)

COURT REPORTER'S CERTIFICATE

I, CYNTHIA FAZIO, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. §753 the foregoing pages is a complete, true, and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United Stated.

DATED at Honolulu, Hawaii, October 25, 2015.

/s/ Cynthia Fazio
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ, Plaintiffs, vs.	CIVIL NO: 15-00322 BMK MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; (Caption continued on next page)

THE STATE OF HAWAII; GOVERNOR DAVID Y. IGE, in his official capacity; ROBERT K. LINDSEY JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, in his official capacity; 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, in their official capacities; KAMANA'OPONO CRABBE, Chief Executive Officer, Office of Hawaiian Affairs, in his official Capacity; JOHN D. WAIHE'E III, Chairman, Native Hawaiian Roll Commission, in his official Capacity; NĀ'ĀLEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MĀHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, in their official capacities; CLYDE W. NĀMU'O, Executive Director, Native Hawaiian Roll Commission, in his official capacity; THE AKAMAI FOUNDATION; and THE NA'I AUPUNI FOUNDATION; and DOE DEFENDANTS 1-50, Defendants.	DECLARATION OF KEALII MAKEKAU; DECLARATION OF YOSHIMASA SEAN MITSUI; DECLARATION OF PEDRO KANA'E GAPERO; DECLARATION OF MELISSA LEINA'ALA MONIZ; DECLARATION OF JOSEPH WILLIAM KENT; EXHIBIT "1"; DECLARATION OF DR. KELI'I AKINA; EXHIBITS "A" – "I"; CERTIFICATE OF COMPLIANCE PURSUANT TO L.R. 7.5(b)

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ ("Plaintiffs"), by their attorneys, respectfully move this Court for a Preliminary Injunction. Specifically, Plaintiffs seek the preliminary relief of an Order preventing Defendant's from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians, as explained in Plaintiffs' Complaint. *See* Doc. No. 1, p. 32, Prayer for Relief.

This Motion is made pursuant to Local Rule 10.2(g) and Fed. R. Civ. Pro. 65, and is based upon the following memorandum in support, the declarations, and exhibits attached thereto.

DATED: Honolulu, Hawaii, August 28, 2015.

/s/ Michael A. Lilly
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

Plaintiffs,

vs.

THE STATE OF HAWAII; GOVERNOR DAVID Y. IGE, in his official capacity; ROBERT K. LINDSEY JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, in his official capacity; 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, in their official capacities; KAMANA'OPONO CRABBE, Chief Executive Officer, Office of Hawaiian Affairs, in his official Capacity; JOHN D. WAIHE'E III, Chairman, Native Hawaiian Roll Commission, in his official Capacity; NĀ'ĀLEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MĀHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, in their official capacities; CLYDE W. NĀMU'O, Executive Director, Native Hawaiian Roll Commission, in his official capacity; THE AKAMAI FOUNDATION; and THE NA'I AUPUNI FOUNDATION; and DOE DEFENDANTS 1-50,

Defendants.

CIVIL NO: 15-00322 BMK

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTUES, RULES, AND REGULATIONS

MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs respectfully submit this memorandum in support of their motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65.

I. INTRODUCTION AND FACTUAL BACKGROUND

In July 2011, then-Hawaii Governor Neil Abercrombie signed Act 195 into law. Akina Decl., ¶ 6. The Act states that its 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. As clearly explained by those charged with implementing the Act, the "means and methods" it envisions are elections – in which only Native Hawaiians who hold particular views may register and vote – to select delegates to a convention, which would then draft the "governance documents" of a Native Hawaiian entity. Kent Decl., ¶¶ 12-14. In this way, the "roll of qualified Native Hawaiians" will result in "a convention of qualified Native Hawaiians, established for the purpose of organizing themselves." HAW. REV. STAT. § 10H-5.

This civil action is brought by five citizens and residents of the State of Hawaii who are registered to vote in elections in Hawaii, and by one citizen and resident of the State of Texas. Compl. at ¶¶ 6-11. Plaintiffs Keli'i Akina and Kealii Makekau are descendants of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in Hawaii, and they therefore satisfy Act 195's

race-based ancestry requirement. However, these Plaintiffs cannot register to vote in elections to be held under Act 195 because they cannot affirm certain viewpoint-based positions that are required by Defendants' registration process and that pertain to whether they favor Native Hawaiian sovereignty and self-governance becoming a part of Hawaii law. Akina Dec., ¶¶ 7, 11-15; Makekau Decl., ¶¶ 3, 6-10.

Plaintiffs Joseph Kent and Yoshimasa Sean Mitsui are citizens and residents of the State of Hawaii who are registered to vote in Hawaii. These Plaintiffs are not descendants of the aboriginal people who occupied and exercised sovereignty in Hawaii prior to 1778. They are therefore prevented from registering to vote in elections held under Act 195 because of the race-based ancestry requirements of the Act and other restrictions and qualifications imposed and enforced by Defendants. Kent Dec., ¶¶ 2-8; Mitsui Decl., ¶¶ 2-7.

Plaintiff Pedro Kana'e Gapero is a citizen, resident and registered voter of the State of Hawaii. Plaintiff Melissa Leina'ala Moniz is a citizen and resident of the State of Texas. Plaintiffs Gapero and Moniz are descendants of the aboriginal people of Hawaii, and both have been registered to vote in elections to be held under Act 195 without their knowledge or consent. Gapero Dec., ¶¶ 2-4; Moniz Decl., ¶¶ 2, 4-6.

Defendants are the State of Hawaii, its governor and various other state officials in their official capacities, and two private organizations that are now involved in the registration/election/convention process[1] under Act 195.

Act 195

The Act created within Defendant-Office of Hawaiian Affairs ("OHA") an administrative subdivision that is Defendant-Native Hawaiian Roll Commission ("NHRC"). Act 195 makes the NHRC responsible for "[p]reparing and maintaining a Roll of qualified Native Hawaiians" and "[c]ertifying that the individuals on the Roll of qualified Native Hawaiians meet the definition of qualified Native Hawaiians." HAW. REV. STAT. § 10H-3(a).

Act 195 provides that a "qualified Native Hawaiian" is an individual whom the NHRC has determined to meet the criteria of eligibility established by the Act. HAW. REV. STAT. § 10H-3(a)(2). The first criterion is based upon ancestry. It defines a qualified Native Hawaiian as a person who is "a descendant of aboriginal peoples who, prior to 1778, occupied or exercised sovereignty in the Hawaiian islands"; who was eligible in 1921 for a Hawaiian Homes Commission Act

[1]The term "registration/election/convention process" will be used in this memorandum to refer to all of the activities that are being taken to implement Act 195, which include the registration of Native Hawaiians on the Roll, the holding of an election to select delegates to the constitutional convention, the holding of the convention, and the holding of a referendum election to approve or disapprove the recommendations of the convention.

("HHCA")[2] lease, or is a descendant of such a person; or who satisfies the "ancestry requirements of Kamehameha Schools or of any Hawaiian registry program of the office of Hawaiian affairs." HAW. REV. STAT. § 10H-3(a)(2)(A). In addition, the Defendants' registration process under Act 195 provides that in order to be placed on the Roll, an otherwise qualified individual must have "maintained a significant cultural, social, or civic connection to the Native Hawaiian community," and the person must also "wish[] to participate in organization of the Native Hawaiian governing entity." HAW. REV. STAT. § 10H-3(a)(2)(B).

The Registration Process for the Roll

Prospective voters were allowed to begin registering online for the Roll in July 2012. Akina Decl., ¶ 22. Registration has been closed and reopened since then. *Id.* Registration is presently available online. Compl., ¶ 39; *see* https://www.kanaiolowalu.org/registernow/. [3] In addition to the individuals whose

[2] The HHCA was enacted by Congress in 1920 to address concerns over poverty and population decline among the native population of Hawaii. H.R. Rep. No. 839, 66th Cong., 2nd Sess. at 4 (1920). The HHCA defines "Native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands prior to 1778." Compl., ¶ 21.

[3] It is well-settled that courts may judicially notice facts on a government website as self-authenticating. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009) (judicial notice of facts on DOJ website); *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2690 (2013) (Maine's website); *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (school websites);

names have been placed on the Roll because they satisfied the ancestry and viewpoint-based requirements of Act 195, tens of thousands of people whose names appeared on other lists of Native Hawaiian – two of whom are Plaintiffs Gapero and Moniz – were subsequently registered for the Roll *without* their knowledge or consent. Akina Decl., ¶¶ 23-24 & Ex. B; Kent Decl., ¶ 14(j); Gapero Decl., ¶¶ 4-5; Moniz Decl., ¶ 5.

During the online voter registration process available on the NHRC's website, applicants are presented with three Declarations that require they affirm: (1) the "unrelinquished sovereignty of the Native Hawaiian people" and their "intent to participate in the process of self-governance;" (2) that they have a "significant cultural, social, or civic connection to the Native Hawaiian community;" and (3) that they satisfy the Native Hawaiian race-based ancestry requirement. Akina Decl, ¶ 13 & Ex. A; Kent Decl., ¶¶ 4, 6, 9. Unless an applicant can affirm all three Declarations, that applicant cannot register for the Roll. Akina Decl, ¶¶ 13-15 & Ex. A; Kent Decl., ¶ 8.

In addition, the President of the Board of Na'i Aupuni has explained that any person who hopes to be a delegate to the planned convention must be registered for the Roll. Kent Decl., ¶ 14(d). In consequence, delegates to the convention

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United States v. Head, 2013 U.S. Dist. LEXIS 151805, at *7 n.2 (E.D. Cal.) ("may take judicial notice of information posted on government websites as it can be 'accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'").

necessarily will have had to affirm the truth of the same three declarations that all other registrants for the Roll had to affirm.

Plaintiffs Akina and Makekau could not affirm the viewpoint-based requirement asserted in Declaration One, and Plaintiffs Kent and Mitsui could not affirm the connections to the Native Hawaiian community and the ancestry requirements in Declarations Two and Three. Akina Decl, ¶ 12; Makekau Decl., ¶ 8; Kent Decl., ¶¶ 4-8; Mitsui Decl., ¶¶ 3-7.

The Joint Conduct of OHA, NHRC, AF and NAF

Commencing in the spring of 2015, representatives of OHA and the Akamai Foundation ("AF") and Na'i Aupuni Foundation ("NAF"), two private nonprofit organizations, entered into an interrelated series of four agreements, which have been posted on NAF's website. Akina Decl., ¶¶ 26-30 & Exs. C, D, E, and F.[4]

The "Grant Agreement" is between OHA, AF, and NAF. It details the transfer from OHA to AF, for use by NAF, of $2,598,000 of government funds, in order that NAF may "facilitate an election of delegates, election and referendum monitoring, a governance ʻAha [convention], and a referendum to ratify any

[4] Statements by OHA trustees and by NAF's President confirm that the intention of this web of arrangements was to defeat any Fourteenth Amendment litigation, presumably by allowing the argument that AF and NAF are not "state actors." Compl., ¶ 58; Akina Decl., ¶ 31 & Ex. G; Kent Decl., ¶ 15(a). As set forth below at point II.B.8, this argument does not come close to working. Under applicable case law, Defendants cannot avoid liability for their constitutional and statutory violations by contracting with private parties, such as AF and NAF, to carry out their election-related duties.

recommendation of the delegates arising out of the 'Aha." Akina Decl., ¶ 29 & Ex. E. The "Letter Agreement" is also between the same three parties, and it concerns the "method and timing of the disbursement of the approved grant funds by OHA" to AF for the benefit of NAF. Akina Decl., ¶ 30 & Ex. F.

The "Fiscal Sponsorship Agreement" is technically between AF and NAF, although OHA is referred to throughout and is even accorded certain specific rights. For example, the "Termination" paragraph provides that, "In consultation with OHA, this Agreement shall terminate if and when Sponsor [AF] and OHA determine that the objectives of the Project can no longer be reasonably accomplished . . ." Akina Decl., ¶ 28(b) & Ex. D. This Agreement also provides that AF is to act "as the fiscal sponsor of restricted funds" from OHA "pursuant to the grant agreement with OHA" that is "incorporated by reference." Akina Decl., ¶ 28(a) & Ex. D.

Finally, a June 2015 contract between NAF and Election American, Inc. ("EAI"), a private New York company, spells out particular dates and details for the planned election. Akina Decl., ¶ 27 & Ex. C. Pursuant to the schedule in that contract, ballots for the delegate election will be mailed out on November 1, 2015 and must be mailed back to Defendants by December 1. *Id.*

II. ARGUMENT

A. Legal Standard for Preliminary Relief.

Courts may enter a preliminary injunction if a plaintiff 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*); and *Guy v. County of Hawaii*, Civil No. 14-00400 SOM/KSC, 2014 U.S. Dist. LEXIS 132226 at *6 (D. Haw.).

In the alternative, a plaintiff is entitled to interim relief in the Ninth Circuit if he shows that plaintiff's 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). *See also Keyoni Enterprises, LLC v. Cnty. of Maui*, Civil No. 15-00086 DJW-RLP, 2015 U.S. Dist. LEXIS 40740 at * 7 (D. Haw. 2015). As set forth below, Plaintiffs submit that they should prevail under both the *Winter* standard and the modified preliminary injunction test in *Alliance for the Wild Rockies*.

B. Plaintiffs Are Likely to Succeed on the Merits.

Plaintiffs are likely to succeed on all nine of their Counts alleged in their complaint.

1. Plaintiffs Are Likely to Succeed on Their Claim that Act 195's Requirement that Voters Have Native Hawaiian Ancestry Violates the Fifteenth Amendment (Count 1).

Plaintiffs' Fifteenth Amendment claim in Count 1 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);[5] *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 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 OHA Board was permitted under precedents, such as *Morton v. Mancari*, 417 U.S.

[5] 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 364-365. Before that date black persons were not allowed to vote in Oklahoma. *Id.*

535 (1974), allowing preferential treatment for members of some Indian tribes. *Id.* at 518-22. *Accord*, *Arakaki v. Cayetano*, 314 F.3d 1091, 1094-95 (9th Cir. 2002). Thus, Defendants 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. Quite simply, in the context of Native Hawaiians that argument has been made and rejected by the Supreme Court. "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.

There is no principled way that the ruling in *Rice* can be distinguished from the Fifteenth Amendment challenge made in Count 1 regarding the exclusion of non-Native Hawaiians from participating in this registration/election/convention process under Act 195. Therefore, Plaintiffs are likely to prevail on this claim.

2. Plaintiffs Are Likely to Succeed on Their Claim that Act 195's Requirement that Voters Have Native Hawaiian Ancestry Violates the Equal Protection Clause of the Fourteenth Amendment (Count 2).

In addition to their Fifteenth Amendment claim, Plaintiffs also challenge Act 195's exclusion of non-Native Hawaiians from voting under the Fourteenth Amendment's Equal Protection Clause. It is axiomatic that the Equal Protection Clause prohibits discrimination on the basis of race in voting. *See e.g.*, *Miller v.*

Johnson,[6] 515 U.S. 900, 905 (1995) (in the context of redistricting, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination"); *Rogers v. Lodge*, 458 U.S. 613, 617 (1882) (intentional racial purpose underlying the enactment or maintenance of an at-large method of election violates the Equal Protection Clause).

There is no question that the provisions of Act 195 that exclude non-Native Hawaiian from voting, on their face and as enforced by Defendants' implementing procedures, involve the intentional creation of racial classifications that are intended to be used to deny non-Native Hawaiian the right to participate in the registration/election/convention process under Act 195. Defendants will not be able to demonstrate that this race-based denial of the right to vote "is narrowly tailored to achieve a compelling state interest," *Miller*, 515 U.S. at 920, because race discrimination in voting does not further any compelling state interest, only the interests of the perpetrators of the discrimination. Accordingly, Plaintiffs are likely to prevail on this claim as well.

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[6] *Miller* stated that the Equal Protection Clause's prohibition against racial discrimination applies "regardless of 'the race of those burdened or benefited by a particular classification,'" quoting *Richmond v. J.A Croson Co*., 488 U.S. 469, 494 (1989). In other words the important inquiry under an equal protection analysis is whether racial discrimination has occurred and not what racial group was the perpetrator or the victim of the discriminatory conduct.

3. Plaintiffs Are Likely to Succeed on Their Claim that Act 195's Requirement that Candidates Have Native Hawaiian Ancestry Violates the Fifteenth Amendment (Count 5).

The President of NAF's Board has stated that any delegates to the planned convention will be drawn from those who are registered for the Roll. Kent Decl., ¶ 14(d). This means that candidates will be qualified according to the same criteria applicable to registrants for the Roll. In particular, it means that candidates will have to meet the ancestry requirements that govern the Roll.

Plaintiffs are likely to prevail on their claim that such a candidate restriction based on race violates the Fifteenth Amendment. The claim in Count 5 is controlled by the Ninth Circuit ruling in *Arakaki v. Cayetano*. 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. 314 F.3d at 1093. The definition used to define "Native Hawaiian" at issue in *Arakaki* was essentially the same definition used in Act 195 and at issue in *Rice*. *Id.* at 1093, n.3.

The State of Hawaii argued in *Arakaki* that the plaintiffs were not harmed by the requirement that all candidates for the OHA Board be Native Hawaiian in light of the ruling in *Rice* that non-Native Hawaiians could vote for members of the OHA Board. *Id.* at 1094. However, relying upon the ruling in *Hadnott v. Amos*, 394 U.S. 358, 364 (1969), a case decided on Fifteenth Amendment grounds, the

court of appeals in *Arakaki* 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.

Arakaki, 314 F.3d at 1095. Therefore, under *Arakaki* all Plaintiffs, as voters, are injured by the candidate restrictions at issue here.

Significantly, the Ninth Circuit in *Arakaki* refused to accept the State of Hawaii's argument that Native Hawaiians, like members of Indians tribes, have special needs that justify excluding non-Hawaiians from service on the OHA Board of Trustees. *Id.* at 1094-95. Relying upon the ruling on the same issue in *Rice*, the court in *Arakaki* noted that the Supreme Court had rejected the State's attempt "to set apart the elections based on the special purpose of OHA or the status of native Hawaiians and Hawaiians as special beneficiaries of its programs." *Id.* at 1095. The Court of Appeals went on to hold that all citizens have an interest in voting in elections that select officials who will make policy choices that will affect them, "even if those policies will affect some groups more than others." *Id.*, citing *Rice*, 528 U.S. at 523.

In the registration/election/convention process under Act 195, recommendations are likely to be made concerning the profoundly important issue of whether Hawaii law should be altered to provide sovereignty and self-government for Native Hawaiian. In these circumstances, it is manifestly obvious that non-Native Hawaiian citizens of the State have real and weighty interests in the outcome of this political process that has the potential for altering the way in which their State is governed. The candidate restriction on non-Native Hawaiians running for the delegate position directly abridges non-Native Hawaiians' right to vote guaranteed by the Fifteenth Amendment. *Arakaki*, 314 F.3d at 1095.

There is no principled way that the ruling in *Arakak*i can be distinguished from the Fifteenth Amendment challenge made here in Count 5 to the exclusion of non-Native Hawaiians candidates from running for the position of delegate under Act 195. Therefore, Plaintiffs are likely to prevail on this Fifteenth Amendment claim as well.

4. Plaintiffs Are Likely to Succeed on Their Claim that Act 195 Violates Section 2 of the Voting Rights Act by Requiring that Voters and Candidates Have Native Hawaiian Ancestry (Counts 3 and 6).

Plaintiffs are also likely to prevail regarding their claims that Act 195's exclusion of non-Native Hawaiians from voting in the impending elections (Count 3) and from running for delegate positions (Count 6) violate 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). It provides that a violation

> is established if, based on the totality of circumstances, 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 class of citizens protected [against such denial or abridgement] in that its members 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). Along with intentional discrimination, Section 2 proscribes "voting practices that 'operate, designedly or otherwise,'" to deny or abridge voting rights in contravention of the statute. *U.S. v. Charleston Cnty.*, 365 F.3d 341, 345 (4th Cir. 2004).

In this case, Defendants clearly *intended* to ensure that the political process leading to a convention was not "equally open" to non-Native Hawaiians and to guarantee that they could not "participate in" that process or "elect representatives of their choice." The blanket exclusion of non-Native Hawaiians also had that desired *result*. Thus, Section 2 was violated.[7]

[7] Note that at the time of the ruling in *Arakaki*, the exclusion of non-Native Hawaiians from voting in OHA trustee elections had already been struck down by the U.S. Supreme Court in *Rice* some two years earlier, which meant that the Ninth Circuit did not have to rule on that claim. Nevertheless, *Arakaki* is persuasive authority for the proposition that the Ninth Circuit would find Act 195's exclusion of non-Native Hawaiians from voting for delegates to be a violation of Section 2. As set forth in the text, the Ninth Circuit concluded in *Arakaki* that the exclusion of non-Native Hawaiians from running for the OHA Board violates Section 2. It

Further, in addition to its Fifteenth Amendment analysis, the Court of Appeals in *Arakaki* analyzed the candidate restriction for the OHA Board under the anti-race discrimination standard in Section 2. 314 F.3d at 1095-97. The Ninth Circuit pointed out that Section 2 prohibits voting practices that result in discrimination on account of race. *Id.* at 1096, citing *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). Applying the discriminatory result standard of Section 2 to the candidate exclusion of non-Native Hawaiians from the OHA Board, the court concluded that

> By systematically disqualifying all non-[Native] Hawaiians from running for the office of OHA trustee on the basis of their race alone . . . the trustee qualifications ensures that the "political processes leading to nomination or election in the State . . . are *not equally open* to participation" by citizens who are not [Native] Hawaiian.

Arakaki, 314 F.3d at 1096 (citations omitted).

There is no principled way that the ruling in *Arakak*i can be distinguished from Plaintiffs' Section 2 claim here in Count 6 concerning the exclusion of non-Native Hawaiians from running for delegates under Act 195. Therefore, Plaintiffs are likely to prevail on this Section 2 claim as well.

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stands to reason that it would most certainly have found that the exclusion of non-Native Hawaiians from voting under Act 195 is likewise a violation of Section 2.

5. Plaintiffs Are Likely to Succeed on Their Claim that The Requirements That an Applicant Affirm the Sovereignty of the Native Hawaiian People and Express an Intent to Participate in Self-Governance Violate the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (Count 4).

"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). Where government restrictions are placed on protected activities such as the right to vote, courts have analyzed the constitutional issues under both the First Amendment and the Equal Protection Clause. *See Police Dep't of Chicago v. Mosley*, 408, U.S. 92, 94-95, 100 (1972) (the city ordinance impermissibly prohibited First Amendment activity of picketing "in terms of subject matter" and therefore denied equal protection). Further, 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); *Idaho Coalition United for Bears v. Cenarrusa*, 342 F.3d 1073, 1076 (9th Cir. 2003) (state law placing conditions on ballot-initiative process raised serious Equal Protection issues).

Plaintiffs Akina and Makekau are not able to register for the Roll because they are not able to affirm that they support the "unrelinquished sovereignty of the Native Hawaiian people" and that they intend "to participate in the process of self-governance" for Native Hawaiian people.[8] Not being on the Roll will deny them the right to participate in the registration/election/convention process under Act 195. These denials will occur even though both of these Plaintiffs satisfy the raced-based ancestry requirement of Act 195. This type of content or viewpoint discrimination can only be justified, if at all, by a showing that the affirmation requirements of Act 195 are "narrowly tailored and advance a compelling state interest." *Angle*, 673 F.3d at 1132. Defendants cannot meet this heavy burden.

The viewpoint discrimination enforced by Defendants demonstrates that they do not intend to get an accurate reading of the sentiments of all Native Hawaiians on the questions of sovereignty. Instead, the effect of this viewpoint discrimination is to limit the number of Native Hawaiians who can participate in the registration/election/convention process under Act 195 to those who favor altering Hawaiian law so as to provide for Native Hawaiian self-governance.

Native Hawaiians such as Plaintiffs Akina and Makekau who do not have the "preapproved" or "accepted" viewpoint are simply excluded from the entire

[8] Furthermore, Plaintiff Akina has stated that he would like to run to be a delegate to the planned convention. Akina Decl., ¶¶ 19-21. Accordingly, he also has standing as a potential candidate to challenge the viewpoint restriction.

process. There is no legitimate and compelling government interest in stacking the electoral deck in this fashion. Accordingly, Plaintiffs are likely to succeed on this claim.

6. Plaintiffs Are Likely to Succeed on Their Claim that Defendants' Requirements, Including the Requirement that Voters Have Significant Ties to the Native Hawaiian Community, Are an Unjustified Restriction on the Fundamental Right to Vote In Violation of the Fourteenth Amendment (Counts 7 and 8).

Recognizing the precious nature of the fundamental right to vote, but also the need to establish reasonable rules for administering elections, the U.S. Supreme Court has developed a balancing test to determine whether administrative election rules violate the Fourteenth Amendment. *Anderson v. Celebrezze*, 460 U.S. 780,789 (1983); *Burdick v.Takushi*, 504 U.S. 428, 434 (1992). In *Burdick*, the Court stated:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule . . . .

504 U.S. at 434 (quotations omitted). Importantly, the *Burdick* balancing test does not look at the impact of the challenged election provision in isolation, but within the context of the election scheme as a whole. *Id.* at 438-39. *See also*, *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 666-67 (1966) (Equal Protection Clause prohibits the 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).

Declaration Two of the registration process implemented by Defendants under Act 195 requires that applicants for placement on the Roll must affirm that they "have a significant cultural, social or civic connection to the Native Hawaiian community." Kent Decl., ¶ 6. Plaintiffs Kent and Mitsui cannot affirm Declaration Two and have been denied the right to have their names placed on the Roll because of their inability to do so. *Id.*, ¶ 5; Mitsui Decl., ¶ 6. Further, all Plaintiffs who desire to register are improperly burdened by the three declarations required by the NHRC. These election requirements do not further any legitimate interest that the State of Hawaii has in the conduct of elections such as election integrity or administrative convenience. Instead, they are unnecessary and unjust burdens on Plaintiffs' right to vote, and therefore constitute violations of the Equal Protection and Due Process Clauses. *Burdick*, 504 U.S. at 438-39; *Bennett*, 140 F.3d at 1226.

Accordingly, Plaintiffs are likely to succeed on their Fourteenth Amendment claims in Counts 7 and 8.

7. Plaintiffs Are Likely to Succeed on Their Claim that Defendants' Placement of Their Names on the Registration Roll Without Plaintiffs' Consent Constitutes the Involuntary Registering of Persons in Violation of the First Amendment (Count 9).

Plaintiffs Gapero and Moniz satisfy the race-based ancestry requirement of Act 195, but they do not wish (and have made no effort) to be placed on the Roll. Their names were placed on the Roll, however, without their knowledge or consent. Compl. at ¶ 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 in *Buckley* 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. 1163, 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).

Accordingly, the involuntary registration of Plaintiffs on the Roll violates their First Amendment right *not* to register to vote, and therefore Plaintiffs are likely to succeed on this claim.

8. Defendants Cannot Avoid the Limitations Imposed by Constitutional and Federal Law by Contracting Government Functions Out to Private Parties.

In *Ohno v. Yasuma*, 723 F.3d 984, 995-96 (9th Cir. 2013), the Ninth Circuit stated that the U. S. Supreme Court has developed four tests for determining whether actions by non- government entities or persons amount to "state action" for the purposes of a constitutional analysis: "(1) the public function test;[9] (2) the joint action test;[10] (3) the state compulsion test;[11] and (4) the government nexus

[9] This test "treats private actors as state actors when they perform a task or exercise powers traditionally reserved to the government." *Id.* at 996.

[10] This test inquires into whether government officials and private actors have acted in concert in causing the deprivation of rights. *Id.* at 996.

test."[12] *Id.* at 995. As explained in *Ohno,* the public function and joint action tests "largely subsume the state compulsion and governmental nexus test because they address the degree to which the state is intertwined with the private actor or action." *Id.* at 995, n.13.

The applicable precedents in this area establish that all election-related activities by AF, NAF and their subcontractors should be deemed state action under the public function and joint action standards. As noted above, OHA has entered into a contractual arrangement with AF and NAF for these entities to carry out duties assigned to OHA and the NHRC under Act 195. In addition, NAF has entered into a contract with EAI related to the latter carrying out some of these duties. *Id.* As the Supreme Court has explained, "[o]ur 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). Thus, Defendants cannot avoid constitutional restraints by attempting to transfer this "exclusively public function" to private parties.

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[11] This test requires a showing that the state has "exercised coercive power or provided such significant encouragement, either overt or cover, that the [private actor's] choice must in law be deemed to be that of the State." *Id.* at 995, n.13, quoting *Johnson v. Knowles,* 113 F.3d 1114, 1119 (9th Cir. 1997).

[12] Under this test the private party's acts are deemed to be under color of state law if "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 995, n. 13.

In its analysis in *Flagg Brothers*, *id.* at 158, the Supreme Court relied upon the all-white primary cases of *Terry v. Adams*, 345 U.S. 461, 469-70, 484 (1953), and *Smith v. Allwright*, 321 U.S. 649 (1944). In those cases, the Supreme Court squarely rejected the argument by state officials that constitutional protections against racial discrimination in voting did not apply to primary elections conducted entirely by *private* political organizations. As *Terry, Allwright*, and *Flagg Brothers* establish, the public function of holding elections, which Act 195 assigned to government agencies OHA and the NHRC, cannot be immunized from constitutional scrutiny by the simple expedient of contracting with private parties. When AF, NAF and EAI seek to register voters and conduct delegate elections pursuant to Act 195, they are state actors.

The same result is reached under the joint action test. In *Swift v. Lewis*, 901 F.3d 730 (9th Cir. 1990), state prison officials had contracted with a private party to make recommendations concerning whether the plaintiff, an inmate, should be classified as a member of a religious group. *Swift*, 901 F.3d at 732 n.2. The plaintiff in *Swift* sued both the prison officials and the private contractor, alleging constitutional deprivation related to the conditions of his incarceration. The private contractor moved to have the constitutional claims against him dismissed on the grounds that his actions were not under color of state law. *Id.*

However, the Ninth Circuit determined that where state officials had contracted with a private party to do work relating to inmates, the private party had become "a willful participant in joint action with the state or its agents," and its actions were state action. *Swift*, 901 F.3d at 732, n 2, citing *Dennis v. Sparks*, 449 U.S. 24, 27-28(1980). *See also*, *Schowengerdt v. General Dynamics Corp*., 823 F.3d 328, 1332, n.3 (9th Cir. 1987) (joint participation in a search of a third party by federal officials and a private actor was sufficient to establish that the latter's actions were state action). In the same vein, the fact that AF and NAF have entered into contractual arrangements in which they spend government funds to do work relating to voting means that they are willful participants in joint action with OHA.

The election-related actions undertaken by AF, NAF and EAI at the contractual direction of OHA constitute state action under both the public function and the joint action tests.

9. Defendants Cannot Successfully Argue that the Election Inflicts No Present Injury on Non-Native Hawaiians.

Defendants might attempt to argue that the indeterminate nature of what the planned convention might do or recommend, or the fact that it does not have authority to pass laws, means that those who cannot register or vote for delegates,

or run as delegates, to that convention can claim no harm.[13]

The recent ruling in *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015) shows that this argument is unavailing. In *Davis*, the Guam Legislature had passed a law that provided for the holding of a plebiscite on Guam's future relationship with the United States. *Davis*, 785 F.3d at 1132. Non-native inhabitants of Guam were not allowed to register for, or vote in, that plebiscite. Despite the fact that the plebiscite had not even been scheduled, plaintiff filed suit seeking registration on the ground that the non-native inhabitant classification was an impermissible proxy for race. *Id.* at 1313-1314. The lower court dismissed on grounds of standing and ripeness. *Id.* On appeal the Ninth Circuit reversed and remanded for a ruling on the merits. *Id.* at 1316.

In reversing, the Court of Appeals concluded that the unequal treatment plaintiff was suffering was sufficient to establish both standing and ripeness. *Id.* at 1315. The 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 to conform" to the preference favored in the plebiscite. *Id.*

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[13] Note that this argument can have no bearing on Plaintiffs' First Amendment claims, because the injuries at issue in those claims necessarily accrue at the time Plaintiffs' viewpoint is either burdened or compelled. *See 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.") Furthermore, this argument also should have no bearing on the claim that restricting candidates on the basis of race infringes voters' Fifteenth Amendment rights, as this injury logically occurs when those restrictions are imposed.

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.*, *Smith v. 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 v. Adams*, 345 U.S. 461, 468 (1953) (the Fifteenth Amendment is applicable to "any election in which public issues are decided or public officials selected.").

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.[14] Those who cannot register for the Roll will have lost the opportunity to participate fully in the

[14] 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. Kent Decl., ¶¶ 14(f) & (i), 15.

registration/election/convention process.[15]

In these circumstances, it is manifestly obvious that non-Native Hawaiian citizens of the State have real and weighty interests in the outcome of this issue that has the potential for altering the way in which their State is governed. Plaintiffs' exclusion from participation in the registration/election/convention 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. *See also 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 allocated government power in a racially discriminatory matter).

Therefore, arguments by Defendants that no injury is inflicted on non-Native Hawaiians by the registration/election/convention process of Act 195 should be rejected.

[15] Certainly Defendants 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. Akina Decl., ¶ 32 & Ex. H.

C. Without a Preliminary Injunction, Plaintiffs Will Suffer Irreparable Harm.

"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). The deprivation of constitutional rights, even for a brief period of time, amounts to irreparable injury. *See Elrod*, 427 U.S. at 373 (plurality opinion) ("The loss of First amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). As the Ninth Circuit has opined, "[a]n 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). *Accord, Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009).

Plaintiffs, 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 process under Act 195. Accordingly, Plaintiffs can satisfy their burden of showing irreparable harm if the requested injunction does not issue.

D. The Balance of Equities Weighs In Favor of Granting the Requested Interim Relief.

In considering the balances of equities, this Court must "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 Defendants are allowed to proceed with the challenged activities under Act 195, a great and substantial harm will be done to the constitutional and statutory rights of Plaintiffs and of 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 Defendants 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 in carrying out registration and election activities. Given that Defendants' project has no inherent deadline or timeframe – and also given the fact that it might still be pursued in the interim in other, lawful ways – any loss of time is not a great harm. 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 upheld as

lawful and constitutional, monies spent in registering voters and in publicizing the effort will not have been wasted. Furthermore, if Plaintiffs are correct in some or all of their constitutional and statutory claims the issuance of interim relief will in the long run actually benefit Defendants. 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 Defendants and to the public treasury of Hawaii when these practices are ultimately held to be illegal in a final judgment.

As the Ninth Circuit 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 Plaintiffs. 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 Plaintiffs 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 Plaintiffs have clearly raised "serious questions" as to the merits while the balance of hardships tips sharply in their favor.

Accordingly, the balance of the equities here clearly weighs in favor of

Plaintiffs and the granting of the preliminary injunction.

E. The Public Interest Will Be Served in the Event the Preliminary Injunction Issues.

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*, 757 F.3d 755, 766 (9th Cir. 2014). *See Arizona Dream Act Coal.*, 757 F.3d *a*t 1069; *Guy v. County of Hawaii*, 2014 U.S. Dist. LEXIS 132226 at *13. 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.").

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that their Motion for a Preliminary Injunction should be granted.

DATED: Honolulu, Hawaii, August 28, 2015.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

Plaintiffs,

vs.

THE STATE OF HAWAII; GOVERNOR DAVID Y. IGE, in his official capacity; ROBERT K. LINDSEY JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, in his official capacity; 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, in their official capacities; KAMANA'OPONO CRABBE, Chief Executive Officer, Office of Hawaiian

CIVIL NO: _____

COMPLAINT

(Caption continued on next page)

Affairs, in his official Capacity; JOHN D. WAIHE'E III, Chairman, Native Hawaiian Roll Commission, in his official Capacity; NĀ'ĀLEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MĀHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, in their official capacities; CLYDE W. NĀMU'O, Executive Director, Native Hawaiian Roll Commission, in his official capacity; THE AKAMAI FOUNDATION; and THE NA'I AUPUNI FOUNDATION; and DOE DEFENDANTS 1-50,

Defendants.

COMPLAINT

Plaintiffs, by their attorneys, bring this action for declaratory and injunctive relief and allege as follows:

INTRODUCTION

1. Plaintiffs are individual registered voters who seek declaratory and injunctive relief to enjoin race-based, viewpoint-based, and other restrictions and qualifications imposed by Hawaii law and enforced by agents of the State of Hawaii on those seeking to register as voters on a list (the "Roll") maintained by the defendants. Voters who are on the Roll will be entitled to vote for the delegates to a proposed constitutional convention, the intended purpose of which is to choose a form of government under which Native Hawaiians would govern themselves. Plaintiffs allege that the restrictions on registering for the Roll violate

the U.S. Constitution, including the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, the First Amendment, and the Due Process Clause of the Fourteenth Amendment; and federal law, including the Civil Rights Act of 1871, 42 U.S.C. § 1983, and Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301.

2. Plaintiffs seek (1) a declaratory judgment that these voting restrictions and qualifications violate their constitutional and federal statutory rights; (2) a permanent injunction against their further use or implementation; and (3) costs and attorneys' fees.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343, and 1357; 42 U.S.C. §§ 1983 and 1988; and 52 U.S.C. §§ 10301 and 10308. Furthermore, this Court has jurisdiction over Plaintiffs' request for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. Jurisdiction for Plaintiffs' claim for attorneys' fees is based on 42 U.S.C. § 1988(b) and 52 U.S.C. § 10310(e).

4. This Court has personal jurisdiction over the defendants, all of whom are officials, employees, or agents of the State of Hawaii, and all of whom are Hawaii residents.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

PARTIES

6. Plaintiff Keli'i Akina is a citizen and a resident of the State of Hawaii, and a registered voter. He is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands. Mr. Akina was prevented from registering as a voter on the Roll because of viewpoint-based and other restrictions and qualifications imposed and enforced by the defendants.

7. Plaintiff Kealii Makekau is a citizen and a resident of the State of Hawaii, and a registered voter. He is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands. Mr. Makekau was prevented from registering as a voter on the Roll because of viewpoint-based and other restrictions and qualifications imposed and enforced by the defendants.

8. Plaintiff Joseph Kent is a citizen and resident of the State of Hawaii, and a registered voter. Mr. Kent was prevented from registering as a voter on the Roll because of race-based and other restrictions and qualifications imposed and enforced by the defendants.

9. Plaintiff Yoshimasa Sean Mitsui is a citizen and resident of the State of Hawaii, and a registered voter. Mr. Mitsui was prevented from registering as a voter on the Roll because of race-based and other restrictions and qualifications imposed and enforced by the defendants.

10. Plaintiff Pedro Kana'e Gapero is a citizen and resident of the State of Hawaii, and a registered voter. He is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands. Mr. Gapero was registered for the Roll without his knowledge or consent.

11. Plaintiff Melissa Leina'ala Moniz is a citizen and resident of the State of Texas. She is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands. Ms. Moniz was registered for the Roll without her knowledge or consent.

12. Defendant State of Hawaii is a sovereign state in the United States of America.

13. Defendant David Y. Ige is the Governor of the State of Hawaii, and is being sued in his official capacity as the State officer charged with responsibility for the faithful execution of the laws of Hawaii as well as those of the United States. The Governor resides at 320 South Beretania Street, Honolulu, Hawaii 96813.

14. Defendant Robert K. Lindsey Jr. is the Chairperson of the Board of Trustees of the Office of Hawaiian Affairs ("OHA"), and is being sued in his official capacity. OHA is a department of the State of Hawaii, and has basic responsibilities relating to the maintenance of the Roll, including, but not limited to, responsibility for funding the Native Hawaiian Roll Commission and for

cooperating with it in the performance of its duties. *See* Act 195, 2011 Legislative Session (codified in chapter 10H, Hawaii Revised Statutes) ("Act 195"), §§ 4, 5. OHA's principal place of business is 560 North Nimitz Highway, Honolulu, Hawaii 96817.

15. Defendants Colette Y. Machado, Peter Apo, Haunani Apoliona, Rowena M.N. Akana, John D. Waihe'e IV, Carmen Hulu Lindsey, Dan Ahuna, and Leina'ala Ahu Isa are the other Trustees of the Board of Trustees of OHA. Defendant Kamana'opono Crabbe is the Chief Executive Officer of OHA. These defendants are being sued in their official capacities.

16. Defendant John D. Waihe'e III is the Chairman of the Native Hawaiian Roll Commission (the "NHRC"), and is being sued in his official capacity. The NHRC was established by Act 195 to be the agency most directly responsible for preparing and maintaining the Roll and for certifying that voters who register for the Roll meet its requirements. HAW. REV. STAT. § 10H-3. The principal place of business of the NHRC is 1960 Naio Street, Honolulu, Hawaii, 96817.

17. Defendant Nā'ālehu Anthony is the Vice-Chairman and a Commissioner, and Defendants Lei Kihoi, Robin Danner, and Māhealani Wendt are the other Commissioners, of the NHRC. Defendant Clyde W. Nāmu'o is the Executive Director of the NHRC. These defendants are being sued in their official

capacities.

18. Defendant The Akamai Foundation ("AF") is, on information and belief, a 501(c)(3) nonprofit organization existing under the laws of the State of Hawaii, with its principal place of business at 1136 Union Mall, Honolulu, Hawaii 96813. AF has entered into contracts with OHA and The Na'i Aupuni Foundation pursuant to which OHA agreed to provide about $2.6 million to AF, which AF in turn agreed to grant to The Na'i Aupuni Foundation to conduct an election in which voters registered on the Roll will elect delegates to a constitutional convention.

19. Defendant The Na'i Aupuni Foundation ("NAF") is, on information and belief, a domestic, nonprofit organization, with its principal place of business at 745 Fort Street, Honolulu, Hawaii, 96813. On information and belief, NAF was created for the sole purpose of conducting an election in which those voters who are registered on the Roll will elect delegates to a constitutional convention.

20. Doe Defendants 1-50 are persons, partnerships, associations, companies, corporations, or entities whose names, identities, capacities, activities and/or responsibilities are presently unknown to Plaintiffs or their attorneys, except that Doe Defendants 1-50 were and/or are subsidiaries, servants, employees, representatives, co-venturers, associates, consultants, owners, lessees, lessors, guarantors, assignees, assignors, licensees, and/or licensors of Defendants and were

or are in some manner presently unknown to Plaintiffs or their attorneys engaged or involved in the activities alleged herein or responsible for the activities of which Plaintiffs complain, or should be subject to the relief Plaintiffs seek. Plaintiffs pray for leave to certify the true names, identities, capacities, activities and/or responsibilities of Doe Defendants 1-50 when, through further discovery in this case, the same are ascertained. Plaintiffs have made a good faith effort to identify said Doe Defendants prior to filing this Complaint, including interviewing witnesses and reviewing publicly available documents.

FACTUAL ALLEGATIONS

Background

21. The Hawaii Homes Commission Act ("HHCA") was enacted by Congress in 1920 to address concerns over poverty and population decline among the native population of Hawaii. H.R. Rep. No. 839, 66th Cong., 2nd Sess. at 4 (1920). The HHCA defined "Native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." The HHCA made about 200,000 acres of public lands available to lease to such native Hawaiians at nominal prices. HHCA §§ 201, 203.

22. When Hawaii was admitted as the fiftieth state in 1959, Congress granted the government of Hawaii title to certain lands previously held by the United States, including the lands set aside by the HHCA. These lands were to be

held in a "public trust" for certain specified purposes. Hawaii Statehood Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 ("Admission Act"); Intro., § 5(b).

23. One purpose was "the betterment of the conditions of native Hawaiians" as defined in the HHCA. Admission Act § 5(f). The other four purposes, which applied to all Hawaiians, were "the support of the public schools and other public educational institutions . . . the development of farm and home ownership on as widespread a basis as possible . . . the making of public improvements, and . . . the provision of lands for public use." Admission Act § 5(f).

24. In 1978, the Hawaii Constitution was amended to establish OHA. HAW. CONST. ART. XII, § 5. The Hawaii Constitution provides that OHA "shall hold 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.* OHA has been granted statutory authority to administer 20% of all funds derived from the public land trust, exclusive of lands set aside pursuant to the HHCA. HAW. REV. STAT. §§ 10-3, 10-13.5.

25. The Hawaii Constitution provided that OHA's board of trustees shall be "elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians." HAW. CONST. ART. XII, § 5. "Hawaiian" is defined

by Hawaii law as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." HAW. REV. STAT. § 10-2.

26. In 2000, the United States Supreme Court struck down Hawaii's requirement that only "Hawaiians," as defined by Hawaii law, could vote for the trustees of OHA, on the ground that this voting restriction violated the Fifteenth Amendment to the U.S. Constitution. *Rice v. Cayetano*, 528 U.S. 495, 524 (2000). In the course of that ruling, the Court observed that "[a]lthough it is apparent that OHA has a unique position under state law, it is just as apparent that it remains an arm of the State." *Id.* at 521. The Court also observed that Hawaii's law used "ancestry" as "a proxy for race." *Id.* at 514.

27. In 2002, the United States Court of Appeals for the Ninth Circuit struck down Hawaii's requirement that candidates for OHA be "Hawaiians," as defined by Hawaii law, as a violation of the Fifteenth Amendment of the U.S. Constitution and of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. *Arakaki v. State of Hawaii*, 314 F.3d 1091, 1098 (9th Cir. 2002).

Act 195

28. In July 2011, Hawaii Governor Neil Abercrombie signed Act 195 into law.

29. Act 195 provides that 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 . . ." HAW. REV. STAT. § 10H-2.

30. Act 195 establishes the NHRC as a subdivision within OHA for administrative purposes, and charges it with responsibility for "[p]reparing and maintaining a roll of qualified Native Hawaiians" and "[c]ertifying that the individuals on the roll of qualified Native Hawaiians meet the definition of qualified Native Hawaiians." HAW. REV. STAT. § 10H-3(a).

31. Act 195 states that the "the roll of qualified Native Hawaiians . . . 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." HAW. REV. STAT. § 10H-5.

32. Act 195 provides that a "qualified Native Hawaiian" means an individual whom the NHRC has determined to meet certain criteria of eligibility established by the Act. The first criterion is based on ancestry, and defines a qualified Native Hawaiian as one 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"; one who was eligible in 1921 for an HHCA lease, or is a descendant of such a person; or one who meets "the

ancestry requirements of Kamehameha Schools or of any Hawaiian registry program of the office of Hawaiian affairs."

33. Act 195 further specifies that a "qualified Native Hawaiian" must have "maintained a significant cultural, social, or civic connection to the Native Hawaiian community"; and must also "wish[] to participate in the organization of the Native Hawaiian governing entity."

The Process of Registering for the Roll

34. Starting in July 2012, prospective voters could register for the Roll.

35. On information and belief, many tens of thousands of registrants currently on the Roll were placed there without their knowledge or consent, when their names were transferred from other lists containing the names of Native Hawaiians.

36. Plaintiffs Gapero and Moniz were placed on and registered for the Roll without their knowledge or consent.

37. On information and belief, registration was closed and subsequently reopened one or more times since July 2012.

38. Registration for the Roll is at present open.

39. Registration is available online at http://www.kanaiolowalu.org/. The screen at that website has a clickable area labeled "REGISTER." Placing the cursor over that area reveals two options, "REGISTER (HAWAIIANS)" and

"SIGN THE PETITION (EVERYONE)."

40. Selecting "SIGN THE PETITION (EVERYONE)" does not allow the option of registering for the Roll, but only allows one to express support for the Roll, for "the efforts of the Native Hawaiian people to restore self-governance to the Hawaiian Nation," for "the unrelinquished sovereignty of the indigenous people of Hawai'i," for the "commitment to bring recognition to the indigenous people of Hawai'i," and for "the movement to restore self-governance to the Hawaiian Nation."

41. Selecting "REGISTER (HAWAIIANS)" returns a single screen, entitled "REGISTER NOW." That screen contains three declarations; information boxes requesting name, birth information, and contact information; checkboxes requesting "Verification of Native Hawaiian Ancestry," and a clickable area labeled "CONFIRM INFO."

42. The three declarations, which all prospective applicants must confirm, read as follows:

Declarations

- **Declaration One**. I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance.
- **Declaration Two**. I have a significant cultural, social or civic connection to the Native Hawaiian community.
- **Declaration Three**. I am a Native Hawaiian: a lineal descendant of the people who lived and exercised sovereignty in the Hawaiian islands prior to

1778, or a person who is eligible for the programs of the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that person.

43. The area labeled "Verification of Native Hawaiian Ancestry" reads as follows:

Verification of Native Hawaiian Ancestry
Please check all applicable categories. (at least one is required)
□ My birth certificate lists (Part) Hawaiian
□ One of my parents birth certificate lists (Part) Hawaiian
□ Other official certificate/registry listing (Part) Hawaiian
□ Attended The Kamehameha Schools
□ Department of Hawaiian Home Lands lessee, renter, or wait list (verified)
□ Operation Ohana
□ Kau Inoa (ancestry confirmed)
□ Kamehameha Schools Ho'oulu Hawaiian Data Center
□ Hawaiian Registry at OHA
□ None of these fit but I can prove ancestry through another ancestor

44. There is no way to register for the Roll without confirming the information, including the declarations and the verification checkboxes, contained on the page entitled "REGISTER NOW."

45. Those plaintiffs who deliberately tried to register for the Roll were unable to confirm the truth of one or more of the declarations contained on the screen entitled "REGISTER NOW."

46. Plaintiffs Akina and Makekau could not confirm the principles enunciated in Declaration One, although they could confirm their ties to the Native Hawaiian community (Declaration Two) and their Native Hawaiian ancestry (Declaration Three). Further, they could have provided information sufficient to

satisfy the verification-of-ancestry checklist.

47. Plaintiffs Kent and Mitsui could not confirm any of the declarations, nor could they have supplied information sufficient to satisfy the verification-of-ancestry checklist.

48. As a result, none of these plaintiffs were able to register for the Roll.

The Joint Conduct of OHA, NHRC, AF, and NAF

49. In the period from about April 27, 2015, to about May 4, 2015, representatives of OHA, AF, and NAF signed an agreement entitled "Grant Agreement Between the Akamai Foundation and the Office of Hawaiian Affairs for the Use and Benefit of Na'i Aupuni" ("Grant Agreement"). In sum and substance, the Grant Agreement authorizes the transfer from OHA to AF, for the use by NAF, of a grant in the total amount of $2,598,000.00. The Grant Agreement provides that "AF will direct the use of the grant to [NAF] so it may facilitate an election of delegates, election and referendum monitoring, a governance 'Aha [constitutional convention], and a referendum to ratify any recommendation of the delegates arising out of the 'Aha ('Scope of Services')."

50. On or about April 27, 2015, AF, as "Fiscal Sponsor," and NAF, as "Client," signed a "Fiscal Sponsorship Agreement Between Akamai Foundation and Na'i Aupuni" ("Sponsorship Agreement"), which sets forth, among other things, the "Na'i Aupuni Projected Budget," describing relevant election-related

tasks and describing the use of the entire grant amount described in the Grant Agreement.

51. On or about May 7 and 8, 2015, OHA, AF, and NAF signed an agreement entitled "Letter Agreement Between Office of Hawaiian Affairs, Na'i Aupuni, and Akamai Foundation" ("Letter Agreement"), which provides, among other things, for an initial payment under the Grant Agreement.

52. In the period from about June 18, 2015, to June 22, 2015, NAF and Election America, Inc. ("EAI"), a private company with its principal place of business in Mineola, New York, signed a contract whereby EAI would perform certain services relating to the Roll and the planned election for a constitutional convention, for a total compensation of $177,208. That contract referred to the following schedule:

> **Tentative Project Timeline**
> E-A [EAI] will mail or email Notice of Election to known electorate.....July 15, 2015
> Deadline for submitting Delegate candidate Applications.....September 15, 2015
> Deadline for E-A to determine eligibility of Delegate Candidates.....September 30, 2015
> Deadline for additions to electorate.....October 15, 2015
> Ballots mailed and/or emailed to known electorate.....November 1, 2015
> Deadline for ballots to be received.....December 1, 2015

53. In an article in the HONOLULU STAR ADVERTISER, dated July 5, 2015,

and written by Christine Donnelly, apparently based on conversations with representatives of NAF, the following schedule was made public:

> » Late July or early August: Notices sent to certified voters explaining the apportionment of delegates, how to file as a delegate candidate and the voting process. . . .
> » Late July or early August: Application available for delegate candidates.
> » Mid-September: Deadline to file as a delegate candidate.
> » End of September: List of qualified delegate candidates announced.
> » Mid-October: Voter registration closes.
> » Early November: Voting begins.
> » Early December: Voting ends.
> » Day after voting ends: Election results announced publicly.
> » Between February and April 2016: 'Aha held on Oahu over the course of eight consecutive weeks (40 work days, Monday through Friday).
> » Two months after 'aha concludes: If delegates recommend a form of Hawaiian government, a referendum will be held among all certified Native Hawaiian voters.

54. On information and belief, OHA and the NHRC attempted to shield themselves from legal responsibility for setting up race-based, viewpoint-based, and other restrictions on voters and candidates in the proposed election based on the Roll by contracting with AF and NAF.

55. In a letter dated July 14, 2015, the NHRC informed plaintiffs' counsel that OHA stopped funding the NHRC on June 30, 2015.

56. On information and belief, some or all of the funds OHA previously allotted to the NHRC have been transferred instead to AF and NAF.

57. Legal tasks NHRC previously was responsible for have been transferred to AF and NAF.

58. As reflected in the written minutes of OHA's Board of Trustees' meeting of February 26, 2015, "Trustee Ahu Isa questioned the legality and allowability of using trust monies to fund Kana'iolowalu [the election effort based on the Roll]." Trustee Hulu Lindsey then asked how OHA will be able to monitor the use of their funds. After a few further comments, Mr. Meheula of NAF stated that "once a fiscal sponsor is identified [AF eventually was so identified], they will execute a three-party agreement between OHA, the fiscal sponsor, and Na'i Aupuni. That agreement will spell out some of OHA's concerns, but will also give Na'i Aupuni autonomy to decide on their own." At that point, "Trustee Apo" stated that he "believes that this is a very tricky navigation required. He is overly cautious [sic] that if we keep tying ourselves to this, we are going to get sued. He believes OHA has to stop talking about making people accountable to us." On information and belief, OHA's trustees intended to achieve the goals of Act 195 but planned to use nonprofit surrogates in order to do so.

59. Under the relevant law, AF and NAF are both state actors. The State of Hawaii cannot avoid liability for its constitutional and statutory transgressions by the simple trick of contracting with nonprofits.

60. OHA is a state agent defined in the Hawaii Constitution, and has been expressly found by the Supreme Court to be "an arm of the State" (*Rice v. Cayetano*, 528 U.S. at 521).

61. The NHRC was established under Hawaii law by Act 195 for a public purpose, and received its funding from OHA (Act 195, Section 4). The NHRC equally is a state actor.

62. OHA actively favors and is pursuing the purposes set forth in Act 195, and specifically, the intent to utilize a list of "qualified Native Hawaiians" to select delegates to a constitutional convention that would establish rules for Native Hawaiians' self-governance.

63. For example, on OHA's website at http://www.oha.org/, a clickable area reads as follows:

> GOVERNANCE
> Laying the foundation for building a new Hawaiian governing entity
>
> Our focus on governance involves facilitating a process for Native Hawaiians to form a governing entity. A recognized governing entity would solidify Native Hawaiians as a political rather than racial group, safeguarding trusts, programs, and funding sources serving Native Hawaiians. A governing entity could advocate and negotiate greater self-sufficiency and autonomy for Native Hawaiians.

64. Upon selecting that area, another screen appears containing, in relevant part, the following text (emphasis added):

> Governance
> Strategic Priority: Ea [sovereignty]
>
> To restore pono and ea, Native Hawaiians will achieve *self-governance, after which the assets of OHA will be transferred to the new governing entity.*
>
> Why is this important?
>
> Native Hawaiian self-governance is of utmost importance to our organization's efforts to improve conditions for Native Hawaiians. *A key*

goal of our efforts is to facilitate a process that gives Hawaiians the opportunity to re-develop a government that reaffirms Native Hawaiians as a political rather than racial group.

The benefit of such a Native Hawaiian government is its ability to provide Native Hawaiians with greater control over their destiny as they *move toward self-determination* and self-sufficiency. Native Hawaiian programs and assets that benefit Native Hawaiians can be attacked in federal courts if political recognition from the federal government is not extended to Native Hawaiians.

* * *

What is our aim?

The transfer of assets to a new governing entity

Adoption by the Board of Trustees of a Transition Plan that includes the legal transfer of assets and other resources to the new Native Hawaiian governing entity.

* * *

OHA's goal is *for all Native Hawaiians* to participate in the nation-building process and allow them to decide what form a Hawaiian nation will take and what sort of relationships it will seek with other government [sic].

The emergence of a Native Hawaiian government is extremely important to the Office of Hawaiian Affairs.

For that reason, *OHA is putting a lot of effort into encouraging Native Hawaiians to participate in the process* to ensure their voices are heard.

In March 2014, OHA's Board of Trustees made public the agency's commitment to helping smooth the way for Native Hawaiians to build a government.

Since then, OHA has launched an outreach campaign aimed at informing the public about the nation-building process. The campaign featured 20 town hall-style meetings across the state as well as canvassing in Hawaiian homestead communities, where volunteers knocked on doors to familiarize Native Hawaiians with this new opportunity to better manage their future.

65. The website contains other information and videos supporting the same goals.

66. The NHRC actively favors and is pursuing the purposes set forth in Act 195.

67. On the NHRC website, virtually every page contains some expression of support for the purposes of Act 195.

68. Private actors who perform a public function at the direction or request of state actors thereby become state actors.

69. The conduct of elections is exclusively a public function.

70. By seeking to conduct, and by conducting, an election based on the Roll, AF and NAF have become state actors subject to the restraints of federal constitutional and statutory law.

71. Joint action exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party.

72. By signing, and by paying for, agreements with AF and NAF to carry out the very purposes that OHA has expressly stated it wants to achieve, OHA has affirmed, authorized, encouraged, and facilitated the wrongful action that is the subject of this lawsuit, thereby rendering AF and NAF state actors subject to the restraints of federal constitutional and statutory law.

73. State compulsion exists where a state has exercised coercive power or has provided such significant encouragement, either overt or covert, that the private actors' choices are deemed to be those of the State.

74. By signing, and by paying for, agreements with AF and NAF, OHA

provided such covert encouragement that AF's and NAF's choices should be deemed those of the State of Hawaii.

75. A private party acts under color of state law if there is a sufficiently close nexus between the State and the challenged action, so that the action of the private party may be fairly treated as that of the State itself.

76. The detailed, written agreements, paid for by OHA, to accomplish the very purposes OHA has expressly sought to achieve, establish a close nexus between OHA and AF and NAF, such that their actions should be treated as state action.

The Need for Section 3(c) Relief

77. This is the third lawsuit, following *Rice v. Cayetano* and *Arakaki v. State of Hawaii*, arising out of an attempt by Hawaiian officials to use race-based qualifications to restrict who may register and vote, and who may run for office, for particular Hawaiian elections. In this case, moreover, trustees of OHA expressly discussed the possibility of being sued for their actions, while seeking to accomplish their discriminatory goals by using contractually bound nonprofit organizations as surrogates.

78. In the absence of relief under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c), Hawaii will continue to violate the Voting Rights Act and the voting guarantees of the Fourteenth and Fifteenth Amendments.

CLAIMS

Claims Alleging Race-Based Restrictions and Qualifications Relating to Voting

COUNT 1: Violation of the Fifteenth Amendment and 42 U.S.C. § 1983.

79. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

80. Act 195 and the registration process used by the defendants restrict who may register for the Roll on the basis of individuals' Hawaiian ancestry.

81. The defendants fully intended to restrict who may register for the Roll on the basis of ancestry, as shown by the plain text of Act 195 as well as the text of the online registration procedures, and as shown by numerous public statements by the defendants, including those made on their registration website.

82. Ancestry, in the context of Act 195 and the defendants' registration procedures, is a proxy for race.

83. The registration process used by the defendants is conduct undertaken under color of Hawaii law, and, specifically, under Act 195.

84. Act 195 and the defendants' registration procedures deny and abridge the rights of Plaintiffs Kent and Mitsui to vote on account of race, in violation of the Fifteenth Amendment.

COUNT 2: Violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

85. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

86. Act 195 and the registration process used by the defendants discriminate against Plaintiffs Kent and Mitsui on account of the fact that they are not Native Hawaiians, as defined by their ancestry.

87. Accordingly, Act 195 and the registration process used by the defendants discriminate against Plaintiffs Kent and Mitsui on account of their race.

88. The registration process used by the defendants is conduct undertaken under color of Hawaii law, and, specifically, under Act 195.

89. Act 195 and the registration process used by the defendants violate the rights of Plaintiffs Kent and Mitsui under the Fourteenth Amendment to the equal protection of the laws.

COUNT 3: Violation of Section 2 of the Voting Rights Act.

90. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

91. Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, proscribes any "qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on

account of race or color."

92. Act 195 and the registration process used by the defendants restrict who may register for the Roll on the basis of individuals' Hawaiian ancestry, which is a proxy for race.

93. The defendants fully intended to restrict who may register for the Roll on the basis of race.

94. Act 195 intentionally discriminates, and has the result of discriminating, against Plaintiffs Kent and Mitsui on the basis of their race, in violation of Section 2 of the Voting Rights Act.

Claims Alleging Viewpoint-Based Restriction Relating to Voting

COUNT 4: Violations of the First Amendment, Fourteenth Amendment, and 42 U.S.C. § 1983.

95. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

96. Declaration One, which is part of the registration process available on the NHRC's website, requires an applicant to confirm this statement: "I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance."

97. It is not possible to register for the Roll without confirming this statement.

98. As a practical matter, requiring confirmation of this statement will stack the electoral deck, guaranteeing that Roll registrants will support the outcome favored by the defendants in any subsequent vote.

99. Requiring agreement with Declaration One in order to register for the Roll is conduct undertaken under color of Hawaii law.

100. By conditioning registration upon agreement with Declaration One, the defendants are compelling speech based on its content.

101. Requiring agreement with Declaration One in order to register for the Roll discriminates against those who do not agree with that statement, including Plaintiffs Akina and Makekau.

102. Forbidding those who do not agree with Declaration One, including Plaintiffs Akina and Makekau, to register for the Roll amounts to viewpoint discrimination.

103. There is no compelling justification for requiring applicants to confirm their agreement with Declaration One.

104. Forbidding those who do not agree with Declaration One to register for the Roll is a blatant violation of the rights of Plaintiffs Akina and Makekau under the First Amendment.

105. Forbidding those who do not agree with Declaration One to register for the Roll is a classification based on speech, in violation of the rights of

Plaintiffs Akina and Makekau under the Fourteenth Amendment to the equal protection of the laws.

Claims Alleging Race-Based Restrictions on Candidates

COUNT 5: Violation of the Fifteenth Amendment and 42 U.S.C. § 1983.

106. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

107. Act 195 states in part that its purpose is to "facilitate the process under which qualified Native Hawaiians may independently commence the organization of a convention *of qualified Native Hawaiians* . . ." HAW. REV. STAT. § 10H-5 (emphasis added).

108. The June 2015 contract between NAF and Election America, Inc., specifies as part of its Tentative Project Deadline the following item:

Deadline for E-A to determine eligibility of Delegate Candidates.....September 30, 2015

109. On information and belief, the process for determining who may be a candidate for the proposed constitutional convention restricts candidacy to Native Hawaiians, as defined by Hawaii law.

110. On information and belief, the nominating process for candidates is structured to ensure that only Native Hawaiians will become candidates.

111. The disqualification of candidates based on race is conduct undertaken under color of Hawaii law.

112. The disqualification of candidates based on race violates the Fifteenth Amendment rights of all Hawaii voters, including Plaintiffs Akina, Makekau, Kent, Mitsui, and Gapero.

COUNT 6: Violation of Section 2 of the Voting Rights Act.

113. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

114. The disqualification of candidates based on race 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.

115. The disqualification of candidates based on race results in a discriminatory abridgement of the right to vote.

116. The disqualification of candidates based on race is a violation of Section 2 of the Voting Rights Act.

Claim Alleging Unjustified Qualification Based on Community Ties

COUNT 7: Violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

117. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

118. Declaration Two, which is part of the registration process available on the NHRC's website, requires an applicant to confirm this statement: "I have a significant cultural, social or civic connection to the Native Hawaiian community."

119. Plaintiffs Kent and Mitsui cannot affirm this statement as they understand it.

120. Requiring Plaintiffs Kent and Mitsui to confirm this statement – and, in consequence, requiring them to have such connections to the Native Hawaiian community – is a burden on Plaintiffs Kent and Mitsui that is not required for the sake of election integrity, administrative convenience, or any other sufficient reason.

121. Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment.

122. Voting qualifications that inflict discriminatory burdens without justification are invalid under the Fourteenth Amendment.

123. Requiring Plaintiffs Kent and Mitsui to have particular connections with the Native Hawaiian community violates the rights of Plaintiffs Kent and Mitsui under the Fourteenth Amendment to the equal protection of the laws.

Claim Alleging Impairment of Fundamental Right to Vote

COUNT 8: Violation of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

124. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

125. Voting is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

126. By requiring Plaintiffs to confirm Declarations One, Two, and Three, the registration process used by the defendants will cause the planned election to be conducted in a manner that is fundamentally unfair.

127. By requiring Plaintiffs to confirm Declarations One, Two, and Three, the registration process used by the defendants burdens the right to vote of all Plaintiffs in violation of their constitutional rights to Due Process.

Claim Alleging Compelled Speech by Virtue of Involuntary Registration.

COUNT 9: Violation of the First Amendment and 42 U.S.C. § 1983.

128. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

129. The First Amendment protects both the right to speak freely and the right to refrain from speaking at all.

130. Voter registration is speech protected by the First Amendment.

131. Forcibly registering an individual amounts to compelled speech.

132. In addition, forcibly registering an individual under conditions that imply that that individual agrees with particular statements or opinions amounts to compelled speech.

133. The NHRC publishes and prominently displays the total number of individuals registered for the Roll on its website, as a way to bolster the legitimacy of the Roll.

134. Plaintiffs Gapero and Moniz do not wish to bolster the legitimacy of the Roll.

135. By publishing and displaying the total number of individuals registered for the Roll on its website, the NHRC implies that those individuals have agreed to Declaration One.

136. Plaintiffs Gapero and Moniz have not agreed, and do not agree, with Declaration One.

137. By registering Plaintiffs Gapero and Moniz without their consent and without notice to them, the NHRC compelled their speech and violated their First Amendment right to refrain from speaking.

PRAYER FOR RELIEF

Wherefore, plaintiffs respectfully pray that this Court:

1. Issue a declaratory judgment finding that the registration procedures

relating to the Roll violate the U.S. Constitution and federal law, as set forth above;

2. Issue preliminary and permanent relief enjoining the defendants from requiring prospective applicants for any voter roll to confirm Declaration One, Declaration Two, or Declaration Three, or to verify their ancestry;

3. Issue preliminary and permanent relief enjoining the use of the Roll that has been developed using these procedures, and the calling, holding, or certifying of any election utilizing the Roll;

4. Order Defendants to pay reasonable attorneys' fees incurred by Plaintiffs, including litigation expenses and costs, pursuant to 52 U.S.C. § 10310(e) and 42 U.S.C. § 1988;

5. Retain jurisdiction under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c), for such a period as the Court deems appropriate and decree that, during such period, no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force at the time this proceeding was commenced shall be enforced by Defendants unless and until the Court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color;

6. Retain jurisdiction to issue any and all further orders that are necessary to satisfy the ends of justice; and

7. Award Plaintiffs any and all further relief that this Court deems just and proper.

DATED: Honolulu, Hawaii, August 13, 2015.

/s/ Michael A. Lilly
MICHAEL A. LILLY
Attorney for Plaintiffs
KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ

No. 15-17134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELI'I AKINA; ET AL.,

Plaintiffs-Appellants,

v.

STATE OF HAWAII; ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
CASE NO. 1:15-CV-00322-JMS-BMK (HON. MICHAEL SEABRIGHT)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE OPPOSING PLAINTIFFS-APPELLANTS' URGENT MOTION FOR AN INJUNCTION PENDING APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTION

FEDERAL STATUTES

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

LEGISLATIVE HISTORY

OTHER AUTHORITIES

INTEREST OF THE UNITED STATES

The United States has a special responsibility for the welfare of Native peoples throughout our Nation, including Native Hawaiians. Pursuant to that responsibility, Congress has enacted more than 150 statutes to benefit Native Hawaiians. Federal programs, services, and benefits specifically for Native Hawaiians run the gamut from education (20 U.S.C. §§ 7511-7517) to economic assistance (42 U.S.C. §§ 2991-2992) to health care (*id.* §§ 11701-11714).

The United States Department of the Interior recently published a Notice of Proposed Rulemaking (NPRM) titled "Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community," 80 Fed. Reg. 59113 (Oct. 1, 2015) [*attached as* Ex. A]. During the district-court proceedings on plaintiffs' motion for a preliminary injunction, the court invited the Department to file an amicus brief regarding the NPRM and "its potential relationship to this action." Dist. Ct. Doc. No. 89. The Department filed an amicus brief explaining that, although the NPRM itself had only limited relevance to the issues presented by plaintiffs' motion, the premises underlying the NPRM are relevant and do not support plaintiffs' claim to injunctive relief.

Additionally, the United States disagrees with the suggestion in plaintiffs' motion for an injunction pending appeal that the Department has reached final decisions on whether and how to proceed with its proposed rulemaking, and that therefore plaintiffs may not "be allowed to have their say." Doc. No. 9-1, Pls.' Mot.

for Inj. Pending Appeal at 15 [hereinafter Mot.]. In fact, the Department will continue to accept comments on its *proposal* until December 30, 2015; so plaintiffs currently have the opportunity to share their views with the Department. *See* 80 Fed. Reg. at 59114. And because the public-comment period for the NPRM is still underway, the Department has not reached a final decision and cannot speak with finality about the issues addressed in the NPRM. *See* 5 U.S.C. § 553; *Chamber of Commerce of U.S. v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980). Until the Department has considered all timely public comments, including any that plaintiffs might submit, the Department cannot state whether it will promulgate a final rule, or what the precise contents of any such rule would be.

INTRODUCTION

Defendant Nai Aupuni, a nonprofit corporation, is currently holding a month-long vote-by-mail election of delegates to an "Aha," a convention charged with considering paths for Native Hawaiian self-determination and potentially drafting a constitution for a Native Hawaiian government. Voting in this election is limited to Native Hawaiians. Plaintiffs seek to enjoin Nai Aupuni's counting of ballots in that election, primarily alleging that excluding non-Natives violates the Federal Constitution. *See* Mot. 1, 10, 20.

While this case concerns the potential reorganization of a Native Hawaiian government, starting with the election of constitutional-convention delegates, the Department's NPRM focuses on a process that would commence only if a Native

Hawaiian government is reorganized and then seeks a formal government-to-government relationship with the United States. The NPRM itself, and the criteria for entering into such a relationship that it proposes for public comment, are not at issue here and have only limited relevance to the issues presented. But the premises underlying the NPRM are relevant here. As explained below, in accordance with Federal law, tribes in the continental United States routinely limit voting in tribal elections, including constitutional referenda, to members, while excluding non-Natives. There is no principled basis for treating the Native Hawaiian community differently.

BACKGROUND

A. The 2014 Advance Notice of Proposed Rulemaking

The Native Hawaiian community has one of the largest indigenous populations in the United States. But unlike more than 500 federally recognized Native communities on the continent, Native Hawaiians lack both an organized government and a formal government-to-government relationship with the United States. In response to requests from the Native Hawaiian community, as well as this Court's suggestion that the Department "appl[y] its expertise to … determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis," *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004), the Department published an Advance Notice of Proposed Rulemaking. 79 Fed. Reg. 35296, 35296-303 (June 20, 2014). The ANPRM solicited public

comment regarding whether the Department should facilitate (1) reorganization of a Native Hawaiian government and (2) reestablishment of a formal government-to-government relationship with the Native Hawaiian community. *See id.* at 35297, 35302-03.

After applying its expertise in Native American affairs to evaluate more than 5,000 comments, the Department determined that it would not propose a rule presuming to reorganize a Native Hawaiian government or prescribing the form or structure of that government; the Native Hawaiian community itself should determine whether and how to reorganize a government. The Department would, however, propose a rule creating a process that the Secretary of the Interior would use to determine whether to reestablish a formal government-to-government relationship if the Native Hawaiian community forms a government that then seeks such a relationship with the United States.

B. The 2015 Notice of Proposed Rulemaking

The NPRM proposes an administrative procedure, as well as criteria, for determining whether to reestablish a formal government-to-government relationship between the United States and the Native Hawaiian community. PR § 50.1.[1] The proposed rule explains that a formal government-to-government relationship would

[1] This brief cites the NPRM's preamble, found at 80 Fed. Reg. 59113-28, as "NPRM [page number]." The proposed rule — the portion of the NPRM that, if finalized, would be codified in Title 43 of the Code of Federal Regulations — is found at 80 Fed. Reg. 59128-32 and is cited here as "PR § [section number]."

allow the United States to more effectively implement and administer the special political and trust relationship that Congress has already established with the Native Hawaiian community by enacting more than 150 Federal statutes over the last century. PR § 50.1(a); *see* PR § 50.1(b) (listing some Acts of Congress creating Federal programs, services, and benefits specifically for Native Hawaiians); *see also* NPRM 59114-18 (providing historical overview).

The Department's proposed rule contemplates a multistep process for a Native Hawaiian government to request a government-to-government relationship with the United States, if it chooses to do so. First, the Native Hawaiian community would draft a constitution or other governing document. PR § 50.11; *see* PR §§ 50.3, 50.10(a), (c), 50.13, 50.16(b), (d)-(f). The proposed rule places few conditions on the drafting of a governing document that might be presented to the Department, merely stating that the governing document should be "based on meaningful input from representative segments of the Native Hawaiian community and reflect[] the will of [that] community." PR § 50.11. The Native Hawaiian community would make the proposed constitution's text available to Native Hawaiians and announce an upcoming ratification vote. PR § 50.14(b)(1)-(2).

The community would then vote on the constitution in a ratification referendum open to adult Native Hawaiian citizens (regardless of residency) but not to persons lacking Native Hawaiian descent. PR §§ 50.10(b), (d), 50.12, 50.14, 50.16(c), (e). Consistent with Federal statutes and caselaw, the proposed rule's

definition of "Native Hawaiian" is restricted to U.S. citizens who descend from the aboriginal people who occupied and exercised sovereignty in Hawaii prior to 1778, when the first Europeans arrived. PR § 50.4; *see* NPRM 59119, 59124. Contrary to plaintiffs' description (*see* Mot. 15), but consistent with Acts of Congress, the proposed rule requires, if the community wishes to reestablish a formal government-to-government relationship, that the Native Hawaiian constitution be ratified both by a majority vote of Native Hawaiians ***and*** by a majority vote of those Native Hawaiians who qualify as "HHCA-eligible" (PR § 50.16(g)-(h); *see* NPRM 59120, 59124-25), meaning that they meet the more restrictive definition of "native Hawaiian" in the Hawaiian Homes Commission Act. PR § 50.4 (citing HHCA § 201(a)(7), 42 Stat. 108 (1921) (requiring a high degree of Native Hawaiian descent)). When determining who may participate in the referendum, the community could — but is not required to — use a roll certified by a state commission such as the Native Hawaiian Roll Commission as a basis for those determinations, if the community conforms the roll to certain requirements in the proposed rule. PR § 50.12(b); *see* PR § 50.14(b)(5)(iii), (c); *see also* NPRM 59121.

If the constitution is approved, the community would hold elections to fill the offices it establishes. PR §§ 50.10(e), 50.15, 50.16(f). The newly installed governing body could enact a resolution seeking a formal government-to-government relationship with the United States. PR § 50.10(f). Then the appropriate officer of

the new government could prepare, certify, and submit to the Secretary of the Interior a request to reestablish that relationship. PR §§ 50.2, 50.10(g), 50.16(a), 50.20.

The public could comment on the Native Hawaiian government's request, the Native Hawaiian government could respond to comments, and the Secretary could seek additional information if needed. PR §§ 50.30, 50.31, 50.40. Applying specific criteria set forth in the proposed rule, the Secretary would decide whether to grant or deny the request. PR §§ 50.16, 50.40, 50.41. If the Secretary grants the request, a *Federal Register* notice would trigger the start of a new, formal government-to-government relationship. PR §§ 50.42, 50.43. The Native Hawaiian community's government-to-government relationship with the United States would then be the same under the U.S. Constitution and Federal law as that of any federally recognized tribe in the continental United States, and the Native Hawaiian government would be recognized as having the same inherent sovereign governmental authorities, subject to Congress's plenary authority. PR § 50.44(a)-(b); *see also* PR § 50.44(c)-(g).

Significantly, although the proposed rule envisions that Native Hawaiians may choose to draft a governing document for a Native Hawaiian government (perhaps through a constitutional convention) and then to ratify that document, those steps would be taken by the Native Hawaiian community without Federal involvement. *See* NPRM 59123. If a Native Hawaiian government reorganizes, that government can decide whether or not to seek a formal relationship with the United States. *See id.* The Federal Government's role would be limited to determining, under criteria

promulgated through the current notice-and-comment rulemaking, whether to reestablish a formal government-to-government relationship if it receives a request from a reorganized Native Hawaiian government. *See id.*

DISCUSSION

The NPRM is rooted in the congressional enactments for Native Hawaiians over the last century and draws from the wellspring of authority related to Congress's long history with Indians and tribal self-determination. That authority is relevant here for four reasons; together, they demonstrate that no injunction should issue.

First, Congress has exercised its broad plenary authority to recognize and implement special political and trust relationships with Native American communities; to promote their self-determination and self-governance; and to safeguard their inherent powers to determine their membership, to reorganize their governments, to ratify constitutions, and to conduct elections. Second, consistent with that body of Federal law, tribes traditionally have not included non-Natives in either membership or voting, a practice that Federal courts uniformly have upheld. Third, non-Natives are properly excluded from tribal elections, whether conducted by the tribe itself or by the Secretary of the Interior, because the exclusion is rationally designed to further Indian self-government. Fourth, with regard to these points, Federal law provides no reason to treat the Native Hawaiian community differently from any tribe in the continental United States.

A. Congress and the courts have long recognized Native communities' inherent powers to determine their membership, organize their governments, ratify constitutions, and conduct elections.

"The powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'" *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (citation and emphasis omitted). That sovereignty, however, is subject to Congress's exceptionally broad plenary power to regulate and modify the status of tribes. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014); *United States v. Lara*, 541 U.S. 193, 200 (2004); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); JUDGE WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 1 (6th ed. 2015). As the Supreme Court recently reaffirmed, "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Bay Mills*, 134 S. Ct. at 2039.

Since the beginning of our Republic, Congress has exercised its plenary authority to recognize and implement special political and trust relationships with hundreds of Native communities. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323-24 (2011). Among those is the Native Hawaiian community. *See, e.g.*, 42 U.S.C. § 11701(17); 20 U.S.C. § 7512(12); Pub. L. No. 106-569, 114 Stat. 2968-69 (2000).

Especially in the last 40 years, Congress has used its plenary authority to promote tribal self-determination and self-governance. *See, e.g.*, 20 U.S.C.

§ 7512(12)(E) (reaffirming that "the aboriginal, indigenous people of the United States have … a continuing right to autonomy in their internal affairs; and … an ongoing right of self-determination and self-governance that has never been extinguished"). Likewise, the Supreme Court has held that tribes are "'distinct, independent political communities, retaining their original natural rights in matters of local self-government,'" with the power to regulate "'their internal and social relations,' … to make their own substantive law in internal matters," and "to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (citations omitted).

Congress has accordingly shown great deference, in scores of statutes, to tribes' definitions of their own membership. *See, e.g.*, 25 U.S.C. §§ 450b(d), 1801(a)(1), 1903(3), 3103(9), 4103(10). The Supreme Court has been similarly deferential: "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *see also Alto v. Black*, 738 F.3d 1111, 1115 (9th Cir. 2013) ("In view of the importance of tribal membership decisions and as part of the federal policy favoring tribal self-government, matters of tribal enrollment are generally beyond federal judicial scrutiny."); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1011 (9th Cir. 2007). "Courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own

membership." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03[3], at 175 (2012 ed.).

Congress has also been highly protective of tribes' powers to organize or reorganize their own governments, to draft and ratify their own constitutions or other governing documents, and to conduct their own elections. *See, e.g.*, 25 U.S.C. §§ 476, 503, 677e, 903b; *see also id.* § 476(h)(1) ("each Indian tribe shall retain inherent sovereign power to adopt governing documents").

B. Consistent with Federal law, tribes traditionally have excluded non-Natives from both membership and voting, a practice that Federal courts uniformly have upheld.

Having worked on a government-to-government basis with more than 500 federally recognized Indian tribes in the continental United States, the Department of the Interior recognizes that tribes traditionally have not included non-Natives as full members of their political communities or as voters in tribal elections, including constitutional ratification referenda. This fact is not surprising, since, by definition, non-Natives lack Native American descent — which is essential to an aboriginal claim to sovereignty under the Constitution.

Moreover, excluding non-Natives from tribes' internal political processes fully comports with Federal law. *See, e.g.*, 25 U.S.C. §§ 476, 503, 677e, 903b. As the Supreme Court explained in *Rice v. Cayetano*, 528 U.S. 495 (2000), non-Indians lack the right to vote in tribal elections because "such elections are the internal affair of a quasi sovereign." *Id.* at 520.

Because tribes pre-date the Constitution and did not participate in the Constitutional Convention, they are not governed by "constitutional provisions framed specifically as limitations on federal or state authority," including the Bill of Rights and the Civil War Amendments. *Santa Clara Pueblo*, 436 U.S. at 56; *see Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008); *Talton v. Mayes*, 163 U.S. 376, 382-85 (1896). Therefore, a tribe's decision to exclude non-Natives from its membership rolls or from its elections cannot and does not violate the Fifteenth or Fourteenth Amendment.

Tribes' exercise of sovereign governmental powers is constrained, however, by the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1304. ICRA guarantees most, but not all, of the protections for individual liberties similar to those found in the Bill of Rights and the Civil War Amendments, and makes them applicable to tribes. *See id.* § 1302(a). For example, ICRA expressly bars an Indian tribe from "deny[ing] to any person within its jurisdiction the equal protection of its laws," *id.* § 1302(a)(8). However, the Department is unaware of any court applying ICRA to invalidate a tribe's decision to exclude non-Natives from tribal elections. Indeed, these challenges have uniformly failed. *See, e.g.*, *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438, 439-41 (D.S.D. 1974); *see also Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1083 (8th Cir. 1975) (interpreting ICRA's equal-protection clause to require only that "a tribe treat equally votes cast by members of the tribe already enfranchised by the tribe itself," and not to allow claims seeking "to enfranchise a new class" of

voters); *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 899-900 (9th Cir. 1988) (describing ICRA standards).

More tellingly, Congress chose ***not*** to incorporate into ICRA a guarantee similar to the Fifteenth Amendment's prohibition against denying the "right … to vote … on account of race [or] color." U.S. CONST. amend. XV, § 1. Indeed, Congress consciously rejected the idea of incorporating a Fifteenth Amendment analogue into ICRA. *See Groundhog v. Keeler*, 442 F.2d 674, 681-82 (10th Cir. 1971).

An early draft of ICRA would have applied the Fifteenth Amendment to tribal elections. *See* S. 961, 89th Cong. (1965). Then-Solicitor of the Interior Frank J. Barry testified against this feature of the draft: "No doubt a tribe would want to restrict voting to members and to restrict membership to persons having a certain proportion of Indian blood." *Constitutional Rights of the American Indian: Hearings on S. 961-968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 18 (1965). Solicitor Barry added that a Federal statute requiring tribes to enfranchise non-Natives would not "be consistent at all with [our] system of Indian administration" and would effectively "abolish" tribal governments, subsuming them within state governments. *Id.* at 50. The Department proposed a substitute bill that selectively incorporated key constitutional protections while omitting any Fifteenth Amendment-like provision. *See id.* at 18-19. That proposal became the model for the bill that Congress ultimately passed, deleting the Fifteenth Amendment analogue from the legislation and enacting ICRA with no restrictions against barring non-Natives

from tribal elections. *See Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 89th Cong., Constitutional Rights of the American Indian: Summary Rep. of Hearings and Investigations Pursuant to S. Res. 194*, at 10, 25-26 (Comm. Print 1966).

C. Excluding non-Natives from tribal elections is also routine, and lawful, in tribal elections conducted by the Secretary of the Interior.

Unlike an Indian tribe, the Secretary of the Interior is constrained by the Federal Constitution. *See Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1088-89 (8th Cir. 1977). Under the Indian Reorganization Act, 25 U.S.C. § 476, and the Oklahoma Indian Welfare Act, *id.* § 503, the Secretary conducts elections to ratify new tribal constitutions. Although these Secretarial elections are subject to the Constitution, the exclusion of non-Natives is routine, as the statutes are expressly designed to reorganize "Indians." *Id.* §§ 476, 503.

Part 81 of Title 25 of the Code of Federal Regulations governs these Secretarial elections to adopt a tribal governing document. One of the Department's responsibilities, through an election board chaired by a Bureau of Indian Affairs employee, is to "compile" and "post[]" the "official list of registered voters." 25 C.F.R. § 81.12 (2014). The Part 81 regulations further provide that, when a tribe is considering whether to reorganize for the first time, "[a]ny duly registered adult member [of the tribe,] regardless of residence[,] shall be entitled to vote on the adoption of a constitution." *Id.* § 81.6(a)(1). Historically, a "member" has been defined as "any ***Indian*** who is duly enrolled in a tribe [1] who meets a tribe's written

criteria for membership or [2] who is recognized as belonging to a tribe by the local Indians comprising the tribe." *Id.* § 81.1(k) (emphasis added). So the right to vote in these Secretarial elections turned not on residence in the tribe's territory, but rather on membership in the tribe and Indian status. *See id.* § 81.6(a)(2) (permitting "registered adult nonresident members" to vote by absentee ballot). While the Secretary recently amended these regulations and now defines "member" solely in terms of a tribe's criteria for membership, tribal membership typically turns on descent. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03[2], at 173 (2012 ed.); 80 Fed. Reg. 63094, 63108 (Oct. 19, 2015) (effective Nov. 18, 2015).

Like other tribal elections that include only Natives, these Secretarial elections, as well as the regulations authorizing them — which have been in effect for more than a third of a century before the recent amendments — have never been successfully challenged for excluding non-Natives. *See, e.g.*, *St. Germain v. U.S. Dep't of the Interior*, No. C13-945RAJ, 2015 WL 2406758, at *4-6 (W.D. Wash. May 20, 2015).

This fact is not surprising. Federal laws singling out Indians do not offend the Constitution as long as the special treatment "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians" and "is reasonable and rationally designed to further Indian self-government." *Mancari*, 417 U.S. at 555; *see EEOC v. Peabody Western Coal Co.*, 773 F.3d 977, 987 (9th Cir. 2014). This standard reflects the settled principle — memorialized in an entire title of the U.S. Code (Title 25) — that Federal Indian laws regulate "once-sovereign political communities," not "a 'racial'

group consisting of 'Indians.'" *United States v. Antelope*, 430 U.S. 641, 646 (1977) (citation and internal quotation marks omitted); *see id.* at 645-47; *Washington v. Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979); *Mancari*, 417 U.S. at 551-55; *see also Peabody*, 773 F.3d at 985-89.

D. Federal law provides no basis for treating the Native Hawaiian community differently from any tribe in the continental United States.

The principles of Federal law summarized above, developed largely in the context of Indian tribes in the continental United States, apply with equal force in the Native Hawaiian context. In enacting scores of Federal statutes directly affecting the Native Hawaiian community over the last century, Congress has exercised its Indian-affairs plenary power repeatedly — and often expressly. In 1920, Congress found constitutional precedent for the Hawaiian Homes Commission Act, 42 Stat. 108 (1921), "in previous enactments granting Indians … special privileges in obtaining and using the public lands." H.R. REP. NO. 66-839, at 11 (1920). In 1992, Congress stated that its constitutional authority "to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii." 42 U.S.C. § 11701(17). And in 2002, Congress "recognized and reaffirmed" that it "does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has

established a trust relationship." 20 U.S.C. § 7512(12)(B); *see* Pub. L. No. 106-569, § 512(13)(B), 114 Stat. 2968 (2000).

Congress's treatment of the Native Hawaiian community as a distinct indigenous group for which it may enact special legislation is manifestly reasonable. Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who once exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claim to its sovereignty. *See* Pub. L. No. 103-150, 107 Stat. 1510, 1512-13 (1993); NPRM 59114-18. *See generally United States v. Sandoval*, 231 U.S. 28, 46-47 (1913).

That history is why both this Court and the Hawaii Supreme Court have held that the Native Hawaiian community falls within the scope of Congress's Indian-affairs power. *See, e.g.*, *Rice v. Cayetano*, 146 F.3d 1075, 1082 (9th Cir. 1998) (citing *Mancari* and rejecting plaintiffs' Fourteenth Amendment claim), *vacated on other grounds*, 528 U.S. 495, 522 (2000); *Ahuna v. Dep't of Haw. Home Lands*, 64 Haw. 327, 339 (1982); *see also Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 847-49, 849-57 (9th Cir. 2006) (en banc) (majority and concurring opinions); *Kahawaiolaa,* 386 F.3d at 1278-79 (applying *Mancari*'s rational-basis review and distinguishing *Rice*, 528 U.S. at 519-22).

The fact that the Native Hawaiian community currently lacks an organized government does not preclude the application of principles of Native self-governance and self-determination. *See United States v. John*, 437 U.S. 634, 649-53 (1978)

(upholding Congress's power to legislate for Indians who had no federally recognized tribal government); *see also Lara*, 541 U.S. at 203 (noting that Congress's broad power extends even to restoring a government-to-government relationship that Congress had "previously extinguished … [or] terminated"). Any ruling that purports to require the Native Hawaiian community to include non-Natives in organizing a government could mean in practice that a Native group could never organize itself, impairing its right to self-government and frustrating its eligibility for a government-to-government relationship with the United States.

Plaintiffs suggest (Mot. 12) that this case requires only a straightforward application of the Supreme Court's holding in *Rice v. Cayetano*, but they seek a decision reaching far beyond any issue resolved in *Rice*. The Court in *Rice* expressly reserved the question whether Congress generally "may treat the native Hawaiians as it does the Indian tribes," 528 U.S. at 518, and instead confined its holding to the specific Fifteenth Amendment context presented there: state elections for state officials responsible for administering state laws and for running a state agency established by the state constitution. *See id.* at 520-22. By contrast, this case is about Native Hawaiian elections for Native Hawaiian delegates to a convention that might propose a constitution or other governing document for the Native Hawaiian community. This election has nothing to do with governing the State of Hawaii.

Nor does the State's provision of assistance to the Native Hawaiian process of self-determination alter the legal analysis. On admitting Hawaii to the Union,

Congress assigned to the State the day-to-day administration of key aspects of the Federal trust responsibility for Native Hawaiians. *See* Pub. L. No. 86-3, §§ 4-5, 73 Stat. 4, 5-6 (1959); *Ahuna*, 64 Haw. at 337-38; *see also* 42 U.S.C. § 11701(16). Subsequently, Congress has often called upon the State to serve as the United States' partner in implementing the special political and trust relationship with the Native Hawaiian community: More than 30 sections of the U.S. Code expressly refer to the state agencies for Native Hawaiian affairs and homelands. *See, e.g.*, 42 U.S.C. §§ 2991b-1, 11711(7)(A)(ii). The programs the State administers with congressional authorization provide benefits to Native Hawaiians, and therefore necessarily entail identifying eligible Native Hawaiians — a function not unlike the one challenged in this litigation. *See, e.g.*, 42 U.S.C. §§ 2991b-1(a)(1)(A), 11709(a)(2), 11711(7)(A)(ii). Just as Federal assistance in a tribal election conducted under the Secretary's auspices does not divest a Native community's actions of their character as internal matters of self-governance, there is no reason to conclude that assistance from the State should have that effect here. *Cf. Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 736 (9th Cir. 2003) (applying rational-basis review to a state Indian law that was enacted in response to, and echoed the classifications in, a Federal Indian statute).

CONCLUSION

Though the Department's NPRM does not directly impact the issues presented by plaintiffs' motion for an injunction pending appeal, the NPRM is rooted in a century of congressional precedent treating the Native Hawaiian people as a distinct

indigenous political community, just as Congress treats tribes in the continental United States. That treatment does bear on the issues before the Court. As a political community entitled to self-determination, the Native Hawaiian people have the same fundamental rights of political liberty and local self-government as any Indian tribe. Native Hawaiians should not be relegated to second-class status among our Nation's indigenous peoples.

The public interest and the balance of equities tip even more dramatically against plaintiffs' request for an injunction, now that voting is underway. *See Nader v. Brewer*, 386 F.3d 1168, 1169 (9th Cir. 2004) (refusing to interfere with an election after voting has begun); *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918-20 (9th Cir. 2003) (en banc) (same); *see also Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

Plaintiffs' motion for an injunction pending appeal should be denied.

Respectfully submitted,

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NOVEMBER 9, 2015
90-12-04078

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2015, I electronically filed the foregoing 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.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Robert P. Stockman
ROBERT P. STOCKMAN

No. 15-17134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELI'I AKINA; ET AL.,

Plaintiffs-Appellants,

v.

STATE OF HAWAII; ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
CASE NO. 1:15-CV-00322-JMS-BMK (HON. MICHAEL SEABRIGHT)

UNOPPOSED MOTION BY THE UNITED STATES FOR LEAVE TO FILE A 20-PAGE BRIEF AS *AMICUS CURIAE*

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Pursuant to Fed. R. App. P. 29(d), the United States of America respectfully requests leave to file the attached 20-page *Brief for the United States as Amicus Curiae Opposing Plaintiffs-Appellants' Urgent Motion for an Injunction Pending Appeal*. Plaintiffs-Appellants filed an urgent motion for an injunction pending appeal on October 29, 2015. This Court ordered that Appellees' opposition to the urgent motion is due November 9, 2015, and the United States seeks leave to file its brief opposing the motion. The United States typically may file an amicus curiae brief without leave of court or consent of the parties, Fed. R. App. P. 29(a), so this motion may be unnecessary. Out of an abundance of caution, the United States files this motion requesting leave to file a 20-page brief because Rule 29 does not explicitly contemplate amicus curiae participating in the motions practice. Additionally, the United States requests permission to file a full-length, 20-page opposition, Fed. R. App. P. 27(d)(2), whereas Rule 29(d) generally contemplates that an amicus brief will be half the length of the principal briefs. As explained in detail below, counsel for the various parties have stated that they do not object to the United States filing this amicus brief.

This is an appeal from the district court's order denying Plaintiffs-Appellants a preliminary injunction. Defendant Nai Aupuni, a nonprofit corporation, is currently holding a month-long vote-by-mail election of delegates to an "Aha," a convention charged with considering paths for Native Hawaiian self-determination and potentially drafting a constitution for a Native Hawaiian government. Voting in this election is

limited to Native Hawaiians. Plaintiffs seek to enjoin Nai Aupuni's counting of ballots in that election, primarily alleging that excluding non-Natives violates the Federal Constitution. *See* Doc. No. 9-1, Pls.' Mot. for Inj. Pending Appeal at 1, 10, 20.

The United States has a special responsibility for the welfare of Native peoples throughout our Nation, including Native Hawaiians. As explained in the amicus brief, Congress has exercised its broad plenary authority to recognize and implement special political and trust relationships with Native American communities; to promote their self-determination and self-governance; and to safeguard their inherent powers to determine their membership, to reorganize their governments, to ratify constitutions, and to conduct elections. Tribes in the continental United States routinely limit voting in tribal elections, including constitutional referenda, to members, while excluding non-Natives. The United States seeks leave to file an amicus brief in light of these Federal interests in the subject matter before the Court.

Additionally, during the district-court proceedings on Plaintiffs' motion for a preliminary injunction, the court invited the U.S. Department of the Interior to file an amicus brief regarding a recently issued Notice of Proposed Rulemaking (NPRM) and "its potential relationship to this action." Dist. Ct. Doc. No. 89. The Department filed an amicus brief explaining that, although the NPRM itself had only limited relevance to the issues presented by Plaintiffs' motion, the premises underlying the

NPRM are relevant. The court found the Department's amicus brief helpful, citing it numerous times throughout its opinion. Dist. Ct. Op. at 10 n.7, 21-24, 39, 48, 55.

The United States respectfully submits that a 20-page brief is appropriate given the breadth of the issues presented by this appeal. In its 20-page amicus brief, the United States provides an overview of the NPRM and the extensive history regarding tribes' inherent powers, tribal control over membership and voting, and the Federal Government's relationship with the Native Hawaiian community. Without the requested increase in pages (from 10 to 20 pages), the United States will have to remove significant factual and legal material that could aid the Court in resolving the pending motion.

Counsel for the United States has contacted counsel for all parties and requested their position on the filing of this amicus brief. Robert Popper, counsel for the Plaintiffs-Appellants, has advised that they will not object to this motion. David J. Minkin, counsel for Defendant-Appellee the Nai Aupuni Foundation, has advised that it consents to this motion. William Meheula, counsel for Defendant-Appellee the Akamai Foundation, has advised that it consents to this motion. Donna H. Kalama, counsel for the State Defendants-Appellees,[1] have advised that they consent to this

[1] The State Defendants-Appellees include the State of Hawaii, Governor David Ige, the Commissioners of the Native Hawaiian Roll Commission (Chair John D. Waihee III, Naalehu Anthony, Lei Kihoi, Robin Danner, Mahealani Wendt), and Clyde W. Namuo, Executive Director of the Native Hawaiian Roll Commission, all in their official capacities.

motion. Kannon Shanmugam and Robert G. Klein, counsel for the Office of Hawaiian Affairs (OHA) Defendants-Appellees,[2] have advised that they consent to this motion.

For the foregoing reasons, the United States respectfully requests leave to file the 20-page *Brief for the United States as Amicus Curiae Opposing Plaintiffs-Appellants' Urgent Motion for an Injunction Pending Appeal*, submitted with this motion.

Respectfully submitted,

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[2] The OHA Defendants-Appellees include the Trustees on the Board of OHA (Chair Robert Lindsey, Jr., Colette Y. Machado, Peter Apo, Haunani Apoliona, Rowena M.N. Akana, John D. Waihee, IV, Carmen Hulu Lindsey, Dan Ahuna, Leinaala Ahu Isa), and the Chief Executive Officer of OHA (Kamanaopono Crabbe), all in their official capacities.

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2015, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Robert P. Stockman
ROBERT P. STOCKMAN

- Specific proposed quality measures in the model, their prior validation, and how they would further the model's goals, including measures of beneficiary experience of care, quality of life, and functional status that could be used.
- How the model would affect access to care for Medicare and Medicaid beneficiaries.
- How the model will affect disparities among beneficiaries by race, and ethnicity, gender, and beneficiaries with disabilities, and how the applicant intends to monitor changes in disparities during the model implementation.
- Proposed geographical location(s) of the model.
- Scope of EP participants for the model, including information about what specialty or specialties EP participants would fall under the model.
- The number of EPs expected to participate in the model, information about whether or not EP participants for the model have expressed interest in participating and relevant stakeholder support for the model.
- To what extent participants in the model would be required to use certified EHR technology.
- An assessment of financial opportunities for model participants including a business case for their participation.
- Mechanisms for how the model fits into existing Medicare payment systems, or replaces them in part or in whole and would interact with or complement existing alternative payment models.
- What payment mechanisms would be used in the model, such as incentive payments, performance-based payments, shared savings, or other forms of payment.
- Whether the model would include financial risk for monetary losses for participants in excess of a minimal amount and the type and amount of financial performance risk assumed by model participants.
- Method for attributing beneficiaries to participants.
- Estimated percentage of Medicare spending impacted by the model and expected amount of any new Medicare/Medicaid payments to model participants.
- Mechanism and amount of anticipated savings to Medicare and Medicaid from the model, and any incentive payments, performance-based payments, shared savings, or other payments made from Medicare to model participants.
- Information about any similar models used by private payers, and how the current proposal is similar to or different from private models and whether and how the model could include additional payers other than Medicare, including Medicaid.
- Whether the model engages payers other than Medicare, including Medicaid and/or private payers. If not, why not? If so, what proportion of the model's beneficiaries is covered by Medicare as compared to other payers?
- Potential approaches for CMS to evaluate the proposed model (study design, comparison groups, and key outcome measures).
- Opportunities for potential model expansion if successful.

C. Technical Assistance to Small Practices and Practices in Health Professional Shortage Areas

Section 1848(q)(11) of the Act provides for technical assistance to small practices and practices in HPSAs. In general, under section 1848(q)(11) of the Act, the Secretary is required to enter into contracts or agreements with entities such as quality improvement organizations, regional extension centers and regional health collaboratives beginning in Fiscal Year 2016 to offer guidance and assistance to MIPS EPs in practices of 15 or fewer professionals. Priority is to be given to small practices located in rural areas, HPSAs, and medically underserved areas, and practices with low composite scores. The technical assistance is to focus on the performance categories under MIPS, or how to transition to implementation of and participation in an APM.

For section 1848(q)(11) of the Act—

- What should CMS consider when organizing a program of technical assistance to support clinical practices as they prepare for effective participation in the MIPS and APMs?
- What existing educational and assistance efforts might be examples of ''best in class'' performance in spreading the tools and resources needed for small practices and practices in HPSAs? What evidence and evaluation results support these efforts?
- What are the most significant clinician challenges and lessons learned related to spreading quality measurement, leveraging CEHRT to make practice improvements, value based payment and APMs in small practices and practices in health shortage areas, and what solutions have been successful in addressing these issues?
- What kind of support should CMS offer in helping providers understand the requirements of MIPS?
- Should such assistance require multi-year provider technical assistance commitment, or should it be provided on a one-time basis?
- Should there be conditions of participation and/or exclusions in the providers eligible to receive such assistance, such as providers participating in delivery system reform initiatives such as the Transforming Clinical Practice Initiative (TCPI; *http://innovation.cms.gov/initiatives/Transforming-Clinical-Practices/*), or having a certain level of need identified?

III. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this document.

Dated: September 10, 2015.

Andrew M. Slavitt,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2015–24906 Filed 9–28–15; 11:15 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 50

[Docket No. DOI–2015–0005]; [145D0102DM DS6CS00000 DLSN00000.000000 DX.6CS25 241A0]

RIN 1090–AB05

Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community

AGENCY: Office of the Secretary, Department of the Interior.

ACTION: Proposed rule.

SUMMARY: The Secretary of the Interior (Secretary) is proposing an administrative rule to facilitate the reestablishment of a formal government-to-government relationship with the Native Hawaiian community to more effectively implement the special political and trust relationship that Congress has established between that community and the United States. The proposed rule does not attempt to reorganize a Native Hawaiian government or draft its constitution, nor does it dictate the form or structure of that government. Rather, the proposed rule would establish an administrative procedure and criteria that the Secretary would use if the Native Hawaiian

community forms a unified government that then seeks a formal government-to-government relationship with the United States. Consistent with the Federal policy of indigenous self-determination and Native self-governance, the Native Hawaiian community itself would determine whether and how to reorganize its government.

DATES: Comments on this proposed rule must be received on or before December 30, 2015. Please see **SUPPLEMENTARY INFORMATION** for dates and locations of public meetings and tribal consultations.

ADDRESSES: You may submit comments by either of the methods listed below. Please use Regulation Identifier Number 1090–AB05 in your message.

1. *Federal eRulemaking portal: http://www.regulations.gov.* Follow the instructions on the Web site for submitting and viewing comments. The rule has been assigned Docket ID DOI–2015–0005.

2. *Email: part50@doi.gov.* Include the number 1090–AB05 in the subject line.

3. *U.S. mail, courier, or hand delivery:* Office of the Secretary, Department of the Interior, Room 7228, 1849 C Street NW., Washington, DC 20240.

We request that you send comments only by one of the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us.

FOR FURTHER INFORMATION CONTACT: Antoinette Powell, telephone (202) 208–5816 (not a toll-free number); *part50@doi.gov.*

SUPPLEMENTARY INFORMATION:

Public Comment

The Secretary is proposing an administrative rule to provide a procedure and criteria for reestablishing a formal government-to-government relationship between the United States and the Native Hawaiian community. The Department would like to hear from leaders and members of the Native Hawaiian community and of federally recognized tribes in the continental United States (*i.e.,* the contiguous 48 States and Alaska). We also welcome comments and information from the State of Hawaii and its agencies, other government agencies, and members of the public. We encourage all persons interested in this Notice of Proposed Rulemaking to submit comments on the proposed rule.

To be most useful, and most likely to inform decisions on the content of a final administrative rule, comments should:

—Be specific;
—Be substantive;
—Explain the reasoning behind the comments; and
—Address the proposed rule.

Most laws and other sources cited in this proposal will be available on the Department of the Interior's Office of Native Hawaiian Relations (ONHR) Web site at *http://www.doi.gov/ohr/.*

I. Background

Over many decades, Congress enacted more than 150 statutes recognizing and implementing a special political and trust relationship with the Native Hawaiian community. Among other things, these statutes create programs and services for members of the Native Hawaiian community that are in many respects analogous to, but separate from, the programs and services that Congress enacted for federally recognized tribes in the continental United States. But during this same period, the United States has not partnered with Native Hawaiians on a government-to-government basis, at least partly because there has been no formal, organized Native Hawaiian government since 1893, when a United States officer, acting without authorization of the U.S. government, conspired with residents of Hawaii to overthrow the Kingdom of Hawaii. Many Native Hawaiians contend that their community's opportunities to thrive would be significantly bolstered by reorganizing their sovereign Native Hawaiian government to engage the United States in a government-to-government relationship, exercise inherent sovereign powers of self-governance and self-determination on par with those exercised by tribes in the continental United States, and facilitate the implementation of programs and services that Congress created specifically to benefit the Native Hawaiian community.

The United States has a unique political and trust relationship with federally recognized tribes across the country, as set forth in the United States Constitution, treaties, statutes, Executive Orders, administrative regulations, and judicial decisions. The Federal Government's relationship with these tribes is guided by a trust responsibility—a longstanding, paramount commitment to protect their unique rights and ensure their well-being, while respecting their inherent sovereignty. In recognition of that special commitment—and in fulfillment of the solemn obligations it entails—the United States, acting through the Department of the Interior (Department), developed processes to help tribes in the continental United States establish government-to-government relationships with the United States.

Strong Native governments are critical to tribes' exercising their inherent sovereign powers, preserving their culture, and sustaining prosperous and resilient Native American communities. It is especially true that, in the current era of tribal self-determination, formal government-to-government relationships between tribes and the United States are enormously beneficial not only to Native Americans but to *all* Americans. Yet the benefits of a formal government-to-government relationship have long been denied to members of one of the Nation's largest indigenous communities: Native Hawaiians. This proposed rule provides a process to reestablish a formal government-to-government relationship with the Native Hawaiian community.

A. The Relationship Between the United States and the Native Hawaiian Community

Native Hawaiians are the aboriginal, indigenous people who settled the Hawaiian archipelago as early as 300 A.D., exercised sovereignty over their island archipelago and, over time, founded the Kingdom of Hawaii. *See* S. Rep. No. 111–162, at 2–3 (2010). During centuries of self-rule and at the time of Western contact in 1778, ''the Native Hawaiian people lived in a highly organized, self-sufficient subsistence social system based on a communal land tenure system with a sophisticated language, culture, and religion.'' 20 U.S.C. 7512(2); *accord* 42 U.S.C. 11701(4). Although the indigenous people shared a common language, ancestry, and religion, four independent chiefdoms governed the eight islands until 1810, when King Kamehameha I unified the islands under one Kingdom of Hawaii. *See Rice* v. *Cayetano,* 528 U.S. 495, 500–01 (2000). *See generally* Davianna Pomaikai McGregor & Melody Kapilialoha MacKenzie, *Moolelo Ea O Na Hawaii: History of Native Hawaiian Governance in Hawaii* (2014), *available at http://www.regulations.gov/#!documentDetail;D=DOI-2014-0002-0005* (comment number 2438) [hereinafter *Moolelo Ea O Na Hawaii*].

Throughout the nineteenth century and until 1893, the United States ''recognized the independence of the Hawaiian Nation,'' ''extended full and complete diplomatic recognition to the Hawaiian Government,'' and entered into several treaties with the Hawaiian monarch. 42 U.S.C. 11701(6); *accord* 20 U.S.C. 7512(4); *see Rice,* 528 U.S. at 504 (citing treaties that the two countries signed in 1826, 1849, 1875, and 1887);

Moolelo Ea O Na Hawaii 169–71, 195–200. But during that same period, Westerners became ''increasing[ly] involve[d] . . . in the economic and political affairs of the Kingdom,'' leading to the overthrow of the Kingdom in 1893 by a small group of non-Hawaiians, aided by the United States Minister to Hawaii and the Armed Forces of the United States. *Rice,* 528 U.S. at 501, 504–05. *See generally Moolelo Ea O Na Hawaii* 313–25; S. Rep. No. 111–162, at 3–6 (2010); *Cohen's Handbook of Federal Indian Law* sec. 4.07[4][b], at 360–61 (2012 ed.).

Following the overthrow of Hawaii's monarchy, Queen Liliuokalani, while yielding her authority under protest to the United States, called for reinstatement of Native Hawaiian governance. Joint Resolution of November 23, 1993, 107 Stat. 1511. The Native Hawaiian community answered, alerting existing Native Hawaiian political organizations and groups from throughout the islands to reinstate the Queen and resist the newly formed Provisional Government and any attempt at annexation. *See Moolelo Ea O Na Hawaii* at 36–39. In 1895, Hawaiian nationalists loyal to Queen Liliuokalani attempted to regain control of the Hawaiian government. *Id.* at 39–40. These attempts resulted in hundreds of arrests and convictions, including the arrest of the Queen herself, who was tried and found guilty of misprision or concealment of treason. The Queen was subsequently forced to abdicate. *Id.* These events, however, did little to suppress Native Hawaiian opposition to annexation. During this period, civic organizations convened a series of large public meetings of Native Hawaiians opposing annexation by the United States and led a petition drive that gathered 21,000 signatures, mostly from Native Hawaiians, opposing annexation (the ''Kue Petitions''). *See Moolelo Ea O Na Hawaii* 342–45.

The United States nevertheless annexed Hawaii ''without the consent of or compensation to the indigenous people of Hawaii or their sovereign government who were thereby denied the mechanism for expression of their inherent sovereignty through self-government and self-determination.'' 42 U.S.C. 11701(11). The Republic of Hawaii ceded its land to the United States, and Congress passed a joint resolution annexing the islands in 1898. *See Rice,* 528 U.S. at 505. The Hawaiian Organic Act, enacted in 1900, established the Territory of Hawaii, placed ceded lands under United States control, and directed the use of proceeds from those lands to benefit the inhabitants of Hawaii. Act of Apr. 30, 1900, 31 Stat. 141.

Hawaii was a U.S. territory for six decades prior to 1959, and during much of this period, educated Native Hawaiians, and a government led by them, were perceived as threats to the incipient territorial government. Consequently, the use of the Hawaiian language in education in public schools was declared unlawful. 20 U.S.C. 7512(19). But various entities connected to the Kingdom of Hawaii adopted other methods of continuing their government and education. Specifically, the Royal Societies, the Bishop Estate (now Kamehameha Schools), the Alii trusts, and civic clubs are examples of Native Hawaiians' continuing efforts to keep their culture, language, and community alive. *See Moolelo Ea O Na Hawaii* 456–58. Indeed, post annexation, Native Hawaiians maintained their separate identity as a single distinct political community through a wide range of cultural, social, and political institutions, as well as through efforts to develop programs to provide governmental services to Native Hawaiians. For example, Ahahui Puuhonua O Na Hawaii (Hawaiian Protective Association) was a political organization formed in 1914 under the leadership of Prince Jonah Kuhio Kalanianaole (Prince Kuhio) alongside other Native Hawaiian political leaders. Its principal purposes were to maintain unity among Native Hawaiians, protect Native Hawaiian interests (including by lobbying the territorial legislature), and promote the education, health, and economic development of Native Hawaiians. It was organized ''for the sole purpose of protecting the Hawaiian people and of conserving and promoting the best things of their tradition.'' Hawaiian Homes Commission Act, 1920: Hearing on H.R. 13500 Before the S. Comm. on Territories, 66th Cong., 3d Sess. 44 (1920) (statement of Rev. Akaiko Akana). *See generally Moolelo Ea O Na Hawaii* 405–10. The Association established 12 standing committees, published a newspaper, undertook dispute resolution, promoted the education and the social welfare of the Native Hawaiian community, and developed the framework that eventually became the Hawaiian Homes Commission Act (HHCA). In 1918, Prince Kuhio, who served as the Territory of Hawaii's Delegate to Congress, and other prominent Hawaiians founded the Hawaiian Civic Clubs, whose goal was ''to perpetuate the language, history, traditions, music, dances and other cultural traditions of Hawaii.'' McGregor, *Aina Hoopulapula: Hawaiian Homesteading,* 24 Hawaiian J. of Hist. 1, 5 (1990). The clubs' first project was to secure enactment of the HHCA in 1921 to set aside and protect Hawaiian home lands.

B. Congress's Recognition of Native Hawaiians as a Political Community

By 1919, the decline in the Native Hawaiian population—by some estimates from several hundred thousand in 1778 to only 22,600—led Delegate Prince Kuhio Kalanianaole, Native Hawaiian politician and Hawaiian Civic Clubs co-founder John Wise, and U.S. Secretary of the Interior John Lane to recommend to Congress that land be set aside to help Native Hawaiians reestablish their traditional way of life. *See* H.R. Rep. No. 66–839, at 4 (1920); 20 U.S.C. 7512(7). This recommendation resulted in enactment of the HHCA, which designated tracts totaling approximately 200,000 acres on the different islands for exclusive homesteading by eligible Native Hawaiians. Act of July 9, 1921, 42 Stat. 108; see also *Rice,* 528 U.S. at 507 (HHCA's stated purpose was ''to rehabilitate the native Hawaiian population'') (citing H.R. Rep. No. 66–839, at 1–2 (1920)); *Moolelo Ea O Na Hawaii* 410–12, 421–33. The HHCA limited benefits to Native Hawaiians with a high degree of Native Hawaiian ancestry, suggesting a Congressional understanding that Native Hawaiians frequently had two Native Hawaiian parents and many Native Hawaiian ancestors, which indicated that this group maintained a distinct political community. The HHCA's proponents repeatedly referred to Native Hawaiians as a ''people'' (at times, as a ''dying people'' or a ''noble people''). *See, e.g.,* H.R. Rep. No. 66–839, at 2–4 (1920); *see also* 59 Cong. Rec. 7453 (1920) (statement of Delegate Prince Kuhio) (''[I]f conditions continue to exist as they do today . . ., my people . . . will pass from the face of the earth.'').

In 1938, Congress again exercised its trust responsibility by granting Native Hawaiians exclusive fishing rights in the Hawaii National Park. Act of June 20, 1938, ch. 530, sec. 3(a), 52 Stat. 784.

In 1959, as a condition of statehood, the Hawaii Admission Act required the State of Hawaii to manage and administer two public trusts for the indigenous Native Hawaiian people. Act of March 19, 1959, 73 Stat. 4. First, the Federal Government required the State to adopt the HHCA as a provision of its constitution, which effectively ensured continuity of the Hawaiian home lands program. *Id.* sec. 4, 73 Stat. 5. Second, it required the State to manage a Congressionally mandated public land

trust for the benefit of the general public and Native Hawaiians. *Id.* sec. 5(f), 73 Stat. 6 (requiring that lands transferred to the State be held by the State ''as a public trust . . . for [among other purposes] the betterment of the conditions of native Hawaiians, as defined in the [HHCA], as amended''). In addition, the Federal Government maintained a continuing role in the management and disposition of the home lands. *See* Admission Act § 4; Hawaiian Home Lands Recovery Act (HHLRA), Act of November 2, 1995, 109 Stat. 357.

Since Hawaii's admission to the United States, Congress has enacted dozens of statutes on behalf of Native Hawaiians pursuant to the United States' recognized political relationship and trust responsibility. The Congress:

- Established special Native Hawaiian programs in the areas of health care, education, loans, and employment. *See, e.g.,* Native Hawaiian Health Care Improvement Act, 42 U.S.C. 11701–11714; Native Hawaiian Education Act, 20 U.S.C. 7511–7517; Workforce Investment Act of 1998, 29 U.S.C. 2911; Native American Programs Act of 1974, 42 U.S.C. 2991–2992.
- Enacted statutes to study and preserve Native Hawaiian culture, language, and historical sites. *See, e.g.,* 16 U.S.C. 396d(a); Native American Languages Act, 25 U.S.C. 2901–2906; National Historic Preservation Act of 1966, 54 U.S.C. 302706.
- Extended to the Native Hawaiian people many of ''the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities'' by classifying Native Hawaiians as ''Native Americans'' under numerous Federal statutes. 42 U.S.C. 11701(19); *accord* 20 U.S.C. 7902(13); *see, e.g.,* American Indian Religious Freedom Act, 42 U.S.C. 1996–1996a. *See generally* 20 U.S.C. 7512(13) (noting that ''[t]he political relationship between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States, as evidenced by the inclusion of Native Hawaiians'' in many statutes); *accord* 114 Stat. 2874–75, 2968–69 (2000).

In a number of enactments, Congress expressly identified Native Hawaiians as ''a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago,'' 42 U.S.C. 11701(1); *accord* 20 U.S.C. 7512(1), with whom the United States has a ''special'' ''trust'' relationship, 42 U.S.C. 11701(15), (16), (18), (20); 20 U.S.C. 7512(8), (10), (11), (12). And when enacting Native Hawaiian statutes, Congress expressly stated in accompanying legislative findings that it was exercising its plenary power over Native American affairs: ''The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii.'' 42 U.S.C. 11701(17); *see* H.R. Rep. No. 66–839, at 11 (1920) (finding constitutional precedent for the HHCA ''in previous enactments granting Indians . . . special privileges in obtaining and using the public lands''); *see also* 20 U.S.C. 7512(12)(B).

In 1993, Congress enacted a joint resolution to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians. Joint Resolution of November 23, 1993, 107 Stat. 1510. In that Joint Resolution, Congress acknowledged that the overthrow of the Kingdom of Hawaii thwarted Native Hawaiians' efforts to exercise their ''inherent sovereignty'' and ''right to self-determination,'' and stated that ''the Native Hawaiian people are determined to preserve, develop, and transmit to future generations their ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions.'' *Id.* at 1512–13; *see* 20 U.S.C. 7512(20); 42 U.S.C. 11701(2). In light of those findings, Congress ''express[ed] its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.'' Joint Resolution of November 23, 1993, 107 Stat. 1513.

Following a series of hearings and meetings with the Native Hawaiian community in 1999, the U.S. Departments of the Interior and Justice issued ''From Mauka to Makai: The River of Justice Must Flow Freely,'' a report on the reconciliation process between the Federal Government and Native Hawaiians. The report recommended as its top priority that ''the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law.'' Department of the Interior & Department of Justice, *From Mauka to Makai* 4 (2000).

In recent statutes, Congress again recognized that ''Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands.'' 20 U.S.C. 7512(12)(A); *accord* 114 Stat. 2968 (2000); *see also id.* at 2966; 114 Stat. 2872, 2874 (2000); 118 Stat. 445 (2004). Congress noted that the State of Hawaii ''recognizes the traditional language of the Native Hawaiian people as an official language of the State of Hawaii, which may be used as the language of instruction for all subjects and grades in the public school system,'' and ''promotes the study of the Hawaiian culture, language, and history by providing a Hawaiian education program and using community expertise as a suitable and essential means to further the program.'' 20 U.S.C. 7512(21); *see also* 42 U.S.C. 11701(3) (continued preservation of Native Hawaiian language and culture). Congress's efforts to protect and promote the traditional Hawaiian language and culture demonstrate that Congress has recognized a continuing Native Hawaiian community. In addition, at the State level, recently enacted laws mandated that members of certain State councils, boards, and commissions complete a training course on Native Hawaiian rights and approved traditional Native Hawaiian burial and cremation customs and practices. *See* Act 169, Sess. L. Haw. 2015; Act 171, Sess. L. Haw. 2015. These State actions similarly reflect recognition by the State government of a continuing Native Hawaiian community.

Congress consistently enacted programs and services expressly and specifically for the Native Hawaiian community that are in many respects analogous to, but separate from, the programs and services that Congress enacted for federally recognized tribes in the continental United States. As Congress has explained, it ''does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous peoples of a once sovereign nation as to whom the United States has established a trust relationship.'' 114 Stat. 2968 (2000). Thus, ''the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives.'' 20 U.S.C. 7512(12)(B), (D); *see Rice,* 528 U.S. at 518–19. Congress's treatment of Native Hawaiians flows from that status of the Native Hawaiian community.

Although Congress repeatedly acknowledged its special political and trust relationship with the Native Hawaiian community since the overthrow of the Kingdom of Hawaii more than a century ago, the Federal Government does not maintain a formal government-to-government relationship with the Native Hawaiian community as

an organized, sovereign entity. Reestablishing a formal government-to-government relationship with a reorganized Native Hawaiian sovereign government would facilitate Federal agencies' ability to implement the established relationship between the United States and the Native Hawaiian community through interaction with a single, representative governing entity. Doing so would strengthen the self-determination of Hawaii's indigenous people and facilitate the preservation of their language, customs, heritage, health, and welfare. This interaction is consistent with the United States government's broader policy of advancing Native communities and enhancing the implementation of Federal programs by implementing those programs in the context of a government-to-government relationship.

Consistent with the HHCA, which is the first Congressional enactment clearly recognizing the Native Hawaiian community's special political and trust relationship with the United States, Congress requires Federal agencies to consult with Native Hawaiians under several Federal statutes. *See, e.g.,* the National Historic Preservation Act of 1966, 54 U.S.C. 302706; the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3002(c)(2), 3004(b)(1)(B). And in 2011, the Department of Defense established a consultation process with Native Hawaiian organizations when proposing actions that may affect property or places of traditional religious and cultural importance or subsistence practices. *See* U.S. Department of Defense Instruction Number 4710.03: Consultation Policy with Native Hawaiian Organizations (2011). Other statutes specifically related to management of the Native Hawaiian community's special political and trust relationship with the United States affirmed the continuing Federal role in Native Hawaiian affairs, namely, the Hawaiian Home Lands Recovery Act (HHLRA), 109 Stat. 357, 360 (1995). The HHLRA also authorized a position within the Department to discharge the Secretary's responsibilities for matters related to the Native Hawaiian community. And in 2004, Congress provided for the Department's Office of Native Hawaiian Relations to effectuate and implement the special legal relationship between the Native Hawaiian people and the United States; to continue the reconciliation process set out in 2000; and to assure meaningful consultation before Federal actions that could significantly affect Native Hawaiian resources, rights, or lands are taken. *See* 118 Stat. 445–46 (2004).

C. Actions by the Continuing Native Hawaiian Political Community

Native Hawaiians maintained a distinct political community through the twentieth century to the present day. Through a diverse group of organizations that includes, for example, the Hawaiian Civic Clubs and the various Hawaiian Homestead Associations, Native Hawaiians deliberate and express their views on issues of importance to their community, some of which are discussed above. *See generally Moolelo Ea O Na Hawaii,* 434–551; *see id.* at 496–516 & appendix 4 (listing organizations, their histories, and their accomplishments). A key example of the Native Hawaiian community taking organized action to advance Native Hawaiian self-determination is a political movement, in conjunction with other voters in Hawaii, which led to a set of amendments to the State Constitution in 1978 to provide additional protection and recognition of Native Hawaiian interests. Those amendments established the Office of Hawaiian Affairs, which administers trust monies to benefit the Native Hawaiian community, Hawaii Const. art. XII, sections 5–6, and provided for recognition of certain traditional and customary legal rights of Native Hawaiians, *id.* art. XII, section 7. The amendments reflected input from broad segments of the Native Hawaiian community, as well as others, who participated in statewide discussions of proposed options. *See* Noelani Goodyear-Kaopua, Ikaika Hussey & Erin Kahunawaikaala Wright, *A Nation Rising: Hawaiian Movements for Life, Land, and Sovereignty* (2014).

There are numerous additional examples of the community's active engagement on issues of self-determination and preservation of Native Hawaiian culture and traditions. For example, Ka Lahui Hawaii, a Native Hawaiian self-governance initiative, which organized a constitutional convention resulting in a governing structure with elected officials and governing documents; the Hui Naauao Sovereignty and Self-Determination Community Education Project, a coalition of over 40 Native Hawaiian organizations that worked together to educate Native Hawaiians and the public about Native Hawaiian history and self-governance; the 1988 Native Hawaiian Sovereignty Conference, where a resolution on self-governance was adopted; the Hawaiian Sovereignty Elections Council, a State-funded entity, and its successor, Ha Hawaii, a non-profit organization, which helped hold an election and convene *Aha Oiwi Hawaii,* a convention of Native Hawaiian delegates to develop a constitution and create a government model for Native Hawaiian self-determination; and efforts resulting in the creation and future transfer of the Kahoolawe Island reserve to the ''sovereign native Hawaiian entity,'' *see* Haw. Rev. Stat. 6K–9. Moreover, the community's continuing efforts to integrate and develop traditional Native Hawaiian law, which Hawaii state courts recognize and apply in various family law and property law disputes, *see Cohen's Handbook of Federal Indian Law* sec. 4.07[4][e], at 375–77 (2012 ed.); *see generally Native Hawaiian Law: A Treatise* (Melody Kapilialoha MacKenzie ed., 2015), encouraged development of traditional justice programs, including a method of alternative dispute resolution, ''hooponopono,'' that is endorsed by the Native Hawaiian Bar Association. *See* Andrew J. Hosmanek, *Cutting the Cord: Hooponopono and Hawaiian Restorative Justice in the Criminal Law Context,* 5 Pepp. Disp. Resol. L.J. 359 (2005); *see also* Hawaii Const. art. XII, § 7 (protecting the traditional and customary rights of certain Native Hawaiian tenants).

Against this backdrop of activity, Native Hawaiians and Native Hawaiian organizations asserted self-determination principles in court. Notably, in 2001, they brought suit challenging Native Hawaiians' exclusion from the Department's acknowledgment regulations (25 CFR part 83), which establish a uniform process for Federal acknowledgment of Indian tribes in the continental United States. The United States Court of Appeals for the Ninth Circuit upheld the geographic limitation in the Part 83 regulations, concluding that there was a rational basis for the Department to distinguish between Native Hawaiians and tribes in the continental United States, given the history of separate Congressional enactments regarding the two groups and the unique history of Hawaii. *See Kahawaiolaa* v. *Norton,* 386 F.3d 1271, 1283 (9th Cir. 2004). The Ninth Circuit also noted the question whether Native Hawaiians ''constitute one large tribe . . . or whether there are, in fact, several different tribal groups.'' *Id.* The court expressed a preference for the Department to apply its expertise to ''determine whether native Hawaiians, or some native Hawaiian groups, could

be acknowledged on a government-to-government basis.'' [1] *Id.*

And in recent years, Congress considered legislation to reorganize a single Native Hawaiian governing entity and reestablish a formal government-to-government relationship between it and the United States. In 2010, during the Second Session of the 111th Congress, nearly identical Native Hawaiian government reorganization bills were passed by the House of Representatives (H.R. 2314), reported out favorably by the Senate Committee on Indian Affairs (S. 1011), and strongly supported by the Executive Branch (S. 3945). In a letter to the Senate concerning S. 3945, the Secretary and the Attorney General stated: ''Of the Nation's three major indigenous groups, Native Hawaiians—unlike American Indians and Alaska Natives—are the only one that currently lacks a government-to-government relationship with the United States. This bill provides Native Hawaiians a means by which to exercise the inherent rights to local self-government, self-determination, and economic self-sufficiency that other Native Americans enjoy.'' 156 Cong. Rec. S10990, S10992 (Dec. 22, 2010).

The 2010 House and Senate bills provided that the Native Hawaiian government would have ''the inherent powers and privileges of self-government of a native government under existing law,'' including the inherent powers ''to determine its own membership criteria [and] its own membership'' and to negotiate and implement agreements with the United States or with the State of Hawaii. The bills required protection of the civil rights and liberties of Natives and non-Natives alike, as guaranteed in the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.,* and provided that the Native Hawaiian government and its members would not be eligible for Federal Indian programs and services unless Congress expressly declared them eligible. And S. 3945 expressly left untouched the privileges, immunities, powers, authorities, and jurisdiction of federally recognized tribes in the continental United States.

The bills further acknowledged the existing special political and trust relationship between Native Hawaiians and the United States, and established a process for reorganizing a Native Hawaiian governing entity. Some in Congress, however, expressed a preference not for recognizing a reorganized Native Hawaiian government by legislation, but rather for allowing the Native Hawaiian community to apply for recognition through the Department's Federal acknowledgment process. *See, e.g.,* S. Rep. No. 112–251, at 45 (2012); S. Rep. No. 111–162, at 41 (2010).

The State of Hawaii, in Act 195, Session Laws of Hawaii 2011, expressed its support for reorganizing a Native Hawaiian government that could then be federally recognized, while also providing for State recognition of the Native Hawaiian people as ''the only indigenous, aboriginal, maoli people of Hawaii.'' Haw. Rev. Stat. 10H–1 (2015); *see* Act 195, sec. 1, Sess. L. Haw. 2011. In particular, Act 195 established a process for compiling a roll of qualified Native Hawaiians, to facilitate the Native Hawaiian community's development of a reorganized Native Hawaiian governing entity. *See* Haw. Rev. Stat. 10H–3–4 (2015); *id.* 10H–5 (''The publication of the roll of qualified Native Hawaiians . . . 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.''); Act 195, secs. 3–5, Sess. L. Haw. 2011. Act 195 created a five-member Native Hawaiian Roll Commission to oversee this process.

II. Responses to Comments on the June 20, 2014 Advance Notice of Proposed Rulemaking and Tribal Summary Impact Statement

In June 2014, the Department issued an Advance Notice of Proposed Rulemaking (ANPRM) titled ''Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Community.'' 79 FR 35,296–303 (June 20, 2014). The ANPRM sought input from leaders and members of the Native Hawaiian community and federally recognized tribes in the continental United States about whether and, if so, how the Department should facilitate the reestablishment of a formal government-to-government relationship with the Native Hawaiian community. The ANPRM asked five threshold questions: (1) Should the Secretary propose an administrative rule that would facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian community? (2) Should the Secretary assist the Native Hawaiian community in reorganizing its government, with which the United States could reestablish a government-to-government relationship? (3) If so, what process should be established for drafting and ratifying a reorganized government's constitution or other governing document? (4) Should the Secretary instead rely on the reorganization of a Native Hawaiian government through a process established by the Native Hawaiian community and facilitated by the State of Hawaii, to the extent such a process is consistent with Federal law? (5) If so, what conditions should the Secretary establish as prerequisites to Federal acknowledgment of a government-to-government relationship with the reorganized Native Hawaiian government? The Department posed 19 additional, specific questions concerning the reorganization of a Native Hawaiian government and a Federal process for reestablishing a formal government-to-government relationship. The ANPRM marked the beginning of ongoing discussions with the Native Hawaiian community, consultations with federally recognized tribes in the continental United States, and input from the public at large.

The Department received over 5,100 written comments by the August 19, 2014 deadline, more than half of which were identical postcards submitted in support of reestablishing a government-to-government relationship through Federal rulemaking. In addition, the Department received general comments, both supporting and opposing the ANPRM, from individual members of the public, Members of Congress, State legislators, and community leaders. All comments received on the ANPRM are available in the ANPRM docket at *http://www.regulations.gov/#!docketDetail;D=DOI-2014-0002-0005.* Most of the comments revolved around a limited number of issues. The Department believes that the issues discussed below encompass the range of substantive issues presented in comments on the ANPRM. To the extent that any persons who submitted comments on the ANPRM believe that they presented additional issues that are not adequately addressed here, and that remain pertinent to the proposed rule, the Department invites further comments highlighting those issues.

After careful review and analysis of the comments on the ANPRM, the Department concludes that it is appropriate to propose a Federal rule that would set forth an administrative procedure and criteria by which the Secretary could reestablish a formal government-to-government relationship between the United States and the Native Hawaiian community.

[1] The Department has carefully reviewed the *Kahawaiolaa* briefs. To the extent that positions taken in this proposed rulemaking may be seen as inconsistent with positions of the United States in the *Kahawaiolaa* litigation, the views in this rulemaking reflect the Department's current view.

Overview of Comments

A total of 5,164 written comments were submitted for the record. Comments came from Native Hawaiian organizations, national organizations, Native Hawaiian and non-Native-Hawaiian individuals, academics, student organizations, nongovernmental organizations, the Hawaiian Affairs Caucus of the Hawaii State Legislature, State legislators, Hawaiian Civic Clubs and their members, Alii Trusts, Royal Orders, religious orders, a federally recognized Indian tribe, intertribal organizations, an Alaska Native Corporation, and Members of the United States Congress, including the Hawaii delegation to the 113th Congress, as well as former U.S. Senator Akaka. The Department appreciates the interest and insight reflected in all the submissions and has considered them carefully.

A large majority of commenters supported a Federal rulemaking to facilitate reestablishment of a formal government-to-government relationship. At the same time, commenters also expressed strong support for reorganizing a Native Hawaiian government without assistance from the United States and urged the Federal Government to instead promulgate a rule tailored to a government reorganized by the Native Hawaiian community. The Department agrees: The process of drafting a constitution or other governing document and reorganizing a government should be driven by the Native Hawaiian community, not by the United States. The process should be fair and inclusive and reflect the will of the Native Hawaiian community.

A. Responses to Specific Issues Raised in ANPRM Comments

1. Should the United States be involved in the Native Hawaiian nation-building process?

Issue: The Department received comments from the Association of Hawaiian Civic Clubs, the Sovereign Councils of the Hawaiian Homelands Assembly, the Native Hawaiian Chamber of Commerce, the Native Hawaiian Bar Association, the Native Hawaiian Legal Corporation, the Association of Hawaiians for Homestead Lands, the Native Hawaiian Chamber of Commerce, Alu Like, the Native Hawaiian Education Association, Hawaiian Community Assets, Papa Ola Lokahi, Koolau Foundation, Protect Kahoolawe Ohana, Kalaeloa Heritage and Legacy Foundation, the Waimanalo Hawaiian Homes Association, the Council for Native Hawaiian Advancement, the Kapolei Community Development Corporation, two Alii Trusts, and eight Hawaiian Civic Clubs, among others, that expressed support for a Federal rule enabling a reorganized Native Hawaiian government to seek reestablishment of a formal government-to-government relationship with the United States. Some of these commenters, and many others, also urged the Department to refrain from engaging in or becoming directly involved with the nation-building that is currently underway in Hawaii.

Response: Consistent with these comments, the Department is proposing only to create a procedure and criteria that would facilitate the reestablishment of a formal government-to-government relationship with a reorganized Native Hawaiian government without involving the Federal Government in the Native Hawaiian community's nation-building process.

2. Does Hawaii's multicultural history preclude the possibility that a reorganized Native Hawaiian government could reestablish a formal government-to-government relationship with the United States?

Issue: Some commenters opposed Federal rulemaking on the basis that the Kingdom of Hawaii had evolved into a multicultural society by the time it was overthrown, and that any attempt to reorganize or reestablish a ''native'' (indigenous) Hawaiian government would consequently be race-based and unlawful.

Response: The fact that individuals originating from other countries lived in and were subject to the rule of the Kingdom of Hawaii does not establish that the Native Hawaiian community ceased to exist as a native community exercising political authority. Indeed, as discussed above, key elements demonstrating the existence of that community, such as intermarriage and sustained cultural identity, persisted at that time and continue to flourish today.

To the extent that these comments suggest that the Department must reestablish a government-to-government relationship with a government that includes non-Native Hawaiians as members, that result is precluded by longstanding Congressional definitions of Native Hawaiians, which require a demonstration of descent from the population of Hawaii as it existed before Western contact. That requirement is consistent with Federal law that generally requires members of a native group or tribe to show an ancestral connection to the indigenous group in question. *See generally United States* v. *Sandoval,* 231 U.S. 28, 46 (1913). Moreover, the Department must defer to Congress's definition of the nature and scope of the Native Hawaiian community.

3. Would reestablishment of a formal government-to-government relationship with the Native Hawaiian community create a political divide in Hawaii?

Issue: Some commenters stated that Hawaii is a multicultural society that would be divided if the United States reestablished a formal government-to-government relationship with the Native Hawaiian community, creating disharmony in the State by permitting race-based discrimination.

Response: The U.S. Constitution provides the Federal Government with authority to enter into government-to-government relationships with Native communities. *See* U.S. Const. art. I, sec. 8, cl. 3 (Commerce Clause); U.S. Const. art. II, sec. 2, cl. 2 (Treaty Clause). These constitutional provisions recognize and provide the foundation for longstanding special relationships between native peoples and the Federal Government, relationships that date to the earliest period of our Nation's history. Consistent with the Supreme Court's holding in *Morton* v. *Mancari,* 417 U.S. 535 (1974), and other cases, the Department believes that the United States' government-to-government relationships with native peoples do not constitute ''race-based'' discrimination but are political classifications. The Department believes that these relationships are generally beneficial, and the Department is aware of no reason to treat the Native Hawaiian community differently in this respect.

4. How do claims concerning occupation of the Hawaiian Islands impact the proposed rule?

Issue: Commenters who objected to Federal rulemaking most commonly based their objections on the assertion that the United States does not have jurisdiction over the Hawaiian Islands. Most of these objections were associated with claims that the United States violated and continues to violate international law by illegally occupying the Hawaiian Islands.

Response: As expressly stated in the ANPRM, comments about altering the fundamental nature of the political and trust relationship that Congress has established between the United States and the Native Hawaiian community were outside the ANPRM's scope and therefore did not inform development of the proposed rule. Though comments on these issues were not solicited, some response here may be helpful to understand the Department's role in this rulemaking.

The Department is an agency of the United States Government. The Department's authority to issue this proposed rule and any final rule derives from the United States Constitution and from Acts of Congress, and the Department has no authority outside that structure. The Department is bound by Congressional enactments concerning the status of Hawaii. Under those enactments and under the United States Constitution, Hawaii is a State of the United States of America.

In the years following the 1893 overthrow of the Hawaiian monarchy, Congress annexed Hawaii and established a government for the Territory of Hawaii. *See* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898); Act of Apr. 30, 1900, 31 Stat. 141. In 1959, Congress admitted Hawaii to the Union as the 50th State. *See* Act of March 19, 1959, 73 Stat. 4. Agents of the United States were involved in the overthrow of the Kingdom of Hawaii in 1893; and Congress, through a joint resolution, has both acknowledged that the overthrow of Hawaii was ''illegal'' and expressed ''its deep regret to the Native Hawaiian people'' and its support for reconciliation efforts with Native Hawaiians. Joint Resolution of November 23, 1993, 107 Stat. 1510, 1513.

The Apology Resolution, however, did not effectuate any changes to existing law. *See Hawaii* v. *Office of Hawaiian Affairs,* 556 U.S. 163, 175 (2009). Thus, the Admission Act established the current status of the State of Hawaii. The Admission Act proclaimed that ''the State of Hawaii is hereby declared to be a State of the United States of America, [and] is declared admitted into the Union on an equal footing with the other States in all respects whatever.'' Act of March 19, 1959, sec. 1, 73 Stat. 4. All provisions of the Admission Act were consented to by the State of Hawaii and its people through an election held on June 27, 1959. The comments in response to the ANPRM that call into question the State of Hawaii's legitimacy, and its status as one of the United States under the Constitution, therefore are inconsistent with the express determination of Congress, which is binding on the Department.

5. What would be the proposed role of HHCA beneficiaries in a Native Hawaiian government that relates to the United States on a formal government-to-government basis?

Issue: Some commenters sought reassurance that the proposed rule would not exclude HHCA beneficiaries and their successors from a role in the Native Hawaiian government. The Department received comments on this issue from the Office of Hawaiian Affairs (OHA) as well as others. The Hawaiian Homes Commission specifically noted the unique relationship recognized under the HHCA between the Federal Government and beneficiaries of that Federal law, urging that any rule should protect this group's existing benefits and take into account their special circumstances.

Response: The proposed rule recognizes HHCA beneficiaries' unique status under Federal law and protects that status in a number of ways:

a. The proposed rule defines the term ''HHCA-eligible Native Hawaiians'' to include any Native Hawaiian individual who meets the definition of ''native Hawaiian'' in the HHCA, regardless of whether the individual resides on Hawaiian home lands, is an HHCA lessee, is on a wait list for an HHCA lease, or receives any benefits under the HHCA.

b. The proposed rule requires that the Native Hawaiian constitution or other governing document be approved in a ratification referendum not only by a majority of Native Hawaiians who vote, but also by a majority of HHCA-eligible Native Hawaiians who vote; and both majorities must include enough voters to demonstrate broad-based community support. This ratification process effectively eliminates any risk that the United States would reestablish a formal relationship with a Native Hawaiian government whose form is objectionable to HHCA-eligible Native Hawaiians. The Department expects that the participation of HHCA-eligible Native Hawaiians in the referendum process will ensure that the structure of any ratified Native Hawaiian government will include long-term protections for HHCA-eligible Native Hawaiians.

c. The proposed rule prohibits the Native Hawaiian government's membership criteria from excluding any HHCA-eligible Native Hawaiian citizen who wishes to be a member.

d. The proposed rule requires that the governing document protect and preserve rights, protections, and benefits under the HHCA.

e. The proposed rule leaves intact rights, protections, and benefits under the HHCA.

f. The proposed rule does not authorize the Native Hawaiian government to sell, dispose of, lease, or encumber Hawaiian home lands or interests in those lands.

g. The proposed rule does not diminish any Native Hawaiian's rights or immunities, including any immunity from State or local taxation, under the HHCA.

6. Would Hawaiian home lands, including those subject to lease, be ''subsumed'' by a Native Hawaiian government?

Issue: The Hawaiian Homes Commission noted that several Native Hawaiian beneficiaries were concerned that Hawaiian home lands, including those subject to lease, would be ''subsumed'' by a Native Hawaiian government ''with little input or control exercised over this decision by Hawaiian home lands beneficiaries.'' An individual homesteader, born and raised in the Papakolea Homestead community, also expressed support for a rule but raised concerns that the HHCA would be subject to negotiation between the United States and the newly reorganized Native Hawaiian government, and sought reassurance that the HHCA would be safeguarded. The Kapolei Community Development Corporation's Board of Directors raised similar concerns, particularly with respect to the potential transfer of Hawaiian home lands currently administered by the State of Hawaii under the HHCA to the newly formed Native Hawaiian government, cautioning that such transfer could ''threaten the specific purpose of those lands, and be used for non-homesteading uses.''

Response: Although the proposed rule would not have a direct impact on the status of Hawaiian home lands, the Department takes the beneficiaries' comments expressing concern over their rights and the future of the HHCA land base very seriously. In response to this concern, the proposed rule includes a provision that makes clear that the promulgation of this rule would not diminish any right, protection, or benefit granted to Native Hawaiians by the HHCA. The HHCA would be preserved regardless of whether a Native Hawaiian government is reorganized, regardless of whether it submits a request to the Secretary, and regardless of whether any such request is granted. In addition, for the reorganized Native Hawaiian government to reestablish a formal government-to-government relationship with the United States, its governing document must protect and preserve Native Hawaiians' rights, protections, and benefits under the HHCA and the HHLRA.

7. Would reestablishment of the formal government-to-government relationship be consistent with existing requirements of Federal law?

Issue: Four U.S. Senators submitted comments generally opposing the rulemaking on constitutional grounds and asserting that the executive authority used to federally acknowledge tribes in the continental United States does not extend to Native Hawaiians. Another Senator submitted similar comments, primarily questioning the Secretary's constitutional authority to promulgate rules and arguing that administrative action would be race-based and thus violate the Constitution's guarantee of equal protection. The Department also received comments from the Heritage Foundation and the Center for Equal Opportunity urging the Secretary to forgo Federal rulemaking on similar bases.

Response: The Federal Government has broad authority with respect to Native American communities. *See* U.S. Const. art. I, sec. 8, cl. 3 (Commerce Clause); U.S. Const. art. II, sec. 2, cl. 2 (Treaty Clause); *Morton* v. *Mancari,* 417 U.S. at 551–52 (''The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.''). Congress has already exercised that plenary power to recognize Native Hawaiians through statutes enacted for their benefit and charged the Secretary and others with responsibility for administering the benefits provided by the more than 150 statutes establishing a special political and trust relationship with the Native Hawaiian community. The Department proposes to better implement that relationship by establishing the administrative procedure and criteria for reestablishing a formal government-to-government relationship with a native community that has already been recognized by Congress. As explained above, moreover, the Supreme Court made clear that legislation affecting Native American communities does not generally constitute race-based discrimination. *See Morton* v. *Mancari,* 417 U.S. at 551–55; *id.* at 553 n.24 (explaining that the challenged provision was ''political rather than racial in nature''). The Department's statutory authority to promulgate the proposed rule is discussed below. *See infra* Section III.

8. Would reestablishment of a government-to-government relationship entitle the Native Hawaiian government to conduct gaming under the Indian Gaming Regulatory Act?

Issue: Several commenters stated that Federal rulemaking would make the Native Hawaiian government eligible to conduct gaming activities under the Indian Gaming Regulatory Act (IGRA), a Federal statute that regulates certain types of gaming activities by federally recognized tribes on Indian lands as defined in IGRA.

Response: The Department anticipates that the Native Hawaiian Governing Entity would not fall within the definition of ''Indian tribe'' in IGRA, 25 U.S.C. 2703(5). Therefore, IGRA would not apply. Moreover, because the State of Hawaii prohibits gambling, the Native Hawaiian Governing Entity would not be permitted to conduct gaming in Hawaii. The Department welcomes comments on this issue.

9. Under this proposed rule could the United States reestablish formal government-to-government relationships with multiple Native Hawaiian governments?

Issue: Many commenters who support a Federal rule urged the Department to promulgate a rule that authorizes the reestablishment of a formal government-to-government relationship with a single official Native Hawaiian government, consistent with the nineteenth-century history of Hawaii's self-governance as a single unified entity.

Response: Congress consistently treated the Native Hawaiian community as a single entity through more than 150 Federal laws that establish programs and services for the community's benefit. Congress's recognition of a single Native Hawaiian community reflects the fact that a single centralized, organized Native Hawaiian government was in place prior to the overthrow of the Hawaiian Kingdom.

This approach also had significant support among commenters. The proposed rule therefore would authorize reestablishing a formal government-to-government relationship with a single representative sovereign Native Hawaiian government. That Native Hawaiian government, however, may adopt either a centralized structure or a decentralized structure with political subdivisions defined by island, by geographic districts, historic circumstances, or otherwise in a fair and reasonable manner.

10. Would the proposed rule require use of the roll certified by the Native Hawaiian Roll Commission to determine eligibility to vote in any referendum to ratify the Native Hawaiian government's constitution or other governing document?

Issue: Several commenters made statements regarding the potential role that the roll certified by the Native Hawaiian Roll Commission might play in reestablishing the formal government-to-government relationship between the United States and the Native Hawaiian community.

Response: Under the proposed rule, the Department permits use of the roll certified by the Native Hawaiian Roll Commission, and such an approach may facilitate the reestablishment of a formal government-to-government relationship. The Department, however, does not require use of the roll. Section 50.12(a)(1)(B) of the proposed rule provides that a roll of Native Hawaiians certified by a State commission or agency under State law may be one of several sources that could provide sufficient evidence that an individual descends from Hawaii's aboriginal people. Section 50.12(b) of the proposed rule provides that the certified roll could serve as an accurate and complete list of Native Hawaiians eligible to vote in a ratification referendum if certain conditions are met. For instance, the roll would need to, among other things, exclude all persons who are not U.S. citizens, exclude all persons who are less than 18 years of age, and include all adult U.S. citizens who demonstrated HHCA eligibility according to official records of Hawaii's Department of Hawaiian Home Lands. (See also the response to question 13 below, which discusses requirements for participation in the ratification referendum under § 50.14.)

11. Would the proposed rule limit the inherent sovereign powers of a reorganized Native Hawaiian government?

Issue: OHA and numerous other commenters expressed a strong interest in ensuring that the proposed rule would not limit any inherent sovereign powers of a reorganized Native Hawaiian government.

Response: The proposed rule would not dictate the inherent sovereign powers a reorganized Native Hawaiian government could exercise. The proposed rule does establish certain elements that must be contained in a request to reestablish a government-to-government relationship with the United States and establishes criteria by

which the Secretary will review a request. *See* 50.10–50.15 (setting out essential elements for a request); *id.* 50.16 (setting out criteria). These provisions include guaranteeing the liberties, rights, and privileges of all persons affected by the Native Hawaiian government's exercise of governmental powers. Although those elements and criteria will inform and influence the process for reestablishing a formal government-to-government relationship, they would not undermine the fundamental, retained inherent sovereign powers of a reorganized Native Hawaiian government.

12. What role will Native Hawaiians play in approving the constitution or other governing document of a Native Hawaiian government?

Issue: Numerous commenters discussed the role of Native Hawaiians in ratifying the constitution or other governing document that establishes the form and functions of a Native Hawaiian government. One commenter, in particular, stated that the Secretary should not require that the governing document be approved by a majority of *all* Native Hawaiians, regardless of whether they participate in the ratification referendum, because such a requirement would be unrealistic and unachievable.

Response: Section 50.16(g) and (h) of the proposed rule would require a requester to demonstrate broad-based community support among Native Hawaiians. The proposed rule requires a majority only of those voters who actually cast a ballot; the number of eligible voters who opt not to participate in the ratification referendum would not be relevant when calculating whether the affirmative votes were or were not in the majority. The proposed rule, however, requires broad-based community support in favor of the requester's constitution or other governing document, thus also safeguarding against a low turnout. The Department solicits comments on this approach and requests that if such comments provide an alternate approach that the commenters explain the reasoning behind any proposed method to establish that broad-based community support has been demonstrated in the ratification process.

13. Who would be eligible to participate in the proposed process for reestablishing a government-to-government relationship?

Issue: Several commenters expressed concern about who would be eligible to participate in the process for reestablishing a government-to-government relationship. Some commenters expressed the belief that participation should be open to persons who have no Native Hawaiian ancestry. Other commenters expressed opposition to the reorganization of a Native Hawaiian government, or to the reestablishment of a government-to-government relationship between such a community and the United States.

Response: Under the proposed rule, to retain the option of eventually reestablishing a formal government-to-government relationship with the United States, the Native Hawaiian community would be required to permit any adult person who is a U.S. citizen and can document Native Hawaiian descent to participate in the referendum to ratify its governing documents. *See* 50.14(b)(5)(C). As discussed in question 2 above, existing Congressional definitions of the Native Hawaiian community and principles of Federal law limit participation to those who can document Native Hawaiian descent and are U.S. citizens. Native Hawaiian adult citizens who do not wish to affirm the inherent sovereignty of the Native Hawaiian people, or who doubt that they and other Native Hawaiians have sufficient connections or ties to constitute a community, or who oppose the process of Native Hawaiian self-government or the reestablishment of a formal government-to-government relationship with the United States, would be free to participate in the ratification referendum and, if they wish, vote against ratifying the community's proposed governing document. And because membership in the Native Hawaiian Governing Entity would be voluntary, they also would be free to choose not to become members of any government that may be reorganized. The Department seeks public comment on these aspects of the proposed rule.

14. Shouldn't the Department require a Native Hawaiian government to go through the existing administrative tribal acknowledgment process?

Issue: The Department promulgated regulations for Federal acknowledgment of tribes in the continental United States in 25 CFR part 83. These regulations, commonly referred to as ''Part 83,'' create a pathway for Federal acknowledgment of petitioners in the continental United States to establish a government-to-government relationship and to become eligible for Federal programs and benefits. Several commenters submitted statements regarding the role of the Department's existing regulations on Federal acknowledgment of tribes with respect to Native Hawaiians, and have articulated arguments about whether the Part 83 regulations should or should not be applied to Native Hawaiians.

Response: Part 83 is inapplicable to Native Hawaiians on its face. The Ninth Circuit has upheld Part 83's express geographic limitation, concluding that there was a rational basis for the Department to distinguish between Native Hawaiians and tribes in the continental United States, given the history of separate Congressional enactments regarding the two groups and the unique history of Hawaii. *Kahawaiolaa* v. *Norton,* 386 F.3d at 1283. The court expressed a preference for the Department to apply its expertise to determine whether the United States should relate to the Native Hawaiian community ''on a government-to-government basis.'' *Id.* The Department, through this proposed rule, seeks to establish a process for determining how a formal Native Hawaiian government can relate to the United States on a formal government-to-government basis, as the Ninth Circuit suggested.

Moreover, Congress's 150-plus enactments, including those in recent decades, for the benefit of the Native Hawaiian community establish that the community is federally ''acknowledged'' or ''recognized'' by Congress. Thus, unlike Part 83 petitioners, the Native Hawaiian community already has a special political and trust relationship with the United States. What remains in question is how the Department could determine whether a Native Hawaiian government that comes forward legitimately represents that community and therefore is entitled to conduct relations with the United States on a formal government-to-government basis. This question is complex, and the Department welcomes public comment as to whether any additional elements should be included in the process that the Department proposes.

B. Tribal Summary Impact Statement

Consistent with Sections 5(b)(2)(B) and 5(c)(2) of Executive Order 13175, and because the Department consulted with tribal officials in the continental United States prior to publishing this proposed rule, the Department seeks to assist tribal officials, and the public as a whole, by including in this preamble the three key elements of a tribal summary impact statement. Specifically, the preamble to this proposed rule (1) describes the extent of the Department's prior consultation with tribal officials; (2) summarizes the nature of their concerns and the Department's position supporting the need to issue the proposed rule; and (3)

states the extent to which tribal officials' concerns have been met. The ''Public Meetings and Tribal Consultations'' section below describes the Department's prior consultations.

Tribal Officials' Concerns: Officials of tribal governments in the continental United States and intertribal organizations strongly supported Federal rulemaking to help reestablish a formal government-to-government relationship between the United States and the Native Hawaiian community. To the extent they raised concerns, the predominant one was the rule's potential impact, if any, on Federal Indian programs, services, and benefits—that is, federally funded or authorized special programs, services, and benefits provided by Federal agencies (such as the Bureau of Indian Affairs and the Indian Health Service) to Indian tribes in the continental United States or their members because of their Indian status. For example, comments from the National Congress of American Indians expressed an understanding that Native Hawaiians are ineligible for Federal Indian programs and services absent express Congressional declarations to the contrary, and recommended that existing and future programs and services for a reorganized Native Hawaiian government remain separate from programs and services dedicated to tribes in the continental United States.

Response: Generally, Native Hawaiians are not eligible for Federal Indian programs, services, or benefits unless Congress has expressly and specifically declared them eligible. Consistent with that approach, the Department's proposed rule would not alter or affect the programs, services, and benefits that the United States currently provides to federally recognized tribes in the continental United States unless an Act of Congress expressly provides otherwise. Federal laws expressly addressing Native Hawaiians will continue to govern existing Federal programs, services, and benefits for Native Hawaiians and for a reorganized Native Hawaiian government if one reestablishes a formal government-to-government relationship with the United States.

The term ''Indian'' has been used historically in reference to indigenous peoples throughout the United States despite their distinct socio-political and cultural identities. Congress, however, has distinguished between Indian tribes in the continental United States and Native Hawaiians when it has provided programs, services, and benefits. Congress, in the Federally Recognized Indian Tribe List Act of 1994, 108 Stat. 4791, defined ''Indian tribe'' broadly as an entity the Secretary acknowledges to exist as an Indian tribe but limited the list published under the List Act to those governmental entities entitled to programs and services because of their status as Indians. 25 U.S.C. 479a(2), 479a–1(a). The Department seeks public comment on the scope and implementation of this distinction, and which references to ''tribes'' and ''Indians'' would encompass the Native Hawaiian Governing Entity and its members.

Further, given Congress's express intention to have the Department's Assistant Secretary for Policy, Management and Budget (PMB) oversee Native Hawaiian matters, as evidenced in the HHLRA, Act of November 2, 1995, sec. 206, 109 Stat. 363, the Assistant Secretary—PMB, not the Assistant Secretary—Indian Affairs, would be responsible for implementing this proposed rule.

III. Overview of the Proposed Rule

The proposed rule reflects the totality of the comments urging the Department to promulgate a rule announcing a procedure and criteria by which the Secretary could reestablish a formal government-to-government relationship with the Native Hawaiian community. If the Department ultimately promulgates a final rule along the lines proposed here, the Department intends to rely on that rule as the sole administrative avenue for reestablishing a formal government-to-government relationship with the Native Hawaiian community.

The authority to issue this rule is vested in the Secretary by 25 U.S.C. 2, 9, 479a, 479a–1; Act of November 2, 1994, sec. 103, 108 Stat. 4791; 43 U.S.C. 1457; and 5 U.S.C. 301. *See also Miami Nation of Indians of Indiana, Inc.* v. *U.S. Dep't of the Interior,* 255 F.3d 342, 346 (7th Cir. 2001) (stating that recognition is an executive function requiring no legislative action). Through its plenary power over Native American affairs, Congress recognized the Native Hawaiian community by passing more than 150 statutes during the last century and providing special Federal programs and services for its benefit. The regulations proposed here would establish a procedure and criteria to be applied if that community reorganizes a unified and representative government and if that government then seeks a formal government-to-government relationship with the United States. And as noted above, Congress enacted scores of laws with respect to Native Hawaiians—actions that also support the Department's rulemaking authority here. *See generally* 12 U.S.C. 1715z–13b; 20 U.S.C. 80q *et seq.;* 20 U.S.C. 7511 *et seq.;* 25 U.S.C. 3001 *et seq.;* 25 U.S.C. 4221 *et seq.;* 42 U.S.C. 2991 *et seq.;* 42 U.S.C. 3057g *et seq.;* 42 U.S.C. 11701 *et seq.;* 54 U.S.C. 302706; HHCA, Act of July 9, 1921, 42 Stat. 108, as amended; Act of March 19, 1959, 73 Stat. 4; Joint Resolution of November 23, 1993, 107 Stat. 1510; HHLRA, 109 Stat. 357 (1995); 118 Stat. 445 (2004).

In accordance with the wishes of the Native Hawaiian community as expressed in the comments on the ANPRM, the proposed rule would not involve the Federal Government in convening a constitutional convention, in drafting a constitution or other governing document for the Native Hawaiian government, in registering voters for purposes of ratifying that document or in electing officers for that government. Any government reorganization would instead occur through a fair and inclusive community-driven process. The Federal Government's only role is deciding whether to reestablish a formal government-to-government relationship with a reorganized Native Hawaiian government.

Moreover, if a Native Hawaiian government reorganizes, it will be for that government to decide whether to seek to reestablish a formal government-to-government relationship with the United States. The process established by this rule would be optional, and Federal action would occur only upon an express formal request from the newly reorganized Native Hawaiian government.

Existing Federal Legal Framework. In adopting this rulemaking, the Department must adhere to the legal framework that Congress already established, as discussed above, to govern relations with the Native Hawaiian community. The existing body of legislation makes plain that Congress determined repeatedly, over a period of almost a century, that the Native Hawaiian population is an existing Native community that is within the scope of the Federal Government's powers over Native American affairs and with which the United States has an ongoing special political and trust relationship.[2]

[2] Congress described this trust relationship, for example, in findings enacted as part of the Native Hawaiian Education Act, 20 U.S.C. 7512 *et seq.,* and the Native Hawaiian Health Care Improvement Act, 42 U.S.C. 11701 *et seq.* Those findings observe that ''through the enactment of the Hawaiian Homes Commission Act, 1920, Congress affirmed the special relationship between the United States and the Hawaiian people,'' 20 U.S.C. 7512(8); *see also* 42 U.S.C. 11701(13), (14) (also citing a 1938 statute conferring leasing and fishing rights on Native

Continued

Although a trust relationship exists, today there is no single unified Native Hawaiian government in place, and no procedure for reestablishing a formal government-to-government relationship should such a government reorganize.

Congress has employed two definitions of ''Native Hawaiians,'' which the proposed rule labels as ''HHCA-eligible Native Hawaiians'' and ''Native Hawaiians.'' The former is a subset of the latter, so every HHCA-eligible Native Hawaiian is by definition a Native Hawaiian. But the converse is not true: Some Native Hawaiians are not HHCA-eligible Native Hawaiians.

Individuals falling within the definition of ''HHCA-eligible Native Hawaiians'' are beneficiaries or potential beneficiaries of the HHCA, as amended. They are eligible for a set of benefits under the HHCA and are, or could become, the beneficiaries of a program initially established by Congress in 1921 and now managed by the State of Hawaii (subject to certain limitations set forth in Federal law). As used in the proposed rule, the term ''HHCA-eligible Native Hawaiian'' means a Native Hawaiian individual who meets the definition of ''native Hawaiian'' in HHCA sec. 201(a)(7), 42 Stat. 108 (1921), and thus has at least 50 percent Native Hawaiian ancestry, which results from marriages within the community, regardless of whether the individual resides on Hawaiian home lands, is an HHCA lessee, is on a wait list for an HHCA lease, or receives any benefits under the HHCA. To satisfy this definition would require some sort of record or documentation demonstrating eligibility under HHCA sec. 201(a)(7), such as enumeration in official Department of Hawaiian Home Lands (DHHL) records demonstrating eligibility under the HHCA. Although the proposed rule does not approve reliance on a sworn statement signed under penalty of perjury, the Department would like to receive public comment on whether there are circumstances in which the final rule should do so.

The term ''Native Hawaiian,'' as used in the proposed rule, means an individual who is a citizen of the United States and a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. This definition flows directly from multiple Acts of Congress. *See, e.g.,* 12 U.S.C. 1715z–13b(6); 25 U.S.C. 4221(9); 42 U.S.C. 254s(c); 42 U.S.C. 11711(3). To satisfy this definition would require some means of documenting descent generation-by-generation, such as enumeration on a roll of Native Hawaiians certified by a State of Hawaii commission or agency under State law, where the enumeration was based on documentation that verified descent. And, of course, enumeration in official DHHL records demonstrating eligibility under the HHCA also would satisfy the definition of ''Native Hawaiian,'' as it would show that a person is an HHCA-eligible Native Hawaiian and by definition a ''Native Hawaiian'' as that term is used in this proposed rule. The Department would like to receive public comment on whether documenting descent from a person enumerated on the 1890 Census by the Kingdom of Hawaii, the 1900 U.S. Census of the Hawaiian Islands, or the 1910 U.S. Census of Hawaii as ''Native'' or part ''Native'' or ''Hawaiian'' or part ''Hawaiian'' is reliable evidence of lineal descent from the aboriginal, indigenous, native people who exercised sovereignty over the territory that became the State of Hawaii.

In keeping with the framework created by Congress, the rule that the Department proposes requires that, to reestablish a formal government-to-government relationship with the United States, a Native Hawaiian government must have a constitution or other governing document ratified both by a majority vote of Native Hawaiians and by a majority vote of those Native Hawaiians who qualify as HHCA-eligible Native Hawaiians. Thus, regardless of which Congressional definition is used, a majority of the voting members of the community with which Congress established a trust relationship through existing legislation will confirm their support for the Native Hawaiian government's structure and fundamental organic law.

Ratification Process. The proposed rule sets forth certain requirements for the process of ratifying a constitution or other governing document, including requirements that the ratification referendum be free and fair, that there be public notice before the referendum occurs, and that there be a process for ensuring that all voters are actually eligible to vote.

The actual form of the ratification referendum is not fixed in the proposed rule; the Native Hawaiian community may determine the form within parameters. The ratification could be an integral part of the process by which the Native Hawaiian community adopts its governing document, or the referendum could take the form of a special election held solely for the purpose of measuring Native Hawaiian support for a governing document that was adopted through other means. The ratification referendum must result in separate vote tallies for (a) HHCA-eligible Native Hawaiian voters and (b) all Native Hawaiian voters.

To ensure that the ratification vote reflects the views of the Native Hawaiian community generally, there is a requirement that the turnout in the ratification referendum be sufficiently large to demonstrate broad-based community support. Even support from a high percentage of the actual voters would not be a very meaningful indicator of broad-based community support if the turnout was minuscule. The proposed rule focuses not on the number of voters who participate in the ratification referendum, but rather on the number who vote in favor of the governing document. The proposed rule creates a strong presumption of broad-based community support if the affirmative votes exceed 50,000, including affirmative votes from at least 15,000 HHCA-eligible Native Hawaiians.

These numbers proposed in the regulations (50,000 and 15,000) are derived from existing estimates of the size of those populations, adjusted for typical turnout levels in elections in the State of Hawaii, although the ratification referendum would also be open to eligible Native Hawaiian citizens of the United States who reside outside the State and may vote by absentee or mail-in ballot. The following figures support the proposed rule's reference to 50,000 affirmative votes from Native Hawaiians. According to the 2010 Federal decennial census, there are about 156,000 Native Hawaiians in the United States, including about 80,000 who reside in Hawaii, who self-identified on their census forms as ''Native Hawaiian'' alone (*i.e.,* they did not check the box for any other demographic category). The comparable figures for persons who self-identified either as Native Hawaiian alone or as Native Hawaiian in combination with another demographic category are about 527,000 for the entire U.S. and 290,000 for Hawaii. According to the census, about 65 percent of these Native Hawaiians are of voting age (18 years of

Hawaiians). Congress then ''reaffirmed the trust relationship between the United States and the Hawaiian people'' in the Hawaii Admission Act, 20 U.S.C. 7512(10); *accord* 42 U.S.C. 11701(16). Since then, ''the political relationship between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States, as evidenced by the inclusion of Native Hawaiians'' in at least ten statutes directed in whole or in part at American Indians and other native peoples of the United States such as Alaska Natives. 20 U.S.C. 7512(13); *see also* 42 U.S.C. 11701(19), (20), (21) (listing additional statutes).

age or older). Hawaii residents currently constitute roughly 80 to 85 percent of the Native Hawaiian Roll Commission's Kanaiolowalu roll, which currently lists about 100,000 Native Hawaiians, from all 50 States.

In the 1990s, the State of Hawaii's Office of Elections tracked Native Hawaiian status and found that the percentage of Hawaii's registered voters who were Native Hawaiian was rising, from about 14.7 percent in 1992, to 15.5 percent in 1994, to 16.0 percent in 1996, and 16.7 percent in 1998. (This trend is generally consistent with census data showing growth in recent decades in the number of persons identifying as Native Hawaiian.) In the most recent of those elections, in 1998, there were just over 100,000 Native Hawaiian registered voters, about 65,000 of whom actually turned out and cast ballots in that off-year (*i.e.,* non-presidential) Federal election. That same year, the total number of registered voters (Native Hawaiian and non-Native Hawaiian) was about 601,000, of whom about 413,000 cast a ballot. By the 2012 general presidential election, Hawaii's total number of registered voters (Native Hawaiian and non-Native Hawaiian) increased to about 706,000, of whom about 437,000 cast a ballot. And in the 2014 general gubernatorial election, the equivalent figures were about 707,000 and about 370,000, respectively.

Weighing these data, the Department concludes that it is reasonable to expect that a ratification referendum among the Native Hawaiian community in Hawaii would have a turnout somewhere in the range between 60,000 and 100,000, although a figure outside that range is possible. But those figures do not include Native Hawaiian voters who reside outside the State of Hawaii, who also could participate in the referendum; the Department believes that the rate of participation among that group is sufficiently uncertain that their numbers should be significantly discounted when establishing turnout thresholds.

Given these data points, if the number of votes that Native Hawaiians cast in favor of the requester's governing document in a ratification referendum was a majority of all votes cast and exceeded 50,000, the Secretary would be well justified in finding broad-based community support among Native Hawaiians. And if the number of votes that Native Hawaiians cast in favor of the requester's governing document in a ratification referendum fell below 60 percent of that quantity—that is, less than 30,000—it would be reasonable to presume a lack of broad-based community support among Native Hawaiians such that the Secretary would decline to process the request. The 30,000-affirmative-vote threshold represents half of the lower bound of the anticipated turnout of Native Hawaiians residing in the State of Hawaii (*i.e.,* half of the lower end of the 60,000-to-100,000 range described above).

As for the proposed rule's reference to 15,000 affirmative votes from HHCA-eligible Native Hawaiians, that figure is based on the data described above, as well as figures from DHHL and from a survey of Native Hawaiians. According to DHHL's comments on the ANPRM, as of August 2014, there were nearly 10,000 Native Hawaiian families living in homestead communities throughout Hawaii, and 27,000 individual applicants awaiting a homestead lease award. And a significant number of HHCA-eligible Native Hawaiians likely were neither living in homestead communities nor awaiting a homestead lease award. Furthermore, in his concurring opinion in *Rice* v. *Cayetano,* Justice Breyer cited the *Native Hawaiian Data Book* which, in turn, reported data indicating that about 39 percent of the Native Hawaiian population in Hawaii in 1984 had at least 50 percent Native Hawaiian ancestry and therefore would satisfy the proposed rule's definition of an HHCA-eligible Native Hawaiian. *See Rice* v. *Cayetano,* 528 U.S. at 526 (Breyer, J., concurring in the result) (citing *Native Hawaiian Data Book* 39 (1998) (citing Office of Hawaiian Affairs, *Population Survey/Needs Assessment: Final Report* (1986) (describing a 1984 study))); *see also* Native Hawaiian Data Book (2013), available at *http://www.ohadatabook.com.* The 1984 data included information by age group, which suggested that the fraction of the Native Hawaiian population with at least 50 percent Native Hawaiian ancestry is likely declining over time. Specifically, the 1984 data showed that the fraction of Native Hawaiians with at least 50 percent Native Hawaiian ancestry was about 20.0 percent for Native Hawaiians born between 1980 and 1984, about 29.5 percent for those born between 1965 and 1979, about 42.4 percent for those born between 1950 and 1964, and about 56.7 percent for those born between 1930 and 1949. The median voter in most U.S. elections today (and for the next several years) is likely to fall into the 1965-to-1979 cohort. Therefore, the current population of HHCA-eligible Native Hawaiian voters is estimated to be about 30 percent as large as the current population of Native Hawaiian voters.

Multiplying the 50,000-vote threshold by 30 percent results in 15,000; it follows that, if the number of votes cast by HHCA-eligible Native Hawaiians in favor of the requester's governing document in a ratification referendum is a majority of all votes cast by such voters, and also exceeds 15,000, the Secretary would be well justified in finding broad-based community support among HHCA-eligible Native Hawaiians. And if the number of votes cast by HHCA-eligible Native Hawaiians in favor of the requester's governing document in a ratification referendum falls below 60 percent of that quantity—that is, less than 9,000—it would be reasonable to presume a lack of broad-based community support among HHCA-eligible Native Hawaiians such that the Secretary would decline to process the request.

The Department seeks public comment on whether these parameters are appropriate to measure broad-based support in the Native Hawaiian community for a Native Hawaiian government's constitution or other governing document, and on whether different sources of population data should also be considered. *See* response to question 13 above.

The Native Hawaiian Government's Constitution or Governing Document. The form or structure of the Native Hawaiian government is left for the community to decide. Section 50.13 of the proposed rule does, however, set forth certain minimum requirements for reestablishing a formal government-to-government relationship with the United States. The constitution or other governing document of the Native Hawaiian government must provide for ''periodic elections for government offices,'' describe procedures for proposing and ratifying constitutional amendments, and not violate Federal law, among other requirements.

The governing document must also provide for the protection and preservation of the rights of HHCA beneficiaries. In addition, the governing document must protect and preserve the liberties, rights, and privileges of all persons affected by the Native Hawaiian government's exercise of governmental powers in accordance with the Indian Civil Rights Act of 1968, as amended (25 U.S.C. 1301 *et seq.*). The Native Hawaiian community would make the decisions as to the institutions of the new government, who could decide the form of any legislative body, the means for ensuring independence of the judiciary, whether certain governmental powers would be centralized in a single body or decentralized to local political subdivisions, and other structural questions.

As to potential concerns that a subsequent amendment to a governing

document could impair the safeguards of § 50.13, Federal law provides both defined protections for HHCA beneficiaries and specific guarantees of individual civil rights, and such an amendment could not contravene applicable Federal law. The drafters of the governing document may also choose to include additional provisions constraining the amendment process; the Native Hawaiian community would decide that question in the process of drafting and ratifying that document.

Membership Criteria. As the Supreme Court explained, a Native community's ''right to define its own membership . . . has long been recognized as central to its existence as an independent political community.'' *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 72 n.32 (1978). The proposed rule therefore provides only minimal guidance about what the governing document must say with regard to membership criteria. HHCA-eligible Native Hawaiians must be included, non-Natives must be excluded, and membership must be voluntary and relinquishable. But under the proposed rule, the community itself would be free to decide whether to include all, some, or none of the Native Hawaiians who are not HHCA-eligible.

Single Government. The rule provides for reestablishment of relations with only a single sovereign Native Hawaiian government. This limitation is consistent with Congress's enactments with respect to Native Hawaiians, which treat members of the Native Hawaiian community as a single indigenous people. It is also consistent with the wishes of the Native Hawaiian community as expressed in comments on the ANPRM. Again, the Native Hawaiian community will decide what form of government to adopt, and may provide for political subdivisions if they so choose.

The Formal Government-to-Government Relationship. Because statutes such as the National Historic Preservation Act of 1966, the Native American Graves Protection and Repatriation Act, and the HHLRA established processes for interaction between the Native Hawaiian community and the U.S. government that in certain limited ways resemble a government-to-government relationship, the proposed rule refers to reestablishment of a ''formal'' government-to-government relationship, the same as the relationship with federally recognized tribes in the continental United States.

Submission and Processing of the Request. In addition to establishing a set of criteria for the Secretary to apply in reviewing a request from a Native Hawaiian government, the rule sets out the procedure by which the Department will receive and process a request seeking to reestablish a formal government-to-government relationship. This rule includes processes for submitting a request, for public comment on any request received, and for issuing a final decision on the request.[3] The Department will respond to significant public comments when it issues its final decision document. We seek comment on whether these proposed processes provide sufficient opportunity for public participation and whether any additional elements should be included.

Other Provisions. The proposed rule also contains provisions governing technical assistance, clarifying the implementation of the formal government-to-government relationship, and addressing similar issues. The proposed rule explains that the government-to-government relationship with the Native Hawaiian Governing Entity is the same as that with federally recognized tribes in the continental United States. Accordingly, the government-to-government relationship with the Native Hawaiian Governing Entity would have very different characteristics from the government-to-government relationship that formerly existed with the Kingdom of Hawaii. The Native Hawaiian Governing Entity would remain subject to the same authority of Congress and the United States to which those tribes are subject and would remain ineligible for Federal Indian programs, services, and benefits (including funding from the Bureau of Indian Affairs and the Indian Health Service) unless Congress expressly declared otherwise.

The proposed rule also clarifies that neither this rulemaking nor granting a request submitted under the proposed rule would affect the rights of HHCA beneficiaries or the status of HHCA lands. Section 50.44(f) makes clear that reestablishment of the formal government-to-government relationship will not affect title, jurisdiction, or status of Federal lands and property in Hawaii. This provision does not affect lands owned by the State of Hawaii or provisions of State law. *See, e.g.,* Haw. Rev. Stat. 6K–9 (''[T]he resources and waters of Kahoolawe shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii.''). They also explain that the reestablished government-to-government relationship would more effectively implement statutes that specifically reference Native Hawaiians, but would not extend the programs, services, and benefits available to Indian tribes in the continental United States to the Native Hawaiian Governing Entity or its members, unless a Federal statute expressly authorizes it. These provisions also state that immediately upon completion of the Federal administrative process, the United States will reestablish a formal government-to-government relationship with the single sovereign government of the Native Hawaiian community that submitted the request to reestablish that relationship. Individuals' eligibility for any program, service, or benefit under any Federal law that was in effect before the final rule's effective date would be unaffected. Likewise, Native Hawaiian rights, protections, privileges, immunities, and benefits under Article XII of the Constitution of the State of Hawaii would not be affected. And nothing in this proposed rule would alter the sovereign immunity of the United States or the sovereign immunity of the State of Hawaii.

[3] Because Congress has already established a relationship with the Native Hawaiian community, the Secretary's determination in this part is focused solely on the process for reestablishing a government-to-government relationship. As a result, the Department believes that additional process elements are not required.

IV. Public Meetings and Tribal Consultations

An integral part of this rulemaking process is the opportunity for Department officials to meet with leaders and members of the Native Hawaiian community. Likewise, a central feature of the government-to-government relationships between the United States and each federally recognized tribe in the continental United States is formal consultation between Federal and tribal officials. The Department conducts these tribal consultations in accordance with Executive Order 13175, 65 FR 67249 (Nov. 6, 2000); the Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, 74 FR 57881 (Nov. 5, 2009); and the Department of the Interior Policy on Consultation with Indian Tribes. Tribal consultations are only for elected or duly appointed representatives of federally recognized tribes in the continental United States, as discussions are held on a government-to-government basis. These sessions may be closed to the public.

A. Past Meetings and Consultations

Shortly after the ANPRM's June 2014 publication in the **Federal Register**, staff from the Departments of the Interior and Justice conducted 15 public meetings across the State of Hawaii to gather testimony on the ANPRM. Hundreds of stakeholders and interested parties attended sessions on the islands of Hawaii, Kauai, Lanai, Maui, Molokai, and Oahu, resulting in over 40 hours of oral testimony on the ANPRM. Also during that time, staff conducted extensive community outreach with Native Hawaiian organizations, groups, and community leaders. The Department also conducted five mainland regional consultations in Indian country that were also supplemented with targeted community outreach in locations with significant Native Hawaiian populations.

B. Future Meetings and Consultations

To build on the extensive record gathered during the ANPRM, the Department will hold teleconferences to collect public comment on the proposed rule. The Department will also consult with Native Hawaiian organizations and with federally recognized tribes in the continental United States by teleconference. Interested individuals may also submit written comments on this proposed rule at any time during the comment period. The Department will consider statements made during the teleconferences and will include them in the administrative record along with the written comments. The Department strongly encourages Native Hawaiian organizations and federally recognized tribes in the continental United States to hold their own meetings to develop comments on this proposed rule, and to share the outcomes of those meetings with us.

1. *Public Meetings by Teleconference.* The Department will conduct two public meetings by teleconference to receive public comments on this proposed rule on the following schedule:

Monday, October 26, 2015

2 p.m.–5 p.m. Eastern Time/8 a.m.–11 a.m. Hawaii Standard Time
Call-in number: 1–888–947–9025
Passcode: 1962786

Saturday, November 7, 2015

3 p.m.–6 p.m. Eastern Time/9 a.m.–12 p.m. Hawaii Standard Time
Call-in number: 1–888–947–9025
Passcode: 1962786

2. *Consultations with Native Hawaiian Organizations.* The Department is legally required to consult with Native Hawaiian organizations in some circumstances. Although such consultation is not required for this proposed rule, the Department is electing to conduct such consultation in order to enhance participation from the Native Hawaiian community. The Department maintains a Native Hawaiian Organization Notification List, *available at www.doi.gov/ohr/nholist/nhol,* which includes Native Hawaiian organizations registered through the designated process. Representatives from Native Hawaiian organizations that appear on this list are invited to participate in a teleconference scheduled below:

Tuesday, October 27, 2015

3 p.m.–6 p.m. Eastern Time/9 a.m.–12 p.m. Hawaii Standard Time
Call-in number: 1–888–947–9025
Passcode: 1962786

Participation will be limited to one telephone line for each listed organization and up to two of their representatives. Only those organizations that appear on the Native Hawaiian Organization Notification List may participate in this consultation. Please RSVP to *RSVPpart50@doi.gov* for this meeting only. No RSVP is necessary for the other meetings.

3. *Tribal Consultation.* The Department will also conduct a tribal consultation by teleconference. The Department conducts such consultations in accordance with Executive Order 13175, 65 FR 67249 (Nov. 6, 2000); the Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, 74 FR 57881 (Nov. 5, 2009); and the Department of the Interior Policy on Consultation with Indian Tribes. Tribal consultations are only for elected or duly appointed representatives of federally recognized tribes in the continental United States, as discussions are held on a government-to-government basis. The following teleconference may be closed to the public:

Wednesday, November 4, 2015

1:30 p.m.–4:30 p.m. Eastern Time
Call-in number: 1–888–947–9025
Passcode: 1962786

Meeting information will also be made available for the tribal consultations in the continental United States by ''Dear Tribal Leader'' notice.

Further information about these meetings, and notice of any additional meetings, will be posted on the ONHR Web site (*http://www.doi.gov/ohr/*).

V. Procedural Matters

A. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA determined that this proposed rule is significant because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. The Department developed this proposed rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

The Department certifies that this proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not result in the expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. The rule's requirements will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

This proposed rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector

of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

Under the criteria in Executive Order 12630, this proposed rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable ''taking.'' A takings implications assessment therefore is not required.

F. Federalism (E.O. 13132)

Under the criteria in Executive Order 13132, this proposed rule has no substantial and direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. A federalism implications assessment therefore is not required.

G. Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175)

Under Executive Order 13175, the Department held several consultation sessions with federally recognized tribes in the continental United States. Details on these consultation sessions and on comments the Department received from tribes and intertribal organizations are described above. The Department considered each of those comments and addressed them, where possible, in the proposed rule.

I. Paperwork Reduction Act

This proposed rule does not require an information collection from ten or more parties, and a submission under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.,* is not required.

J. National Environmental Policy Act

This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, or procedural nature. *See* 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act of 1969.

K. Information Quality Act

In developing this proposed rule we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

L. Effects on the Energy Supply (E.O. 13211)

This proposed rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required. This rule will not have a significant effect on the nation's energy supply, distribution, or use.

M. Clarity of This Regulation

Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, require the Department to write all rules in plain language. This means that each rule the Department publishes must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that the Department did not met these requirements, please send comments by one of the methods listed in the ''COMMENTS'' section. To better help the Department revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

N. Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask the Department in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

If you send an email comment directly to the Department without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the Department recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the Department cannot read your comment due to technical difficulties and cannot contact you for clarification, the Department may not be able to consider your comment. Electronic files should avoid the use of special characters, avoid any form of encryption, and be free of any defects or viruses.

The Department cannot ensure that comments received after the close of the comment period (*see* **DATES**) will be included in the docket for this rulemaking and considered. Comments sent to an address other than those listed above will not be included in the docket for this rulemaking.

List of Subjects in 43 CFR Part 50

Administrative practice and procedure, Indians—tribal government.

Proposed Rule

For the reasons stated in the preamble, the Department of the Interior proposes to amend title 43 of the Code of Federal Regulations by adding part 50 to read as follows:

PART 50—PROCEDURES FOR REESTABLISHING A FORMAL GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH THE NATIVE HAWAIIAN COMMUNITY

Subpart A—General Provisions

Sec.

Subpart B—Criteria for Reestablishing a Formal Government-to-Government Relationship

Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 479a, 479a–1; 43 U.S.C. 1457; Hawaiian Homes Commission Act, 1920 (Act of July 9, 1921, 42 Stat. 108), as amended; Act of March 19, 1959, 73 Stat. 4; Joint Resolution of November 23, 1993, 107 Stat. 1510; Act of November 2, 1994, sec. 103, 108 Stat. 4791; 112 Departmental Manual 28.

Subpart A—General Provisions

§ 50.1 What is the purpose of this part?

This part sets forth the Department's administrative procedure and criteria for reestablishing a formal government-to-government relationship between the United States and the Native Hawaiian community to allow the United States to more effectively implement and administer:

(a) The special political and trust relationship that Congress established between the United States and the Native Hawaiian community; and

(b) The Federal programs, services, and benefits that Congress created specifically for the Native Hawaiian community (*see, e.g.,* 12 U.S.C. 1715z–13b; 20 U.S.C. 80q *et seq.;* 20 U.S.C. 7511 *et seq.;* 25 U.S.C. 3001 *et seq.;* 25 U.S.C. 4221 *et seq.;* 42 U.S.C. 2991 *et seq.;* 42 U.S.C. 3057g *et seq.;* 42 U.S.C. 11701 *et seq.;* 54 U.S.C. 302706).

§ 50.2 How will reestablishment of this formal government-to-government relationship occur?

A Native Hawaiian government seeking to reestablish a formal government-to-government relationship with the United States under this part must submit to the Secretary a request as described in § 50.10. Reestablishment of a formal government-to-government relationship will occur if the Secretary grants the request as described in §§ 50.40 through 50.43.

§ 50.3 May the Native Hawaiian community reorganize itself based on island or other geographic, historical, or cultural ties?

The Secretary will reestablish a formal government-to-government relationship with only one sovereign Native Hawaiian government, which may include political subdivisions with limited powers of self-governance defined in the Native Hawaiian government's governing document.

§ 50.4 What definitions apply to terms used in this part?

As used in this part, the following terms have the meanings given in this section:

Continental United States means the contiguous 48 states and Alaska.

Department means the Department of the Interior.

DHHL means the Department of Hawaiian Home Lands, or the agency or department of the State of Hawaii that is responsible for administering the HHCA.

Federal Indian programs, services, and benefits means any federally funded or authorized special program, service, or benefit provided by any Federal agency (including, but not limited to, the Bureau of Indian Affairs and the Indian Health Service) to Indian tribes in the continental United States or their members because of their status as Indians.

Federal Native Hawaiian programs, services, and benefits means any federally funded or authorized special program, service, or benefit provided by any Federal agency to a Native Hawaiian government, its political subdivisions (if any), its members, the Native Hawaiian community, Native Hawaiians, or HHCA-eligible Native Hawaiians because of their status as Native Hawaiians.

Governing document means a written document (*e.g.,* constitution) embodying a government's fundamental and organic law.

Hawaiian home lands means all lands given the status of Hawaiian home lands under the HHCA (or corresponding provisions of the Constitution of the State of Hawaii), the HHLRA, or any other Act of Congress, and all lands acquired pursuant to the HHCA.

HHCA means the Hawaiian Homes Commission Act, 1920 (Act of July 9, 1921, 42 Stat. 108), as amended.

HHCA-eligible Native Hawaiian means a Native Hawaiian individual who meets the definition of ''native Hawaiian'' in HHCA sec. 201(a)(7), 42 Stat. 108, regardless of whether the individual resides on Hawaiian home lands, is an HHCA lessee, is on a wait list for an HHCA lease, or receives any benefits under the HHCA.

HHLRA means the Hawaiian Home Lands Recovery Act (Act of November 2, 1995, 109 Stat. 357), as amended.

Native Hawaiian means any individual who is a:

(1) Citizen of the United States, and

(2) Descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

Native Hawaiian community means the distinct indigenous political community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship.

Native Hawaiian Governing Entity means the Native Hawaiian community's representative sovereign government with which the Secretary reestablishes a formal government-to-government relationship.

Request means an express written submission to the Secretary asking for designation as the Native Hawaiian Governing Entity.

Requester means the government that submits to the Secretary a request seeking to be designated as the Native Hawaiian Governing Entity.

Secretary means the Secretary of the Interior or that officer's authorized representative.

Subpart B—Criteria for Reestablishing a Formal Government-to-Government Relationship

§ 50.10 What are the required elements of a request to reestablish a formal government-to-government relationship with the United States?

A request must include the following seven elements:

(a) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community drafted the governing document, as described in § 50.11;

(b) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community determined who can

participate in ratifying a governing document, consistent with § 50.12;

(c) The duly ratified governing document, as described in § 50.13;

(d) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community adopted or approved the governing document in a ratification referendum, as described in § 50.14;

(e) A written narrative with supporting documentation thoroughly describing how and when elections were conducted for government offices identified in the governing document, as described in § 50.15;

(f) A duly enacted resolution of the governing body authorizing an officer to certify and submit to the Secretary a request seeking the reestablishment of a formal government-to-government relationship with the United States; and

(g) A certification, signed and dated by the authorized officer, stating that the submission is the request of the governing body.

§ 50.11 What process is required in drafting the governing document?

The written narrative thoroughly describing the process for drafting the governing document must describe how the process ensured that the document was based on meaningful input from representative segments of the Native Hawaiian community and reflects the will of the Native Hawaiian community.

§ 50.12 What documentation is required to demonstrate how the Native Hawaiian community determined who could participate in ratifying a governing document?

The written narrative thoroughly describing how the Native Hawaiian community determined who could participate in ratifying a governing document must explain the processes for verifying that participants were Native Hawaiians and for verifying those who were also HHCA-eligible Native Hawaiians, and should further explain how those processes were rational and reliable. For purposes of determining who may participate in the ratification process:

(a) The Native Hawaiian community may provide:

(1) That the definition for a Native Hawaiian may be satisfied by:

(i) Enumeration in official DHHL records demonstrating eligibility under the HHCA, excluding noncitizens of the United States;

(ii) Enumeration on a roll of Native Hawaiians certified by a State of Hawaii commission or agency under State law, where enumeration is based on documentation that verifies descent, excluding noncitizens of the United States; or

(iii) Other means to document generation-by-generation descent from a Native Hawaiian; and

(2) That the definition for an HHCA-eligible Native Hawaiian may be satisfied by:

(i) Enumeration in official DHHL records demonstrating eligibility under the HHCA, excluding noncitizens of the United States; or

(ii) Other records or documentation demonstrating eligibility under the HHCA; or

(b) The Native Hawaiian community may use a roll of Native Hawaiians certified by a State of Hawaii commission or agency under State law as an accurate and complete list of Native Hawaiians eligible to vote in the ratification referendum: *Provided,* that:

(1) The roll was:

(i) Based on documentation that verified descent;

(ii) Compiled in accordance with applicable due-process principles; and

(iii) Published and made available for inspection following certification; and

(2) The Native Hawaiian community also:

(i) Included adult citizens of the United States who demonstrated eligibility under the HHCA according to official DHHL records;

(ii) Removed persons who are not citizens of the United States;

(iii) Removed persons who were younger than 18 years of age on the last day of the ratification referendum;

(iv) Removed persons who were enumerated without documentation that verified descent; and

(v) Removed persons who voluntarily requested to be removed.

§ 50.13 What must be included in the governing document?

The governing document must:

(a) State the government's official name;

(b) Prescribe the manner in which the government exercises its sovereign powers;

(c) Establish the institutions and structure of the government, and of its political subdivisions (if any) that are defined in a fair and reasonable manner;

(d) Authorize the government to negotiate with governments of the United States, the State of Hawaii, and political subdivisions of the State of Hawaii, and with non-governmental entities;

(e) Provide for periodic elections for government offices identified in the governing document;

(f) Describe the criteria for membership, which:

(1) Must permit HHCA-eligible Native Hawaiians to enroll;

(2) May permit Native Hawaiians who are not HHCA-eligible Native Hawaiians, or some defined subset of that group that is not contrary to Federal law, to enroll;

(3) Must exclude persons who are not Native Hawaiians;

(4) Must establish that membership is voluntary and may be relinquished voluntarily; and

(5) Must exclude persons who voluntarily relinquished membership.

(g) Protect and preserve Native Hawaiians' rights, protections, and benefits under the HHCA and the HHLRA;

(h) Protect and preserve the liberties, rights, and privileges of all persons affected by the government's exercise of its powers, *see* 25 U.S.C. 1301 *et seq.;*

(i) Describe the procedures for proposing and ratifying amendments to the governing document; and

(j) Not contain provisions contrary to Federal law.

§ 50.14 What information about the ratification referendum must be included in the request?

The written narrative thoroughly describing the ratification referendum must include the following information:

(a) A certification of the results of the ratification referendum including:

(1) The date or dates of the ratification referendum;

(2) The number of Native Hawaiians, regardless of whether they were HHCA-eligible Native Hawaiians, who cast a vote in favor of the governing document;

(3) The total number of Native Hawaiians, regardless of whether they were HHCA-eligible Native Hawaiians, who cast a ballot in the ratification referendum;

(4) The number of HHCA-eligible Native Hawaiians who cast a vote in favor of the governing document; and

(5) The total number of HHCA-eligible Native Hawaiians who cast a ballot in the ratification referendum.

(b) A description of how the Native Hawaiian community conducted the ratification referendum that demonstrates:

(1) How and when the Native Hawaiian community made the full text of the proposed governing document (and a brief impartial description of that document) available to Native Hawaiians prior to the ratification referendum, through the Internet, the news media, and other means of communication;

(2) How and when the Native Hawaiian community notified Native Hawaiians about how and when it

would conduct the ratification referendum;

(3) How the Native Hawaiian community accorded Native Hawaiians a reasonable opportunity to vote in the ratification referendum;

(4) How the Native Hawaiian community prevented voters from casting more than one ballot in the ratification referendum; and

(5) How the Native Hawaiian community ensured that the ratification referendum:

(i) Was free and fair;

(ii) Was held by secret ballot or equivalent voting procedures;

(iii) Was open to all persons who were verified as satisfying the definition of a Native Hawaiian (consistent with § 50.12) and were 18 years of age or older, regardless of residency;

(iv) Did not include in the vote tallies votes cast by persons who were not Native Hawaiians; and

(v) Did not include in the vote tallies for HHCA-eligible Native Hawaiians votes cast by persons who were not HHCA-eligible Native Hawaiians.

(c) A description of how the Native Hawaiian community verified whether a potential voter in the ratification referendum was a Native Hawaiian and whether that potential voter was also an HHCA-eligible Native Hawaiian, consistent with § 50.12.

§ 50.15 What information about the elections for government offices must be included in the request?

The written narrative thoroughly describing how and when elections were conducted for government offices identified in the governing document, including members of the governing body, must show that the elections were:

(a) Free and fair;

(b) Held by secret ballot or equivalent voting procedures; and

(c) Open to all eligible Native Hawaiian members as defined in the governing document.

§ 50.16 What criteria will the Secretary apply when deciding whether to reestablish the formal government-to-government relationship?

The Secretary shall grant a request if the Secretary determines that the following exclusive list of eight criteria has been met:

(a) The request includes the seven required elements described in § 50.10;

(b) The process by which the Native Hawaiian community drafted the governing document met the requirements of § 50.11;

(c) The process by which the Native Hawaiian community determined who could participate in ratifying the governing document met the requirements of § 50.12;

(d) The duly ratified governing document, submitted as part of the request, meets the requirements of § 50.13;

(e) The ratification referendum for the governing document met the requirements of § 50.14(b) and (c) and was conducted in a manner not contrary to Federal law;

(f) The elections for the government offices identified in the governing document, including members of the governing body, were consistent with § 50.15 and were conducted in a manner not contrary to Federal law;

(g) The number of votes that Native Hawaiians, regardless of whether they were HHCA-eligible Native Hawaiians, cast in favor of the governing document exceeded half of the total number of ballots that Native Hawaiians cast in the ratification referendum: *Provided,* that the number of votes cast in favor of the governing document in the ratification referendum was sufficiently large to demonstrate broad-based community support among Native Hawaiians; *and Provided Further,* that, if fewer than 30,000 Native Hawaiians cast votes in favor of the governing document, this criterion is not satisfied; *and Provided Further,* that, if more than 50,000 Native Hawaiians cast votes in favor of the governing document, the Secretary shall apply a strong presumption that this criterion is satisfied; and

(h) The number of votes that HHCA-eligible Native Hawaiians cast in favor of the governing document exceeded half of the total number of ballots that HHCA-eligible Native Hawaiians cast in the ratification referendum: *Provided,* that the number of votes cast in favor of the governing document in the ratification referendum was sufficiently large to demonstrate broad-based community support among HHCA-eligible Native Hawaiians; *and Provided Further,* that, if fewer than 9,000 HHCA-eligible Native Hawaiians cast votes in favor of the governing document, this criterion is not satisfied; *and Provided Further,* that, if more than 15,000 HHCA-eligible Native Hawaiians cast votes in favor of the governing document, the Secretary shall apply a strong presumption that this criterion is satisfied.

Subpart C—Process for Reestablishing a Formal Government-to-Government Relationship

Submitting a Request

§ 50.20 How may a request be submitted?

A request under this part may be submitted to the Department of the Interior, 1849 C Street NW., Washington, DC 20240.

§ 50.21 Is the Department available to provide technical assistance?

Yes. The Department may provide technical assistance to facilitate compliance with this part and with other Federal law, upon request for assistance.

Public Comments and Responses to Public Comments

§ 50.30 What opportunity will the public have to comment on a request?

(a) Within 20 days after receiving a request that is consistent with § 50.10 and § 50.16(g)–(h), the Department will publish notice of receipt of the request in the **Federal Register** and post the following on the Department Web site:

(1) The request, including the governing document;

(2) The name and mailing address of the requester;

(3) The date of receipt; and

(4) Notice of an opportunity for the public, within a 30-day comment period following the Web site posting, to submit comments and evidence on whether the request meets the criteria described in § 50.16.

(b) Within 10 days after the close of the comment period, the Department will post on its Web site any comment or notice of evidence relating to the request that was timely submitted to the Department under paragraph (a)(4) of this section.

§ 50.31 What opportunity will the requester have to respond to comments?

Following the Web site posting described in § 50.30(b), the requester will have 30 days to respond to any comment or evidence that was timely submitted to the Department under § 50.30(a)(4).

§ 50.32 May the deadlines in this part be extended?

Yes. Upon a finding of good cause, the Secretary may extend any deadline in this part by posting on the Department Web site and publishing in the **Federal Register** the length of and the reasons for the extension.

The Secretary's Decision

§ 50.40 When will the Secretary issue a decision?

The Secretary may request additional documentation and explanation with respect to material required to be submitted by the requester under this part. The Secretary will apply the criteria described in § 50.16 and endeavor to either grant or deny a request within 120 days of determining

that the requester's submission is complete, after receiving any additional information the Secretary deems necessary and after receiving all the information described in §§ 50.30 and 50.31.

§ 50.41 What will the Secretary's decision include?

The decision will respond to significant public comments and summarize the evidence, reasoning, and analyses that are the basis for the Secretary's determination regarding whether the request meets the criteria described in § 50.16.

§ 50.42 When will the Secretary's decision take effect?

The Secretary's decision will take effect with the publication of a document in the **Federal Register**.

§ 50.43 What does it mean for the Secretary to grant a request?

When a decision granting a request takes effect, the requester will immediately be identified as the Native Hawaiian Governing Entity (or the official name stated in that entity's governing document), the special political and trust relationship between the United States and the Native Hawaiian community will be reaffirmed, and a formal government-to-government relationship will be reestablished with the Native Hawaiian Governing Entity as the sole representative sovereign government of the Native Hawaiian community.

§ 50.44 How will the formal government-to-government relationship between the United States Government and the Native Hawaiian Governing Entity be implemented?

(a) Upon reestablishment of the formal government-to-government relationship, the Native Hawaiian Governing Entity will have the same government-to-government relationship under the United States Constitution and Federal law as the government-to-government relationship between the United States and a federally recognized tribe in the continental United States, and the same inherent sovereign governmental authorities.

(b) The Native Hawaiian Governing Entity will be subject to Congress's plenary authority.

(c) Absent Federal law to the contrary, any member of the Native Hawaiian Governing Entity will be eligible for current Federal Native Hawaiian programs, services, and benefits.

(d) The Native Hawaiian Governing Entity, its political subdivisions (if any), and its members will not be eligible for Federal Indian programs, services, and benefits unless Congress expressly and specifically has declared the Native Hawaiian community, the Native Hawaiian Governing Entity (or the official name stated in that entity's governing document), its political subdivisions (if any), its members, Native Hawaiians, or HHCA-eligible Native Hawaiians to be eligible.

(e) Reestablishment of the formal government-to-government relationship will not authorize the Native Hawaiian Governing Entity to sell, dispose of, lease, or encumber Hawaiian home lands or interests in those lands, or to diminish any Native Hawaiian's rights, protections, or benefits, including any immunity from State or local taxation, granted by:

(1) The HHCA;

(2) The HHLRA;

(3) The Act of March 18, 1959, 73 Stat. 4; or

(4) The Act of November 11, 1993, secs. 10001–10004, 107 Stat. 1418, 1480–84.

(f) Reestablishment of the formal government-to-government relationship will not affect the title, jurisdiction, or status of Federal lands and property in Hawaii.

(g) Nothing in this part impliedly amends, repeals, supersedes, abrogates, or overrules any provision of Federal law, including case law, affecting the privileges, immunities, rights, protections, responsibilities, powers, limitations, obligations, authorities, or jurisdiction of any tribe in the continental United States.

Michael L. Connor,

Deputy Secretary.

[FR Doc. 2015–24712 Filed 9–29–15; 11:15 am]

BILLING CODE 4334–63–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2015–0045]

RIN 2127–AL01

Federal Motor Vehicle Safety Standards; Correction

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Proposed rule; correction.

SUMMARY: This document corrects the preamble to a proposed rule published in the **Federal Register** of May 21, 2015, regarding Federal Motor Vehicle Safety Standard for Motorcycle Helmets. This correction removes language relating to the incorporation by reference of certain publications that was inadvertently and inappropriately included in the preamble to the proposed rule.

DATES: October 1, 2015.

FOR FURTHER INFORMATION CONTACT: Mr. Otto Matheke, Office of the Chief Counsel (Telephone: 202–366–5253) (Fax: 202–366–3820).

SUPPLEMENTARY INFORMATION:

Correction

In proposed rule FR Doc. 2015–11756 beginning on page 29458 in the issue of May 21, 2015, make the following correction in the **DATES** section. On page 29458 in the 2nd column, remove at the end of the second paragraph the following:

''The incorporation by reference of certain publications listed in the proposed rule is approved by the Director of the Federal Register as of May 22, 2017.''

Dated: September 25, 2015.

Frank S. Borris II,

Acting Associate Administrator for Enforcement.

[FR Doc. 2015–24918 Filed 9–30–15; 8:45 am]

BILLING CODE 4910–59–P

9th Circuit Case Number(s) 15-17134

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing 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 (date) Nov 9, 2015 .

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.

Signature (use "s/" format) s/ Robert P. Stockman

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

4334-63

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 50

Docket No. DOI-2015-0005

145D0102DM DS6CS00000 DLSN00000.000000 DX.6CS25 241A0

RIN 1090-AB05

Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community

AGENCY: Office of the Secretary, Department of the Interior.

ACTION: Proposed rule.

SUMMARY: The Secretary of the Interior (Secretary) is proposing an administrative rule to facilitate the reestablishment of a formal government-to-government relationship with the Native Hawaiian community to more effectively implement the special political and trust relationship that Congress has established between that community and the United States. The proposed rule does not attempt to reorganize a Native Hawaiian government or draft its constitution, nor does it dictate the form or structure of that government. Rather, the proposed rule would establish an administrative procedure and criteria that the Secretary would use if the Native Hawaiian community forms a unified government that then seeks a formal government-to-government relationship with the United States. Consistent with the Federal policy of indigenous self-determination and Native self-governance, the Native Hawaiian community itself would determine whether and how to reorganize its government.

EXHIBIT 15

DATES: Comments on this proposed rule must be received on or before [INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Please see SUPPLEMENTARY INFORMATION for dates and locations of public meetings and tribal consultations.

ADDRESSES: You may submit comments by either of the methods listed below. Please use Regulation Identifier Number 1090-AB05 in your message.

1. Federal eRulemaking portal: *http://www.regulations.gov*. Follow the instructions on the website for submitting and viewing comments. The rule has been assigned Docket ID DOI-2015-0005.
2. Email: *part50@doi.gov*. Include the number 1090-AB05 in the subject line.
3. U.S. mail, courier, or hand delivery: Office of the Secretary, Department of the Interior, Room 7228, 1849 C Street NW, Washington, DC 20240.

We request that you send comments only by one of the methods described above. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us.

FOR FURTHER INFORMATION CONTACT: Antoinette Powell, telephone (202) 208-5816 (not a toll-free number); *part50@doi.gov*.

SUPPLEMENTARY INFORMATION:

Public Comment

The Secretary is proposing an administrative rule to provide a procedure and criteria for reestablishing a formal government-to-government relationship between the United States and the Native Hawaiian community. The Department would like to hear from leaders and members of the Native Hawaiian community and of federally recognized tribes in the

continental United States (i.e., the contiguous 48 States and Alaska). We also welcome comments and information from the State of Hawaii and its agencies, other government agencies, and members of the public. We encourage all persons interested in this Notice of Proposed Rulemaking to submit comments on the proposed rule.

To be most useful, and most likely to inform decisions on the content of a final administrative rule, comments should:

—Be specific;

—Be substantive;

—Explain the reasoning behind the comments; and

—Address the proposed rule.

Most laws and other sources cited in this proposal will be available on the Department of the Interior's Office of Native Hawaiian Relations (ONHR) website at *http://www.doi.gov/ohr/*.

I. Background

Over many decades, Congress enacted more than 150 statutes recognizing and implementing a special political and trust relationship with the Native Hawaiian community. Among other things, these statutes create programs and services for members of the Native Hawaiian community that are in many respects analogous to, but separate from, the programs and services that Congress enacted for federally recognized tribes in the continental United States. But during this same period, the United States has not partnered with Native Hawaiians on a government-to-government basis, at least partly because there has been no formal, organized Native Hawaiian government since 1893, when a United States officer, acting without authorization of the U.S. government, conspired with residents of Hawaii to overthrow the Kingdom of Hawaii. Many Native Hawaiians contend that their community's opportunities to thrive would be significantly bolstered by reorganizing their sovereign Native Hawaiian

government to engage the United States in a government-to-government relationship, exercise inherent sovereign powers of self-governance and self-determination on par with those exercised by tribes in the continental United States, and facilitate the implementation of programs and services that Congress created specifically to benefit the Native Hawaiian community.

The United States has a unique political and trust relationship with federally recognized tribes across the country, as set forth in the United States Constitution, treaties, statutes, Executive Orders, administrative regulations, and judicial decisions. The Federal Government's relationship with these tribes is guided by a trust responsibility — a longstanding, paramount commitment to protect their unique rights and ensure their well-being, while respecting their inherent sovereignty. In recognition of that special commitment — and in fulfillment of the solemn obligations it entails — the United States, acting through the Department of the Interior (Department), developed processes to help tribes in the continental United States establish government-to-government relationships with the United States.

Strong Native governments are critical to tribes' exercising their inherent sovereign powers, preserving their culture, and sustaining prosperous and resilient Native American communities. It is especially true that, in the current era of tribal self-determination, formal government-to-government relationships between tribes and the United States are enormously beneficial not only to Native Americans but to *all* Americans. Yet the benefits of a formal government-to-government relationship have long been denied to members of one of the Nation's largest indigenous communities: Native Hawaiians. This proposed rule provides a process to reestablish a formal government-to-government relationship with the Native Hawaiian community.

A. The Relationship Between the United States and the Native Hawaiian Community

Native Hawaiians are the aboriginal, indigenous people who settled the Hawaiian archipelago as early as 300 A.D., exercised sovereignty over their island archipelago and, over time, founded the Kingdom of Hawaii. *See* S. Rep. No. 111-162, at 2-3 (2010). During centuries of self-rule and at the time of Western contact in 1778, "the Native Hawaiian people lived in a highly organized, self-sufficient subsistence social system based on a communal land tenure system with a sophisticated language, culture, and religion." 20 U.S.C. 7512(2); *accord* 42 U.S.C. 11701(4). Although the indigenous people shared a common language, ancestry, and religion, four independent chiefdoms governed the eight islands until 1810, when King Kamehameha I unified the islands under one Kingdom of Hawaii. *See Rice v. Cayetano,* 528 U.S. 495, 500-01 (2000). *See generally* Davianna Pomaikai McGregor & Melody Kapilialoha MacKenzie, *Moolelo Ea O Na Hawaii: History of Native Hawaiian Governance in Hawaii* (2014), *available at* http://www.regulations.gov/#!documentDetail;D=DOI-2014-0002-0005 (comment number 2438) [hereinafter *Moolelo Ea O Na Hawaii*].

Throughout the nineteenth century and until 1893, the United States "recognized the independence of the Hawaiian Nation," "extended full and complete diplomatic recognition to the Hawaiian Government," and entered into several treaties with the Hawaiian monarch. 42 U.S.C. 11701(6); *accord* 20 U.S.C. 7512(4); *see Rice,* 528 U.S. at 504 (citing treaties that the two countries signed in 1826, 1849, 1875, and 1887); *Moolelo Ea O Na Hawaii* 169-71, 195-200. But during that same period, Westerners became "increasing[ly] involve[d] . . . in the economic and political affairs of the Kingdom," leading to the overthrow of the Kingdom in 1893 by a small group of non-Hawaiians, aided by the United States Minister to Hawaii and the Armed Forces of the United States. *Rice,* 528 U.S. at 501, 504-05. *See generally Moolelo*

Ea O Na Hawaii 313-25; S. Rep. No. 111-162, at 3-6 (2010); *Cohen's Handbook of Federal Indian Law* sec. 4.07[4][b], at 360-61 (2012 ed.).

Following the overthrow of Hawaii's monarchy, Queen Liliuokalani, while yielding her authority under protest to the United States, called for reinstatement of Native Hawaiian governance. Joint Resolution of November 23, 1993, 107 Stat. 1511. The Native Hawaiian community answered, alerting existing Native Hawaiian political organizations and groups from throughout the islands to reinstate the Queen and resist the newly formed Provisional Government and any attempt at annexation. *See Moolelo Ea O Na Hawaii* at 36-39. In 1895, Hawaiian nationalists loyal to Queen Liliuokalani attempted to regain control of the Hawaiian government. *Id.* at 39-40. These attempts resulted in hundreds of arrests and convictions, including the arrest of the Queen herself, who was tried and found guilty of misprision or concealment of treason. The Queen was subsequently forced to abdicate. *Id.* These events, however, did little to suppress Native Hawaiian opposition to annexation. During this period, civic organizations convened a series of large public meetings of Native Hawaiians opposing annexation by the United States and led a petition drive that gathered 21,000 signatures, mostly from Native Hawaiians, opposing annexation (the "Kue Petitions"). *See Moolelo Ea O Na Hawaii* 342-45.

The United States nevertheless annexed Hawaii "without the consent of or compensation to the indigenous people of Hawaii or their sovereign government who were thereby denied the mechanism for expression of their inherent sovereignty through self-government and self-determination." 42 U.S.C. 11701(11). The Republic of Hawaii ceded its land to the United States, and Congress passed a joint resolution annexing the islands in 1898. *See Rice*, 528 U.S. at 505. The Hawaiian Organic Act, enacted in 1900, established the Territory of Hawaii,

placed ceded lands under United States control, and directed the use of proceeds from those lands to benefit the inhabitants of Hawaii. Act of Apr. 30, 1900, 31 Stat. 141.

Hawaii was a U.S. territory for six decades prior to 1959, and during much of this period, educated Native Hawaiians, and a government led by them, were perceived as threats to the incipient territorial government. Consequently, the use of the Hawaiian language in education in public schools was declared unlawful. 20 U.S.C. 7512(19). But various entities connected to the Kingdom of Hawaii adopted other methods of continuing their government and education. Specifically, the Royal Societies, the Bishop Estate (now Kamehameha Schools), the Alii trusts, and civic clubs are examples of Native Hawaiians' continuing efforts to keep their culture, language, and community alive. *See Moolelo Ea O Na Hawaii* 456-58. Indeed, post annexation, Native Hawaiians maintained their separate identity as a single distinct political community through a wide range of cultural, social, and political institutions, as well as through efforts to develop programs to provide governmental services to Native Hawaiians. For example, Ahahui Puuhonua O Na Hawaii (Hawaiian Protective Association) was a political organization formed in 1914 under the leadership of Prince Jonah Kuhio Kalanianaole (Prince Kuhio) alongside other Native Hawaiian political leaders. Its principal purposes were to maintain unity among Native Hawaiians, protect Native Hawaiian interests (including by lobbying the territorial legislature), and promote the education, health, and economic development of Native Hawaiians. It was organized "for the sole purpose of protecting the Hawaiian people and of conserving and promoting the best things of their tradition." Hawaiian Homes Commission Act, 1920: Hearing on H.R. 13500 Before the S. Comm. on Territories, 66th Cong., 3d Sess. 44 (1920) (statement of Rev. Akaiko Akana). *See generally Moolelo Ea O Na Hawaii* 405-10. The Association established 12 standing committees, published a newspaper, undertook dispute resolution,

promoted the education and the social welfare of the Native Hawaiian community, and developed the framework that eventually became the Hawaiian Homes Commission Act (HHCA). In 1918, Prince Kuhio, who served as the Territory of Hawaii's Delegate to Congress, and other prominent Hawaiians founded the Hawaiian Civic Clubs, whose goal was "to perpetuate the language, history, traditions, music, dances and other cultural traditions of Hawaii." McGregor, *Aina Hoopulapula: Hawaiian Homesteading*, 24 Hawaiian J. of Hist. 1, 5 (1990). The clubs' first project was to secure enactment of the HHCA in 1921 to set aside and protect Hawaiian home lands.

B. Congress's Recognition of Native Hawaiians as a Political Community

By 1919, the decline in the Native Hawaiian population — by some estimates from several hundred thousand in 1778 to only 22,600 — led Delegate Prince Kuhio Kalanianaole, Native Hawaiian politician and Hawaiian Civic Clubs co-founder John Wise, and U.S. Secretary of the Interior John Lane to recommend to Congress that land be set aside to help Native Hawaiians reestablish their traditional way of life. *See* H.R. Rep. No. 66-839, at 4 (1920); 20 U.S.C. 7512(7). This recommendation resulted in enactment of the HHCA, which designated tracts totaling approximately 200,000 acres on the different islands for exclusive homesteading by eligible Native Hawaiians. Act of July 9, 1921, 42 Stat. 108; see also *Rice*, 528 U.S. at 507 (HHCA's stated purpose was "to rehabilitate the native Hawaiian population") (citing H.R. Rep. No. 66-839, at 1-2 (1920)); *Moolelo Ea O Na Hawaii* 410-12, 421-33. The HHCA limited benefits to Native Hawaiians with a high degree of Native Hawaiian ancestry, suggesting a Congressional understanding that Native Hawaiians frequently had two Native Hawaiian parents and many Native Hawaiian ancestors, which indicated that this group maintained a distinct political community. The HHCA's proponents repeatedly referred to Native Hawaiians as a

"people" (at times, as a "dying people" or a "noble people"). *See*, e.g., H.R. Rep. No. 66-839, at 2-4 (1920); *see also* 59 Cong. Rec. 7453 (1920) (statement of Delegate Prince Kuhio) ("[I]f conditions continue to exist as they do today . . . , my people . . . will pass from the face of the earth.").

In 1938, Congress again exercised its trust responsibility by granting Native Hawaiians exclusive fishing rights in the Hawaii National Park. Act of June 20, 1938, ch. 530, sec. 3(a), 52 Stat. 784.

In 1959, as a condition of statehood, the Hawaii Admission Act required the State of Hawaii to manage and administer two public trusts for the indigenous Native Hawaiian people. Act of March 19, 1959, 73 Stat. 4. First, the Federal Government required the State to adopt the HHCA as a provision of its constitution, which effectively ensured continuity of the Hawaiian home lands program. *Id.* sec. 4, 73 Stat. 5. Second, it required the State to manage a Congressionally mandated public land trust for the benefit of the general public and Native Hawaiians. *Id.* sec. 5(f), 73 Stat. 6 (requiring that lands transferred to the State be held by the State "as a public trust . . . for [among other purposes] the betterment of the conditions of native Hawaiians, as defined in the [HHCA], as amended"). In addition, the Federal Government maintained a continuing role in the management and disposition of the home lands. *See* Admission Act § 4; Hawaiian Home Lands Recovery Act (HHLRA), Act of November 2, 1995, 109 Stat. 357.

Since Hawaii's admission to the United States, Congress has enacted dozens of statutes on behalf of Native Hawaiians pursuant to the United States' recognized political relationship and trust responsibility. The Congress:

- Established special Native Hawaiian programs in the areas of health care, education,

loans, and employment. *See*, e.g., Native Hawaiian Health Care Improvement Act, 42 U.S.C. 11701-11714; Native Hawaiian Education Act, 20 U.S.C. 7511-7517; Workforce Investment Act of 1998, 29 U.S.C. 2911; Native American Programs Act of 1974, 42 U.S.C. 2991-2992.

- Enacted statutes to study and preserve Native Hawaiian culture, language, and historical sites. *See*, e.g., 16 U.S.C. 396d(a); Native American Languages Act, 25 U.S.C. 2901-2906; National Historic Preservation Act of 1966, 54 U.S.C. 302706.
- Extended to the Native Hawaiian people many of "the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities" by classifying Native Hawaiians as "Native Americans" under numerous Federal statutes. 42 U.S.C. 11701(19); *accord* 20 U.S.C. 7902(13); *see*, e.g., American Indian Religious Freedom Act, 42 U.S.C. 1996-1996a. *See generally* 20 U.S.C. 7512(13) (noting that "[t]he political relationship between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States, as evidenced by the inclusion of Native Hawaiians" in many statutes); *accord* 114 Stat. 2874-75, 2968-69 (2000).

In a number of enactments, Congress expressly identified Native Hawaiians as "a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago," 42 U.S.C. 11701(1); *accord* 20 U.S.C. 7512(1), with whom the United States has a "special" "trust" relationship, 42 U.S.C. 11701(15), (16), (18), (20); 20 U.S.C. 7512(8), (10), (11), (12). And when enacting Native Hawaiian statutes, Congress expressly stated in accompanying legislative findings that it was exercising its plenary power over Native American affairs: "The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United

States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii." 42 U.S.C. 11701(17); *see* H.R. Rep. No. 66-839, at 11 (1920) (finding constitutional precedent for the HHCA "in previous enactments granting Indians . . . special privileges in obtaining and using the public lands"); *see also* 20 U.S.C. 7512(12)(B).

In 1993, Congress enacted a joint resolution to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians. Joint Resolution of November 23, 1993, 107 Stat. 1510. In that Joint Resolution, Congress acknowledged that the overthrow of the Kingdom of Hawaii thwarted Native Hawaiians' efforts to exercise their "inherent sovereignty" and "right to self-determination," and stated that "the Native Hawaiian people are determined to preserve, develop, and transmit to future generations their ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions." *Id.* at 1512-13; *see* 20 U.S.C. 7512(20); 42 U.S.C. 11701(2). In light of those findings, Congress "express[ed] its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." Joint Resolution of November 23, 1993, 107 Stat. 1513.

Following a series of hearings and meetings with the Native Hawaiian community in 1999, the U.S. Departments of the Interior and Justice issued "From Mauka to Makai: The River of Justice Must Flow Freely," a report on the reconciliation process between the Federal Government and Native Hawaiians. The report recommended as its top priority that "the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law." Department of the Interior & Department of Justice, *From Mauka to Makai* 4 (2000).

In recent statutes, Congress again recognized that "Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands." 20 U.S.C. 7512(12)(A); *accord* 114 Stat. 2968 (2000); *see also id.* at 2966; 114 Stat. 2872, 2874 (2000); 118 Stat. 445 (2004). Congress noted that the State of Hawaii "recognizes the traditional language of the Native Hawaiian people as an official language of the State of Hawaii, which may be used as the language of instruction for all subjects and grades in the public school system," and "promotes the study of the Hawaiian culture, language, and history by providing a Hawaiian education program and using community expertise as a suitable and essential means to further the program." 20 U.S.C. 7512(21); *see also* 42 U.S.C. 11701(3) (continued preservation of Native Hawaiian language and culture). Congress's efforts to protect and promote the traditional Hawaiian language and culture demonstrate that Congress has recognized a continuing Native Hawaiian community. In addition, at the State level, recently enacted laws mandated that members of certain State councils, boards, and commissions complete a training course on Native Hawaiian rights and approved traditional Native Hawaiian burial and cremation customs and practices. *See* Act 169, Sess. L. Haw. 2015; Act 171, Sess. L. Haw. 2015. These State actions similarly reflect recognition by the State government of a continuing Native Hawaiian community.

Congress consistently enacted programs and services expressly and specifically for the Native Hawaiian community that are in many respects analogous to, but separate from, the programs and services that Congress enacted for federally recognized tribes in the continental United States. As Congress has explained, it "does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous peoples of a once

sovereign nation as to whom the United States has established a trust relationship." 114 Stat. 2968 (2000). Thus, "the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives." 20 U.S.C. 7512(12)(B), (D); *see Rice*, 528 U.S. at 518-19. Congress's treatment of Native Hawaiians flows from that status of the Native Hawaiian community.

Although Congress repeatedly acknowledged its special political and trust relationship with the Native Hawaiian community since the overthrow of the Kingdom of Hawaii more than a century ago, the Federal Government does not maintain a formal government-to-government relationship with the Native Hawaiian community as an organized, sovereign entity. Reestablishing a formal government-to-government relationship with a reorganized Native Hawaiian sovereign government would facilitate Federal agencies' ability to implement the established relationship between the United States and the Native Hawaiian community through interaction with a single, representative governing entity. Doing so would strengthen the self-determination of Hawaii's indigenous people and facilitate the preservation of their language, customs, heritage, health, and welfare. This interaction is consistent with the United States government's broader policy of advancing Native communities and enhancing the implementation of Federal programs by implementing those programs in the context of a government-to-government relationship.

Consistent with the HHCA, which is the first Congressional enactment clearly recognizing the Native Hawaiian community's special political and trust relationship with the United States, Congress requires Federal agencies to consult with Native Hawaiians under several Federal statutes. *See, e.g.,* the National Historic Preservation Act of 1966, 54 U.S.C. 302706; the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3002(c)(2),

3004(b)(1)(B). And in 2011, the Department of Defense established a consultation process with Native Hawaiian organizations when proposing actions that may affect property or places of traditional religious and cultural importance or subsistence practices. *See* U.S. Department of Defense Instruction Number 4710.03: Consultation Policy with Native Hawaiian Organizations (2011). Other statutes specifically related to management of the Native Hawaiian community's special political and trust relationship with the United States affirmed the continuing Federal role in Native Hawaiian affairs, namely, the Hawaiian Home Lands Recovery Act (HHLRA), 109 Stat. 357, 360 (1995). The HHLRA also authorized a position within the Department to discharge the Secretary's responsibilities for matters related to the Native Hawaiian community. And in 2004, Congress provided for the Department's Office of Native Hawaiian Relations to effectuate and implement the special legal relationship between the Native Hawaiian people and the United States; to continue the reconciliation process set out in 2000; and to assure meaningful consultation before Federal actions that could significantly affect Native Hawaiian resources, rights, or lands are taken. *See* 118 Stat. 445-46 (2004).

C. Actions by the Continuing Native Hawaiian Political Community

Native Hawaiians maintained a distinct political community through the twentieth century to the present day. Through a diverse group of organizations that includes, for example, the Hawaiian Civic Clubs and the various Hawaiian Homestead Associations, Native Hawaiians deliberate and express their views on issues of importance to their community, some of which are discussed above. *See generally Moolelo Ea O Na Hawaii*, 434-551; *see id.* at 496-516 & appendix 4 (listing organizations, their histories, and their accomplishments). A key example of the Native Hawaiian community taking organized action to advance Native Hawaiian self-determination is a political movement, in conjunction with other voters in Hawaii, which led to a

set of amendments to the State Constitution in 1978 to provide additional protection and recognition of Native Hawaiian interests. Those amendments established the Office of Hawaiian Affairs, which administers trust monies to benefit the Native Hawaiian community, Hawaii Const. art. XII, §§ 5-6, and provided for recognition of certain traditional and customary legal rights of Native Hawaiians, *id.* art. XII, § 7. The amendments reflected input from broad segments of the Native Hawaiian community, as well as others, who participated in statewide discussions of proposed options. *See* Noelani Goodyear-Kaopua, Ikaika Hussey & Erin Kahunawaikaala Wright, *A Nation Rising: Hawaiian Movements for Life, Land, and Sovereignty* (2014).

There are numerous additional examples of the community's active engagement on issues of self-determination and preservation of Native Hawaiian culture and traditions. For example, Ka Lahui Hawaii, a Native Hawaiian self-governance initiative, which organized a constitutional convention resulting in a governing structure with elected officials and governing documents; the Hui Naauao Sovereignty and Self-Determination Community Education Project, a coalition of over 40 Native Hawaiian organizations that worked together to educate Native Hawaiians and the public about Native Hawaiian history and self-governance; the 1988 Native Hawaiian Sovereignty Conference, where a resolution on self-governance was adopted; the Hawaiian Sovereignty Elections Council, a State-funded entity, and its successor, Ha Hawaii, a non-profit organization, which helped hold an election and convene *Aha Oiwi Hawaii*, a convention of Native Hawaiian delegates to develop a constitution and create a government model for Native Hawaiian self-determination; and efforts resulting in the creation and future transfer of the Kahoolawe Island reserve to the "sovereign native Hawaiian entity," *see* Haw. Rev. Stat. 6K-9. Moreover, the community's continuing efforts to integrate and develop traditional Native

Hawaiian law, which Hawaii state courts recognize and apply in various family law and property law disputes, *see Cohen's Handbook of Federal Indian Law* sec. 4.07[4][e], at 375-77 (2012 ed.); *see generally Native Hawaiian Law: A Treatise* (Melody Kapilialoha MacKenzie ed., 2015), encouraged development of traditional justice programs, including a method of alternative dispute resolution, "hooponopono," that is endorsed by the Native Hawaiian Bar Association. *See* Andrew J. Hosmanek, *Cutting the Cord: Hooponopono and Hawaiian Restorative Justice in the Criminal Law Context*, 5 Pepp. Disp. Resol. L.J. 359 (2005); *see also* Hawaii Const. art. XII, § 7 (protecting the traditional and customary rights of certain Native Hawaiian tenants).

Against this backdrop of activity, Native Hawaiians and Native Hawaiian organizations asserted self-determination principles in court. Notably, in 2001, they brought suit challenging Native Hawaiians' exclusion from the Department's acknowledgment regulations (25 CFR Part 83), which establish a uniform process for Federal acknowledgment of Indian tribes in the continental United States. The United States Court of Appeals for the Ninth Circuit upheld the geographic limitation in the Part 83 regulations, concluding that there was a rational basis for the Department to distinguish between Native Hawaiians and tribes in the continental United States, given the history of separate Congressional enactments regarding the two groups and the unique history of Hawaii. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004). The Ninth Circuit also noted the question whether Native Hawaiians "constitute one large tribe . . . or whether there are, in fact, several different tribal groups." *Id.* The court expressed a preference for the Department to apply its expertise to "determine whether native Hawaiians, or some native Hawaiian groups, could be acknowledged on a government-to-government basis."[1] *Id.*

[1] The Department has carefully reviewed the *Kahawaiolaa* briefs. To the extent that positions taken in this proposed rulemaking may be seen as inconsistent with positions of the United States in the *Kahawaiolaa* litigation, the views in this rulemaking reflect the Department's current view.

And in recent years, Congress considered legislation to reorganize a single Native Hawaiian governing entity and reestablish a formal government-to-government relationship between it and the United States. In 2010, during the Second Session of the 111th Congress, nearly identical Native Hawaiian government reorganization bills were passed by the House of Representatives (H.R. 2314), reported out favorably by the Senate Committee on Indian Affairs (S. 1011), and strongly supported by the Executive Branch (S. 3945). In a letter to the Senate concerning S. 3945, the Secretary and the Attorney General stated: "Of the Nation's three major indigenous groups, Native Hawaiians — unlike American Indians and Alaska Natives — are the only one that currently lacks a government-to-government relationship with the United States. This bill provides Native Hawaiians a means by which to exercise the inherent rights to local self-government, self-determination, and economic self-sufficiency that other Native Americans enjoy." 156 Cong. Rec. S10990, S10992 (Dec. 22, 2010).

The 2010 House and Senate bills provided that the Native Hawaiian government would have "the inherent powers and privileges of self-government of a native government under existing law," including the inherent powers "to determine its own membership criteria [and] its own membership" and to negotiate and implement agreements with the United States or with the State of Hawaii. The bills required protection of the civil rights and liberties of Natives and non-Natives alike, as guaranteed in the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.*, and provided that the Native Hawaiian government and its members would not be eligible for Federal Indian programs and services unless Congress expressly declared them eligible. And S. 3945 expressly left untouched the privileges, immunities, powers, authorities, and jurisdiction of federally recognized tribes in the continental United States.

The bills further acknowledged the existing special political and trust relationship

between Native Hawaiians and the United States, and established a process for reorganizing a Native Hawaiian governing entity. Some in Congress, however, expressed a preference not for recognizing a reorganized Native Hawaiian government by legislation, but rather for allowing the Native Hawaiian community to apply for recognition through the Department's Federal acknowledgment process. *See*, e.g., S. Rep. No. 112-251, at 45 (2012); S. Rep. No. 111-162, at 41 (2010).

The State of Hawaii, in Act 195, Session Laws of Hawaii 2011, expressed its support for reorganizing a Native Hawaiian government that could then be federally recognized, while also providing for State recognition of the Native Hawaiian people as "the only indigenous, aboriginal, maoli people of Hawaii." Haw. Rev. Stat. 10H-1 (2015); *see* Act 195, sec. 1, Sess. L. Haw. 2011. In particular, Act 195 established a process for compiling a roll of qualified Native Hawaiians, to facilitate the Native Hawaiian community's development of a reorganized Native Hawaiian governing entity. *See* Haw. Rev. Stat. 10H-3-4 (2015); *id.* 10H-5 ("The publication of the roll of qualified Native Hawaiians . . . 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."); Act 195, secs. 3-5, Sess. L. Haw. 2011. Act 195 created a five-member Native Hawaiian Roll Commission to oversee this process.

II. Responses to Comments on the June 20, 2014 Advance Notice of Proposed Rulemaking and Tribal Summary Impact Statement

In June 2014, the Department issued an Advance Notice of Proposed Rulemaking (ANPRM) titled "Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Community." 79 FR 35,296-303 (June 20, 2014). The ANPRM sought

input from leaders and members of the Native Hawaiian community and federally recognized tribes in the continental United States about whether and, if so, how the Department should facilitate the reestablishment of a formal government-to-government relationship with the Native Hawaiian community. The ANPRM asked five threshold questions: (1) Should the Secretary propose an administrative rule that would facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian community? (2) Should the Secretary assist the Native Hawaiian community in reorganizing its government, with which the United States could reestablish a government-to-government relationship? (3) If so, what process should be established for drafting and ratifying a reorganized government's constitution or other governing document? (4) Should the Secretary instead rely on the reorganization of a Native Hawaiian government through a process established by the Native Hawaiian community and facilitated by the State of Hawaii, to the extent such a process is consistent with Federal law? (5) If so, what conditions should the Secretary establish as prerequisites to Federal acknowledgment of a government-to-government relationship with the reorganized Native Hawaiian government? The Department posed 19 additional, specific questions concerning the reorganization of a Native Hawaiian government and a Federal process for reestablishing a formal government-to-government relationship. The ANPRM marked the beginning of ongoing discussions with the Native Hawaiian community, consultations with federally recognized tribes in the continental United States, and input from the public at large.

The Department received over 5,100 written comments by the August 19, 2014 deadline, more than half of which were identical postcards submitted in support of reestablishing a government-to-government relationship through Federal rulemaking. In addition, the Department received general comments, both supporting and opposing the ANPRM, from

individual members of the public, Members of Congress, State legislators, and community leaders. All comments received on the ANPRM are available in the ANPRM docket at *http://www.regulations.gov/#!docketDetail;D=DOI-2014-0002-0005*. Most of the comments revolved around a limited number of issues. The Department believes that the issues discussed below encompass the range of substantive issues presented in comments on the ANPRM. To the extent that any persons who submitted comments on the ANPRM believe that they presented additional issues that are not adequately addressed here, and that remain pertinent to the proposed rule, the Department invites further comments highlighting those issues.

After careful review and analysis of the comments on the ANPRM, the Department concludes that it is appropriate to propose a Federal rule that would set forth an administrative procedure and criteria by which the Secretary could reestablish a formal government-to-government relationship between the United States and the Native Hawaiian community.

Overview of Comments

A total of 5,164 written comments were submitted for the record. Comments came from Native Hawaiian organizations, national organizations, Native Hawaiian and non-Native-Hawaiian individuals, academics, student organizations, nongovernmental organizations, the Hawaiian Affairs Caucus of the Hawaii State Legislature, State legislators, Hawaiian Civic Clubs and their members, Alii Trusts, Royal Orders, religious orders, a federally recognized Indian tribe, intertribal organizations, an Alaska Native Corporation, and Members of the United States Congress, including the Hawaii delegation to the 113th Congress, as well as former U.S. Senator Akaka. The Department appreciates the interest and insight reflected in all the submissions and has considered them carefully.

A large majority of commenters supported a Federal rulemaking to facilitate reestablishment of a formal government-to-government relationship. At the same time, commenters also expressed strong support for reorganizing a Native Hawaiian government without assistance from the United States and urged the Federal Government to instead promulgate a rule tailored to a government reorganized by the Native Hawaiian community. The Department agrees: The process of drafting a constitution or other governing document and reorganizing a government should be driven by the Native Hawaiian community, not by the United States. The process should be fair and inclusive and reflect the will of the Native Hawaiian community.

A. Responses to specific issues raised in ANPRM comments

1. *Should the United States be involved in the Native Hawaiian nation-building process?*

ISSUE: The Department received comments from the Association of Hawaiian Civic Clubs, the Sovereign Councils of the Hawaiian Homelands Assembly, the Native Hawaiian Chamber of Commerce, the Native Hawaiian Bar Association, the Native Hawaiian Legal Corporation, the Association of Hawaiians for Homestead Lands, the Native Hawaiian Chamber of Commerce, Alu Like, the Native Hawaiian Education Association, Hawaiian Community Assets, Papa Ola Lokahi, Koolau Foundation, Protect Kahoolawe Ohana, Kalaeloa Heritage and Legacy Foundation, the Waimanalo Hawaiian Homes Association, the Council for Native Hawaiian Advancement, the Kapolei Community Development Corporation, two Alii Trusts, and eight Hawaiian Civic Clubs, among others, that expressed support for a Federal rule enabling a reorganized Native Hawaiian government to seek reestablishment of a formal government-to-government relationship with the United States. Some of these commenters, and many others, also urged the Department to refrain from engaging in or becoming directly involved with the nation-building that is currently underway in Hawaii.

RESPONSE: Consistent with these comments, the Department is proposing only to create a procedure and criteria that would facilitate the reestablishment of a formal government-to-government relationship with a reorganized Native Hawaiian government without involving the Federal Government in the Native Hawaiian community's nation-building process.

2. *Does Hawaii's multicultural history preclude the possibility that a reorganized Native Hawaiian government could reestablish a formal government-to-government relationship with the United States?*

ISSUE: Some commenters opposed Federal rulemaking on the basis that the Kingdom of Hawaii had evolved into a multicultural society by the time it was overthrown, and that any attempt to reorganize or reestablish a "native" (indigenous) Hawaiian government would consequently be race-based and unlawful.

RESPONSE: The fact that individuals originating from other countries lived in and were subject to the rule of the Kingdom of Hawaii does not establish that the Native Hawaiian community ceased to exist as a native community exercising political authority. Indeed, as discussed above, key elements demonstrating the existence of that community, such as intermarriage and sustained cultural identity, persisted at that time and continue to flourish today.

To the extent that these comments suggest that the Department must reestablish a government-to-government relationship with a government that includes non-Native Hawaiians as members, that result is precluded by longstanding Congressional definitions of Native Hawaiians, which require a demonstration of descent from the population of Hawaii as it existed before Western contact. That requirement is consistent with Federal law that generally requires members of a native group or tribe to show an ancestral connection to the indigenous group in question. *See generally United States v. Sandoval*, 231 U.S. 28, 46 (1913). Moreover, the

Department must defer to Congress's definition of the nature and scope of the Native Hawaiian community.

3. *Would reestablishment of a formal government-to-government relationship with the Native Hawaiian community create a political divide in Hawaii?*

ISSUE: Some commenters stated that Hawaii is a multicultural society that would be divided if the United States reestablished a formal government-to-government relationship with the Native Hawaiian community, creating disharmony in the State by permitting race-based discrimination.

RESPONSE: The U.S. Constitution provides the Federal Government with authority to enter into government-to-government relationships with Native communities. *See* U.S. Const. art. I, sec. 8, cl. 3 (Commerce Clause); U.S. Const. art. II, sec. 2, cl. 2 (Treaty Clause). These constitutional provisions recognize and provide the foundation for longstanding special relationships between native peoples and the Federal Government, relationships that date to the earliest period of our Nation's history. Consistent with the Supreme Court's holding in *Morton v. Mancari*, 417 U.S. 535 (1974), and other cases, the Department believes that the United States' government-to-government relationships with native peoples do not constitute "race-based" discrimination but are political classifications. The Department believes that these relationships are generally beneficial, and the Department is aware of no reason to treat the Native Hawaiian community differently in this respect.

4. *How do claims concerning occupation of the Hawaiian Islands impact the proposed rule?*

ISSUE: Commenters who objected to Federal rulemaking most commonly based their objections on the assertion that the United States does not have jurisdiction over the Hawaiian

Islands. Most of these objections were associated with claims that the United States violated and continues to violate international law by illegally occupying the Hawaiian Islands.

RESPONSE: As expressly stated in the ANPRM, comments about altering the fundamental nature of the political and trust relationship that Congress has established between the United States and the Native Hawaiian community were outside the ANPRM's scope and therefore did not inform development of the proposed rule. Though comments on these issues were not solicited, some response here may be helpful to understand the Department's role in this rulemaking.

The Department is an agency of the United States Government. The Department's authority to issue this proposed rule and any final rule derives from the United States Constitution and from Acts of Congress, and the Department has no authority outside that structure. The Department is bound by Congressional enactments concerning the status of Hawaii. Under those enactments and under the United States Constitution, Hawaii is a State of the United States of America.

In the years following the 1893 overthrow of the Hawaiian monarchy, Congress annexed Hawaii and established a government for the Territory of Hawaii. *See* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750 (1898); Act of Apr. 30, 1900, 31 Stat. 141. In 1959, Congress admitted Hawaii to the Union as the 50th State. *See* Act of March 19, 1959, 73 Stat. 4. Agents of the United States were involved in the overthrow of the Kingdom of Hawaii in 1893; and Congress, through a joint resolution, has both acknowledged that the overthrow of Hawaii was "illegal" and expressed "its deep regret to the Native Hawaiian people" and its support for reconciliation efforts with Native Hawaiians. Joint Resolution of November 23, 1993, 107 Stat. 1510, 1513.

The Apology Resolution, however, did not effectuate any changes to existing law. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009). Thus, the Admission Act established the current status of the State of Hawaii. The Admission Act proclaimed that "the State of Hawaii is hereby declared to be a State of the United States of America, [and] is declared admitted into the Union on an equal footing with the other States in all respects whatever." Act of March 19, 1959, sec. 1, 73 Stat. 4. All provisions of the Admission Act were consented to by the State of Hawaii and its people through an election held on June 27, 1959. The comments in response to the ANPRM that call into question the State of Hawaii's legitimacy, and its status as one of the United States under the Constitution, therefore are inconsistent with the express determination of Congress, which is binding on the Department.

5. *What would be the proposed role of HHCA beneficiaries in a Native Hawaiian government that relates to the United States on a formal government-to-government basis?*

ISSUE: Some commenters sought reassurance that the proposed rule would not exclude HHCA beneficiaries and their successors from a role in the Native Hawaiian government. The Department received comments on this issue from the Office of Hawaiian Affairs (OHA) as well as others. The Hawaiian Homes Commission specifically noted the unique relationship recognized under the HHCA between the Federal Government and beneficiaries of that Federal law, urging that any rule should protect this group's existing benefits and take into account their special circumstances.

RESPONSE: The proposed rule recognizes HHCA beneficiaries' unique status under Federal law and protects that status in a number of ways:

a. The proposed rule defines the term "HHCA-eligible Native Hawaiians" to include any Native Hawaiian individual who meets the definition of "native Hawaiian" in the HHCA,

regardless of whether the individual resides on Hawaiian home lands, is an HHCA lessee, is on a wait list for an HHCA lease, or receives any benefits under the HHCA.

b. The proposed rule requires that the Native Hawaiian constitution or other governing document be approved in a ratification referendum not only by a majority of Native Hawaiians who vote, but also by a majority of HHCA-eligible Native Hawaiians who vote; and both majorities must include enough voters to demonstrate broad-based community support. This ratification process effectively eliminates any risk that the United States would reestablish a formal relationship with a Native Hawaiian government whose form is objectionable to HHCA-eligible Native Hawaiians. The Department expects that the participation of HHCA-eligible Native Hawaiians in the referendum process will ensure that the structure of any ratified Native Hawaiian government will include long-term protections for HHCA-eligible Native Hawaiians.

c. The proposed rule prohibits the Native Hawaiian government's membership criteria from excluding any HHCA-eligible Native Hawaiian citizen who wishes to be a member.

d. The proposed rule requires that the governing document protect and preserve rights, protections, and benefits under the HHCA.

e. The proposed rule leaves intact rights, protections, and benefits under the HHCA.

f. The proposed rule does not authorize the Native Hawaiian government to sell, dispose of, lease, or encumber Hawaiian home lands or interests in those lands.

g. The proposed rule does not diminish any Native Hawaiian's rights or immunities, including any immunity from State or local taxation, under the HHCA.

6. *Would Hawaiian home lands, including those subject to lease, be "subsumed" by a Native Hawaiian government?*

ISSUE: The Hawaiian Homes Commission noted that several Native Hawaiian beneficiaries were concerned that Hawaiian home lands, including those subject to lease, would be "subsumed" by a Native Hawaiian government "with little input or control exercised over this decision by Hawaiian home lands beneficiaries." An individual homesteader, born and raised in the Papakolea Homestead community, also expressed support for a rule but raised concerns that the HHCA would be subject to negotiation between the United States and the newly reorganized Native Hawaiian government, and sought reassurance that the HHCA would be safeguarded. The Kapolei Community Development Corporation's Board of Directors raised similar concerns, particularly with respect to the potential transfer of Hawaiian home lands currently administered by the State of Hawaii under the HHCA to the newly formed Native Hawaiian government, cautioning that such transfer could "threaten the specific purpose of those lands, and be used for non-homesteading uses."

RESPONSE: Although the proposed rule would not have a direct impact on the status of Hawaiian home lands, the Department takes the beneficiaries' comments expressing concern over their rights and the future of the HHCA land base very seriously. In response to this concern, the proposed rule includes a provision that makes clear that the promulgation of this rule would not diminish any right, protection, or benefit granted to Native Hawaiians by the HHCA. The HHCA would be preserved regardless of whether a Native Hawaiian government is reorganized, regardless of whether it submits a request to the Secretary, and regardless of whether any such request is granted. In addition, for the reorganized Native Hawaiian government to reestablish a formal government-to-government relationship with the United States, its governing document must protect and preserve Native Hawaiians' rights, protections, and benefits under the HHCA and the HHLRA.

7. *Would reestablishment of the formal government-to-government relationship be consistent with existing requirements of Federal law?*

ISSUE: Four U.S. Senators submitted comments generally opposing the rulemaking on constitutional grounds and asserting that the executive authority used to federally acknowledge tribes in the continental United States does not extend to Native Hawaiians. Another Senator submitted similar comments, primarily questioning the Secretary's constitutional authority to promulgate rules and arguing that administrative action would be race-based and thus violate the Constitution's guarantee of equal protection. The Department also received comments from the Heritage Foundation and the Center for Equal Opportunity urging the Secretary to forgo Federal rulemaking on similar bases.

RESPONSE: The Federal Government has broad authority with respect to Native American communities. *See* U.S. Const. art. I, sec. 8, cl. 3 (Commerce Clause); U.S. Const. art. II, sec. 2, cl. 2 (Treaty Clause); *Morton v. Mancari*, 417 U.S. at 551-52 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."). Congress has already exercised that plenary power to recognize Native Hawaiians through statutes enacted for their benefit and charged the Secretary and others with responsibility for administering the benefits provided by the more than 150 statutes establishing a special political and trust relationship with the Native Hawaiian community. The Department proposes to better implement that relationship by establishing the administrative procedure and criteria for reestablishing a formal government-to-government relationship with a native community that has already been recognized by Congress. As explained above, moreover, the Supreme Court made clear that legislation affecting Native American communities does not generally constitute race-based discrimination. *See Morton v. Mancari*, 417 U.S. at 551-55; *id.*

at 553 n.24 (explaining that the challenged provision was "political rather than racial in nature"). The Department's statutory authority to promulgate the proposed rule is discussed below. *See infra* Section III.

8. *Would reestablishment of a government-to-government relationship entitle the Native Hawaiian government to conduct gaming under the Indian Gaming Regulatory Act?*

ISSUE: Several commenters stated that Federal rulemaking would make the Native Hawaiian government eligible to conduct gaming activities under the Indian Gaming Regulatory Act (IGRA), a Federal statute that regulates certain types of gaming activities by federally recognized tribes on Indian lands as defined in IGRA.

RESPONSE: The Department anticipates that the Native Hawaiian Governing Entity would not fall within the definition of "Indian tribe" in IGRA, 25 U.S.C. 2703(5). Therefore, IGRA would not apply. Moreover, because the State of Hawaii prohibits gambling, the Native Hawaiian Governing Entity would not be permitted to conduct gaming in Hawaii. The Department welcomes comments on this issue.

9. *Under this proposed rule could the United States reestablish formal government-to-government relationships with multiple Native Hawaiian governments?*

ISSUE: Many commenters who support a Federal rule urged the Department to promulgate a rule that authorizes the reestablishment of a formal government-to-government relationship with a single official Native Hawaiian government, consistent with the nineteenth-century history of Hawaii's self-governance as a single unified entity.

RESPONSE: Congress consistently treated the Native Hawaiian community as a single entity through more than 150 Federal laws that establish programs and services for the community's benefit. Congress's recognition of a single Native Hawaiian community reflects

the fact that a single centralized, organized Native Hawaiian government was in place prior to the overthrow of the Hawaiian Kingdom.

This approach also had significant support among commenters. The proposed rule therefore would authorize reestablishing a formal government-to-government relationship with a single representative sovereign Native Hawaiian government. That Native Hawaiian government, however, may adopt either a centralized structure or a decentralized structure with political subdivisions defined by island, by geographic districts, historic circumstances, or otherwise in a fair and reasonable manner.

10. *Would the proposed rule require use of the roll certified by the Native Hawaiian Roll Commission to determine eligibility to vote in any referendum to ratify the Native Hawaiian government's constitution or other governing document?*

ISSUE: Several commenters made statements regarding the potential role that the roll certified by the Native Hawaiian Roll Commission might play in reestablishing the formal government-to-government relationship between the United States and the Native Hawaiian community.

RESPONSE: Under the proposed rule, the Department permits use of the roll certified by the Native Hawaiian Roll Commission, and such an approach may facilitate the reestablishment of a formal government-to-government relationship. The Department, however, does not require use of the roll. § 50.12(a)(1)(B) of the proposed rule provides that a roll of Native Hawaiians certified by a State commission or agency under State law may be one of several sources that could provide sufficient evidence that an individual descends from Hawaii's aboriginal people. § 50.12(b) of the proposed rule provides that the certified roll could serve as an accurate and complete list of Native Hawaiians eligible to vote in a ratification referendum if

certain conditions are met. For instance, the roll would need to, among other things, exclude all persons who are not U.S. citizens, exclude all persons who are less than 18 years of age, and include all adult U.S. citizens who demonstrated HHCA eligibility according to official records of Hawaii's Department of Hawaiian Home Lands. (See also the response to question 13 below, which discusses requirements for participation in the ratification referendum under § 50.14.)

11. *Would the proposed rule limit the inherent sovereign powers of a reorganized Native Hawaiian government?*

ISSUE: OHA and numerous other commenters expressed a strong interest in ensuring that the proposed rule would not limit any inherent sovereign powers of a reorganized Native Hawaiian government.

RESPONSE: The proposed rule would not dictate the inherent sovereign powers a reorganized Native Hawaiian government could exercise. The proposed rule does establish certain elements that must be contained in a request to reestablish a government-to-government relationship with the United States and establishes criteria by which the Secretary will review a request. *See* 50.10-50.15 (setting out essential elements for a request); *id.* 50.16 (setting out criteria). These provisions include guaranteeing the liberties, rights, and privileges of all persons affected by the Native Hawaiian government's exercise of governmental powers. Although those elements and criteria will inform and influence the process for reestablishing a formal government-to-government relationship, they would not undermine the fundamental, retained inherent sovereign powers of a reorganized Native Hawaiian government.

12. *What role will Native Hawaiians play in approving the constitution or other governing document of a Native Hawaiian government?*

ISSUE: Numerous commenters discussed the role of Native Hawaiians in ratifying the constitution or other governing document that establishes the form and functions of a Native Hawaiian government. One commenter, in particular, stated that the Secretary should not require that the governing document be approved by a majority of *all* Native Hawaiians, regardless of whether they participate in the ratification referendum, because such a requirement would be unrealistic and unachievable.

RESPONSE: Section 50.16(g) and (h) of the proposed rule would require a requester to demonstrate broad-based community support among Native Hawaiians. The proposed rule requires a majority only of those voters who actually cast a ballot; the number of eligible voters who opt not to participate in the ratification referendum would not be relevant when calculating whether the affirmative votes were or were not in the majority. The proposed rule, however, requires broad-based community support in favor of the requester's constitution or other governing document, thus also safeguarding against a low turnout. The Department solicits comments on this approach and requests that if such comments provide an alternate approach that the commenters explain the reasoning behind any proposed method to establish that broad-based community support has been demonstrated in the ratification process.

13. *Who would be eligible to participate in the proposed process for reestablishing a government-to-government relationship?*

ISSUE: Several commenters expressed concern about who would be eligible to participate in the process for reestablishing a government-to-government relationship. Some commenters expressed the belief that participation should be open to persons who have no Native Hawaiian ancestry. Other commenters expressed opposition to the reorganization of a

Native Hawaiian government, or to the reestablishment of a government-to-government relationship between such a community and the United States.

RESPONSE: Under the proposed rule, to retain the option of eventually reestablishing a formal government-to-government relationship with the United States, the Native Hawaiian community would be required to permit any adult person who is a U.S. citizen and can document Native Hawaiian descent to participate in the referendum to ratify its governing documents. *See* 50.14(b)(5)(C). As discussed in question 2 above, existing Congressional definitions of the Native Hawaiian community and principles of Federal law limit participation to those who can document Native Hawaiian descent and are U.S. citizens. Native Hawaiian adult citizens who do not wish to affirm the inherent sovereignty of the Native Hawaiian people, or who doubt that they and other Native Hawaiians have sufficient connections or ties to constitute a community, or who oppose the process of Native Hawaiian self-government or the reestablishment of a formal government-to-government relationship with the United States, would be free to participate in the ratification referendum and, if they wish, vote against ratifying the community's proposed governing document. And because membership in the Native Hawaiian Governing Entity would be voluntary, they also would be free to choose not to become members of any government that may be reorganized. The Department seeks public comment on these aspects of the proposed rule.

14. *Shouldn't the Department require a Native Hawaiian government to go through the existing administrative tribal acknowledgment process?*

ISSUE: The Department promulgated regulations for Federal acknowledgment of tribes in the continental United States in 25 CFR Part 83. These regulations, commonly referred to as "Part 83," create a pathway for Federal acknowledgment of petitioners in the continental United

States to establish a government-to-government relationship and to become eligible for Federal programs and benefits. Several commenters submitted statements regarding the role of the Department's existing regulations on Federal acknowledgment of tribes with respect to Native Hawaiians, and have articulated arguments about whether the Part 83 regulations should or should not be applied to Native Hawaiians.

RESPONSE: Part 83 is inapplicable to Native Hawaiians on its face. The Ninth Circuit has upheld Part 83's express geographic limitation, concluding that there was a rational basis for the Department to distinguish between Native Hawaiians and tribes in the continental United States, given the history of separate Congressional enactments regarding the two groups and the unique history of Hawaii. *Kahawaiolaa v. Norton*, 386 F.3d at 1283. The court expressed a preference for the Department to apply its expertise to determine whether the United States should relate to the Native Hawaiian community "on a government-to-government basis." *Id.* The Department, through this proposed rule, seeks to establish a process for determining how a formal Native Hawaiian government can relate to the United States on a formal government-to-government basis, as the Ninth Circuit suggested.

Moreover, Congress's 150-plus enactments, including those in recent decades, for the benefit of the Native Hawaiian community establish that the community is federally "acknowledged" or "recognized" by Congress. Thus, unlike Part 83 petitioners, the Native Hawaiian community already has a special political and trust relationship with the United States. What remains in question is how the Department could determine whether a Native Hawaiian government that comes forward legitimately represents that community and therefore is entitled to conduct relations with the United States on a formal government-to-government basis. This

question is complex, and the Department welcomes public comment as to whether any additional elements should be included in the process that the Department proposes.

B. Tribal Summary Impact Statement

Consistent with Sections 5(b)(2)(B) and 5(c)(2) of Executive Order 13175, and because the Department consulted with tribal officials in the continental United States prior to publishing this proposed rule, the Department seeks to assist tribal officials, and the public as a whole, by including in this preamble the three key elements of a tribal summary impact statement. Specifically, the preamble to this proposed rule (1) describes the extent of the Department's prior consultation with tribal officials; (2) summarizes the nature of their concerns and the Department's position supporting the need to issue the proposed rule; and (3) states the extent to which tribal officials' concerns have been met. The "Public Meetings and Tribal Consultations" section below describes the Department's prior consultations.

TRIBAL OFFICIALS' CONCERNS: Officials of tribal governments in the continental United States and intertribal organizations strongly supported Federal rulemaking to help reestablish a formal government-to-government relationship between the United States and the Native Hawaiian community. To the extent they raised concerns, the predominant one was the rule's potential impact, if any, on Federal Indian programs, services, and benefits — that is, federally funded or authorized special programs, services, and benefits provided by Federal agencies (such as the Bureau of Indian Affairs and the Indian Health Service) to Indian tribes in the continental United States or their members because of their Indian status. For example, comments from the National Congress of American Indians expressed an understanding that Native Hawaiians are ineligible for Federal Indian programs and services absent express Congressional declarations to the contrary, and recommended that existing and future programs

and services for a reorganized Native Hawaiian government remain separate from programs and services dedicated to tribes in the continental United States.

RESPONSE: Generally, Native Hawaiians are not eligible for Federal Indian programs, services, or benefits unless Congress has expressly and specifically declared them eligible. Consistent with that approach, the Department's proposed rule would not alter or affect the programs, services, and benefits that the United States currently provides to federally recognized tribes in the continental United States unless an Act of Congress expressly provides otherwise. Federal laws expressly addressing Native Hawaiians will continue to govern existing Federal programs, services, and benefits for Native Hawaiians and for a reorganized Native Hawaiian government if one reestablishes a formal government-to-government relationship with the United States.

The term "Indian" has been used historically in reference to indigenous peoples throughout the United States despite their distinct socio-political and cultural identities. Congress, however, has distinguished between Indian tribes in the continental United States and Native Hawaiians when it has provided programs, services, and benefits. Congress, in the Federally Recognized Indian Tribe List Act of 1994, 108 Stat. 4791, defined "Indian tribe" broadly as an entity the Secretary acknowledges to exist as an Indian tribe but limited the list published under the List Act to those governmental entities entitled to programs and services because of their status as Indians. 25 U.S.C. 479a(2), 479a-1(a). The Department seeks public comment on the scope and implementation of this distinction, and which references to "tribes" and "Indians" would encompass the Native Hawaiian Governing Entity and its members.

Further, given Congress's express intention to have the Department's Assistant Secretary for Policy, Management and Budget (PMB) oversee Native Hawaiian matters, as evidenced in

the HHLRA, Act of November 2, 1995, sec. 206, 109 Stat. 363, the Assistant Secretary – PMB, not the Assistant Secretary – Indian Affairs, would be responsible for implementing this proposed rule.

III. Overview of the Proposed Rule

The proposed rule reflects the totality of the comments urging the Department to promulgate a rule announcing a procedure and criteria by which the Secretary could reestablish a formal government-to-government relationship with the Native Hawaiian community. If the Department ultimately promulgates a final rule along the lines proposed here, the Department intends to rely on that rule as the sole administrative avenue for reestablishing a formal government-to-government relationship with the Native Hawaiian community.

The authority to issue this rule is vested in the Secretary by 25 U.S.C. 2, 9, 479a, 479a-1; Act of November 2, 1994, sec. 103, 108 Stat. 4791; 43 U.S.C. 1457; and 5 U.S.C. 301. *See also Miami Nation of Indians of Indiana, Inc. v. U.S. Dep't of the Interior*, 255 F.3d 342, 346 (7th Cir. 2001) (stating that recognition is an executive function requiring no legislative action). Through its plenary power over Native American affairs, Congress recognized the Native Hawaiian community by passing more than 150 statutes during the last century and providing special Federal programs and services for its benefit. The regulations proposed here would establish a procedure and criteria to be applied if that community reorganizes a unified and representative government and if that government then seeks a formal government-to-government relationship with the United States. And as noted above, Congress enacted scores of laws with respect to Native Hawaiians — actions that also support the Department's rulemaking authority here. *See generally* 12 U.S.C. 1715z-13b; 20 U.S.C. 80q *et seq.*; 20 U.S.C. 7511 *et seq.*; 25 U.S.C. 3001 *et seq.*; 25 U.S.C. 4221 *et seq.*; 42 U.S.C. 2991 *et seq.*; 42 U.S.C. 3057g *et*

seq.; 42 U.S.C. 11701 *et seq.*; 54 U.S.C. 302706; HHCA, Act of July 9, 1921, 42 Stat. 108, as amended; Act of March 19, 1959, 73 Stat. 4; Joint Resolution of November 23, 1993, 107 Stat. 1510; HHLRA, 109 Stat. 357 (1995); 118 Stat. 445 (2004).

In accordance with the wishes of the Native Hawaiian community as expressed in the comments on the ANPRM, the proposed rule would not involve the Federal Government in convening a constitutional convention, in drafting a constitution or other governing document for the Native Hawaiian government, in registering voters for purposes of ratifying that document or in electing officers for that government. Any government reorganization would instead occur through a fair and inclusive community-driven process. The Federal Government's only role is deciding whether to reestablish a formal government-to-government relationship with a reorganized Native Hawaiian government.

Moreover, if a Native Hawaiian government reorganizes, it will be for that government to decide whether to seek to reestablish a formal government-to-government relationship with the United States. The process established by this rule would be optional, and Federal action would occur only upon an express formal request from the newly reorganized Native Hawaiian government.

Existing Federal Legal Framework. In adopting this rulemaking, the Department must adhere to the legal framework that Congress already established, as discussed above, to govern relations with the Native Hawaiian community. The existing body of legislation makes plain that Congress determined repeatedly, over a period of almost a century, that the Native Hawaiian population is an existing Native community that is within the scope of the Federal Government's powers over Native American affairs and with which the United States has an ongoing special

political and trust relationship.[2] Although a trust relationship exists, today there is no single unified Native Hawaiian government in place, and no procedure for reestablishing a formal government-to-government relationship should such a government reorganize.

Congress has employed two definitions of "Native Hawaiians," which the proposed rule labels as "HHCA-eligible Native Hawaiians" and "Native Hawaiians." The former is a subset of the latter, so every HHCA-eligible Native Hawaiian is by definition a Native Hawaiian. But the converse is not true: some Native Hawaiians are not HHCA-eligible Native Hawaiians.

Individuals falling within the definition of "HHCA-eligible Native Hawaiians" are beneficiaries or potential beneficiaries of the HHCA, as amended. They are eligible for a set of benefits under the HHCA and are, or could become, the beneficiaries of a program initially established by Congress in 1921 and now managed by the State of Hawaii (subject to certain limitations set forth in Federal law). As used in the proposed rule, the term "HHCA-eligible Native Hawaiian" means a Native Hawaiian individual who meets the definition of "native Hawaiian" in HHCA sec. 201(a)(7), 42 Stat. 108 (1921), and thus has at least 50 percent Native Hawaiian ancestry, which results from marriages within the community, regardless of whether the individual resides on Hawaiian home lands, is an HHCA lessee, is on a wait list for an HHCA lease, or receives any benefits under the HHCA. To satisfy this definition would require

[2] Congress described this trust relationship, for example, in findings enacted as part of the Native Hawaiian Education Act, 20 U.S.C. 7512 *et seq.*, and the Native Hawaiian Health Care Improvement Act, 42 U.S.C. 11701 *et seq.* Those findings observe that "through the enactment of the Hawaiian Homes Commission Act, 1920, Congress affirmed the special relationship between the United States and the Hawaiian people," 20 U.S.C. 7512(8); *see also* 42 U.S.C. 11701(13), (14) (also citing a 1938 statute conferring leasing and fishing rights on Native Hawaiians). Congress then "reaffirmed the trust relationship between the United States and the Hawaiian people" in the Hawaii Admission Act, 20 U.S.C. 7512(10); *accord* 42 U.S.C. 11701(16). Since then, "the political relationship between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States, as evidenced by the inclusion of Native Hawaiians" in at least ten statutes directed in whole or in part at American Indians and other native peoples of the United States such as Alaska Natives. 20 U.S.C. 7512(13); *see also* 42 U.S.C. 11701(19), (20), (21) (listing additional statutes).

some sort of record or documentation demonstrating eligibility under HHCA sec. 201(a)(7), such as enumeration in official Department of Hawaiian Home Lands (DHHL) records demonstrating eligibility under the HHCA. Although the proposed rule does not approve reliance on a sworn statement signed under penalty of perjury, the Department would like to receive public comment on whether there are circumstances in which the final rule should do so.

The term "Native Hawaiian," as used in the proposed rule, means an individual who is a citizen of the United States and a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. This definition flows directly from multiple Acts of Congress. *See*, e.g., 12 U.S.C. 1715z-13b(6); 25 U.S.C. 4221(9); 42 U.S.C. 254s(c); 42 U.S.C. 11711(3). To satisfy this definition would require some means of documenting descent generation-by-generation, such as enumeration on a roll of Native Hawaiians certified by a State of Hawaii commission or agency under State law, where the enumeration was based on documentation that verified descent. And, of course, enumeration in official DHHL records demonstrating eligibility under the HHCA also would satisfy the definition of "Native Hawaiian," as it would show that a person is an HHCA-eligible Native Hawaiian and by definition a "Native Hawaiian" as that term is used in this proposed rule. The Department would like to receive public comment on whether documenting descent from a person enumerated on the 1890 Census by the Kingdom of Hawaii, the 1900 U.S. Census of the Hawaiian Islands, or the 1910 U.S. Census of Hawaii as "Native" or part "Native" or "Hawaiian" or part "Hawaiian" is reliable evidence of lineal descent from the aboriginal, indigenous, native people who exercised sovereignty over the territory that became the State of Hawaii.

In keeping with the framework created by Congress, the rule that the Department proposes requires that, to reestablish a formal government-to-government relationship with the

United States, a Native Hawaiian government must have a constitution or other governing document ratified both by a majority vote of Native Hawaiians and by a majority vote of those Native Hawaiians who qualify as HHCA-eligible Native Hawaiians. Thus, regardless of which Congressional definition is used, a majority of the voting members of the community with which Congress established a trust relationship through existing legislation will confirm their support for the Native Hawaiian government's structure and fundamental organic law.

Ratification Process. The proposed rule sets forth certain requirements for the process of ratifying a constitution or other governing document, including requirements that the ratification referendum be free and fair, that there be public notice before the referendum occurs, and that there be a process for ensuring that all voters are actually eligible to vote.

The actual form of the ratification referendum is not fixed in the proposed rule; the Native Hawaiian community may determine the form within parameters. The ratification could be an integral part of the process by which the Native Hawaiian community adopts its governing document, or the referendum could take the form of a special election held solely for the purpose of measuring Native Hawaiian support for a governing document that was adopted through other means. The ratification referendum must result in separate vote tallies for (a) HHCA-eligible Native Hawaiian voters and (b) all Native Hawaiian voters.

To ensure that the ratification vote reflects the views of the Native Hawaiian community generally, there is a requirement that the turnout in the ratification referendum be sufficiently large to demonstrate broad-based community support. Even support from a high percentage of the actual voters would not be a very meaningful indicator of broad-based community support if the turnout was minuscule. The proposed rule focuses not on the number of voters who participate in the ratification referendum, but rather on the number who vote in favor of the

governing document. The proposed rule creates a strong presumption of broad-based community support if the affirmative votes exceed 50,000, including affirmative votes from at least 15,000 HHCA-eligible Native Hawaiians.

These numbers proposed in the regulations (50,000 and 15,000) are derived from existing estimates of the size of those populations, adjusted for typical turnout levels in elections in the State of Hawaii, although the ratification referendum would also be open to eligible Native Hawaiian citizens of the United States who reside outside the State and may vote by absentee or mail-in ballot. The following figures support the proposed rule's reference to 50,000 affirmative votes from Native Hawaiians. According to the 2010 Federal decennial census, there are about 156,000 Native Hawaiians in the United States, including about 80,000 who reside in Hawaii, who self-identified on their census forms as "Native Hawaiian" alone (i.e., they did not check the box for any other demographic category). The comparable figures for persons who self-identified either as Native Hawaiian alone or as Native Hawaiian in combination with another demographic category are about 527,000 for the entire U.S. and 290,000 for Hawaii. According to the census, about 65 percent of these Native Hawaiians are of voting age (18 years of age or older). Hawaii residents currently constitute roughly 80 to 85 percent of the Native Hawaiian Roll Commission's Kanaiolowalu roll, which currently lists about 100,000 Native Hawaiians, from all 50 States.

In the 1990s, the State of Hawaii's Office of Elections tracked Native Hawaiian status and found that the percentage of Hawaii's registered voters who were Native Hawaiian was rising, from about 14.7 percent in 1992, to 15.5 percent in 1994, to 16.0 percent in 1996, and 16.7 percent in 1998. (This trend is generally consistent with census data showing growth in recent decades in the number of persons identifying as Native Hawaiian.) In the most recent of

those elections, in 1998, there were just over 100,000 Native Hawaiian registered voters, about 65,000 of whom actually turned out and cast ballots in that off-year (i.e., non-presidential) Federal election. That same year, the total number of registered voters (Native Hawaiian and non-Native Hawaiian) was about 601,000, of whom about 413,000 cast a ballot. By the 2012 general presidential election, Hawaii's total number of registered voters (Native Hawaiian and non-Native Hawaiian) increased to about 706,000, of whom about 437,000 cast a ballot. And in the 2014 general gubernatorial election, the equivalent figures were about 707,000 and about 370,000, respectively.

Weighing these data, the Department concludes that it is reasonable to expect that a ratification referendum among the Native Hawaiian community in Hawaii would have a turnout somewhere in the range between 60,000 and 100,000, although a figure outside that range is possible. But those figures do not include Native Hawaiian voters who reside outside the State of Hawaii, who also could participate in the referendum; the Department believes that the rate of participation among that group is sufficiently uncertain that their numbers should be significantly discounted when establishing turnout thresholds.

Given these data points, if the number of votes that Native Hawaiians cast in favor of the requester's governing document in a ratification referendum was a majority of all votes cast and exceeded 50,000, the Secretary would be well justified in finding broad-based community support among Native Hawaiians. And if the number of votes that Native Hawaiians cast in favor of the requester's governing document in a ratification referendum fell below 60 percent of that quantity — that is, less than 30,000 — it would be reasonable to presume a lack of broad-based community support among Native Hawaiians such that the Secretary would decline to process the request. The 30,000-affirmative-vote threshold represents half of the lower bound of

the anticipated turnout of Native Hawaiians residing in the State of Hawaii (i.e., half of the lower end of the 60,000-to-100,000 range described above).

As for the proposed rule's reference to 15,000 affirmative votes from HHCA-eligible Native Hawaiians, that figure is based on the data described above, as well as figures from DHHL and from a survey of Native Hawaiians. According to DHHL's comments on the ANPRM, as of August 2014, there were nearly 10,000 Native Hawaiian families living in homestead communities throughout Hawaii, and 27,000 individual applicants awaiting a homestead lease award. And a significant number of HHCA-eligible Native Hawaiians likely were neither living in homestead communities nor awaiting a homestead lease award. Furthermore, in his concurring opinion in *Rice v. Cayetano*, Justice Breyer cited the *Native Hawaiian Data Book* which, in turn, reported data indicating that about 39 percent of the Native Hawaiian population in Hawaii in 1984 had at least 50 percent Native Hawaiian ancestry and therefore would satisfy the proposed rule's definition of an HHCA-eligible Native Hawaiian. *See Rice v. Cayetano*, 528 U.S. at 526 (Breyer, J., concurring in the result) (citing *Native Hawaiian Data Book* 39 (1998) (citing Office of Hawaiian Affairs, *Population Survey / Needs Assessment: Final Report* (1986) (describing a 1984 study))); *see also* Native Hawaiian Data Book (2013), available at http://www.ohadatabook.com. The 1984 data included information by age group, which suggested that the fraction of the Native Hawaiian population with at least 50 percent Native Hawaiian ancestry is likely declining over time. Specifically, the 1984 data showed that the fraction of Native Hawaiians with at least 50 percent Native Hawaiian ancestry was about 20.0 percent for Native Hawaiians born between 1980 and 1984, about 29.5 percent for those born between 1965 and 1979, about 42.4 percent for those born between 1950 and 1964, and about 56.7 percent for those born between 1930 and 1949. The median voter in most

U.S. elections today (and for the next several years) is likely to fall into the 1965-to-1979 cohort. Therefore, the current population of HHCA-eligible Native Hawaiian voters is estimated to be about 30 percent as large as the current population of Native Hawaiian voters.

Multiplying the 50,000-vote threshold by 30 percent results in 15,000; it follows that, if the number of votes cast by HHCA-eligible Native Hawaiians in favor of the requester's governing document in a ratification referendum is a majority of all votes cast by such voters, and also exceeds 15,000, the Secretary would be well justified in finding broad-based community support among HHCA-eligible Native Hawaiians. And if the number of votes cast by HHCA-eligible Native Hawaiians in favor of the requester's governing document in a ratification referendum falls below 60 percent of that quantity — that is, less than 9,000 — it would be reasonable to presume a lack of broad-based community support among HHCA-eligible Native Hawaiians such that the Secretary would decline to process the request.

The Department seeks public comment on whether these parameters are appropriate to measure broad-based support in the Native Hawaiian community for a Native Hawaiian government's constitution or other governing document, and on whether different sources of population data should also be considered. *See* response to question 13 above.

The Native Hawaiian Government's Constitution or Governing Document. The form or structure of the Native Hawaiian government is left for the community to decide. § 50.13 of the proposed rule does, however, set forth certain minimum requirements for reestablishing a formal government-to-government relationship with the United States. The constitution or other governing document of the Native Hawaiian government must provide for "periodic elections for government offices," describe procedures for proposing and ratifying constitutional amendments, and not violate Federal law, among other requirements.

The governing document must also provide for the protection and preservation of the rights of HHCA beneficiaries. In addition, the governing document must protect and preserve the liberties, rights, and privileges of all persons affected by the Native Hawaiian government's exercise of governmental powers in accordance with the Indian Civil Rights Act of 1968, as amended (25 U.S.C. 1301 *et seq.*). The Native Hawaiian community would make the decisions as to the institutions of the new government, who could decide the form of any legislative body, the means for ensuring independence of the judiciary, whether certain governmental powers would be centralized in a single body or decentralized to local political subdivisions, and other structural questions.

As to potential concerns that a subsequent amendment to a governing document could impair the safeguards of § 50.13, Federal law provides both defined protections for HHCA beneficiaries and specific guarantees of individual civil rights, and such an amendment could not contravene applicable Federal law. The drafters of the governing document may also choose to include additional provisions constraining the amendment process; the Native Hawaiian community would decide that question in the process of drafting and ratifying that document.

Membership Criteria. As the Supreme Court explained, a Native community's "right to define its own membership . . . has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). The proposed rule therefore provides only minimal guidance about what the governing document must say with regard to membership criteria. HHCA-eligible Native Hawaiians must be included, non-Natives must be excluded, and membership must be voluntary and relinquishable. But under the proposed rule, the community itself would be free to decide whether to include all, some, or none of the Native Hawaiians who are not HHCA-eligible.

Single Government. The rule provides for reestablishment of relations with only a single sovereign Native Hawaiian government. This limitation is consistent with Congress's enactments with respect to Native Hawaiians, which treat members of the Native Hawaiian community as a single indigenous people. It is also consistent with the wishes of the Native Hawaiian community as expressed in comments on the ANPRM. Again, the Native Hawaiian community will decide what form of government to adopt, and may provide for political subdivisions if they so choose.

The Formal Government-to-Government Relationship. Because statutes such as the National Historic Preservation Act of 1966, the Native American Graves Protection and Repatriation Act, and the HHLRA established processes for interaction between the Native Hawaiian community and the U.S. government that in certain limited ways resemble a government-to-government relationship, the proposed rule refers to reestablishment of a "formal" government-to-government relationship, the same as the relationship with federally recognized tribes in the continental United States.

Submission and Processing of the Request. In addition to establishing a set of criteria for the Secretary to apply in reviewing a request from a Native Hawaiian government, the rule sets out the procedure by which the Department will receive and process a request seeking to reestablish a formal government-to-government relationship. This rule includes processes for submitting a request, for public comment on any request received, and for issuing a final decision on the request.[3] The Department will respond to significant public comments when it issues its final decision document. We seek comment on whether these proposed processes

[3] Because Congress has already established a relationship with the Native Hawaiian community, the Secretary's determination in this part is focused solely on the process for reestablishing a government-to-government relationship. As a result, the Department believes that additional process elements are not required.

provide sufficient opportunity for public participation and whether any additional elements should be included.

Other Provisions. The proposed rule also contains provisions governing technical assistance, clarifying the implementation of the formal government-to-government relationship, and addressing similar issues. The proposed rule explains that the government-to-government relationship with the Native Hawaiian Governing Entity is the same as that with federally recognized tribes in the continental United States. Accordingly, the government-to-government relationship with the Native Hawaiian Governing Entity would have very different characteristics from the government-to-government relationship that formerly existed with the Kingdom of Hawaii. The Native Hawaiian Governing Entity would remain subject to the same authority of Congress and the United States to which those tribes are subject and would remain ineligible for Federal Indian programs, services, and benefits (including funding from the Bureau of Indian Affairs and the Indian Health Service) unless Congress expressly declared otherwise.

The proposed rule also clarifies that neither this rulemaking nor granting a request submitted under the proposed rule would affect the rights of HHCA beneficiaries or the status of HHCA lands. Section 50.44(f) makes clear that reestablishment of the formal government-to-government relationship will not affect title, jurisdiction, or status of Federal lands and property in Hawaii. This provision does not affect lands owned by the State of Hawaii or provisions of State law. *See, e.g.*, Haw. Rev. Stat. 6K-9 ("[T]he resources and waters of Kahoolawe shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii."). They also explain that the reestablished government-to-government relationship would more effectively implement statutes

that specifically reference Native Hawaiians, but would not extend the programs, services, and benefits available to Indian tribes in the continental United States to the Native Hawaiian Governing Entity or its members, unless a Federal statute expressly authorizes it. These provisions also state that immediately upon completion of the Federal administrative process, the United States will reestablish a formal government-to-government relationship with the single sovereign government of the Native Hawaiian community that submitted the request to reestablish that relationship. Individuals' eligibility for any program, service, or benefit under any Federal law that was in effect before the final rule's effective date would be unaffected. Likewise, Native Hawaiian rights, protections, privileges, immunities, and benefits under Article XII of the Constitution of the State of Hawaii would not be affected. And nothing in this proposed rule would alter the sovereign immunity of the United States or the sovereign immunity of the State of Hawaii.

IV. Public Meetings and Tribal Consultations

An integral part of this rulemaking process is the opportunity for Department officials to meet with leaders and members of the Native Hawaiian community. Likewise, a central feature of the government-to-government relationships between the United States and each federally recognized tribe in the continental United States is formal consultation between Federal and tribal officials. The Department conducts these tribal consultations in accordance with Executive Order 13175, 65 FR 67249 (Nov. 6, 2000); the Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, 74 FR 57881 (Nov. 5, 2009); and the Department of the Interior Policy on Consultation with Indian Tribes. Tribal consultations are only for elected or duly appointed representatives of federally recognized tribes in the

continental United States, as discussions are held on a government-to-government basis. These sessions may be closed to the public.

A. Past Meetings and Consultations

Shortly after the ANPRM's June 2014 publication in the Federal Register, staff from the Departments of the Interior and Justice conducted 15 public meetings across the State of Hawaii to gather testimony on the ANPRM. Hundreds of stakeholders and interested parties attended sessions on the islands of Hawaii, Kauai, Lanai, Maui, Molokai, and Oahu, resulting in over 40 hours of oral testimony on the ANPRM. Also during that time, staff conducted extensive community outreach with Native Hawaiian organizations, groups, and community leaders. The Department also conducted five mainland regional consultations in Indian country that were also supplemented with targeted community outreach in locations with significant Native Hawaiian populations.

B. Future Meetings and Consultations

To build on the extensive record gathered during the ANPRM, the Department will hold teleconferences to collect public comment on the proposed rule. The Department will also consult with Native Hawaiian organizations and with federally recognized tribes in the continental United States by teleconference. Interested individuals may also submit written comments on this proposed rule at any time during the comment period. The Department will consider statements made during the teleconferences and will include them in the administrative record along with the written comments. The Department strongly encourages Native Hawaiian organizations and federally recognized tribes in the continental United States to hold their own meetings to develop comments on this proposed rule, and to share the outcomes of those meetings with us.

1. Public Meetings by Teleconference. The Department will conduct two public meetings by teleconference to receive public comments on this proposed rule on the following schedule:

Monday, October 26, 2015

2:00 pm – 5:00 pm Eastern Time / 8:00am – 11:00am Hawaii Standard Time

Call-in number: 1-888-947-9025

Passcode: 1962786

Saturday, November 7, 2015

3:00 pm – 6:00pm Eastern Time / 9:00am – 12:00pm Hawaii Standard Time

Call-in number: 1-888-947-9025

Passcode: 1962786

2. Consultations with Native Hawaiian Organizations. The Department is legally required to consult with Native Hawaiian organizations in some circumstances. Although such consultation is not required for this proposed rule, the Department is electing to conduct such consultation in order to enhance participation from the Native Hawaiian community. The Department maintains a Native Hawaiian Organization Notification List, *available at* www.doi.gov/ohr/nholist/nhol, which includes Native Hawaiian organizations registered through the designated process. Representatives from Native Hawaiian organizations that appear on this list are invited to participate in a teleconference scheduled below:

Tuesday, October 27, 2015

3:00 pm – 6:00 pm Eastern Time / 9:00 am – 12:00pm Hawaii Standard Time

Call-in number: 1-888-947-9025

Passcode: 1962786

Participation will be limited to one telephone line for each listed organization and up to two of their representatives. Only those organizations that appear on the Native Hawaiian Organization Notification List may participate in this consultation. **Please RSVP to RSVPpart50@doi.gov for this meeting only.** No RSVP is necessary for the other meetings.

3. Tribal Consultation. The Department will also conduct a tribal consultation by teleconference. The Department conducts such consultations in accordance with Executive Order 13175, 65 FR 67249 (Nov. 6, 2000); the Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, 74 FR 57881 (Nov. 5, 2009); and the Department of the Interior Policy on Consultation with Indian Tribes. Tribal consultations are only for elected or duly appointed representatives of federally recognized tribes in the continental United States, as discussions are held on a government-to-government basis. The following teleconference may be closed to the public:

Wednesday, November 4, 2015

1:30pm – 4:30pm Eastern Time

Call-in number: 1-888-947-9025

Passcode: 1962786

Meeting information will also be made available for the tribal consultations in the continental United States by "Dear Tribal Leader" notice.

Further information about these meetings, and notice of any additional meetings, will be posted on the ONHR website (http://www.doi.gov/ohr/).

V. Procedural Matters

A. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA determined that this proposed rule is significant because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. The Department developed this proposed rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

The Department certifies that this proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not result in the expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. The rule's requirements will not cause a major increase in costs or prices for consumers,

individual industries, Federal, State, or local government agencies, or geographic regions. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

This proposed rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

Under the criteria in Executive Order 12630, this proposed rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable "taking." A takings implications assessment therefore is not required.

F. Federalism (E.O. 13132)

Under the criteria in Executive Order 13132, this proposed rule has no substantial and direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. A federalism implications assessment therefore is not required.

G. Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

H. Consultation with Indian Tribes (E.O. 13175)

Under Executive Order 13175, the Department held several consultation sessions with federally recognized tribes in the continental United States. Details on these consultation sessions and on comments the Department received from tribes and intertribal organizations are described above. The Department considered each of those comments and addressed them, where possible, in the proposed rule.

I. Paperwork Reduction Act

This proposed rule does not require an information collection from ten or more parties, and a submission under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, is not required.

J. National Environmental Policy Act

This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, or procedural nature. *See* 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act of 1969.

K. Information Quality Act

In developing this proposed rule we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106-554).

L. Effects on the Energy Supply (E.O. 13211)

This proposed rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required. This rule will not have a significant effect on the nation's energy supply, distribution, or use.

M. Clarity of this Regulation

Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, require the Department to write all rules in plain language. This means that each rule the Department publishes must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that the Department did not met these requirements, please send comments by one of the methods listed in the "COMMENTS" section. To better help the Department revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

N. Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment — including your personal identifying information — may be made publicly available at any time. While you can ask the Department in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

If you send an email comment directly to the Department without going through *http://www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the Department recommends that you include your name

and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the Department cannot read your comment due to technical difficulties and cannot contact you for clarification, the Department may not be able to consider your comment. Electronic files should avoid the use of special characters, avoid any form of encryption, and be free of any defects or viruses.

The Department cannot ensure that comments received after the close of the comment period (*see* DATES) will be included in the docket for this rulemaking and considered. Comments sent to an address other than those listed above will not be included in the docket for this rulemaking.

List of Subjects in 43 CFR Part 50

Administrative practice and procedure, Indians—tribal government.

VI. Proposed Rule

For the reasons stated in the preamble, the Department of the Interior proposes to amend title 43 of the Code of Federal Regulations by adding new part 50 as set forth below:

PART 50 — PROCEDURES FOR REESTABLISHING A FORMAL GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH THE NATIVE HAWAIIAN COMMUNITY

Subpart A — General Provisions

Sec.

Subpart B — Criteria for Reestablishing a Formal Government-to-Government Relationship

Subpart C — Process for Reestablishing a Formal Government-to-Government Relationship

Submitting a Request

Public Comments and Responses to Public Comments

The Secretary's Decision

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 479a, 479a-1; 43 U.S.C. 1457; Hawaiian Homes Commission Act, 1920 (Act of July 9, 1921, 42 Stat. 108), as amended; Act of March 19, 1959, 73 Stat. 4; Joint Resolution of November 23, 1993, 107 Stat. 1510; Act of November 2, 1994, sec. 103, 108 Stat. 4791; 112 Departmental Manual 28.

Subpart A — General Provisions

§ 50.1 What is the purpose of this part?

This part sets forth the Department's administrative procedure and criteria for reestablishing a formal government-to-government relationship between the United States and the Native Hawaiian community to allow the United States to more effectively implement and administer:

(a) the special political and trust relationship that Congress established between the United States and the Native Hawaiian community; and

(b) the Federal programs, services, and benefits that Congress created specifically for the Native Hawaiian community (*see*, e.g., 12 U.S.C. 1715z-13b; 20 U.S.C. 80q *et seq.*; 20 U.S.C. 7511 *et seq.*; 25 U.S.C. 3001 *et seq.*; 25 U.S.C. 4221 *et seq.*; 42 U.S.C. 2991 *et seq.*; 42 U.S.C. 3057g *et seq.*; 42 U.S.C. 11701 *et seq.*; 54 U.S.C. 302706).

§ 50.2 How will reestablishment of this formal government-to-government relationship occur?

A Native Hawaiian government seeking to reestablish a formal government-to-government relationship with the United States under this part must submit to the Secretary a request as described in §50.10. Reestablishment of a formal government-to-government relationship will occur if the Secretary grants the request as described in §§50.40-50.43.

§ 50.3 May the Native Hawaiian community reorganize itself based on island or other geographic, historical, or cultural ties?

The Secretary will reestablish a formal government-to-government relationship with only one sovereign Native Hawaiian government, which may include political subdivisions with limited powers of self-governance defined in the Native Hawaiian government's governing document.

§ 50.4 What definitions apply to terms used in this part?

As used in this part, the following terms have the meanings given in this section:

Continental United States means the contiguous 48 states and Alaska.

Department means the Department of the Interior.

DHHL means the Department of Hawaiian Home Lands, or the agency or department of the State of Hawaii that is responsible for administering the HHCA.

Federal Indian programs, services, and benefits means any federally funded or authorized special program, service, or benefit provided by any Federal agency (including, but not limited to, the Bureau of Indian Affairs and the Indian Health Service) to Indian tribes in the continental United States or their members because of their status as Indians.

Federal Native Hawaiian programs, services, and benefits means any federally funded or authorized special program, service, or benefit provided by any Federal agency to a Native Hawaiian government, its political subdivisions (if any), its members, the Native Hawaiian community, Native Hawaiians, or HHCA-eligible Native Hawaiians because of their status as Native Hawaiians.

Governing document means a written document (e.g., constitution) embodying a government's fundamental and organic law.

Hawaiian home lands means all lands given the status of Hawaiian home lands under the HHCA (or corresponding provisions of the Constitution of the State of Hawaii), the HHLRA, or any other Act of Congress, and all lands acquired pursuant to the HHCA.

HHCA means the Hawaiian Homes Commission Act, 1920 (Act of July 9, 1921, 42 Stat. 108), as amended.

HHCA-eligible Native Hawaiian means a Native Hawaiian individual who meets the definition of "native Hawaiian" in HHCA sec. 201(a)(7), 42 Stat. 108, regardless of whether the individual resides on Hawaiian home lands, is an HHCA lessee, is on a wait list for an HHCA lease, or receives any benefits under the HHCA.

HHLRA means the Hawaiian Home Lands Recovery Act (Act of November 2, 1995, 109 Stat. 357), as amended.

Native Hawaiian means any individual who is a:

(1) citizen of the United States, and

(2) descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

Native Hawaiian community means the distinct indigenous political community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship.

Native Hawaiian Governing Entity means the Native Hawaiian community's representative sovereign government with which the Secretary reestablishes a formal government-to-government relationship.

Request means an express written submission to the Secretary asking for designation as the Native Hawaiian Governing Entity.

Requester means the government that submits to the Secretary a request seeking to be designated as the Native Hawaiian Governing Entity.

Secretary means the Secretary of the Interior or that officer's authorized representative.

Subpart B — Criteria for Reestablishing a Formal Government-to-Government Relationship

§ 50.10 What are the required elements of a request to reestablish a formal government-to-government relationship with the United States?

A request must include the following seven elements:

(a) a written narrative with supporting documentation thoroughly describing how the Native Hawaiian community drafted the governing document, as described in §50.11;

(b) a written narrative with supporting documentation thoroughly describing how the Native Hawaiian community determined who can participate in ratifying a governing document, consistent with §50.12;

(c) the duly ratified governing document, as described in §50.13;

(d) a written narrative with supporting documentation thoroughly describing how the Native Hawaiian community adopted or approved the governing document in a ratification referendum, as described in §50.14;

(e) a written narrative with supporting documentation thoroughly describing how and when elections were conducted for government offices identified in the governing document, as described in §50.15;

(f) a duly enacted resolution of the governing body authorizing an officer to certify and submit to the Secretary a request seeking the reestablishment of a formal government-to-government relationship with the United States; and

(g) a certification, signed and dated by the authorized officer, stating that the submission is the request of the governing body.

§ 50.11 What process is required in drafting the governing document?

The written narrative thoroughly describing the process for drafting the governing document must describe how the process ensured that the document was based on meaningful input from representative segments of the Native Hawaiian community and reflects the will of the Native Hawaiian community.

§ 50.12 What documentation is required to demonstrate how the Native Hawaiian community determined who could participate in ratifying a governing document?

The written narrative thoroughly describing how the Native Hawaiian community determined who could participate in ratifying a governing document must explain the processes for verifying that participants were Native Hawaiians and for verifying those who were also HHCA-eligible Native Hawaiians, and should further explain how those processes were rational and reliable. For purposes of determining who may participate in the ratification process:

(a) the Native Hawaiian community may provide:

(1) that the definition for a Native Hawaiian may be satisfied by:

(i) enumeration in official DHHL records demonstrating eligibility under the HHCA, excluding noncitizens of the United States;

(ii) enumeration on a roll of Native Hawaiians certified by a State of Hawaii commission or agency under State law, where enumeration is based on documentation that verifies descent, excluding noncitizens of the United States; or

(iii) other means to document generation-by-generation descent from a Native Hawaiian; and

(2) that the definition for an HHCA-eligible Native Hawaiian may be satisfied by:

(i) enumeration in official DHHL records demonstrating eligibility under the HHCA, excluding noncitizens of the United States; or

(ii) other records or documentation demonstrating eligibility under the HHCA; or

(b) the Native Hawaiian community may use a roll of Native Hawaiians certified by a State of Hawaii commission or agency under State law as an accurate and complete list of Native Hawaiians eligible to vote in the ratification referendum: *Provided,* that:

(1) the roll was:

(i) based on documentation that verified descent;

(ii) compiled in accordance with applicable due-process principles; and

(iii) published and made available for inspection following certification; and

(2) the Native Hawaiian community also:

(i) included adult citizens of the United States who demonstrated eligibility under the HHCA according to official DHHL records;

(ii) removed persons who are not citizens of the United States;

(iii) removed persons who were younger than 18 years of age on the last day of the ratification referendum;

(iv) removed persons who were enumerated without documentation that verified descent; and

(v) removed persons who voluntarily requested to be removed.

§ 50.13 What must be included in the governing document?

The governing document must:

(a) state the government's official name;

(b) prescribe the manner in which the government exercises its sovereign powers;

(c) establish the institutions and structure of the government, and of its political subdivisions (if any) that are defined in a fair and reasonable manner;

(d) authorize the government to negotiate with governments of the United States, the State of Hawaii, and political subdivisions of the State of Hawaii, and with non-governmental entities;

(e) provide for periodic elections for government offices identified in the governing document;

(f) describe the criteria for membership, which:

(1) must permit HHCA-eligible Native Hawaiians to enroll;

(2) may permit Native Hawaiians who are not HHCA-eligible Native Hawaiians, or some defined subset of that group that is not contrary to Federal law, to enroll;

(3) must exclude persons who are not Native Hawaiians;

(4) must establish that membership is voluntary and may be relinquished voluntarily; and

(5) must exclude persons who voluntarily relinquished membership.

(g) protect and preserve Native Hawaiians' rights, protections, and benefits under the HHCA and the HHLRA;

(h) protect and preserve the liberties, rights, and privileges of all persons affected by the government's exercise of its powers, *see* 25 U.S.C. 1301 *et seq.*;

(i) describe the procedures for proposing and ratifying amendments to the governing document; and

(j) not contain provisions contrary to Federal law.

§ 50.14 What information about the ratification referendum must be included in the request?

The written narrative thoroughly describing the ratification referendum must include the following information:

(a) A certification of the results of the ratification referendum including:

(1) the date or dates of the ratification referendum;

(2) the number of Native Hawaiians, regardless of whether they were HHCA-eligible Native Hawaiians, who cast a vote in favor of the governing document;

(3) the total number of Native Hawaiians, regardless of whether they were HHCA-eligible Native Hawaiians, who cast a ballot in the ratification referendum;

(4) the number of HHCA-eligible Native Hawaiians who cast a vote in favor of the governing document; and

(5) the total number of HHCA-eligible Native Hawaiians who cast a ballot in the ratification referendum.

(b) A description of how the Native Hawaiian community conducted the ratification referendum that demonstrates:

(1) how and when the Native Hawaiian community made the full text of the proposed governing document (and a brief impartial description of that document) available to Native Hawaiians prior to the ratification referendum, through the Internet, the news media, and other means of communication;

(2) how and when the Native Hawaiian community notified Native Hawaiians about how and when it would conduct the ratification referendum;

(3) how the Native Hawaiian community accorded Native Hawaiians a reasonable opportunity to vote in the ratification referendum;

(4) how the Native Hawaiian community prevented voters from casting more than one ballot in the ratification referendum; and

(5) how the Native Hawaiian community ensured that the ratification referendum:

(i) was free and fair;

(ii) was held by secret ballot or equivalent voting procedures;

(iii) was open to all persons who were verified as satisfying the definition of a Native Hawaiian (consistent with § 50.12) and were 18 years of age or older, regardless of residency;

(iv) did not include in the vote tallies votes cast by persons who were not Native Hawaiians; and

(v) did not include in the vote tallies for HHCA-eligible Native Hawaiians votes cast by persons who were not HHCA-eligible Native Hawaiians.

(c) A description of how the Native Hawaiian community verified whether a potential voter in the ratification referendum was a Native Hawaiian and whether that potential voter was also an HHCA-eligible Native Hawaiian, consistent with § 50.12.

§ 50.15 What information about the elections for government offices must be included in the request?

The written narrative thoroughly describing how and when elections were conducted for government offices identified in the governing document, including members of the governing body, must show that the elections were:

(a) free and fair;

(b) held by secret ballot or equivalent voting procedures; and

(c) open to all eligible Native Hawaiian members as defined in the governing document.

§ 50.16 What criteria will the Secretary apply when deciding whether to reestablish the formal government-to-government relationship?

The Secretary shall grant a request if the Secretary determines that the following exclusive list of eight criteria has been met:

(a) The request includes the seven required elements described in § 50.10;

(b) The process by which the Native Hawaiian community drafted the governing document met the requirements of §50.11;

(c) The process by which the Native Hawaiian community determined who could participate in ratifying the governing document met the requirements of §50.12;

(d) The duly ratified governing document, submitted as part of the request, meets the requirements of §50.13;

(e) The ratification referendum for the governing document met the requirements of §50.14(b)–(c) and was conducted in a manner not contrary to Federal law;

(f) The elections for the government offices identified in the governing document, including members of the governing body, were consistent with §50.15 and were conducted in a manner not contrary to Federal law;

(g) The number of votes that Native Hawaiians, regardless of whether they were HHCA-eligible Native Hawaiians, cast in favor of the governing document exceeded half of the total number of ballots that Native Hawaiians cast in the ratification referendum: *Provided,* that the number of votes cast in favor of the governing document in the ratification referendum was sufficiently large to demonstrate broad-based community support among Native Hawaiians; *and Provided Further,* that, if fewer than 30,000 Native Hawaiians cast votes in favor of the governing document, this criterion is not satisfied; *and Provided Further,* that, if more than 50,000 Native Hawaiians cast votes in favor of the governing document, the Secretary shall apply a strong presumption that this criterion is satisfied; and

(h) The number of votes that HHCA-eligible Native Hawaiians cast in favor of the governing document exceeded half of the total number of ballots that HHCA-eligible Native Hawaiians cast in the ratification referendum: *Provided,* that the number of votes cast in favor of the governing document in the ratification referendum was sufficiently large to demonstrate broad-based community support among HHCA-eligible Native Hawaiians; *and Provided Further,* that, if fewer than 9,000 HHCA-eligible Native Hawaiians cast votes in favor of the governing document, this criterion is not satisfied; *and Provided Further,* that, if more than 15,000 HHCA-eligible Native Hawaiians cast votes in favor of the governing document, the Secretary shall apply a strong presumption that this criterion is satisfied.

Subpart C — Process for Reestablishing a Formal Government-to-Government Relationship

Submitting a Request

§ 50.20 How may a request be submitted?

A request under this part may be submitted to the Department of the Interior, 1849 C Street, NW, Washington, DC 20240.

§ 50.21 Is the Department available to provide technical assistance?

Yes. The Department may provide technical assistance to facilitate compliance with this part and with other Federal law, upon request for assistance.

Public Comments and Responses to Public Comments

§ 50.30 What opportunity will the public have to comment on a request?

(a) Within 20 days after receiving a request that is consistent with §50.10 and §50.16(g)-(h), the Department will publish notice of receipt of the request in the Federal Register and post the following on the Department website:

(1) the request, including the governing document;

(2) the name and mailing address of the requester;

(3) the date of receipt; and

(4) notice of an opportunity for the public, within a 30-day comment period following the website posting, to submit comments and evidence on whether the request meets the criteria described in § 50.16.

(b) Within 10 days after the close of the comment period, the Department will post on its website any comment or notice of evidence relating to the request that was timely submitted to the Department under subsection (a)(4).

§ 50.31 What opportunity will the requester have to respond to comments?

Following the website posting described in §50.30(b), the requester will have 30 days to respond to any comment or evidence that was timely submitted to the Department under §50.30(a)(4).

§ 50.32 May the deadlines in this part be extended?

Yes. Upon a finding of good cause, the Secretary may extend any deadline in this part by posting on the Department website and publishing in the Federal Register the length of and the reasons for the extension.

The Secretary's Decision

§ 50.40 When will the Secretary issue a decision?

The Secretary may request additional documentation and explanation with respect to material required to be submitted by the requester under this part. The Secretary will apply the criteria described in § 50.16 and endeavor to either grant or deny a request within 120 days of determining that the requester's submission is complete, after receiving any additional information the Secretary deems necessary and after receiving all the information described in §50.30 and §50.31.

§ 50.41 What will the Secretary's decision include?

The decision will respond to significant public comments and summarize the evidence, reasoning, and analyses that are the basis for the Secretary's determination regarding whether the request meets the criteria described in §50.16.

§ 50.42 When will the Secretary's decision take effect?

The Secretary's decision will take effect with the publication of notice in the Federal Register.

§ 50.43 What does it mean for the Secretary to grant a request?

When a decision granting a request takes effect, the requester will immediately be identified as the Native Hawaiian Governing Entity (or the official name stated in that entity's governing document), the special political and trust relationship between the United States and the Native Hawaiian community will be reaffirmed, and a formal government-to-government relationship will be reestablished with the Native Hawaiian Governing Entity as the sole representative sovereign government of the Native Hawaiian community.

§ 50.44 How will the formal government-to-government relationship between the United States Government and the Native Hawaiian Governing Entity be implemented?

(a) Upon reestablishment of the formal government-to-government relationship, the Native Hawaiian Governing Entity will have the same government-to-government relationship under the United States Constitution and Federal law as the government-to-government relationship between the United States and a federally recognized tribe in the continental United States, and the same inherent sovereign governmental authorities.

(b) The Native Hawaiian Governing Entity will be subject to Congress's plenary authority.

(c) Absent Federal law to the contrary, any member of the Native Hawaiian Governing Entity will be eligible for current Federal Native Hawaiian programs, services, and benefits.

(d) The Native Hawaiian Governing Entity, its political subdivisions (if any), and its members will not be eligible for Federal Indian programs, services, and benefits unless Congress expressly and specifically has declared the Native Hawaiian

community, the Native Hawaiian Governing Entity (or the official name stated in that entity's governing document), its political subdivisions (if any), its members, Native Hawaiians, or HHCA-eligible Native Hawaiians to be eligible.

(e) Reestablishment of the formal government-to-government relationship will not authorize the Native Hawaiian Governing Entity to sell, dispose of, lease, or encumber Hawaiian home lands or interests in those lands, or to diminish any Native Hawaiian's rights, protections, or benefits, including any immunity from State or local taxation, granted by:

(1) the HHCA;

(2) the HHLRA;

(3) the Act of March 18, 1959, 73 Stat. 4; or

(4) the Act of November 11, 1993, secs. 10001-10004, 107 Stat. 1418, 1480-84.

(f) Reestablishment of the formal government-to-government relationship will not affect the title, jurisdiction, or status of Federal lands and property in Hawaii.

(g) Nothing in this part impliedly amends, repeals, supersedes, abrogates, or overrules any provision of Federal law, including case law, affecting the privileges, immunities, rights, protections, responsibilities, powers, limitations, obligations, authorities, or jurisdiction of any tribe in the continental United States.

_____

Date

_____

Michael L. Connor,
Deputy Secretary.

FREQUENTLY ASKED QUESTIONS ON THE NOTICE OF PROPOSED RULEMAKING FOR PROCEDURES FOR REESTABLISHING A GOVERNMENT-TO-GOVERNMENT RELATIONSHIP WITH THE NATIVE HAWAIIAN COMMUNITY

SEPTEMBER 2015

What does the proposed rule say?

The Notice of Proposed Rulemaking ("proposed rule") would create a path for a reorganized Native Hawaiian government to reestablish a government-to-government relationship with the United States. The proposed rule would establish an administrative procedure and criteria that the Secretary of the Interior would apply if the Native Hawaiian community forms a unified government that then seeks a formal government-to-government relationship with the United States.

The decision to reorganize a Native Hawaiian government and to reestablish a formal government-to-government relationship with the United States is a decision for the Native Hawaiian community. Therefore, the proposed rule does not attempt to reorganize a Native Hawaiian government or dictate the form or structure of that government.

Why did the Department decide to move forward with a proposed rule?

After reviewing more than 5,000 comments submitted for the written record, and over 40 hours of testimony received during the Federal consultations in Hawaii in 2014 on the Advance Notice of Proposed Rulemaking, the Department found that the public commenters overwhelmingly supported creating a pathway for reestablishing a formal government-to-government relationship between the Native Hawaiian community and the United States, as the next step in the reconciliation process set in motion by Federal law (the Apology Resolution) over 20 years ago. The Department believes that reestablishing such a relationship would allow the United States to more effectively implement the special political and trust relationship that Congress has long recognized with the Native Hawaiian community.

How did the Department arrive at its decision to move forward with a proposed rule?

The Department of the Interior is the lead Federal agency on Native Hawaiian affairs. It applies its expertise to administer the special political and trust relationship between Native Hawaiians and the United States. In deciding to propose a rule through the notice-and-comment process, the Department applied its expertise in Native Hawaiian affairs and analyzed the written and oral testimony submitted last year as part of the administrative record. The proposed rule, however, is only a proposal, and the Department will receive and consider further public comments before determining whether it should issue a final rule and, if so, what the final rule should say.

Why is the Department taking action now?

The Department believes that reestablishing a formal government-to-government relationship with the Native Hawaiian community would allow the United States to more effectively implement the special political and trust relationship that Congress has established with that community.

We are proposing an administrative rule in response to calls to action from leaders within the Native Hawaiian community, as well as from Hawaii's elected political leaders. Members of the community have requested that the Department take this step for over a decade.

As the lead Federal agency for Native Hawaiian issues, it is within the Department of the Interior's purview and prerogative to consider such matters. Importantly, the overwhelming majority of those who commented on the Advance Notice of Proposed Rulemaking, issued in June 2014, urged us to move forward with a proposed rule that would set out a process for reestablishing formal government-to-government ties to the Native Hawaiian community.

What are the benefits associated with reestablishing a government-to-government relationship?

The Federal government has a longstanding policy of supporting self-determination and self-governance for Native peoples throughout the United States. Such self-government provides many Native populations enhanced economic development and greater ability to preserve their distinctive cultures and traditions.

A government-to-government relationship with the United States can significantly enhance a Native community's ability to exercise self-government by giving a Native government special status under Federal law. For example, if the Native Hawaiian government seeks and obtains a formal relationship with the United States, Federal courts would then accord greater weight to the laws enacted by that Native Hawaiian government and the decisions of the Native Hawaiian courts. That in turn will facilitate and support self-governance by enabling the community to exercise powers of self-government over many issues directly impacting community members. A government-to-government relationship also would provide a Native Hawaiian government with additional abilities to protect its members' interests by filing suit in Federal court.

Moreover, once a government-to-government relationship exists, Federal agencies would treat the Native Hawaiian government as the legal representative of the community. Many Federal agencies have procedures in place for regular communication and consultation with recognized Native governments.

Does the proposed rule alter the fundamental nature of the political and trust relationship established by Congress between the United States and the Native Hawaiian community?

No. Over many decades, Congress has enacted more than 150 statutes recognizing and implementing a special political and trust relationship with the Native Hawaiian community. These Federal laws help preserve and protect Native Hawaiian culture, language, and historical sites, as well as establish special Native Hawaiian programs in the areas of health care, education, loans, and employment, among others.

Does the proposed rule have any direct impact on the status of the Hawaiian home lands?

No. Nothing in the proposed rule, or granting a request submitted under it, would affect the status of Hawaiian Homes Commission Act (HHCA) beneficiaries or Hawaiian home lands.

Does the proposed rule authorize compensation for past wrongs?

No. The proposed rule does not authorize or in any way contemplate compensation for any past wrongs.

What is the impact of the proposed rule on Federal lands in Hawaii?

The proposed rule makes clear that reestablishment of a formal government-to-government relationship would not affect title, jurisdiction, or status of Federal lands in Hawaii.

Does the proposed rule determine who ultimately would be a member or citizen of a Native Hawaiian government?

Under the proposed rule, a Native Hawaiian government would have significant discretion to define its own membership criteria. Under principles of Federal law, however, only persons with Native Hawaiian ancestry could be members if a formal government-to-government relationship is reestablished. The proposed rule also requires that any person who is within Congress's definition of beneficiaries under the HHCA be eligible for membership.

Will the Secretary reestablish a government-to-government relationship with more than one Native Hawaiian government?

No. The proposed rule provides that the Secretary will reestablish a formal government-to-government relationship with only one sovereign Native Hawaiian government, but that it may include political subdivisions.

The structure of the Native Hawaiian government is left for the community to decide. Should the Native Hawaiian government seek to reestablish a formal government-to-government relationship with the United States, the proposed rule has a short list of requirements for that government's constitution or governing document. For example, the governing document must

provide for periodic elections, guarantee civil rights protections, and protect rights and benefits arising under the HHCA.

Does the proposed rule determine the process for ratifying a constitution or other governing document in a ratification referendum? Does it limit who would be eligible to vote in a ratification referendum?

The proposed rule requires that a ratification referendum be free and fair, that there be public notice before the referendum occurs, and that there be a process for ensuring that those who vote are actually eligible to vote. To ensure that the ratification vote reflects the views of the Native Hawaiian community as a whole, there is a requirement that the turnout in the ratification referendum be sufficiently large to demonstrate broad-based community support.

Congress uses two approaches to defining the Native Hawaiian community. The definition appearing in the HHCA requires at least 50 percent Native Hawaiian ancestry; in other statutes, Congress defines the term more broadly, to include any U.S. citizen who descends from the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. Because Congress uses both definitions, the proposed rule requires that a majority of voters from each of these groups support the governing document in a ratification referendum. The proposed rule also considers the total number of affirmative votes cast in favor of the governing document to ensure that support is genuinely broad-based. The proposed rule creates a strong presumption of broad-based community support if the affirmative votes exceed 50,000, including affirmative votes from at least 15,000 Native Hawaiians who are within the HHCA definition of Native Hawaiian. At a minimum, the affirmative votes must exceed 30,000, including affirmative votes from at least 9,000 Native Hawaiians who are within the HHCA definition of Native Hawaiian.

Would reestablishment of a government-to-government relationship under the proposed rule make the Native Hawaiian government eligible for Federal Indian programs and services?

No. Congress enacted programs and services expressly and specifically for the Native Hawaiian community that are separate from the programs and services that Congress enacted for federally recognized tribes in the continental United States. Native Hawaiians are therefore not eligible for Federal Indian programs, services, or benefits unless Congress expressly and specifically declares them eligible.

Consistent with that approach, the proposed rule would not alter or affect the programs, services, and benefits that the United States currently provides to federally recognized tribes in the continental United States unless an Act of Congress expressly provides otherwise.

Will the Department go forward with reestablishing a formal government-to-government relationship if the Native Hawaiian community decides it does not want to do so?

No. If the community does not support a government-to-government relationship, no such relationship will be reestablished. The proposed rule sets a process under which the Native Hawaiian community can, through a democratic process, request a formal government-to-government relationship with the United States if the community chooses. Because the proposal provides for a referendum, broad-based community support will be a precondition for reestablishing a government-to-government relationship.

Would the proposed rule make a Native Hawaiian government eligible to invoke the Indian Gaming Regulatory Act (IGRA)?

No. The Department anticipates that IGRA would not apply to the Native Hawaiian government. Furthermore, because Hawaii state law prohibits gambling, the Native Hawaiian government would not be permitted to conduct gaming in Hawaii.

Has the Obama Administration previously supported reestablishment of a government-to-government relationship with the Native Hawaiian community?

Yes. The Obama Administration has a strong commitment to enhancing principles of self-determination and self-governance for Native communities, including Native Hawaiians. Notably, in 2010, Secretary of the Interior Salazar and Attorney General Holder sent Congress a letter strongly supporting legislation to reorganize a Native Hawaiian government to which the United States could relate on a government-to-government basis.

Who can submit public comments on the proposed rule?

Anyone may comment on the proposed rule. We are particularly interested in hearing from leaders and members of the Native Hawaiian community and of federally recognized tribes in the continental United States. We also welcome comments and information from the State of Hawaii and its agencies, other government agencies, and members of the public.

What types of public comments are being solicited?

We are seeking comments on the contents of the proposed rule. We welcome all comments from the public, but comments that deal directly with the proposal are most helpful.

The proposed rule has three subparts: General provisions (Subpart A); Criteria for reestablishing a formal government-to-government relationship (Subpart B); and Process for reestablishing a formal government-to-government relationship (Subpart C). Generally, Subpart B sets out the elements required in a request to reestablish a formal government-to-government relationship with the United States and the criteria the Secretary would use to review the request. Subpart C details the process for reestablishing a formal government-to-government relationship, including public comment on the request, and the implementation of that relationship.

The preamble to the proposed rule contains background information on aspects of the proposed rule, responds to comments received on the Advance Notice of Proposed Rulemaking, and summarizes the Department's approach to developing the proposed rule. We welcome comment on that discussion as well.

Will there be public meetings or consultations to discuss the proposed rule?

Yes. We will conduct four meetings by teleconference: two will be open to the public and the other two will target comments from Native Hawaiian organizations and federally recognized tribes in the continental United States. Details for each teleconference are listed below:

Public Meeting

Monday, October 26, 2015

2:00 pm – 5:00 pm Eastern Time / 8:00 am – 11:00 am Hawaii Time

Call-in number: 1-888-947-9025

Passcode: 1962786

*Native Hawaiian Organizations Meeting**

Tuesday, October 27, 2015

3:00 pm – 6:00 pm Eastern Standard Time / 9:00 am – 12:00 pm Hawaii Standard Time

Call-in number: 1-888-947-9025

Passcode: 1962786

Tribal Consultation

Wednesday, November 4, 2015

1:30 pm – 4:30 pm Eastern Standard Time

Call-in number: 1-888-947-9025

Passcode: 1962786

Public Meeting

Saturday, November 7, 2015

3:00 pm – 6:00 pm Eastern Standard Time / 9:00 am – 12:00 pm Hawaii Standard Time

Call-in number: 1-888-947-9025

Passcode: 1962786

**Limited to organizations listed on the Native Hawaiian Organization Notification list, available at www.doi.gov/ohr/nholist/nhol. Please RSVP to RSVPpart50@doi.gov for this meeting only. No RSVP is necessary for the other meetings.*

This information is also available at www.doi.gov/ohr and printed in the *Federal Register*.

We strongly encourage Native Hawaiian organizations and federally recognized tribes in the continental United States to hold their own meetings to develop comments on the issues outlined in the proposed rule and to submit them to us for the record.

Once the public comment period on the proposed rule closes, what are the next steps in the rulemaking process?

The public comment period for the proposed rule will last 90 days. The Department will then review and analyze those comments along with the testimony received during the scheduled teleconferences to determine if a final rule should issue.

Excerpts of Minutes from the January 8, 2015
OHA Board of Trustees Meeting

(Pages 11 and 14)

State of Hawai'i
Office of Hawaiian Affairs
560 N. Nimitz Hwy., Suite 200
Honolulu, HI 96817

Minutes of the Office of Hawaiian Affairs Board of Trustees
Thursday, January 8, 2015, 12:30 pm

I. CALL TO ORDER

The meeting of the Office of Hawaiian Affairs Board of Trustees was called to order by Chair Robert K. Lindsey, Jr. at 12:31 pm. Those present were as follows:

Attendance

Trustee Robert K. Lindsey, Jr., Chair
Trustee Dan Ahuna, Vice Chair
Trustee Lei Ahu Isa
(departed 2:55 pm)
Trustee Rowena Akana
(arrived 12:36 pm)
Trustee Peter Apo
(departed 3:48 pm)
Trustee S. Haunani Apoliona
Trustee Carmen Hulu Lindsey
Trustee Colette Machado
(departed 2:34 pm)
Trustee John Waihe'e IV
(departed 2:36 pm)

Kamana'opono Crabbe, Ka Pouhana/CEO
Robert G. Klein, Esq., Board Counsel
(arrived 12:45 pm, departed 2:44 pm)

Excused

-None-

Staff Present

Harold Nedd, Chief of Staff
Capsun M. Poe, Board Secretary
Jeremy Kama Hopkins, Trustee Aide
Kauikeaolani Wailehua, Trustee Aide
Claudine Calpito, Trustee Aide
Davis Price, Trustee Aide
Lady Garrett, Trustee Aide
Alvin Akee, Trustee Secretary
Liana Pang, Trustee Aide
Lehua Itokazu, Trustee Aide
Kathy Owara-Takeo, Trustee Aide
Kawika Burgess, COO
Kehau Abad, CE Director
Kawika Riley, Chief Advocate
Lisa Watkins-Victorino, Research Director
Miles Nishijima, RM-LAD Director
Ernest Kimoto, Corporate Counsel
Momilani Lazo, EO
Alice Silbanuz, MRM
Deirdra Alo, EO
Derek Kauanoe, GOV
Grant Manikis, EO
Jim McMahon, ADV
Joseph Lewis, OUTR
Kalani Akana, EO
Kamoa Quitevis, CULT
Kealoha Fox, EO
Keopulaulani Reelitz, GOV
Mehana Hind, EO
Myrle Johnson, DEMO
Natashja Wahine Tong, CULT
Pilialoha Wong, CE
Ryan Gonzalez, DM
Sterling Wong, PP

Others Present

Kalei Ka'eo
Dan Purcell
Stephany SOfos
Rich Miano
Ilima Long
Andre Perez
Louis Agard
Lesley Agard
Pauline Namuo
Gerry Miyamoto

Terri Keko'olani
Malia Smith
Kaiolani Martinez
Keala Kelly
Kaiulani Milham
Stanton Enomoto

Kealoha Ballesteros
Kuhio Asam
Bill Meheula
Jimmy Wong
Keoni Agard

II. APPROVAL OF MINUTES

Motion

Vice Chair Ahuna moved, seconded by Trustee Hulu Lindsey, to approve the minutes of October 2, 2014; October 14, 2014; and October 16, 2014.

TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
TRUSTEE LEI	AHU ISA					X	
TRUSTEE DAN	AHUNA	1		X			
TRUSTEE ROWENA	AKANA						X
TRUSTEE PETER	APO			X			
TRUSTEE HAUNANI	APOLIONA			X			
TRUSTEE HULU	LINDSEY		2	X			
TRUSTEE COLETTE	MACHADO			X			
TRUSTEE JOHN	WAIHE'E			X			
CHAIR ROBERT	LINDSEY			X			
TOTAL VOTE COUNT				7	0	1	1

MOTION: [ ] UNANIMOUS [X] PASSED [ ] DEFERRED [ ] FAILED

Motion passed with seven (7) YES votes, zero (0) NO votes, one (1) abstention, and one (1) excused.

III. DISCUSSION ON KULEANA

Chair Lindsey asked each of the Trustees and Dr. Crabbe to share their answers to the question, "As we launch forward into a new year, what do we seek to be our kuleana to the Office of Hawaiian Affairs and to our beneficiaries?"

Chair Lindsey promised to his colleagues and the OHA staff to make the Board table and our hale at Na Lama Kukui, to be a pu'uhonua, a safe place, where we can come to work to be a safe and joyful place. He wants us as servant leaders to open our hearts and our minds and to do our very best every day to serve our people. He stated that, "What you see is what you get. I mean what I say and I say what I mean."

Vice Chair Ahuna sees his kuleana to our people and working toward unifying our people and also being in line with OHA's strategic plan, to malama and protect. After learning about sovereignty and how it deals with land issues, it is important to him and to our people. He stated, "As the Vice Chair, I want to help serve, keep things moving, and help make sure things are in alignment."

Trustee Waihe'e asked that Chair Lindsey's words be written into the record as his own.

Trustee Machado noted that it is a broad question, then stated that she has always been a strong advocate for native rights and cultural practitioners, having led many charges to preserve those rights, and working with kupuna to lay the foundation for access from mauka to makai. Tremendous work has been done to

keep that alive, such as water rights issues like Na Wai ʻEhā, and with filling the vacancies on the Island Burial Councils. With those principal approaches, OHA has continued to advocate for our community. But for OHA's involvement, many legal cases, like Waiāhole, which allowed them to demand for their fair share would not be. She believes we must continue that high regard to assure that beneficiaries obtain what is due to them as the native people. As far as governance, she supports a government within a government model, and Federal recognition, which she will continue to work towards. Even if there are differences, she wants to still allow others to give their input. As a grassroots woman born and raised on Molokaʻi, she knows her sense of direction. George Helm taught her about wahi pana, when you take a land that has been abused and used as a bombing target, and are then able to raise the expectation of a generation that came forward to malama Kahoʻolawe. She believesur task is to malama those things that others may have forgotten to take on and we have the resources and capacity to do that.

Trustee Apoliona shared her manaʻo that our vision must stay clear and that we should be reviewing it daily. Our mission statement about protecting people, environmental resources, assets and our strategic plan is critical for us to have measures and focus on what we want to accomplish. Our advocacy, research, asset management, and community engagement continues to be critical. That all said, all for the betterment of Native Hawaiians, that's our focus, Native Hawaiians, first and foremost. Within the larger context, we also must keep in mind the context in which the Trustees have authority and responsibility. They have all taken an oath of office, and it should matter, because they are not just words. They also have expectations of their duties of loyalty, care, and prudence, all of which are critical to the decisions every time they take action. Prudence is important and vital to the things that are going to be coming up at the Board table. OHA is a well-established entity moving into new waters; we must carry with us what have been strengths, correct what we need to from that past, and stand strong as we move forward. The context and framework in which we must do our work toward the betterment of Native Hawaiians is very important. We all have our own thoughts on how to do that. Finally, she stated that she wants to reinforce of our reach to Native Hawaiians, both here and away from Hawaiʻi. She ended her remarks by quoting several lines from Nā ʻŌiwi ʻŌlino:

E ō e nā ʻōiwi ʻōlino ʻeā
Nā pulapula a Hāloa ʻeā
Mai Hawaiʻi a Niʻihau ʻeā
A puni ke ao mālamalama ʻeā ē
E hana kākou me ke ahonui ʻeā

Trustee Hulu Lindsey noted that she takes her service as a Trustee very seriously, because she has a family that she loves dearly, and if she can't do a good job here, she'd rather be home with them. She has enjoyed the last three years of moving forward and was grateful for the confidence of her colleagues to chair the Land and Property Committee, an important assignment, that allows her to help OHA realize the importance of our land assets, both legacy and commercial. She feels it is an exciting time for OHA as we move into the development of Kakaʻako Makai so that we can see the benefits it can provide our people from both its use and revenues, which help neighbor islands who don't have the daily benefits of Kakaʻako Makai. She anxiously looks forward to reviewing OHA's 20% share of the Public Land Trust; it is important because she feels we are not getting our fair share right now. We are setting forth with nation-building, but it is very important to her that the voices of all people are heard, that all people are treated equally, not only those on one list. Lastly, on Maui, Na Wai ʻEhā is a critical problem, and she hopes to continue working in that direction to help local people get fairness in the distribution of water. She thanked everyone for the confidence they placed in her by reelecting her as Maui Trustee.

Trustee Lei Ahu Isa shared that growing up as a child, she witnessed firsthand the wrongdoings against our Native Hawaiian people. She was raised by her grandmother, a strong Kaʻahumanu member, who had land behind Kaumakapili Church, which was taken from her and her family because they had no paper. They lived in the basement in a horrible place, where they had nothing to say and no voice like OHA to go to. She is humbled, proud, and honored to serve, she comes because of the great kuleana she feels

being elected. She offers a new, different perspective, knowing that sometimes others are too near the source and may not know what is going on out there.

Trustee Apo shared that the first thing on his mind is to support the Chair, in the same way he supported the previous Chair, to be loyal to the organization and its leadership. Second, he will try to do a better job and focus more on community engagement and communications, not just with Hawaiians, but with the broader community. He thinks it's important that OHA decisions are carried directly to our constituents. He will do this by familiarizing with his staff on what the various media platforms and portals of communication, to begin to gear our messaging and carrying out that mission. He is also creating a speaker's bureau, which he began by posting on his website about, "What does OHA do?" a question that after all these years, people still ask. He also wants to carry out a longheld initiative to get together with the four Ali'i Trusts and DHHL and begin to produce data on the impact of Hawaiian spending on the Hawai'i economy, which he believes is a vital piece of information that addresses how relevant Native Hawaiians are to the future of the state and to the economics of how it works. He will add more initiatives later. Essentially, he is trying to step up the idea of "Thought Leadership" throughout the community. He also wants to engage on issues that may not seem directly relevant to OHA or Native Hawaiians, such as the pending sale of HECO, an important decision that will affect Native Hawaiians as much as it affects others. His goal is to do all of this so that people can make informed decisions.

Trustee Akana started by thanking everyone who allowed her to come back as a Trustee and Chair Lindsey for giving her the opportunity to head the Asset and Resource Management Committee. Her focus will be on fiscal responsibility, continuing the idea she has always had that we should have a trust set for many, many future generations. In order to do that, we have to be mindful of our spending and long-term plans, like economic development. Our Kaka'ako Makai development, with those hired to help us build it, is one way we can perpetuate our trust for future generations of Native Hawaiians. As ARM Chair, one of her responsibilities is to ensure proper management, planning, evaluation, and investment of OHA's trust funds, review and approve all acquisition expenditures that have a multi-year impact on OHA's investments or future spending policies. She wants to improve our spending policies and work on establishing policies which strengthens OHA's fiscal controls and management, oversee the use of OHA's real estate, developing a policy on issues and land and native rights, and natural and cultural resources, to review and approve grants that support OHA and its overall mission, to evaluate OHA programs to determine their effectiveness, develop training and orientation programs for Trustees and staff on roles, responsibilities, and ethics. With the BAE Chair, she will carryout the recruitment and selection of the Administrator and provide oversight over permanent social councils or commissions assigned by the BOT. She will focus on all these things over the next year. Her hope for the future of OHA is that it can be a place where not just the people of Hawai'i, but also the people of the world, can come to for all things of knowledge and all things Hawaiian. She also wants to see OHA do more on economic development, to provide jobs for our people and bring income into the organization. The $15.1 million from the State is not enough.

Dr. Crabbe shared that when he first came to OHA, he wanted to improve the conditions of our people, after 25 years of working in the Native Hawaiian health community, where he saw the desperate conditions of our people. He wanted to bring greater focus in utilizing the resources that we have and making great strides, which he still believes today. His time as Ka Pouhana/CEO has had some highlights and challenges. First and foremost, he wants to improve his relationship with the Board leadership; he supports Chair Lindsey and the Committee Chairs. He will improve communication regarding administration and operations, implementation of Board policy, and reporting that in a timely manner. He will meet with Trustees individually on a monthly basis about their own concerns and priorities that Administration should consider. By doing so, he hopes we can all strive for organizational alignment between the Board and the Administration, to be done by all of us, working together. He supports many of Trustee Akana's comments, especially regarding fiscal responsibility and understanding fiduciary duties, for Trustees and officers of OHA. A guiding principle for him has been to be pono, to be fair,

which was reflected in the Investiture theme; this goes beyond fairness and what is right, but to strive for justice, something OHA was formed on. We may have different plans on how we can get there, but that is why we need dialog and discussion with our people, to listen, and to make right decisions, not just for our community of today, but the unborn generation of tomorrow.

IV. COMMUNITY CONCERNS

Vice Chair Ahuna introduced Mr. Rich Miano to speak about the Polynesian Football Hall of Fame. Mr. Miano has tried to dedicate his life since he became a professional football player to get scholarships and other educational opportunities for young people. He sees sports as a way to get socioeconomic opportunities for people who may not otherwise have them. All of the PFHOF board members want some of the proceeds from their upcoming fundraising dinner, which will have over 600 paid attenees, to go back to the Hawaiian community. They will do this by funding projects on Moloka'i, Lāna'i, and Kaua'i.

Mr. Kaleikoa Ka'eo spoke to the Board about his concern that OHA continues to ignore the voices of the people. On January 16, UH Maui College will have a real community meeting, and he invited everyone there to attend. During the DOI hearings, the voices of the people came out overwhelmingly to say what they did and did not want. Yet OHA's policies ignore those voices. This is all part of the process, but what happened to Ka Mau A Ea? He thinks it's been put on the side because those people aren't following up with Federal recognition, which he believes exposes OHA's inability and unwillingness to follow their own commitment. If OHA is still confused about the will of the people, his challenge is to hold OHA's own hearings, and listen to what they have to say. He stated that any motion that comes forward to further support this process, whether Act 195 or Kana'iolowalu, or anything else, it will be met on the field of battle, right here. Civil disobedience will happen right here and our people will come here. He is not here to support the interests of the State of Hawai'i or the United States military; he's here to fight for those Hawaiians who live under the blue tarps on the beaches, who are still being miseducated in the education system. He's come before, but has been ignored; ignorance comes from the fear or lack of education from the situation. If OHA makes a move to fund just one portion of the Hawaiian community, then the rest of the Hawaiian community has a kuleana to come forward. He doesn't want to go forward, but it's OHA's decision; if they come, it's because of what OHA has done to support the State of Hawai'i's plans. During Ka Mau A Ea, the talk was about OHA being open to everybody, but that was a lie. Quickly, the talk became about Federal recognition; independence talk was allowed, but only within the Federal recognition discussion of Act 195. He reminded everyone that Act 195 is part of the Provisional Government's plan. The question is, "Are you a continuation of the Provisional Government or are you going to be part of the rebirth and restoration of a true, representative body?" He believes OHA's role should be to help establish a body that represents everybody, not just those who succumb and support the wishes of the State of Hawai'i. Either we are all in, or we are not; either we are lahui kanaka, or we are not. The dominators, our oppressors, the State of Hawai'i, will never have the same agenda as our people. He feels sorry for anyone who believes that they do and that he has to come here to engage.

Mr. Dan Purcell expressed his pleasure to follow the agenda item on *kuleana*, his favorite Hawaiian word, which he believes would translate well to cultures around the world. He congratulated Chair Lindsey on his election and noted the photos of the Investiture were beautiful. He enjoyed the meeting this morning on Kaka'ako Makai. Finally, he spoke about Sunshine, and was somewhat concerned about the decision to appeal the Office of Information Practices opinion. He asks, "What is wrong with the public testifying in advance of an executive session? What harm does it have to listen?" It is the Trustees' decision, but he is a big fan of Sunshine; it's not onerous, it's something that helps you to be open, honest, and accountable. He encourages the Board to continue to maintain openness and honesty.

Ms. Ilima Long spoke to the Board, supporting Mr. Ka'eo's sentiments. Her organization is committed to organize for civil disobedience if the process that marginalizes so many that are passionate about governance and are not allowed to participate because it's exclusive to the roll. She thanked Trustee Hulu

Lindsey for her commitment to be critical of the Roll and its exclusivity. Act 195 is the center of their problems, which exposes the untruth of OHA's commitment to neutrality. OHA's infographics on nation-building presents the process as if there are choices at the end of the line. Yet in Act 195, it states that those on the Roll will be recognized by the State of Hawai'i as well as their descendants. This is not a choice that we can all think about and decide on, it's already in place, and it's exclusive to those who consent to this process. She was disturbed to hear Trustee Apoliona emphasize everybody's commitment to the State of Hawai'i and the State Constitution, which she thinks shows a disconnect of consciousness. The State is the entity that compels all of us to be here fighting for the betterment of our people, the entity that wants our lands, the entity that wants our resources, and that wants to make profits off those things. She emphasized that governance is not just for those who sign up on the roll; those who do not sign up or haven't signed up, do this as an active choice. She is still bothered that OHA never responded to the DOI hearings and allowed a narrative to build about those who went to the meetings as angry, violent, mean people, while the silent majority stayed at home because they didn't want to go out there. She encourages OHA to hold their own hearings and tell the so-called silent majority to show up. She believes it wasn't a threatening place to be; those who are passionate about this issue and about governance came. The results were overwhelmingly in opposition.

Trustee Apoliona clarified that every single Trustee takes the oath of office. Along the lines of self-determination, she says that rests with this effort for a convention, and move into a process for Native Hawaiian self-determination. She believes as long as we are a State entity and as long as we take an oath of office, we are what we are, but that doesn't mean that's where we should stay. To her, the best way to handle what might not be viewed as satisfactory, while they still have to fulfill their fiduciary duties, and where they can go in the future, is up to us now. How we get there is we have to move in a way that will shape and design a convention process, with involvement and engagement by Native Hawaiians. Until that happens, we are stuck in the middle.

Ms. Long responded that the convention stems from Act 195, which predetermines certain things, and that's what they've been critical of. What about everyone else who hasn't signed up?

Trustee Apoliona stated that we need to move the process so we can get beyond and can get to a next step, some sort of self-determination entity.

Mr. Andre Perez addressed the Board to raise concerns and issues with the lāhui, OHA, nation-building, and self-determination. He hopes with new leadership, OHA may rethink how it is proceeding with Kana'iolowalu. He was at a recent meeting with Daviana McGregor, Annelle Amaral, Mahealani Wendt, and Lei Kihoi, who all support Federal recognition. He is concerned because these proponents have no critiques of the process and don't question the legal and political implications of being on a roll. He has raised these and other issues with Act 195. At a recent OHA international symposium, the presenters shared information that was inaccurate or incorrect; they are experts in international law, but didn't know our political history. He wanted to ask how does the Federal recognition framework impact the potential for independence, but couldn't ask that because US Code 25 Section 371 that basically says no native tribes shall seek independence. We should leave no stones unturned for future generations. He likes Trustee Ahu Isa's idea to repeal Act 195. In an email with Esther Kia'aina, she stated that she is disturbed by the statement of two Kana'iolowalu commissioners saying it is not a real roll. He noted that they will continue to kū'e against a forced agenda; he expects as the convention nears, their activism, resistance, and actions will be heightened. He is willing to occupy OHA, start a revolving door occupation, and get arrested, but he's not excited about it. He implores Chair Lindsey to address these issues and concerns, which they have come in and brought up over and over. He concluded by saying we will never be successful in moving forward with a political agenda of Hawaiian self-determination if we don't move in a way that acknowledges both sides.

Trustee Ahu Isa noted that she ran on a platform of repealing Act 195 and knows there are Representatives and Senators who will be working on a bill to do that.

Trustee Akana stated that she agrees with Esther and considers Kana'iolowalu a roll. She asked Mr. Perez how they get independence their way, without identifying who is Hawaiian and who isn't. She thinks there would have to have a consensus of Hawaiians who make up 20% of the population and those who live here. If we were independent, it would leave us to be conquered by someone else. Questions of economic and protection remain.

Mr. Perez responded that the plan, which is deoccupation, is already in the law. He had two points in response. First, we should be thinking about not jeopardizing future potential. And two, how do we get a majority to participate. He believes we shouldn't lock ourselves into a political agenda that hasn't been thought out and analyzed. In the past, HSEC, HSAC, Ha Hawai'i, have been attempts at discussion, but every time they get into independence, the effort is shut down; most recently, that happened with the Native Hawaiian Coalition. While he doesn't have all the answers, he thinks we need to figure it out together and explore the possibilities.

Trustee Akana responded that OHA does not have all the answers either and believes a convention and a roll will help with that process. She has been told by Interior and Justice that the convention will determine what kind of entity is wanted. She thinks that anyone who is concerned would want to be there. Whatever we want, we will never get to that point unless there is a convention, where she thinks the independence voices have to be heard. In Australia, New Zealand, and Canada, they provide a number of seats for natives, so that they have a voice. But in the end, no matter what someone believes, we have to abide by the majority.

Dr. Crabbe reported that the Board has voted and committed funding to support a Native Hawaiian Consortium comprised of benevolent societies and Ali'i Trusts, which they will present. They are an independent entity that will make decisions. He believes the Board needs to consider rights under domestic law and international law, which do conflict. In the future, OHA will look at the Consortium to sort out the many issues involved with the convention.

Mr. Perez asked if consideration would be made for funding a maka'āinana consortium, to allow other voices. He didn't know about Act 195 until it came out.

Dr. Crabbe explained that the UC Berkley training for OHA employees helped identify three overarching organizational goals: integrity, collaboration, and innovation. Executive leadership has set four additional goals: improving communication internally and within the community; improving on our vision and mission; improving efficiency and processes within OHA; and change management. All of these combine to transform OHA into a Hawaiian institution, not just a State agency. These have been expressed as core values that should guide everyone in the organization on how we should behave, which will be part of performance evaluations for staff and set a foundation of living our philosophy.

Chair Lindsey called on Dr. Kalani Akana to speak on the core value of aloha. Dr. Akana shared several handouts with the Board and began with Pilahi Paki's aloha chant and noted that aloha is codified in State statute. He reported that a Core Values Working Group has been formed to talk about what it will take for OHA to become an organization where aloha is more basic. He offered to p

Trustee Akana asked if new hires are introduced to the Hawaiianness of OHA from a cultural perspective. Ka Pouhana/CEO Crabbe responded that the new employee orientation was updated about a year and a half ago to include a series of trainings over one week, including the history of OHA, the Kukulu Hou philosophy, and core values. Dr. Akana offered to be available if the Board would like to explore these values in the future.

Trustee Apo noted that the challenge is translating it in such a way that the cultural values have real use to employees. He has seen it done successfully by including it in performance reviews, as an opportunity to reinforce, but not penalize. He believes it is a legitimate concern for people to want OHA to be inclusive. The word "Hawaiian" does not refer to an ethnic Hawaiian; at the time of the Kingdom, it was a reference to a place-based people, and who the citizens were: a multi-racial society at the time of the Overthrow. The challenge is in trying to be recognized by other nations, we are going to have to show a continuum of the nation and who the citizens were. He asks if we should include the ancestors of those non-ethnic Hawaiian citizens of the Kingdom; it is something he believes needs to be addressed.

Trustee Hulu Lindsey shared that from her reading of history, the non-Native Hawaiians were not given all of the same privileges of citizens. She believes the 'aha should decide what privileges should be granted and to whom.

Trustee Akana noted that when the question was posed to Departments of Interior and Justice, they both said it was absolutely critical because they are talking about a blood-based race attached to the land. According to them, after the nation is formed, you can include others if you wish, but the formation must be with natives.

VI. NEW BUSINESS

Chair Lindsey noted that he would take up New Business before Unfinished Business.

A. Committee on Beneficiary Advocacy and Empowerment

Motion

Trustee Waihe'e moved, seconded by Vice Chair Ahuna, to waive the 72-hour materials distribution policy for Item IV. A. 1., BAE 15-01, Revisions to the 2015 OHA Legislative Package.

TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
TRUSTEE LEI	AHU ISA			X			
TRUSTEE DAN	AHUNA		2	X			
TRUSTEE ROWENA	AKANA			X			
TRUSTEE PETER	APO			X			
TRUSTEE HAUNANI	APOLIONA			X			
TRUSTEE HULU	LINDSEY			X			
TRUSTEE COLETTE	MACHADO			X			
TRUSTEE JOHN	WAIHE'E	1		X			
CHAIR ROBERT	LINDSEY			X			
TOTAL VOTE COUNT				9	0	0	0

MOTION: [X] UNANIMOUS [X] PASSED [ ] DEFERRED [ ] FAILED

Motion passed with nine (9) YES votes, zero (0) NO votes, zero (0) abstentions, and zero (0) excused.

Trustee Waihe'e reported that the Committee on Beneficiary Advocacy and Empowerment, having met on January 7, 2015, and after full and free discussion, recommends approval of BAE 15-01, Revisions to the 2015 OHA Legislative Package to:

- Replace the contents of OHA-6, which is a short form bill relating to incarcerated parents and their children, with new language;
- Replace the contents of OHA-7, which is a short form bill relating to the Public Land Trust revenues, with a resolution relating to the same;
- Amend the provisions of OHA-1, which is a bill relating to the budget of the Office of Hawaiian Affairs; and
- Amend the provisions of OHA-5, which is a bill relating to Hawaiian plants in public landscaping.

Motion

Trustee Waihe'e moved, seconded by Vice Chair Ahuna, to approve BAE 15-01, Revisions to the 2015 OHA Legislative Package.

TRUSTEE		1	2	'AE (YES)	A'OLE (NO)	KANALUA (ABSTAIN)	EXCUSED
TRUSTEE LEI	AHU ISA			X			
TRUSTEE DAN	AHUNA		2	X			
TRUSTEE ROWENA	AKANA			X			
TRUSTEE PETER	APO			X			
TRUSTEE HAUNANI	APOLIONA			X			
TRUSTEE HULU	LINDSEY			X			
TRUSTEE COLETTE	MACHADO			X			
TRUSTEE JOHN	WAIHE'E	1		X			
CHAIR ROBERT	LINDSEY			X			
TOTAL VOTE COUNT				9	0	0	0

MOTION: [X] UNANIMOUS [X] PASSED [ ] DEFERRED [ ] FAILED

Motion passed with nine (9) YES votes, zero (0) NO votes, zero (0) abstentions, and zero (0) excused.

Trustee Ahu Isa noted that OHA-6 would result in OHA being asked to come up with a budget because it would require a position to input the data and money to fund the position. Dr. Crabbe noted that OHA is not currently asking for funding, but would be responsible for providing estimates.

V. UNFINISHED BUSINESS

A. 2) New OHA Website

Dr. Crabbe noted that he would cover the new OHA website and multimedia displays first, followed by nation-building and the Consortium presentation. He called on Digital Media Manager Ryan Gonzalez, Executive Manager Kealoha Fox, and Performance-Based Management Specialist Grant Manikis to present updates to the Board. Mr. Gonzalez has been integral in developing the new OHA website over the past year and a half; Ms. Fox has been integral in implementing the Socrata dashboard, and Mr. Manikis has been part of implementing change management at OHA.

Dr. Crabbe asked Community Engagement Director Kehau Abad and Mr. Gonzalez to share about the new OHA website. Dr. Abad reported that this effort is part of a larger plan to kukulu hou and that it is an iterative process. The team was charged with: providing a website with more, better, and richer content; to utilize the best technology available to share more effectively; to organize this information in a user-friendly way so that beneficiaries would find seamless; and to embody and reflect the vibrancy that is covered in kukulu hou. All of this has been an across-OHA effort.

Mr. Gonzalez reported that beginning next week, the new OHA.org will replace the current one and it will take a more visual and vibrant approach to presenting information. The new website will provide information on-demand, both on mobile and desktop. It also does a better job of answering the question, "What does OHA do?" in a variety of ways. For users who want to dive down into the information, that is available. But for those who are more interested in multimedia, there is a box on the front page that can show videos of what OHA is doing. Videos include community voices telling the story, in addition to articles and text. It is also efficient and easier to navigate. Stories show concrete examples of OHA impacting our community. The website integrates with Socrata that helps provide transparency and accountability.

Dr. Crabbe explained that OHA is now able to report out data that we have collected. OHA is one of four agencies using Socrata, which is open-source and has been customized to the strategic plan, results, and priorities. In the future, he expects the data will help show how OHA is impacting the community in terms of dollars. He recognized Dr. Malia Smith of Hawai'i Pacific University and Sustain Hawai'i., who was a partner in this initiative.

Ms. Fox provided background and information about open data, noting that at the Federal level, open and machine-readable data is the new default for government information. Act 263 in 2013 requires that all state data should be open. According to the Federal open data directive, "Transparency, participation, and collaboration form the cornerstone of an open government." Act 263 states in part, "To increase public awareness and access to data and information created by and available from state departments and agencies." Based on these, she believes OHA is leading the State in aligning our open data efforts with these guidelines. OHA is collaborating on this Socrata project through the Office of Information Management and Technology with the Departments of Agriculture; Budget and Finance; Business, Economic Development, and Tourism; Education; Human Services; and Public Safety. OHA is being held up as the pillar for the State because the State goal is 17 pages and OHA alone has 14. Socrata allows OHA to measure our work and report results for all of our strategic priorities. She distributed a handout with detailed information about Socrata. Socrata allows the data to be downloaded, exported, and even shared on Facebook. Socrata is able to track baselines, and using an equation, it can predict whether a strategic result will be achieved by 2018. Because it is able to track and interpret a great deal of data, which reduces the need to print and mail detailed information to people across the world. Instead, staff now refer people to this dashboard to view and manipulate data on their own. This data provides a great deal of information to decision makers when evaluating and planning. Dr. Crabbe stated that Administration will schedule trainings with Trustee Aides to familiarize them with using Socrata.

Trustee Ahu Isa commended the staff for this work, noting it is exactly what she meant when she wrote her Letter to the Editor about OHA needing to come into the 21st century. She thinks this is what universities and banks are already using, and this is a welcome addition to OHA. Dr. Crabbe noted that one big improvement as part of this system is that OHA's grants program has gone online, so applicants can submit it online. He added that it is currently in beta testing, additional improvements will be made along the way over the next year, but that the redesigned website will be launched publicly in the next week.

Trustee Apoliona shared that she thought this technology was terrific and very forward-looking. She did ask that staff continue to look out for those who may not be as tech savvy, encouraging Administration to keep that in mind for balance.

A. 3) Multimedia Displays

Dr. Crabbe called on Mr. Manikis to present on the multimedia displays throughout the OHA offices. Mr. Manikis noted there is a strong need for timely and consistent communication, both internally and externally. The display project is coordinated by the Executive Office and is used by many organizations to disseminate information to a large amount of people in a short amount of time. It is versatile, which

brings several benefits: can lead to highly productive and collaborative environments, promotes commitment to the organization, creates a sense of cohesiveness, and promotes transparency within the organization and externally. The displays use a digital sign technology and have been placed strategically in Reception and work areas throughout the building. They will be deployed to our neighbor island offices during Phase II. Information that will be shared will include: vision, mission, core values, inspirational quotes, ʻōlelo noʻeau, and executive communications. It also has the ability to broadcast livestream events, HR workshops, and paia updates. External-facing updates such as the vision, mission, what OHA is doing, strategic priorities and results, notices of meetings, job openings, and the BOT page will display in the main reception area. Internal-facing updates will display in work areas. It is still in beta, but content is being displayed on monitors. Mr. Manikis then demonstrated each of the templates and pages available as part of the multimedia displays.

Dr. Crabbe assured the Board that Trustee Apo's comments about OHA's messaging and image have not gone unheard, but this is their attempt to pull in all of the different strands of communication, standardizing it, controlling it, and managing it. This allows OHA to get to the core of what we do, but make it easy for beneficiaries to navigate it, so they will know what OHA has been doing for them. He believes this is a major way for OHA to use technology to help us communicate, but staff will continue to go out into the community as well.

A. 1) Nation Building

Dr. Crabbe called on Governance Manager Derek Kauanoe to provide a brief update on nation-building and introduce the Board to the Consortium.

Recess

Chair Lindsey called a recess at 3:00 pm and called the meeting back to order at 3:05 pm.

Mr. Kauanoe thanked Chair Lindsey for emphasizing the importance of making the Board table a safe space for our community to discuss important issues. He noted in the audience are members of the Consortium, now calling themselves Naʻi Aupuni. On March 6, 2014, the Board approved a statement of commitment, which included pursuing partnerships with Aliʻi Trusts, benevolent societies, and other Native Hawaiian Organizations, with the goal of having a nation-building process that OHA would co-facilitate in partnership with those groups. More importantly, these entities have a link to a time of our undisputed sovereignty. The Consortium merely facilitates the process, meaning it does not conduct the election, does not facilitate the convention, and does not conduct the referendum. The convention will develop the governing documents, including the form, scope, and guiding principles of the Native Hawaiian Government. In the referendum, the Native Hawaiian people will decide whether they support that or not. The Consortium is responsible for hiring the vendors that will carry out the election, convention, and referendum. Additionally, they will provide independent monitoring of the delegate election, convention, and referendum vote. This means that other organizations can submit proposals for each of those. While the Consortium facilitates, it also invites participation by the larger Native Hawaiian community, who will elect convention delegates, and decide if they support what those delegates create. The Consortium is an autonomous and independent only, with OHA providing funding and sitting as an *ex officio* member. Since August, a group has been meeting weekly and has hired an attorney. They have identified an urgent need to go forward with nation building, while also ensuring the process has integrity and is transparent. Three entities have emerged to lead it: King William Charles Lunalilo Trust, ʻAhahui Kaʻahumanu, and Hale O Na Aliʻi. He then called on Dr. J. Kuhio Asam, Executive Director of Lunalilo Trust and Home, to present on behalf of the Consortium.

Dr. Asam introduced himself as the president of the newly-created Naʻi Aupuni. He thanked all those who have preceded us, who have given us their knowledge and set the structure to advance ourselves as Native Hawaiians. He introduced Naʻi Aupuni leaders who accompanied him: Pauline Namuo and Gerry Miyamoto of ʻAhahui Kaʻahumanu, Kealoha Ballesteros of Hale O Na Aliʻi, and their legal counsel,

William Meheula. He reported that at the December 8, 2014 meeting of the group, 'Ahahui Ka'ahumanu, Hale O Na Ali'i, and Lunalilo Trust agreed to incorporate. After submitting required paperwork to DCCA, they are now incorporated as Na'i Aupuni, a reference to King Kamehameha and his call to Ka Na'i Aupuni. Officers include him as president, Ms. Namuo as vice president, and Ms. Ballesteros as secretary-treasurer.

Na'i Aupuni is excited about the arduous process that is being undertaken and advancing their co-facilitation with OHA for the benefit of the Native Hawaiian community, which will have tremendous impact on their lives. They are committed to transparency, solid relationships with all involved, and their neutrality as to the eventual form of government through this process. They will obtain a fiscal sponsor relationship with another entity to administer funds and oversee contracts with vendors. They are also considering retaining a public relations firm to speak with one voice. The agreement they will have with OHA will separate OHA from the decision-making regarding process; they will be made independently by Na'i Aupuni. They do intend to involve and engage anyone interested in getting involved in this process.

Na'i Aupuni has established a timeframe to accomplish their goals, with expected completion in spring 2016. They have also reviewed the budget projections from March 2014, which solely covered contracts with vendors to cover the process, but did not cover the costs of operating the Consortium itself. They will be submitting revised estimates to reflect costs related to insurance, legal representation, public relations, and fiscal sponsor fees. Their draft is about $400,000 above the initial $1.9 million allocated for the Consortium. They look forward to next steps including: establishing a formal relationship with OHA, obtain insurance coverage, ensure sufficient finances to complete their tasks, form and institute a communications plan, identify a fiscal sponsor to administer their finances, formulate RFPs for each of the tasks, and assure adherence to the timelines to complete their kuleana by early 2016.

Chair Lindsey thanked Dr. Asam for appearing on behalf of the Consortium and apologized for making them wait so long in the meeting to present.

Trustee Akana asked why Na'i Aupuni thought it was necessary to hire an attorney. Dr. Asam responded that as a separate entity, they wanted to ensure their endeavors were within legal boundaries and were defensible. The attorney has filed their legal paperwork and will draft the contract with OHA. Mr. Kauanoe added that because the Consortium will need to award contracts, it is important for them to ensure that they are legally sound, defensible, and enforceable.

Trustee Akana asked if this means OHA will not have to pay additional monies and that it will come out of the budget that was originally allocated. Dr. Asam responded that the $1.9 million initially allocated will not cover the costs of operations from now until next year, which they estimate will be an additional $400,000. Dr. Crabbe explained that when Administration originally proposed the budget, it was based on estimates for contracting out the services and that OHA Community Engagement would provide much of the assistance needed. Since that time and the Consortium formed, all funding and activities internally have stopped. The funds for the PR firm internally will be cancelled and those funds transferred to the Consortium.

Trustee Akana stated that she recalled there was $3 million allocated, with a portion being held internally by Administration. She asked if that money will now go to the Consortium, which should take care of their expenses. With a $3 million total budget, of which $1.9 million is for the Consortium to contract, and the additional $400,000 they are requesting, she believes they will have more than enough to cover their expenses without additional funds. Dr. Crabbe stated he believes that is correct but he will have to follow-up with the Chief Financial Officer on the amounts because approximately $600,000 has already been spent on media and other expenses. Trustee Akana reiterated that there should be a lot more than

their $400,000 request available and that she will expect detailed answers during ARM Committee meetings.

Trustee Hulu Lindsey noted that the Royal Order of Kamehameha I was originally going to be part of the Consortium and asked for an explanation on why they were not. Dr. Asam responded that the initial call from OHA went out over 6-9 months ago, with most of the Ali'i Trusts represented, as well as the benevolent societies, and the Civic Clubs. Through discussions by each of the organizations, a decision was made not to participate. He was unaware of the exact nature of why an organization withdrew or otherwise decided not to participate.

Trustee Hulu Lindsey asked who made the budget for the entity. Dr. Asam responded that the budget for Na'i Aupuni was formulated by OHA, with only the costs of the contracted services. He calculated that at $1,870,000. Trustee Hulu Lindsey stated that the Trustees should be privy to the budget if they will be asked to consider additional monies for this effort. She expressed that a total figure is not enough and that she would want to see more detailed information. Mr. Kauanoe explained that the Ad Hoc Governance Planning Committee determined the budget, which was passed on March 6, 2014; he committed to provide a copy of that budget to Trustee Hulu Lindsey.

Trustee Hulu Lindsey wanted to confirm that all Hawaiians will be considered for election to the convention. She believes the Consortium needs to find a way to include Hawaiians who have not signed up for Kana'iolowalu. Dr. Asam clarified that Na'i Aupuni will work with OHA to get funds and to have independence on decision-making. He added that decisions regarding delegates and participation in the aha will not necessarily be made by Na'i Aupuni. They anticipate that when they put out the RFP, the contractors doing apportionment and election will be asked to involve the broadest participation possible. He understands that the credibility and legitimacy of the end product will depend on participation, so it is their goal to get the widest possible participation, which will be included in the evaluations of the RFPs.

Chair Lindsey asked Mr. Kauanoe that when the $400,000 budget detail is available, it be sent to his office, who will be responsible for distributing that information to Trustees. Dr. Crabbe noted they will also provide the original budget, so that it is easy to see where the adjustments have been made.

Trustee Apo noted that he still has a lot of concerns with the relationship trails between OHA, the Consortium, and the third party vendors. He believes all roads will lead to the money, which comes from OHA. He does not know what to do about it, but he fears that there will be a challenge when we speak to the notion of neutrality and the commitment by OHA to remain neutral. He thought it was easier for OHA to express interest in having a third-party directly come forward with a proposal that OHA had no input in and then ask for a grant. It would eliminate the need for doing the current two-step process and seems like a clean way to do it. Dr. Asam confirmed that it would be the kuleana of Na'i Aupuni to draft the RFPs, judge them, and award them.

Trustee Apo noted that as controversial as the roll has been, the issue of who will have access to it will continue. He stated that you have to know who the citizens are before you can have a convention. It allows anyone who is interested in being in the driver seat to go around OHA and directly access it. Dr. Crabbe responded that some of these discussions have taken place with the Consortium and deferred to Mr. Meheula regarding how Na'i Aupuni will direct third parties to carry out their work.

Trustee Apoliona stated that she believes approving or providing a grant to someone directly from OHA would cause major trouble according to what she understands from the legal side. So that is not an option and she knows that is what staff is trying to figure out. That would lock OHA in poorly and things could go down the tubes.

Trustee Akana stated that her understanding is that the people on the roll are the ones that will participate in the convention; therefore Na'i Aupuni is not charged with finding an alternative to the roll, their charge is to find the people to do apportionment, election, and convention. From her meetings in Washington, DC, she believes access to the roll by anyone else would invalidate it; the alternative route would come after the convention. She asked for confirmation or clarification from Mr. Meheula because she does not want people to think something else is happening. Mr. Meheula responded that one of the challenges is that it takes a lot of money to hold an election, an aha, and then have a ratification vote. Because the money is coming from OHA, a state entity, the entire process can be challenged under the US or state constitution. Native Hawaiians who do not feel it is a fair process could also challenge. That is why they have to look at creating an independent process; they will propose in their contract with OHA that the Consortium members will pledge that they will not have anything to do with the outcome of what happens at the aha and that all of their consultants and vendors make the same pledge. They will ask OHA to agree not to play any part in controlling what they do, once the funds are given through the fiscal sponsor. Philosophically, it goes against what they are trying to do when he is asked to answer a question or commit to doing something one way. The Consortium members have not done enough work with vendors to be able to answer detailed questions yet. Once they have their contract with OHA, they will be able to get everyone on the same page when they hire vendors.

Trustee Akana stated that the Feds have told them that if you infuse something into the roll, it invalidates it. She does not want anyone to confuse the Consortium into thinking they can go out and do another process. It would mess things up because it would lead them down the wrong path.

Trustee Hulu Lindsey shared that from her conversation with the Indian attorney who was given the responsibility to write the DOI statement for OHA, when she mentioned being concerned about those who did not want to sign onto Kana'iolowalu, the DOI attorney was open to doing that. It did not have to be limited to just one roll, something she spoke to Trustee Lindsey about in depth. She asked what the status was of Kana'iolowalu verifications.

Corporate Counsel Kimoto advised the Board that they must be very careful and not step over the line by directing Na'i Aupuni to do or desist from certain activities. They will have total discretion on how they will manage their task, as will be sounded in their contract. He brought it up because it may subject us to a state action attack should those that feel contrary to OHA's work regarding Na'i Aupuni choose to bring litigation. He advises against discussions that direct Na'i Aupuni, which should be within their total discretion.

Dr. Crabbe explained that they originally started with a number of organizations and have received feedback about being more inclusive of Hawaiian organizations. He asked Dr. Asam to explain how the Consortium will move forward and how they will receive community input. Dr. Asam responded that they are cognizant of the many different voices that are in our community and are committed to including as many voices as possible.

Trustee Apoliona asked if there is any additional mana'o that Na'i Aupuni needs to share. Mr. Meheula responded that they have talked about having non-voting organizations be a part of them to listen to and putting a lot of the information up on a website so people can participate that way.

In response to Dr. Crabbe, Mr. Meheula estimated that a contract between OHA and Na'i Aupuni could be ready in a soon as two weeks.

Trustee Apoliona believes the individuals from Na'i Aupuni who have stepped forward to help these next steps move forward are doing a great service for us as Native Hawaiians. She applauded their willingness to step forward and commit to helping this process move forward because OHA has its limitations legally and politically. She knows they have witnessed what the Board has been trying to work and engage with,

having been at it for a while; she sees this as an opportunity to move OHA to a place that is arms-length because of the state actor issue. This is a major commitment and she thanked them for giving of themselves. At the end of the day, this opportunity for self-determination, with a Hawaiian convention, is where it needs to go. Once we get into the delegate process, that moves into the convention activity, and that is where we need to go or we will just move in circles. She noted it is unfortunate that the Consortium was moved to such a late part of the agenda.

Chair Lindsey apologized again to Na'i Aupuni representatives for the delay and asked Dr. Asam and the Consortium to report to the Board again when they felt it was warranted.

VII. BENEFICIARY COMMENTS

There were no Beneficiary Comments.

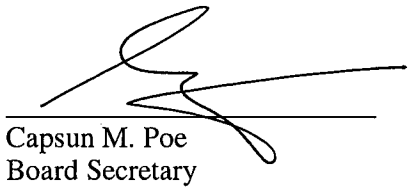
VIII. ANNOUNCEMENTS

There were no Announcements.

IX. ANNOUNCEMENTS

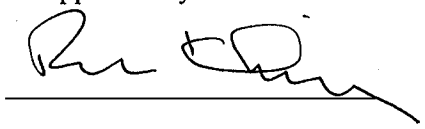
Trustee Akana moved, seconded by Trustee Apoliona, to adjourn. With no opposition, Chair Lindsey adjourned the meeting at 3:54 pm.

Respectfully Submitted,



Capsun M. Poe
Board Secretary

As approved by the Board of Trustees on February 12, 2015.



Robert K. Lindsey, Jr.
Chair, Board of Trustees

Excerpts of Keli'i Akina's

Second Declaration

(Page 3)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KELI'I AKINA, *et al*., *Plaintiffs*, *v.* THE STATE OF HAWAII, *et al*. *Defendants*.	Civil Action No.: 15-00322

SECOND DECLARATION OF DR. KELI'I AKINA

Keli'i Akina, 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. When I attempted to register for the Kana‘iolowalu Roll, I did not receive notice nor did I witness any material on the Native Hawaiian Roll Commission ("NHRC") website that indicated I could avoid affirming to Declaration One: "I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance."
3. During the online registration process, I was asked to confirm the above referenced Declaration One.
4. Once I failed to confirm the statement and the principles asserted in Declaration One, I received no other information from the NHRC website suggesting that I could register without affirming the Declaration.

5. I am very familiar with the Native Hawaiian community and the issues it is concerned with. I know of no notice in any other news or information source used by the Hawaiian community indicating that Declaration One was optional or that one could register for the Roll without affirming it.
6. To my knowledge, I never received any communications of any kind (prior to the filing of this lawsuit) from any source informing me that I did not have to affirm Declaration One.
7. A Native Hawaiian registering for the Roll would be led to believe that affirming to Declaration One was the only alternative. There was nothing on the NHRC website, nor through their official publications to indicate otherwise. Thus, any Native Hawaiian, such as myself, would be led to believe that affirming to Declaration One was the only option to allow registration.
8. Further, I previously wrote articles detailing the fact that registration for the Roll requires an applicant to affirm Declaration One. See for example: http://dailycaller.com/2014/06/04/hawaiians-are-not-a-tribe/ in the Daily Caller. At no time, prior to this litigation, have these assertions been rejected or negated in any way by OHA, NHRC, Na'i Aupuni, or by any other official.
9. Attached as Exhibit A is a true and correct copy of an article composed by Office of Hawaiian Affairs ("OHA") Trustee Peter Apo. In the article, Trustee Apo admits the current Na'i Aupuni election is a "nation-building process" that is "intentionally limited . . . exclusively to Native Hawaiians." In addition, Trustee Apo notes it is "not likely" that Native Hawaiians meet the political "continuum" test to constitute nationhood sovereignty.

10. Attached as Exhibit B is a true and correct copy of the January 8, 2015 OHA Board of Trustees meeting minutes, in which the Trustees talk about the legal problems affecting any use of the Roll.

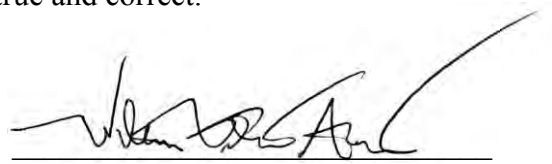
11. Attached as Exhibit C is a true and correct copy of an article composed by Professor Randall Akee, who is a Native Hawaiian and graduate of the Kamehameha Schools. In the letter, Professor Akee notes the Na'i Aupuni and Kanaiolowalu election processes attract a "small minority" of the Native Hawaiian community and do not reflect the "will of all Native Hawaiians." In fact, Professor Akee's study of roll registrants indicates "[a] large portion of the candidate pool . . . is well-connected to the existing agencies that are spearheading the federal recognition process." The disparity on the roll is due to "[the] state-led and funded processes [that] either discouraged (purposely or not) participation by the majority of Native Hawaiians or only encouraged participation by a select few." This process, he notes, is "fundamentally wrong."

12. I agree with the sentiments expressed in Professor Akee's article.

13. On information and belief, Defendant Clyde Namu'o, Executive Director of the Native Hawaiian Roll Commission, is married to Pauline Nakoolani Namu'o, Vice-President and member of Na'i Aupuni's Board. I recall that, upon hearing of her appointment, I wondered whether there was a conflict of interest.

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

Dated: October 8, 2015



Keli'i Akina

Excerpts of Kamana'opono Crabbe's

Declaration

(Page 7)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

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

Plaintiffs,

vs.

THE STATE OF HAWAI'I; GOVERNOR DAVID Y. IGE, in his official capacity; ROBERT K. LINDSEY JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, in his official capacity; 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, in their official capacities; KAMANA'OPONO CRABBE, Chief Executive Officer, Office of Hawaiian Affairs, in his official Capacity; JOHN D. WAIHE'E III, Chairman, Native Hawaiian Roll Commission, in his official Capacity; NĀ'ĀLEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MĀHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, in their official capacities; CLYDE W. NĀMU'O, Executive Director, Native Hawaiian Roll Commission, in his official capacity; THE AKAMAI FOUNDATION; and

CIVIL NO. 15-00322 JMS-BMK

DECLARATION OF KAMANA'OPONO CRABBE

THE NA'I AUPUNI FOUNDATION; and DOE DEFENDANTS 1-50,

Defendants.

DECLARATION OF KAMANA'OPONO CRABBE

I, KAMANA'OPONO CRABBE, declare as follows:

I make this declaration based upon personal knowledge, and I am competent to testify to the matters stated herein.

1. I am an individual over eighteen (18) years of age and under no legal or mental disability, and I am competent to testify, having personal knowledge of the matters set forth herein.

2. At all relevant times, I serve as the Chief Executive Officer ("CEO"), or Ka Pouhana, of the Office of Hawaiian Affairs ("OHA").

3. I was selected as CEO from OHA's executive team, where I had been Research Director since November 2009, gathering data relating to Native Hawaiian health, housing, income, education, governance and culture that was needed for OHA to make sound decisions that allow it to engage policymakers in its efforts. Before joining OHA, I was the Director of Psychology Training at the Wai'anae Coast Comprehensive Health Center since 2008. I earned my doctorate in clinical psychology from the

University of Hawai'i at Mānoa where I focused my studies on improving the health conditions of Native Hawaiians.

4. I am a custodian of records for OHA.

5. In my capacity as the Chief Executive Officer for OHA, I have personal knowledge of the matters stated herein and the business records maintained in the ordinary course of business by OHA, and I make this declaration upon personal knowledge unless otherwise stated herein.

6. Pursuant to Act 77, OHA compiled a database of all verified Hawaiians and Native Hawaiians (collectively, "Native Hawaiians") who have registered for one or more of OHA's registry programs including Operation 'Ohana, Kau Inoa and the Native Hawaiian Registry (collectively, "OHA Database").

7. Through a review of official government records, OHA verified that all the individuals included in the OHA Database meet the ancestry requirements of Act 195, assuming a reasonable margin of error.

8. OHA is required to hold ceded land revenues as a public trust for the betterment of the conditions of Native Hawaiians. Native Hawaiians' portion of the trust revenue, which OHA manages, is not State money. It is intended solely for OHA's Native Hawaiian beneficiaries. OHA considers its OHA Database registrants to be registered beneficiaries of the Native Hawaiian trust administered by OHA, and OHA's records reflect that many

registrants of the OHA Database also demonstrate other indicia of social, civic, and cultural connections to the Native Hawaiian community, such as Hawai'i residency, involvement in Native Hawaiian civic clubs and other Native Hawaiian organizations, and enrollment in educational institutions such as the Kamehameha Schools, Hawaiian language immersion schools, and Native Hawaiian-based charter schools.

9. OHA Database registrants were not and are not required to make the affirmations included in the Native Hawaiian Roll Commission's ("Roll Commission") registration form to be included in the OHA Database.

10. Pursuant to Act 77, the Roll Commission also includes on its roll ("Roll") those verified Native Hawaiians registered in the OHA Database.

11. Thus, an OHA Database registrant may be transferred to the Roll Commission and included on the Roll without affirming the declarations required under Act 195.

12. On at least three separate occasions in August, September, and October 2013, OHA provided public notice of the Act 77 transfer to OHA Database registrants through its Ka Wai Ola publication. Plaintiffs Pedro Kana'e Gapero ("Gapero") and Melissa Leina'ala Moniz ("Moniz") were, at all relevant times, included on the Ka Wai Ola mailing list. A true and accurate copy of the public notices in Ka Wai Ola are attached hereto as Exhibit "A".

13. OHA Database registrants who preferred to avoid having their name transferred to the Roll were informed of their right to complete and submit a short form (available electronically or in print through Ka Wai Ola) to opt-out of the Act 77 transfer. A true and accurate copy of the form as it appeared in Ka Wai Ola's August 2013 and September 2013 issues is attached hereto as Exhibit "B".

14. On August 14, 2013, OHA sent email notification to OHA Database registrants regarding OHA's transfer of information to the Roll Commission pursuant to Act 77. The text on the right banner titled, "Public Notice to Native Hawaiians," is a hyperlink, now inactive, that directed the reader to an electronic copy of the Public Notice in the August 2013 issue of Ka Wai Ola, attached hereto as part of Exhibit "A," and the opt-out form in the August 2013 and September 2013 issues of Ka Wai Ola, attached hereto as Exhibit "B". The text on the right banner titled, "Find Out," is a hyperlink, now inactive, that directed the reader to an electronic copy of "What's at Stake?" published in the August 2013 issue of Ka Wai Ola on page 9, and attached hereto as part of Exhibit "A". This email was sent to ohanamoniz@aol.com, which was the email address on file for Plaintiff Moniz. A true and accurate copy of these email notifications is attached hereto as Exhibit "C".

15. On seven occasions—September 20, 2013; November 7, 2013; June 10, 2014; July 6, 2015; September 3, 2015; September 11, 2015; and September 17, 2015—OHA sent letters confirming its electronic transmittal to the Roll Commission of individuals who, as of those dates, were registered with OHA as verified Native Hawaiians through the OHA Database. A true and accurate copy of these transmittal letters is attached hereto as Exhibit "D".

16. Additionally, after the Act 77 transfer, OHA informed OHA Database registrants of their right to opt-out of the Roll in the October 2013 issue of its Ka Wai Ola publication. A true and accurate copy of this notice is attached hereto as Exhibit "E".

17. On October 16, 2014, the OHA Board of Trustees ("BOT") authorized the realignment of the budget for Governance Planning, consisting of Native Hawaiian trust funds and pursuant to OHA's policy to support Native Hawaiian self-governance. The realignment would provide funds to an independent entity to formulate a democratic process through which Native Hawaiians could consider organizing, for themselves, a governing entity. A true and accurate copy of pages 1, 11-12 of BOT's October 16, 2014 Meeting Minutes is attached hereto as Exhibit "F". A true and correct copy of pages 1-2 of BOT's January 8, 2015 Meeting Minutes, approving the October 16, 2014 Minutes, is attached hereto as Exhibit "G".

18. On April 27, 2015, OHA, Na'i Aupuni ("NA"), and Akamai Foundation ("AF") entered into an agreement ("Grant Agreement").

19. Pursuant to the Grant Agreement, OHA is prohibited from exercising direct or indirect control over NA; provided only that NA's use of the grant does not violate OHA's fiduciary duty to allocate Native Hawaiian trust funds for the betterment of Native Hawaiians.

20. Prior to entering into the Grant Agreement, NA informed OHA that it intended to use the Roll but that it continued to investigate whether there are other available lists of Native Hawaiians that it may also use to form its voter list. Thus, under the Grant Agreement, NA has the sole discretion to determine whether to go beyond the inclusion of the Roll in developing its list of individuals eligible to participate in Native Hawaiians' self-governance process.

21. Similarly, NA has no obligation under the Grant Agreement to consult with OHA.

22. As required by the Grant Agreement, OHA has not exercised control over NA.

23. Based on my education, training and experience as health provider for Native Hawaiians, researcher, and CEO for OHA, it is undisputed that Native Hawaiians' socio-economic status has steadily declined, and for the

last several decades has been the lowest of any ethnic group residing in Hawai'i. *See, e.g.*, 20 U.S.C. §7512(16)(C) (education deficit); 42 U.S.C. §11701(22) (poor health); 20 U.S.C. §16(G)(ii) & (iii) (drug/alcohol use, child abuse and neglect); Pub.L. 106-569, Title V, §512, Dec. 27, 2000, 114 Stat. 2966 (low income).

24. It is important for the betterment of the Native Hawaiian people to organize a governing entity, crafted by Native Hawaiians, for Native Hawaiians, with the power of a collective will and a unified voice, the resources to provide tailored services, and the institutional legacy to perpetuate the sacred traditions, customs, and values of the only indigenous people of Hawai'i. Based on my experience, the structural change that self-governance will bring about is likely the best stimulus to reverse the persistent low socio-economic conditions that have plagued Native Hawaiians for decades. For example, the 2000 *Mauka to Makai Report* stated: "A Native Hawaiian Governing Body, organized against the background of established precedent, would serve as a representative voice for the Native Hawaiian people, focus community goals, provide governmental services to improve community welfare, and recognize the legitimate aspiration of the Native Hawaiian people to transmit their values, traditions, and beliefs to their future generations."

I, KAMANA'OPONO CRABBE declare under penalty of perjury that the foregoing is true and correct.

Executed this 30 day of September, 2015, Honolulu, Hawaii.

Kamana'opono Crabbe

KAMANA'OPONO CRABBE

Excerpts of Na'i Aupuni's Bylaws

(Page 1)

BYLAWS

OF

NA'I AUPUNI

ARTICLE I.
PURPOSE; NONPROFIT CHARACTER

Section 1.1 Purposes. The purpose of the Corporation shall be to assist in the non-political aspects of an election of delegates, 'Aha and ratification vote for the purpose of self-determination.

Section 1.2 Nonprofit Character. The Corporation shall be a nonprofit corporation. The Corporation shall not authorize or issue shares of stock. No dividend shall be paid and no part of the income or earnings which may be derived from its operations, in pursuance of the purposes of the Corporation, shall be distributed to or inure to the benefit of any Director or Officer of the Corporation, or any private individual, but shall be used to promote the purpose of the Corporation.

Section 1.3 Formation Background. By Action Item dated March 6, 2014, the Office of Hawaiian Affairs (OHA) authorized and approved the use of the Funds to enable Native Hawaiians to participate in a process through which a structure for a governing entity may be determined by the collective will of the Native Hawaiian people by transmitting the Funds to an entity that is independent of OHA and any apparatus of the State of Hawai'i. OHA initially invited nine Ali'i trusts, Royal societies and Civic organizations to discuss the development of this independent body. From that group of nine, the following three organizations, each represented by two individuals, continued the discussion: King Lunalilo Trust & Home (James Kuhio Asam and Michelle Nalei Akina), 'Ahahui Ka'ahumanu (Pauline Nakoolani Namuo and Geraldine Abbey Miyamoto) and Hale O Nā Ali'i O Hawai'i (Naomi Kealoha Ballesteros and Selena Lehua Schuelke). Eventually, the three organizations and the six individuals decided that the purpose of entity would be best served if the six individuals in their individual capacity and not as representatives of any organization should form and lead the independent entity by serving as directors of the Na'i Aupuni.

ARTICLE II.
PRINCIPAL OFFICE; PLACE OF MEETING; SEAL

EXHIBIT 4

Section 2.1 Principal Office. The principal office of the Corporation shall be maintained at such place within or without the State of Hawaii, and the Corporation may have such other offices within or without the State of Hawaii, as the Board of Directors shall determine.

Section 2.2 Place of Meetings. All meetings of the Board of Directors shall be held at the principal office of the Corporation, unless some other place is stated in the call. Any meeting, regular or special, of the Board of Directors may be held by conference telephone or similar communication equipment as long as all Directors participating in the meeting can hear one another, and all such Directors shall be deemed to be present in person at the meeting.

Section 2.3 Seal. The Corporation may have a corporate seal as the Board of Directors shall determine.

ARTICLE III.
BOARD OF DIRECTORS

Section 3.1 Powers. The Board of Directors shall manage the property and business of the Corporation and shall have and may exercise all of the powers of the Corporation.

Section 3.2 Number; Election. There shall be a Board of Directors of the Corporation, to consist of not less than three (3) nor more than six (6) members. The number of Directors for the ensuing year shall be fixed by the Board of Directors at each annual meeting and the number so designated shall then be elected by ballot by the Board of Directors, to hold off until the next annual meeting and thereafter until their successors shall be duly elected, and the number of Directors may be decreased or increased by the Board of Directors at any special meeting and, in case the number is increased, the additional Directors shall be elected by ballot as if elected at an annual meeting.

Section 3.3 Chairman. The Board of Directors may appoint from among its members a Chairman who shall preside at all meetings, serve during the pleasure of the Board of Directors, and perform such other duties as may be assigned to him by the Articles of Incorporation, these Bylaws or the Board of Directors.

Section 3.4 Annual Meeting. A meeting of the Board of Directors shall be held annually, and the Board of Directors shall thereat elect the Officers of the Corporation for the ensuing year.

Section 3.5. Regular Meetings. The Board of Directors may establish regular meetings to be held in such places and at such times as it may from time to time by vote determine, and no further notice thereof shall be required.

Section 3.6 Special Meetings. Special meetings of the Board of Directors may be called at any time by the President or by any two (2) Directors.

Section 3.7 Notice of Meetings. Except as otherwise expressly provided, reasonable notice of any meeting of the Board of Directors shall be given to each Director (other than the person or persons calling the meeting and other than the person giving notice of the meeting) by the Secretary, or by the person or one of the persons calling the meeting, by advising the Director of the meeting by word of mouth or by telephone or by leaving written notice thereof with him or at his residence or usual place of business. Such written notice shall be mailed not less than five (5) days prior to the date of the meeting. Nonreceipt by a Director of any written notice of a meeting mailed to such Director shall not invalidate any business done at the meeting while a quorum it present.

Section 3.8 Waiver of Notice.

(a) Any Director may, prior to, at the meeting, or subsequent thereto, waive notice of any meeting in writing, signed by him.

(b) The presence at any meeting of any Director shall be the equivalent of a waiver of the requirement of the giving of notice of said meeting to such Director, unless the Director, at the beginning of the meeting or prior to the vote on a matter not properly noticed, objects to the lack of notice and does not thereafter vote or assent to the objected action.

Section 3.9 Quorum. A majority of the total number of Directors at which the Board of Directors has been fixed shall constitute a quorum to transact business, and, in order to valid, any act or business must receive the approval of a majority of such quorum. A vacancy or vacancies in the membership of the Board of Directors shall not affect the validity of any action of the Board of Directors, provided there is present at the meeting a quorum of all the Directors at which the Board of Directors has been fixed.

Section 3.10 Adjournment. Any meeting of the Board of Directors, whether annual or special, may be adjourned from time to time, whether a quorum be present or not, without notice other than the announcement at the meeting. Such adjournment may be to such time and to such place as shall be determined by a majority of the Board of Directors present. At any such adjourned meeting at which a quorum shall be present, any business may be transacted which might have been transacted by a quorum at the original meeting as originally called.

Section 3.11 Action by Directors Without a Meeting. Any action required or permitted to be taken at a meeting of the Directors may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the Directors with respect to the subject matter thereof and filed with the records of the meetings of the Board of Directors. Such consent shall have the same effect as a unanimous vote of the Board of Directors and may be stated as such in any articles or documents filed with the Director of the Department of Commerce and Consumer Affairs.

Section 3.12 Removal; Withdrawal; Admission. Any Director may be removed as a Director of the Corporation, with or without cause, by the affirmative vote of all Directors at the time of such vote (which shall not include any Director whose removal is subject of such vote). Any Director may withdraw from the Corporation at any time upon giving prior written notice to the Secretary. Additional Directors may be elected or appointed as set forth in these Bylaws.

Section 3.13 Permanent Vacancies. If any permanent vacancy shall occur in the Board of Directors through death, resignation, disqualification, removal or other cause other than temporary absence, illness or disability, the remaining Directors, by the affirmative vote of a majority of all remaining members of the Board of Directors, may elect a successor Director to hold office for the unexpired portion of the term of the Director whose place shall be vacant.

Section 3.14 Temporary Vacancies, Substitute Directors. If any temporary vacancy shall occur in the Board of Directors through the sickness or disability of any Director, the remaining Director, whether constituting a majority or a minority of the whole Board of Directors, may by the affirmative vote of a majority of such remaining Directors appoint some person as a substitute Director, who shall be a Director during such absence, sickness or disability and until such Director shall return to duty or the office of such director shall become permanently vacant.

Section 3.15 Proxies. Voting by proxy may be permitted at any meeting of the Board of Directors or of any committees, boards or bodies created by the Board of Directors.

Section 3.16 Procedure. The Board of Directors shall fix its own rules of procedure which shall not be inconsistent with these Bylaws.

ARTICLE IV.
OFFICERS AND MANAGEMENT

Section 4.1 Appointment, Term, Removal. The Officers of the Corporation shall be the President, [one or more Vice Presidents,], the Secretary, the Treasurer, and in addition thereto, one or more Assistant Secretaries, one or more Assistant Treasurers and such other Officers, with such duties, as the Board of Directors shall from time to time determine. The Officers shall be elected annually by the Board of Directors at its annual or a special meeting and shall hold office at the pleasure of the Board of Directors until the next annual meeting and thereafter until their respective successors shall be duly elected or appointed and qualified. [Each Officer must be a Director of the Corporation.] Any person may hold more than one office. The Board of Directors may, in its discretion, from time to time limit or enlarge the duties and powers of any officer appointed by it.

Section 4.2 The President. The President shall be the Chief Executive Officer of the Corporation. In the absence of the Chairman of the Board of Directors, or if no Chairman of the

Board of Directors shall have been appointed, the President shall preside at all meetings of the Board of Directors, and may call special meetings of the Board of Directors at his discretion and shall call annual meetings of Board of Directors, as provide by these Bylaws. Subject to the discretion and control of the Board of Directors, the President shall:

(a) be in personal charge of the principal place of the Corporation;

(b) have the general management, supervision and control of all of the property, business and affairs of the Corporation, prescribe the duties of the managers of all branch offices, and exercise such other powers as the Board of Directors may from time to time confer upon him; and

(c) subject to approval of the Board of Directors, appoint heads of departments and generally control the engagement, government and discharge of all employees of the Corporation, and fix their duties and compensation.

He shall at all times keep the Board of Directors fully advised as to all of the Corporation's business.

(d) The Vice President or Vice Presidents. The Vice President or Vice Presidents shall, in such order as the Board of Directors shall determine, perform all of the duties and exercise all of the powers of the President provided by these Bylaws or otherwise during the absence or disability of the President or whenever the office of the President shall be vacant, and shall perform all other duties assigned to him or them by the Board of Directors or the President. The Board of Directors may designate one of the Vice Presidents as Executive Vice President and the Vice President so designated shall be first in order to perform the duties and exercise the power of the President in the absence of that Officer.

Section 4.3 The Secretary. The Secretary shall attend all meetings of the Board of Directors, and shall record the proceedings thereof in the minute book or books of the Corporation. He shall give notice, in conformity with these Bylaws, of meetings, where required, of the Board of Directors. In the absence of the Chairman of the Board of Directors and of the President and the Vice President, or the Vice Presidents if there be more than one, he shall have power to call such meetings and shall preside thereat until a President Pro Tempore shall be chosen. The Secretary shall perform all other duties. incident to his office of which may be assigned to him by the Board of Directors or the President.

Section 4.4 The Treasurer. The Treasurer shall have custody of all of the funds, notes, bonds and other evidences of property of the Corporation. He shall deposit or cause to be deposited in the name of the Corporation all monies or other valuable effects in such banks, trust companies or other depositories as shall from time to time be designated by the Board of Directors. He shall make such disbursements as the regular course of the business of the

Corporation may require or the Board of Directors may order. He shall perform all other duties incident to his office or which may be assigned to him by the President or the Board of Directors.

Section 4.5 Absence of Officers. In the absence or disability of the President and Vice President, or Vice Presidents if there be more than one, the duties of the President (other than the calling of meetings of the Board of Directors) shall be performed by such persons as may be designated for such purpose by the Board of Directors. In the absence or disability of the Secretary and of the Assistant Secretary, or Assistant Secretaries if more than one, or of the Treasurer and the Assistant Treasurers, if more than one, the duties of the Secretary or Treasurer, as the case may be, shall be performed by such person or persons as may be designated for such purposes by the Board of Directors.

ARTICLE V.
REMOVALS

The Board of Directors may at any time remove from office or discharge from employment any Officer, subordinate Officer, agent or employee appointed by it or by any person under authority delegated by it, whenever, in their judgment, the best interests of the Corporation will be served thereby. The number of votes cast to remove a Director must be sufficient to elect the Director at a meeting to elect Directors.

ARTICLE VI.
AUDIT OF BOOKS

The Board of Directors shall cause a complete audit to be made of the books of the Corporation at least once in each fiscal year and more often if required by the Board of Directors, and shall thereafter make appropriate reports to all members of the Board of Directors. The Board of Directors may appoint some person, firm or corporation engaged in the business of auditing to act as the auditor of the Corporation.

ARTICLE VII.
EXECUTION OF INSTRUMENTS

Section 7.1 Proper Officers. Except as hereinafter provided or as required by law, all checks, drafts, notes, bonds, acceptances, deeds, leases, contracts, bills of exchange, order for the payment of money, licenses, endorsements, powers of attorney, proxies, waivers, consents, returns, applications, notices, mortgages and other instruments or writings of any nature, which require execution on behalf of the Corporation, shall be signed by (a) the President or one of such officers and (b) a Vice President, the Secretary or the Treasurer. The Board of Director may from time to time authorize any such documents, instruments or writings to be signed by such Officers, or any one of them, in such manner as the Board of Directors may determine.

Section 7.2 Facsimile Signatures. The Board of Directors may, from time to time by resolution, provide for the execution of any corporate instrument or document, including but not

limited to checks, warrants, letters of credit, drafts and other orders for the payment of money, by a mechanical device or machine or by the use of facsimile signatures under such terms and conditions as shall set forth in any such resolution.

Section 7.3 Funds. All funds of the Corporation are to be deposited from time to time to the credit of the Corporation in such banks, trust companies, or other depositories as the Board of Directors may select.

ARTICLE VIII.
CORPORATE BOOKS AND RECORDS; INSPECTION OF SAME AND BYLAWS

Section 8.1 Books and Records. The Corporation must keep correct and complete books and records of account of the Corporation and minutes of the proceedings of the Board of Directors and any committee having any of the authority of the Board of Directors, and it must keep at its registered office or principal office in the State a record of the names and addresses of the Directors. All books and records of the Corporation may be inspected, upon written demand, by any Director or Director's agent or attorney for any proper purpose at any reasonable time. Demand of inspection other than at a meeting must be made in writing upon the President, the Secretary, or any other officer designated by the Board of Directors.

Section 8.2 Inspection of Bylaws. The Corporation must keep in its principal office for the transaction of business a copy of the Bylaws of the Corporation as amended or otherwise altered to date, to be open to inspection by the Directors at all reasonable times during office hours.

ARTICLE IX.
FISCAL YEAR

The fiscal year of the Corporation is such as may be from time to time established by resolution by the Board of Directors.

ARTICLE X.
AMENDMENT TO BYLAWS

The Bylaws may be altered, amended or repealed,, and new Bylaws may be adopted, by a majority vote of the Directors present at any meeting of the Board of Directors at which a quorum is present or by the written consent of such Directors.

ARTICLE XI.
DEFINITIONS

The word "**person**" or any pronoun used in place thereof, where the context so requires or admits, includes and means individuals, firms, corporations, partnerships, and associations. The singular includes and means the plural, or vice versa. Masculine, feminine, and neuter genders include or interchange each of the genders as the context implies or requires.

CERTIFICATE OF SECRETARY

I certify:

1. I am the Secretary of NA'I AUPUNI.

2. The attached Bylaws are the Bylaws of the Corporation adopted by the Board of Directors at a meeting held on February 16, 2015.

DATED: 2-23-2015, 2015.

Naomi Kealoha Ballesteros
Secretary

Excerpts of James Asam's

Declaration

(Pages 8 and 9)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

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

Plaintiffs,

vs.

THE STATE OF HAWAII, GOVENOR DAVID Y. IGE, in his official capacity; ROBERT K. LINDSEY JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, in his official capacity; 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, in their official capacities; KAMANA'OPONO CRABBE, Chief Executive, Office of Hawaiian Affairs, in his official Capacity; JOHN D. WAIHE'E III, Chairman, Native Hawaiian Roll Commission, in his official Capacity; NĀ'ĀLEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MĀHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, in their official capacities; CLYDE W. NĀMU'O, Executive Director, Native Hawaiian Roll Commission, in his official capacity; THE AKAMAI FOUNDATION; and THE NA'I

CASE NO: 1:15-cv-00322-JMS-BMK

DECLARATION OF JAMES KUHIO ASAM

AUPUNI FOUNDATION; and DOE DEFENDANTS 1-50,

Defendants.

DECLARATION OF JAMES KUHIO ASAM

I, JAMES KUHIO ASAM, hereby declare under penalty of perjury that the foregoing is true and correct as follows:

1. I am President for Defendants Na'i Aupuni ("**NA**") in this proceeding.

2. I make this declaration on my personal knowledge and would be competent to testify on the matters stated herein.

3. On July 6, 2011, **Act 195** became law that established the Native Hawaiian Roll Commission ("**NHRC**") to publish a roll of Native Hawaiians "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." Act 195 also acknowledged that the state should not interfere with Native Hawaiians' right to "freely determine their political status" as stated in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples. A true and accurate copy of Act 195 is attached hereto as Exhibit 1.

4. On May 21, 2013, **Act 77** became law, which amended Act 195 to allow Office of Hawaiian Affairs ("**OHA**") registrants to be added to the NHRC's roll. A true and accurate copy of Act 77 is attached hereto as Exhibit 2.

5. On June 20, 2014, the Department of the Interior ("**DOI**") issued its procedures for re-establishing a government-to-government relationship with the Native Hawaiian Community ("**ANPRM**") that favorably reported on the State of Hawaii's efforts to support reorganizing a Native Hawaiian government citing Act 195. A true and accurate copy of the ANPRM is attached hereto as Exhibit 3.

6. NA is a Hawaii non-profit corporation that supports efforts to achieve Native Hawaiian self-determination. NA was incorporated on December 23, 2014. A true and accurate copy of the NA's Bylaws is attached hereto as Exhibit 4. The Bylaws provide in part:

> Section 1.3 Formation Background. By Action Item dated March 6, 2014, the Office of Hawaiian Affairs (OHA) authorized and approved the use of the Funds to enable Native Hawaiians to participate in a process through which a structure for a governing entity may be determined by the collective will of the Native Hawaiian people by transmitting the Funds to an entity that is *independent of OHA and any apparatus of the State of Hawai'i.* OHA initially invited nine Ali'i trusts, Royal societies and Civic organizations to discuss the development of this independent body. From that group of nine, the following three organizations, each represented by two individuals, continued the discussion: King Lunalilo Trust & Home (James Kuhio Asam and Michelle Nalei Akina), 'Ahahui Ka'ahumanu (Pauline Nakoolani Namuo and Geraldine Abbey Miyamoto) and Hale O Nā Ali'i O Hawai'i (Naomi Kealoha Ballesteros and Selena Lehua Schuelke). Eventually, the three organizations and the six

individuals decided that the purpose of entity would be best served if the six individuals in their individual capacity and not as representatives of any organization should form and lead the independent entity by serving as directors of the Na'i Aupuni.

7. My biographical background is accurately noted on the NA website is as follows:

> Dr. J. Kūhiō Asam is the executive director of the King William Charles Lunalilo Trust. He brings a lifelong professional and volunteer commitment to build and strengthen the Hawaiian community.
>
> As the executive overseeing the trust left by the sixth monarch of the Hawaiian Kingdom, Dr. Asam has accepted the responsibility to carry out the will of King Lunalilo, as applied to contemporary times, transform Lunalilo Home, and expand its reach into communities to become the foremost system of elder services in support of Native Hawaiian kupuna and families.
>
> He attended public elementary schools, the Kamehameha Schools, and earned his bachelor of arts in psychology and child development from Yale University in New Haven, Connecticut. Asam obtained his medical degree at the John A. Burns School of Medicine at the University of Hawaii and furthered his advanced education with specialty training to become the first Native Hawaiian child psychiatrist.
>
> As a civic and community leader, Dr. Asam currently serves on the boards of the Hanahauoli School, Sutter Pacific Health, and the Pacific Health Research and Education Institute. He is a member of Prince Kūhiō Hawaiian Civic Club and Ha Kupuna Joint Advisory Council, the National Resource Center for Native Hawaiian Elders.
>
> Residing in Honolulu and living an active lifestyle, Dr. Asam enjoys exercise, cooking, culinary consumption, travel adventures with his wife Dr. Claire L. Asam, and spending special times with his two adult sons, two daughters-in-law, and four grandsons.

8. Biological background on Pauline Nakoolani Namuo, NA's Vice

President and Director is accurately noted on the NA website is as follows:

> Pauline Nakoolani Namu'o is President of Ahahui Kaahumanu, Chapter 1, Honolulu. Established in 1864, the Ahahui Kaahumanu is one of four Hawaiian Royal Benevolent Societies. It was created to care for Hawaiian women.
>
> Her experience and interests include a career in government, assisting in the field of education, Hawaiian issues and programs, and women's leadership organizations and issues.
>
> Pauline's career in government spans approximately 32 years: 24 in the State Judiciary and eight in the Executive Branch. She also has been a substitute teacher throughout Honolulu for the past 10 years and is experienced in multi-cultural instructional strategies.
> She was Legislative Coordinator for Governor Ben Cayetano, was Deputy Director of Administration at the State of Hawaii, Department of Public Safety, and has served as a consultant to the Kahoolawe Island Reserve Commission.
>
> She is a member of the Co-Cathedral of St. Theresa Church, former member of the Prince Kūhiō and Honolulu Hawaiian Civic Clubs, current member of the Kalihi Hawaiian Civic Club, Secretary of Aha Hipuu, and has served in leadership roles with the American Businesswomen's Association, the YWCA of Oahu, the Organization of Women Leaders, and the Management, Development & Leadership Academy, State of Hawaii.
>
> Namu'o is an honors graduate of Roosevelt High School. She received her Bachelor of Education degree from the University of Hawaii at Manoa. Married to Clyde W. Namu'o, Executive Director of the Polynesian Voyaging Society, the couple has two grown sons and five grandchildren. Her time is spent with family and working on preserving Hawaiian culture.

9. Biological background on Geraldine Abbey Miyamoto, a NA

Director, is accurately noted on the NA website is as follows:

Gerry Miyamoto is Vice President and a 27 year member of Ahahui Kaahumanu Chapter 1, Honolulu. Ahahui Kaahumanu is one of four Hawaiian Benevolent Royal Societies established in 1864 by Princess Victoria Kamamalu, Queen Liliuokalani, and Princess Bernice Pauahi Bishop to care for Hawaiian women.

Active in the community and with a deep appreciation for the heritage and history of the Islands, Miyamoto served as Regent for the Daughters of Hawaii in 2006, 2007 and 2008. She was instrumental in securing from the State legislature the funds needed to restore Hulihee Palace in Kona after the 2006 earthquake. She has also travelled to Midway atoll in 2011 with four others to re-create, in the 21st century, the ancient Hawaiian system of feather gathering.

Raised in Kaimuki and Punaluu on the Island of Oahu, Miyamoto is a graduate of Maryknoll High School and the University of Hawaii at Manoa. She holds both a Bachelor of Arts and a Master of Arts degree in History from the University of Hawaii. She is a member of the Daughters of Hawaii and a member of Aha Hipuu the organization of the four Hawaiian Royal Societies.

Miyamoto has three grown children and five grandchilden. Her late husband was a member of the famed 100th Battalion, 442nd Infantry. Her interests are reading, hula, ukulele and learning slack key guitar. She is dedicated to preserving Hawaiian culture.

10. Biological background on Naomi Kealoha Ballesteros, NA's Secretary/Treasurer and Director, is accurately noted on the NA website is as follows:

Kealoha Ballesteros is a member of Hale O Na Alii O Hawaii and has served as president of Halau O Poomaikelani Helu Ehiku, Chapter 7 since 2009. Hale O Na Alii O Hawaii is a Hawaiian Royal Benevolent Society that was originally established by King David Kalakaua in 1886 as Hale Naua. This organization was re-established on April 7, 1918, by Princess Abigail Wahiikaahuula Kawananakoa and has 7 chapters throughout Hawaii and members throughout the Americas. Hale O Na Alii O Hawaii is still overseen by the House of Kawananakoa.

> Ballesteros is also the Vice President of Aha Hipuu, an association of the four Hawaiian Royal Benevolent Societies: Mamakakaua, Ahahui Kaahumanu, Royal Order of Kamehameha I, and Hale O Na Alii O Hawaii. She is active and interested in current affairs that affect Hawaiians and Hawaii.
>
> Born and raised in Kaimuki by grandparents Ben and Juanita Niihau, she is a graduate of Kaimuki High School. Now retired after a 40-year career of service in financial management, Ballesteros lives in Kapolei. She is a wife, mother, grandmother and great grandmother. Her life is dedicated to preserving Hawaiian culture and language for future generations.

11. Biological background on Selena Lehua Schuelke, a NA Director, is accurately noted on the NA website is as follows:

> Lehua Schuelke is president of Hale O Na Alii O Hawaii, Chapter 1, whose members are descended from Hawaiian alii. Originally established by King David Kalakaua in 1886 as Hale Naua, this organization was re-established on April 7, 1918, by Princess Abigail Wahiikaahuula Kawananakoa. Hale O Na Alii O Hawaii is one of four Hawaiian Royal Benevolent Societies.
>
> In addition to serving as president of Hale O Na Alii O Hawaii, she is a member of Ahahui Kaahumanu, Chapter 1, a member of the Kuini Piolani, Hawaiian Civic Club, and a board member of Aha Hipuu. Lehua is a graduate of the Kenway School of Accounting and the Med-Assist School of Hawaii. She also is a paralegal. Raised in West O'ahu, Lehua graduated from Waianae High School. Currently residing in Ewa Beach, she is a wife, mother, grandmother and great grandmother.
>
> The granddaughter of Elizabeth Kauahipaula, the former Hawaiian educator, Lehua believes in service to her community and actively volunteers for the benefit of the Native Hawaiian people. She works to keep Hawaiian heritage and culture alive and lives by the belief that it is essential to retain the culture for future generations.

12. As of April 7, 2015, Michelle Nalei Akina stepped down as a NA Director for personal reasons and has not been replaced. Thus, current NA directors are Pauline Nakoolani Namuo, Naomi Kealoha Ballesteros, Geraldine Abbey Miyamoto, Selena Lehua Schuelke and me.

13. One of the initial decisions that the NA directors made was that the voter for election of delegates and the delegates should be limited to Native Hawaiians. While NA anticipated that the convention delegates will discuss and perhaps propose a recommendation on membership of the governing entity, NA decided, *on its own*, that Native Hawaiian delegates should make that determination and that its election and convention process thus should be composed of Native Hawaiians. Furthermore, prior to entering into the below described Grant Agreement, NA informed OHA that it intended to use the Roll but that it might also look into whether there are other available lists of Native Hawaiians that it could also use to form its voter list. Thus, under the Grant Agreement, NA has the sole discretion to determine whether to go beyond the inclusion of the Roll in developing its list of individuals eligible to participate in Native Hawaiians' self-governance process.

14. NA requested grant funds from the OHA so that NA may conduct its election of delegates, convention and ratification vote process. On April 27, 2015, at NA's request, OHA , The Akamai Foundation ("**Akamai**") and NA entered into

a **Grant Agreement** whereby OHA provided $2,595,000 of Native Hawaiian trust funds to Akamai as a grant for the purpose of NA conducting an election of delegates, convention and ratification vote ("**Scope of Services**"). A true and accurate copy of the Grant Agreement is attached hereto as Exhibit 5. The Grant Agreement importantly also provides:

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

15. Also, on April 27, 2015, NA and Akamai entered into a **Fiscal Sponsorship Agreement** because NA does not have a 501(c)(3) exemption. A true and accurate copy of the Fiscal Sponsorship Agreement is attached hereto as Exhibit 6. Upon information and belief, Akamai is a private, Hawaii non-profit corporation with no contracts with OHA other than the Grant Agreement and the Fiscal Sponsorship Agreement and no contracts with NHRC.

16. On May 8, 2015, OHA, NA and Akamai entered into a **Letter Agreement** that addressed the timing and disbursement of the grant funds. A true and accurate copy of the Letter Agreement is attached hereto as Exhibit 7. Upon

information and belief, pursuant to this Letter Agreement, as of August 2015, Akamai has obtained all of said grant funds from OHA.

17. On May 27, 2015, NA launched its website at **www.naiaupuni.org** that attached these agreements with OHA and Akamai, as well as FAQs that attempted to address issues related to the NA election and convention process. A true and accurate copy of the FAQs as of September 28, 2015, is attached hereto as Exhibit 8.

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

19. NA understood that OHA's Hawaiian Registry process did not require attestation to the "unrelinquished sovereignty of the Native Hawaiian people", and "intent to participate in the process of self-governance" ("**Declaration One**"). NA concluded, *on its own*, that having this alternative registration process was favorable because it provided Native Hawaiians who may take issue with Declaration One with the opportunity to participate in the NA process.

Accordingly, NA noted on its website that Native Hawaiians may register through the NHRC or OHA's Hawaiian Registry and provided links to both registration options.

20. Although NA understood that unlike the NHRC process, the Hawaiian Registry process also did not require registrants to declare "a significant cultural, social or civic connection to the Native Hawaiian community" ("**Declaration Two**"), NA believes that registering with OHA *in and of itself* demonstrates a significant connection. Moreover, NA believes that most of the OHA registrants have this connection because they either reside in Hawaii, are eligible to be a beneficiary of programs under the Hawaiian Homes Commission Act, participate in Hawaiian language schools or programs, attended or have family members who attend or attended Kamehameha Schools, participate in OHA programs, are members of Native Hawaiian organizations or are regarded as Native Hawaiian in the Native Hawaiian community.

21. On June 18, 2015, NA and Election-America ("**EA**") entered into an Agreement for EA to provide services to conduct the delegate election. A true and accurate copy of the EA Agreement, is attached hereto as Exhibit 9.

22. By letter dated June 25, 2015, NA requested that the NHRC provide EA with its certified list of voters in mid-July 2015. A true and accurate copy of this letter, is attached hereto as Exhibit 10.

23. By email dated July 14, 2015, the NHRC informed NA of its certification decision and requested that NA pay its consultant $5,000 for the cost of producing an electronic file of the certified registrants to EA, which NA shortly thereafter paid to the consultant. A true and accurate copy of this email, is attached hereto as Exhibit 11.

24. Neither NA nor Akamai (upon information and belief) have any contractual relationship with the NHRC, notwithstanding the aforementioned agreement to pay NHRC's consultant about $15,000 to date (which includes the aforementioned $5,000) for the cost of the electronic files containing the certified registrants and updating information.

25. Upon information and belief, on August 3, 2015, EA sent to approximately 95,000 certified Native Hawaiians a **Notice** of the election of delegates that included information about becoming a delegate candidate. A true and accurate copy of the Notice, is attached hereto as Exhibit 12. The Notice included that the following key dates:

9/15/15	Deadline to apply to be a delegate candidate
10/15/15	Deadline to be certified registrants eligible to vote
11/1/15	EA to transmit ballots to certified voters
11/30/15	Deadline for votes to be received by EA
Feb-April/2016	Convention
June 2016	Potential ratification vote

The Notice also described NA's apportionment plan:

O'ahu will be represented by 20 delegates.

> Hawai'i Island will be represented by 7 delegates.
> Maui will be represented by 3 delegates.
> Kaua'i & Ni'ihau will be represented by 2 delegates.
> Moloka'i & Lana'i combined will be represented by 1 delegate.
> Out-of-state Hawaiians will be represented by 7 delegates.

NA, *on its own*, decided on these dates and deadlines, the apportionment plan and the election process set forth in the Notice. NA is also allowing Native Hawaiians who do not live in the State of Hawaii to vote in the delegate election and to serve as delegates at the convention. For purposes of determining who is eligible to vote in the November delegate election, NA will allow individuals that the NHRC has certified as of October 15, 2015.

26. On August 30, 2015, the Honolulu Star-Advertiser published an op-ed by NA that stated in part:

> Two of the Native Hawaiian Grassroot plaintiffs complain they were deprived of the opportunity to register with the Roll Commission because they do not agree with the Commission's declaration to affirm the "unrelinquished sovereignty of the Native Hawaiian people and an intent to participate in the process of self-governance."
>
> We understand that the Roll Commission has registered and certified voters -- and will continue to do so -- even if these voters refuse to agree to this declaration.

NA submitted this op-ed in response to the allegations of Plaintiffs Akina and Makekau that they would register if they did not have to attest to Declaration One, and to inform Plaintiffs and Native Hawaiians generally that they may register

without making this attestation. A true and accurate copy of this op-ed, is attached hereto as Exhibit 13.

27. On September 30, 2015, EA announced the delegate candidates. A true and accurate copy of the announcement is attached hereto as Exhibit 14. Since then, delegate candidates have been campaigning for the November election.

28. All decisions regarding who may vote and who may be a delegate candidate in the upcoming delegate election scheduled for November 2015 were decisions made by NA, *on its own*, and were not the decisions of NHRC, OHA or Akamai. Also, NHRC, OHA and Akamai did not compel, coerce, or cause NA to make these decisions.

29. As noted above, NA is comprised of five directors who are Native Hawaiian, are active in the Native Hawaiian community and formed NA to provide a process for Native Hawaiians to further self-determination and self-governance for Native Hawaiians. All of NA's decisions have been in furtherance of Native Hawaiians' right to "freely determine their political status" as stated in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples.

30. Since the illegal overthrow of the Hawaiian Kingdom in 1893, Native Hawaiians have been unable to re-organize a Native Hawaiian governing entity. The 1993 *Apology Resolution* provides that "on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17,

1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people.". Corresponding with the loss of Hawaiian Kingdom monarchy in 1893, Native Hawaiians' socio-economic status has declined and for the last several decades has been the lowest of any ethnic group residing in Hawai'i. *See, e.g.*, 20 U.S.C. §7512(16)(C) (education deficit); 42 U.S.C. §11701(22) (poor health); 20 U.S.C. §16(G)(ii) & (iii) (drug/alcohol use, child abuse and neglect); Pub.L. 106-569, Title V, §512, Dec. 27, 2000, 114 Stat. 2966 (low income).

31. The NA process is the first opportunity that Native Hawaiians have had since the overthrow whereby a near majority of Native Hawaiians residing in Hawai'i may vote for delegates to convene to discuss self-governance. If this process is stalled in the Courts, the NHRC's list will become stale, OHA's funding may not be available and if history is a useful compass - it may be decades before funding, a similarly substantial roll, state and federal government support of Native Hawaiian self-governance, and self-determination zeal among Native Hawaiians converge to bring about another such opportunity. Moreover, the structural change that self-governance will bring about is likely the best stimulus to reverse the persistent low socio-economic conditions that have plagued Native Hawaiians for decades. The 2000 *Mauka to Makai Report* states: "A Native Hawaiian Governing Body, organized against the background of established precedent, would serve as a

representative voice for the Native Hawaiian people, focus community goals, provide governmental services to improve community welfare, and recognize the legitimate aspiration of the Native Hawaiian people to transmit their values, traditions, and beliefs to their future generations."

32. NA intends to proceed with and support the delegate election in November, regardless of whether the Roll Commission has certified the final version of the Roll by that date. In February to April 2015, NA intends to proceed with and support the elected delegates will come together in a convention to consider matters relating to self-governance. In or about June 2016, or thereafter, NA intends to proceed with and support a ratification vote of any governing document that the delegates may propose.

33. On September 29, 2015, the DOI published its proposed administrative rule ("**NPRM**"). A true and accurate copy of the proposed administrative rule is attached hereto as Exhibit 15.

34. A true and accurate copy of Chris Backert's declaration dated September 28, 2015, is attached hereto as Exhibit 16.

DATED: Honolulu, Hawai'i, SEP 29 2015.

JAMES ~~KUHIO~~ ASAM

Letter Agreement
Between
Office of Hawaiian Affairs, Na'i Aupuni, and Akamai Foundation

The terms of this Letter Agreement shall be binding on the signatories to this Letter Agreement, on the signatories to the Grant Agreement, and on the signatories to the Fiscal Sponsorship Agreement, namely: the Office of Hawaiian Affairs (OHA), Na'i Aupuni (NA), and the Akamai Foundation (AF) (collectively "parties").

OHA's Board of Trustees has authorized the use of trust funds of up to $2,598,547 by their approval of OHA Action Item No. ARM #14-07 on October 16, 2014.

The undersigned mutually agree to the method and timing of the disbursement of the approved grant funds by OHA to the Akamai Foundation, aka Sponsor, for the benefit of Na'i Aupuni, aka Client.

1. No funds will be disbursed unless such disbursements are consistent with the Grant Agreement and the Fiscal Sponsorship Agreement executed by the parties.

2. Upon execution of the Grant Agreement, **TWO HUNDRED FIFTY THOUSAND AND N0/100 DOLLARS** ($250,000)("initial payment") shall be provided to AF, the Sponsor, within five (5) business days.

3. All subsequent payments have been authorized by OHA's Chief Executive Officer and funding shall be made available upon the request of the AF, the Sponsor, based upon the following Schedule of Disbursements:

A. Item number 2. above ($250,000).
B. Per Na'i Aupuni's Projected Budget (3/9/2015) for Apportionment and Election Contract, plus the Independent Election Monitoring Contract ($276,250), plus first tranche of funding for any attorneys fees, any other consultants or if any budget category needs additional funding ($159,137.33).
C. Per Na'i Aupuni's Projected Budget for the Governance 'Aha Contract ($1,457,088), plus second tranche of funding for any attorneys fees, any other consultants or if any budget category needs additional funding ($159,137.33).
D. Per Na'i Aupuni's Projected Budget for the Referendum Contract and Independent Referendum Monitoring Contract ($137,250), plus third tranche of funding for any attorneys fees, any other consultants or if any

EXHIBIT "F"

budget category needs additional funding ($159,137.33).

At any point in time, OHA's Chief Executive Officer has the right to object to a requested disbursement on the grounds that such disbursement is inconsistent with the Grant Agreement and/or the Fiscal Sponsorship Agreement.

3. It is mutually agreed that the terms of this Letter Agreement are hereby incorporated into the Grant Agreement by reference.

4. Should any of the terms of this Letter Agreement conflict with the Grant Agreement or the Fiscal Sponsorship Agreement, the terms of the Grant Agreement and the Fiscal Sponsorship Agreement will prevail.

5. The terms of this Letter Agreement may not be changed except by mutual agreement and by a writing signed by the parties.

6. Each party signing this Letter Agreement represents to each other that they are authorized by their respective organizations to execute this agreement and to be bound by the terms thereof.

OFFICE OF HAWAIIAN AFFAIRS

Date: 5/8/15

By _____
Kamana'opono Crabbe, Ph.D.
Its Chief Executive Officer

NA'I AUPUNI

Date: 05-07-2015

By _____
James Kuhio Asam
Its President and Director

AKAMAI FOUNDATION

Date: 5/8/15

By _____
Louis F. Perez III
Its Chairman and Secretary

GRANT AGREEMENT
BETWEEN
THE AKAMAI FOUNDATION AND THE OFFICE OF HAWAIIAN AFFAIRS
FOR THE USE AND BENEFIT OF
NA'I AUPUNI

THIS Grant Agreement is made as of the 27th day of April, 2015, by and between the AKAMAI FOUNDATION (the "AF" or "GRANTEE") and the OFFICE OF HAWAIIAN AFFAIRS ("OHA" or "GRANTOR") for the use and benefit of NA'I AUPUNI ("NA"). AF is a 501 (c) (3) non-profit organization that exists under the laws of the State of Hawai'i whose principal place of business and mailing address is 1136 Union Mall, Suite 206, Honolulu, Hawai'i, 96813. OHA is a body corporate, existing under the Constitution of the State of Hawai'i, whose principal place of business and mailing address is 560 N. Nimitz Highway, Suite 200, Honolulu, Hawai'i 96817 and its Chief Executive Officer is Kamana'opono M. Crabbe, Ph.D. NA'I AUPUNI is a Hawai'i non-profit organization, whose principal place of business and mailing address is 745 Fort Street, Suite 800, Honolulu, Hawai'i, 96813.

W I T N E S S E T H:

WHEREAS, one of the purposes for which OHA has been established is to better the conditions of Hawaiians as defined in Section 10-2, Hawai'i Revised Statutes ("HRS"); and

WHEREAS, OHA was established to better the conditions of Native Hawaiians and Hawaiians as defined in HRS sections 10-2, 10-4(4), 10-4(6) and 10-4(8), and other applicable law(s), as amended; and

WHEREAS, OHA Board of Trustees Executive Policy 1.3.1 delegates authority to the OHA Chief Executive Officer to negotiate, approve, award and execute contracts, agreements, grants, warrants and other binding legal documents and instruments on behalf of OHA; and

WHEREAS, the expenditure of the Funds as proposed in this Agreement is intended for the betterment of conditions of Hawaiians as set forth in section 10-3(1) and (2), HRS, and is consistent with the purpose for which this grant has been authorized; and

WHEREAS, by Action Item dated March 6, 2014, OHA authorized and approved the use of the certain funds from income and proceeds from the public land trust pursuant to article XII, section 6 of the Hawai'i Constitution under its control to enable Hawaiians to participate in a process through which a structure for a governing entity may be determined by the collective will of the Hawaiian people through a process that is independent of OHA and any apparatus of the State of Hawai'i ("Funds"); and

WHEREAS, AF has committed to direct the use of the Funds pursuant to the Fiscal Sponsorship Agreement to allow Hawaiians to pursue self-determination; and

WHEREAS, OHA has committed to allow the use of its grant by AF for the benefit of NA under the terms and conditions set forth below to allow Hawaiians to pursue self-determination; and

EXHIBIT "E"

NOW, THEREFORE, the parties hereto mutually agree as follows:

1. **Scope of Services**. AF will direct the use of the grant to NA so it may facilitate an election of delegates, election and referendum monitoring, a governance ʻAha, and a referendum to ratify any recommendation of the delegates arising out of the ʻAha ("Scope of Services"). The scope of services represents the internal affairs of the Hawaiian community and thus will not exclude those Hawaiians who have enrolled and have been verified by the Native Hawaiian Roll Commission.

2. **Funds**. OHA will periodically transfer to AF a total of TWO MILLION FIVE HUNDRED NINETY-EIGHT THOUSAND and NO/DOLLARS ($2,598,000.00), inclusive of all taxes and fees, in tranches defined in a separate Letter Agreement, which is incorporated by reference herein, with AF for NA to perform the Scope of Services.

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

4. **Naʻi Aupuni Commitment Not to Affect the Delegates' Political Decisions**. NA hereby agrees:

(a) that the decisions of NA and its directors, paid consultants, attorneys and vendors regarding the performance of the Scope of Services will not directly or indirectly control or purposefully affect the political decisions of the delegates at the ʻAha; and

(b) NA and its directors, paid consultants, attorneys, and all of its vendors are barred from serving as Aha delegates. NA also commits that its performance of the Scope of Services will not interfere with the right to self-determination such that the ʻAha delegates may freely determine their political status.

5. **Project Time Table**. NA commits to completing the Scope of Services within 15 months following the date this Agreement is executed, including the election of delegates projected to occur at about November 2015.

6. **Replacement of NA members**. As noted above, NA is comprised of five to six directors. In the event any director before the completion of the Scope of Services terminates his or her affiliation with NA, the remaining members may vote to replace that member as long as the replacement director commits in writing to OHA and NA to comply with the terms of this Agreement.

7. **Fiscal Sponsor**. The terms of AF's agreement with NA is addressed in a separate Fiscal Sponsorship Agreement which is incorporated herein by reference and has been prepared in accordance with federal and state laws.

8. **Non-Confidential Agreement**. This Agreement is not confidential and may be disclosed to the public.

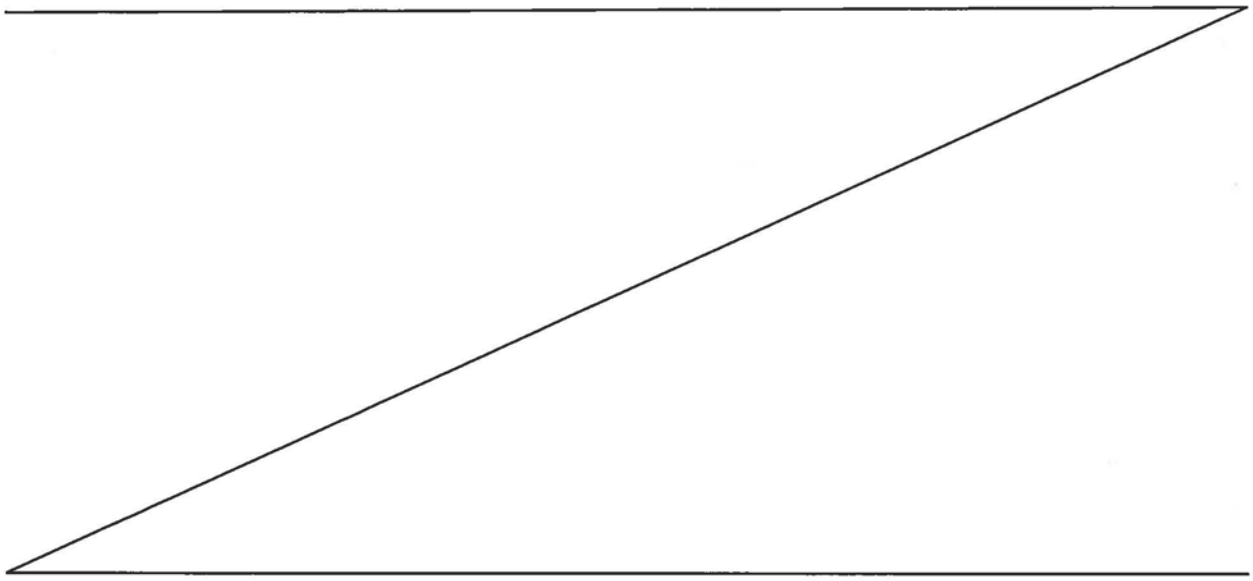
9. **Insurance**. Prior to commencing the scope of services pursuant to this Agreement AF and NA shall provide evidence that each has in full force and effect a commercial general liability (CGL) and if necessary commercial umbrella insurance with a limit of not less than $1,000,000.00 per occurrence and $2,000,000.00 general aggregate. The policy shall be an "Occurrence" form of policy.

10. **Alternative Dispute Resolution**. Any and all claims, controversies, or disputes arising out of or relating to this Agreement, or the breach thereof, shall be fully and finally resolved by arbitration in accordance with the Rules, Procedures, and Protocols for Arbitration of Disputes of Dispute Prevention & Resolution, Inc., then in effect. In the event arbitration is invoked, the parties agree that one arbitrator shall be appointed to hear and resolve the case. The parties further agree that the award of the arbitrator is binding upon the parties and that judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction. Notwithstanding anything set forth in this Section, nothing herein shall prevent any Party from resorting to a court of competent jurisdiction for injunctive relief only in those instances where a Party has breached or is threatening to breach a covenant of this Agreement.

11. **Amendment**. This Agreement may be amended only by a written instrument signed by the Parties.

12. **Severability**. The invalidity or unenforceability of any provisions of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, which shall remain in full force and effect.

13. **Applicable Law**. This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of Hawai‘i.



IN WITNESS WHEREOF, the parties executed this AGREEMENT as of the date first written above.

OFFICE OF HAWAIIAN AFFAIRS

Date: 5/4/15

By _____
KAMANA'OPONO M. CRABBE, PH.D.
Its Chief Executive Officer

"OHA"

NA'I AUPUNI

Date: APR 27 2015

By _____
JAMES KUHIO ASAM
Its PRESIDENT AND ~~DIRECTOR~~

Date: APR 27 2015

By _____
PAULINE NAKOOLANI NAMUO
Its VICE PRESIDENT AND DIRECTOR

Date: APR 27 2015

By _____
NAOMI KEALOHA BALLESTEROS
Its SECRETARY/TREASURER AND DIRECTOR

Date: APR 27 2015

By _____
GERALDINE ABBEY MIYAMOTO
Its DIRECTOR

Date: APR 27 2015

By _____
SELENA LEHUA SCHUELKE
Its DIRECTOR

"NA"

AKAMAI FOUNDATION

Date: 4-27-15

By _____
LOUIS F. PEREZ, III
Its Chairman and Secretary

Date: 4-28-15

By _____
JOHNNY CHANKHAMANY
Its President and Director

"AF"

APPROVED AS TO CONTENT

_____ Date: 4/29/15
KAWIKA RILEY
OHA Chief Advocate

APPROVED AS TO FORM:

_____ Date: 4-29-15
ERNEST M. KIMOTO
Corporate Counsel for OHA

_____ Date: 4/29/15
WILLIAM K. MEHEULA
Counsel for NA

FISCAL SPONSORSHIP AGREEMENT
BETWEEN
AKAMAI FOUNDATION AND NA'I AUPUNI

This Fiscal Sponsorship Agreement (Agreement) is made by and between The AKAMAI Foundation (Sponsor) and Na'i Aupuni (Client).

Sponsor is a non-profit Internal Revenue Code (IRC) Section 501(c)(3) organization incorporated in the State of Hawai'i and headquartered at 1136 Union Plaza, Suite 206, Honolulu, Hawaii 96813. Sponsor's mission and work is community development.

Client is an organization whose mission is to provide assistance in the non-political aspects of an election of Native Hawaiian delegates, 'Aha and ratification vote for the purpose of Native Hawaiian self-determination.

RECITALS

A. Client desires Sponsor to act, for the duration of this Agreement, as the fiscal sponsor of restricted funds from the Office of Hawaiian Affairs (OHA) for the Project pursuant to the grant agreement with OHA dated April 27th, 2015 that is incorporated herein by reference, and Client projects that grant funds will be used pursuant to the budget, a true copy of which is attached hereto as Exhibit 1.

B. Sponsor agrees to act, for the duration of this Agreement, as the fiscal sponsor of the restricted funds it receives for the Project.

C. Sponsor and Client each represent and warrant to the other that they have the power and authority to execute and perform this Agreement.

D. Sponsor and Client each agree that they shall act in good faith to give effect to the intent of this Agreement and to take such other action as may be necessary or convenient to consummate the purpose and subject matter of this Agreement.

NOW, THEREFORE, THE PARTIES HEREBY AGREE AS FOLLOWS:

1. Duration of Agreement. The duration of this Agreement shall be from April 27, 2015 to and including the earlier of THIRTY (30) days after any ratification vote or December 31, 2016.

2. Duties of Sponsor. Sponsor agrees to:

a. Provide Client with copies of all written materials received by Sponsor from OHA related to restricted funds received under this Agreement.

b. Deposit restricted funds it receives under this Agreement into a designated interest-bearing account with a federally insured financial institution with dual signatures required for disbursement by Sponsor.

EXHIBIT "D"

c. In a timely manner consistent with the Letter of Agreement, disburse restricted funds received under this Agreement to Client upon receipt of appropriate written request from Client for Project purposes.

d. Provide necessary and timely custodial, accounting, reporting, and record-keeping services for restricted funds it receives pursuant to this Agreement to both Na'i Aupuni and OHA.

e. Report restricted funds it receives under this Agreement as income of Sponsor on Sponsor's financial statements and tax returns.

f. Perform these duties and services for Client's Project for the following amount: FIVE PERCENT (5%) of the $2.598 million from OHA that is used by Client for the Project purposes which shall be automatically earned by Sponsor upon use by Client of any Project grant funds.

g. Perform services by the Sponsor's Chairman/Treasurer without involvement of other employees of Sponsor or its officers and directors so that other employees of Sponsor or its officers and directors may freely participate in the election of delegates, 'Aha and/or ratification vote. To the extent that any of the above listed employees of Sponsor is qualified to participate in the election of delegates, 'Aha and/or ratification vote by virtue their Hawaiian or Native Hawaiian descent, the same hereby knowingly, voluntarily and intelligently waive such qualification and promise to abstain from participation as a delegate.

h. In the event Client requests disbursements that are substantially different than as set forth in the budget, Sponsor shall exercise its sole discretion to determine if said requests comply with the Project purposes and are reasonably justified to satisfy Project purposes and if not Client agrees that Sponsor is not required to comply with said requests.

3. Duties of Client. Client agrees to:

a. Fully adhere to and comply with all applicable laws and regulations in management, implementation, and operation of the Project.

b. Fully adhere to and comply with all contractual agreements or obligations entered into regarding restricted funds for the Project, and make Sponsor immediately aware of any such contractual agreements or obligations.

c. Identify to Sponsor any individual(s) authorized to and responsible for requesting disbursements of restricted funds for the Project, and use and adhere to Sponsor's disbursement request forms, methods, and procedures.

d. Not spend or otherwise obligate Sponsor to pay for any amount exceeding the balance in the restricted fund for the Project, nor authorize or permit anyone to do so.

e. Conduct timely reporting regarding the Project as required by Sponsor and/or OHA, and Client shall be responsible for delivery of any reports to OHA.

f. Prepare and submit timely to Sponsor any and all reports, documentation, or other information regarding the Project as required by Sponsor.

g. Prepare and submit written acknowledgments timely to OHA as requested by Sponsor.

h. Not refer to or use Sponsor's name in any written materials, proposals, or solicitations regarding the Project without the express prior written approval of Sponsor.

i. Keep confidential any information or material proprietary to Sponsor or designated by Sponsor as Confidential Information that Client may receive, have access to, develop, or contribute to the production of or in connection with this Agreement.

4. Performance of Charitable Purposes. All restricted funds received by Sponsor under this Agreement shall be devoted to the purposes of the Project, within the tax exempt purposes of Sponsor. Sponsor shall not, and shall not permit Client or Project, to use restricted funds received under this Agreement to attempt to influence legislation; to participate or intervene in any political campaign on behalf of or in opposition to any candidate for public office; to induce or encourage violations of law or public policy; to cause any private inurement or improper private benefit to occur; nor to take any other action inconsistent with IRC Section 501(c)(3).

Client shall not, and shall not permit Project to use restricted funds received under this Agreement to attempt to influence legislation; to participate or intervene in any political campaign on behalf of or in opposition to any candidate for public office; to induce or encourage violations of law or public policy; to cause any private inurement or improper private benefit to occur; nor to take any other action inconsistent with Sponsor's status as a non-profit IRC Section 501(c)(3) organization.

The restricted fund may not be a donor-advised fund within the meaning of IRC Section 4966(d)(2) as presently interpreted under federal tax authorities.

5. Termination. In consultation with OHA, this Agreement shall terminate if and when Sponsor and OHA determine that the objectives of the Project can no longer be reasonably accomplished upon thirty days written notice to the AF by OHA and NA.

6. Unclaimed Funds. The manner of disposition of any restricted funds received under this Agreement that are not used for Project purposes shall be returned to OHA.

7. Limitations. This Agreement states the terms of Sponsor's fiscal sponsorship of Client's Project only, and does not express or imply Sponsor's endorsement of any decisions, actions, or conduct of Client or any other activity undertaken by Client. Client is an independent organization whose decisions, actions, conduct and activities or those of its representatives do not necessarily represent the decisions, actions, conduct or positions of Sponsor or Sponsor's directors and staff.

8. Indemnification. Sponsor shall defend, indemnify and hold harmless Client, its directors, officers, employees and agents, from and against any and all liability, loss, expenses, attorneys' fees

or claim for injury or damages asserted by any third party, arising out of acts or omissions of Sponsor in the performance of this Agreement but only in proportion to and to the extent such liability, loss, expense, attorneys' fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of Sponsor, its directors, officers, employees or agents.

Client shall defend, indemnify and hold harmless Sponsor, its directors, officers, employees and agents, from and against any and all liability, loss, expenses, attorneys' fees or claim for injury or damages asserted by any third party, arising out of acts or omissions of Client in the performance of this Agreement but only in proportion to and to the extent such liability, loss, expense, attorneys' fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of Client, its directors, officers, employees or agents. In addition, Client waives any and all claims arising out of the exercise or failure to exercise discretion set forth in section 2(h) of this Agreement.

8. Miscellaneous. Each provision of this Agreement shall be separately enforceable, and the invalidity of one provision shall not affect the validity or enforceability of any other provision. This Agreement shall be interpreted and construed in accordance with the laws of the State of Hawai'i. The failure of Sponsor to exercise any of its rights under this Agreement shall not be deemed a waiver of such rights.

9. Entire Agreement. This Agreement constitutes the only agreement, and supersedes all prior agreements and understandings, both written and oral, between the parties with respect to the subject matter hereof. This Agreement may not be amended or modified, except in writing signed by both parties to this Agreement.

10. Effective upon Signing. This Agreement is effective upon the signing of both parties by their authorized representatives.

FISCAL SPONSOR

Date: 4-27-15

Louis F. Perez III
Chairman / Treasurer

CLIENT

Date: 04-27-2015

James Kuhio Asam

Enclosure: Attachment "A" PRESIDENT AND DIRECTOR NA'I AUPUNI PROJECTED BUDGET

Attachment "A"

President & Director **NA'I AUPUNI PROJECTED BUDGET** 3/9/2015

Category	
Apportionment & Election Contract	**$256,500**
This includes	
Base Estimate	$171,000
Estimate for Sub-Contractor with Expertise in Native Hawaiian Affairs	$34,200
Estimate for Expenses related to Community Consultation	$17,100
Estimate for Additional Needs, Election Website, Unforeseen Circumstances	$34,200
Total	$256,500
Governance `Aha Contract	**$1,457,088**
Assumes 62 working days, 40 delegates, 5 facilitators, 10 staff	
Includes convention site and meals, stipend, and travel costs	
Includes 10 percent scaling	
Referendum Contract	**$117,000**
This includes	
Base Estimate	$78,000
Estimate for Sub-Contractor with Expertise in Native Hawaiian Affairs	$15,600
Estimate for Expenses related to Community Consultation	$7,800
Estimate for Additional Needs, Election Website, Unforeseen Circumstances	$15,600
Total	$117,000
Independent Election Monitoring Contract	**$20,250**
This includes	
Base Estimate	$3,000
Estimate of Expenses related to Travel	$17,250
Total	$20,250
Independent Referendum Monitoring Contract	**$20,250**
This includes	
Base Estimate	$3,000
Estimate of Expenses related to Travel	$17,250
Total	$20,250
Any attorneys fees, any other consultants, or if any category above needs additional funding	**$726,912**
TOTAL BUDGET (as set forth by OHA 1/12/15)	**$2,598,000**

AGREEMENT

This Agreement, dated as of Thursday, June 18, 2015 (this "Agreement"), by and between ELECTION AMERICA, INC., with its principal offices located at 147 E 2nd St, Suite 102 Mineola, NY 11501 (hereinafter referred to as "E-A") and **Na'i Aupuni**, with its principal offices located at 745 Fort Street, Suite 800 Honolulu, Hawaii 96813 (hereinafter referred to as "Client").

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

1. Election Services. Subject to the terms and conditions set forth in this Agreement, E-A and Client agree that during the term (as stated below in Section 2) of this Agreement, E-A will provide election services for election of delegates to the 'Aha (the "Election(s)"). With respect to the Election, E-A, shall provide Client with a schedule (each, an "Election Services Schedule") and a Proposal for Election Services, specifying the services (the "Election Services") to be performed by E-A and the rate for each such Election. A copy of each Election Services Schedule and Proposal shall be attached hereto and shall become a part of this Agreement. In connection with each Election, not later than 30 days prior to such Election, Client will provide E-A with specific schedules, time frames and procedures (including copies of all internal and external rules, laws, regulations, bylaws, directives, statutes and ordinances which may affect, relate to or govern each such Election) to be incorporated into the Election Services Schedule which shall be prepared and administered by E-A. E-A will submit each the Election Services Schedule to Client for Client's approval and, upon such approval, such the Election Services Schedule shall be attached hereto and shall become a part of this Agreement.

2. Term. The term of this Agreement shall commence on June 18, 2015 and shall continue until December 31, 2015, unless terminated earlier pursuant to Section 6.

3. Fees.

(A) Client agrees to pay E-A for its performance of the Election Services as set forth in the Election Services Schedule, for each Election conducted.

(B) If a recount, rerun or runoff of an Election is required, E-A shall have the exclusive right to conduct such recount, rerun or runoff at a fee to be agreed upon in advance between Client and E-A. If the parties cannot agree upon a fee for such services, E-A shall not be required to perform or conduct such recount, rerun or runoff.

(C) Client agrees to pay all federal, state, county and local excise, sales and user taxes applicable to this Agreement and each Election, if any. If Client is tax exempt, Client agrees to provide certification of tax exemption.

(D) If Client requests additional support or services beyond those specifically stated herein, E-A reserves the right to invoice Client for such services; provided, that Client and E-A shall agree in advance on the fees for such services and Client shall sign a Change Order. Change Orders shall be invoiced and are due with final payment unless otherwise stated.

4. Payment Terms. All invoices are due and payable upon receipt. In the event of a dispute regarding an invoice or any portion thereof, Client must provide written notice to E-A and shall promptly pay to E-A the full amount of the invoice less such disputed amount. Any invoice not contested within twenty (20) days from the date of the invoice shall be conclusively presumed to be correct. Payment for all invoices, including invoices for postage, shall be made payable to Election-America, Inc. All payments not received by E-A within thirty (30) days of the invoice date shall accrue interest at a rate of 2% per month or the maximum legal rate, whichever is lower. Client shall be responsible for all reasonable fees incurred by E-A in collecting any invoices past due.

5. Processing and Storage of Election Materials.

(A) All processing of Election ballots will be performed at facilities designated by E-A.

(B) Except as otherwise provided in Section 7, only E-A authorized personnel are permitted to handle, touch or examine any Election materials provided, however, that candidates, representatives of candidates, authorized observers, or authorized monitors shall be permitted to observe the processing of the ballots and proxies if Client has provided prior written authorization of same to E-A and if the operative rules and regulations governing such Election permit such observation.

(C) E-A will store all Election materials free of charge for thirty (90) days after any Election is completed. Election materials include voted and unvoted ballots, unused envelopes and any collateral biographical information. Prior to the end of such thirty-day period, Client shall notify E-A in writing as to the final disposition of such Election materials. The parties hereby agree that if Client fails to notify E-A in writing as to the final disposition of such Election materials within the required time period, E-A shall have the right, but not the obligation, to dispose of all such Election materials without any liability on the part of E-A.

6. Termination.

(A) If either party breaches this Agreement or fails to perform its obligations hereunder, the other party shall provide a written notice of such breach or non-performance to the breaching or non-performing party, and such party shall have ten (10) days from receipt of such notice to cure such breach (if capable of cure) or non-performance. Should such party not adequately cure such breach or non-performance within such 10-day period, this Agreement may be terminated by the other party.

(B) In addition to and notwithstanding anything to the contrary in Section 6(A) above, in the event Client fails to pay any E-A invoice or any portion thereof (other than a disputed amount), E-A may, at its option (i) suspend its performance during the period of delinquency

EXHIBIT "C"

or, if Client fails to cure said non-payment within seven (7) calendar days notice by E-A, or (ii) terminate this agreement. This remedy is non-exclusive and is in addition to all other remedies E-A may have at law or in equity.

(C) In the event this Agreement is terminated pursuant to Section 6(A) or 6(B) above, E-A shall nevertheless be entitled to retain the non-refundable deposit and shall be reimbursed by Client for all expenses incurred by E-A until the actual date of termination.

7. Use Of Subcontractors. Client acknowledges that E-A, at certain stages of each Election process, may utilize the services of an independent subcontractor(s) to perform specialized functions including, but not limited to, inserting and mailing of Election materials. E-A shall be responsible for the performance of any such services by any independent contractor retained by E-A. Other than any observation rights Client may have under Section 5(b) above, Client shall have no right to control or supervise any subcontractor performing services hereunder.

8. Adherence to Time Frames. Both E-A and Client understand the necessity of adhering to each Election Services Schedule. Should Client not adhere to predetermined time frames and deliveries as set forth in each Election Services Schedule, E-A may assess overtime charges, as deemed appropriate and Client hereby agrees to pay such charges, plus all unforeseen or unanticipated expenses incurred by E-A resulting from Client's failure to adhere to the Election Services Schedule. Client acknowledges that E-A will not be able to perform the Election Services required to meet its obligations unless Client performs in a timely manner any and all of its obligations outlined in each Election Services Schedule and Client hereby agrees that E-A shall be held harmless for any damages or liability from Client's failure to perform such obligations.

9. Rules Governing Election. Client warrants to E-A that Client has provided E-A with true, correct and complete copies of all internal and external rules, laws, regulations, bylaws, directives, statutes and ordinances which may affect each Election. Client further warrants that each Election as provided for herein is in compliance therewith. Client will solely be responsible (i) for compliance with all laws and governmental regulations affecting its business and (ii) for any use Client may make of the Election Services to assist in complying with such laws and governmental regulations. Client agrees that it shall certify in writing to E-A all rules governing contact or communications between E-A and Election candidates.

10. Indemnification.

(A) Client will indemnify and hold harmless E-A, its directors, officers, employees, agents, subsidiaries, affiliates, successors and assigns against any and all actions, proceedings, claims, liabilities, demands and costs, damages and expenses (including, without limitation, reasonable attorneys' fees) (collectively, "Damages"), as a result of lawsuits, claims, demands, costs, or judgments to which such party may be subjected by any third party arising out of or related to this Agreement or any Election, including, but not limited to, any alleged non-compliance with any rules, laws, regulations, bylaws, directives, statutes or ordinances affecting, relating to, or governing an Election, except to the extent that it is determined that such Damages were caused by the misconduct or negligence of E-A in the performance of its duties hereunder.

(B) E-A will indemnify and hold harmless Client, its directors, officers, employees, agents, subsidiaries, affiliates, successors and assigns against any and all actions, proceedings, claims, liabilities, demands and costs, damages and expenses (including, without limitation, reasonable attorneys' fees) (collectively, "Damages"), as a result of lawsuits, claims, demands, costs, or judgments to which such party may be subjected by any third party arising out of or related to this Agreement or any Election, including, but not limited to, any alleged non-compliance with any rules, laws, regulations, bylaws, directives, statutes or ordinances affecting, relating to, or governing an Election; provided, however, that E-A shall only be required to indemnify such party to the extent that it is determined that such Damages were caused by the willful misconduct or gross negligence of E-A in the performance of its duties hereunder.

11. Limitation of Liability.

(A) Except as may be required under section 10 above, neither party nor their respective directors, officers, employees, agents, subsidiaries, affiliates, successors and assigns shall be liable to the other ,or their respective directors, officers, employees, agents, subsidiaries, affiliates, successors and assigns, whether in contract, tort or under any other legal theory, for lost profits or revenues, loss of use, or similar economic loss, or for any indirect, special, incidental, consequential or similar damages or punitive damages, arising out of or in connection with the performance or non-performance of the election services.

(B) E-A assumes no responsibility for the accuracy of information provided to it by client, including but not limited to, any membership database, names, addresses, member identification numbers and the like. Client will be responsible for (i) the consequences of any instructions client may give to E-A, (ii) client's failure to use the election services in the manner prescribed by E-A, and (iii) client's failure to supply accurate information.

(C) In no event shall E-A's liability under any claim made by client with respect to the election services exceed the total amount of fees (less postage) theretofore paid by client to E-A.

12. Excuse. Neither party shall be liable or shall be deemed to be in default for any delay or failure in performance arising under this Agreement or interruption of service resulting from acts of God, civil or military authorities, acts of war, acts of terrorism, fires, explosions, earthquakes, floods, the elements, strikes, labor disputes, communication line failure, or power failures outside the reasonable control of either party.

13. Confidentiality.

(A) All Confidential Information, as defined in this paragraph, will remain the exclusive and confidential property of the disclosing party. The receiving party will not disclose the Confidential Information of the disclosing party and will use at least the same degree of care, discretion and diligence in protecting the Confidential Information of the disclosing party as it uses with respect to its own confidential information. The receiving party will limit access to Confidential Information to its employees and agents, including sub-contractors with a need to know and will instruct and obligate such employees and agents to keep such information confidential. Notwithstanding the

foregoing, the receiving party may disclose Confidential Information to the extent necessary to comply with any law, rule, regulation or ruling applicable to it and to the extent necessary to enforce its rights under this Agreement. Upon the request of the disclosing party, the receiving party will return or destroy all Confidential Information of the disclosing party that is in its possession. For purposes of this Section, "Confidential Information" shall mean: all information of a confidential or proprietary nature provided by the disclosing party to the receiving party for use in connection with the Election Services, but does not include (i) information that is already known by the receiving party, (ii) information that becomes generally available to the public other than as a result of disclosure by the receiving party in violation of this Agreement, and (iii) information that becomes known to the receiving party from a source other than the disclosing party on a non-confidential basis. Confidential information of E-A also includes all E-A trade secrets, processes, proprietary data, information or documentation related thereto, or any pricing or product information furnished to Client by E-A.

(B) Electronic information that may be qualified as non-public personal information, under the Gramm–Leach–Bliley Act and other consumer information protection legislation in effect at the time of this contract, shall be purged from E-A systems within thirty (30) days from completion of the final reports and resolution of all challenges or complaints, if any.

14. Reference. Client agrees to let E-A use Client's name and contact information as a reference to potential E-A clients and/ or investors. Disclosed information to potential clients and/or investors will be limited to the Client's name, the size of the Client's membership, a general description of the Client's election process, the work performed by E-A and the results achieved. The contact information will be the person stated in section 15.

15. Notices. Any notice or other communications hereunder must be in writing and shall be deemed to have been duly given and received on the day on which it is served by personal delivery upon the party for whom it is intended, on the third business Day after it is mailed by registered or certified mail, return receipt requested, on the business Day after it is delivered to a national courier service, or on the business Day on which it is sent by telecopier; provided, that the telecopy is promptly confirmed by telephone confirmation thereof, to the person at the address or telephone number, as the case may be, set forth below, or such other address or telephone number as may be designated in writing hereafter, in the same manner, by such person:

To: Election-America:
Election America, Inc.
147 E 2nd St, Ste 102
Mineola, NY 11501
Telephone: (202) 360-4420 x102
FAX: 516-345-2079
Attn: Chris Backert

To: CLIENT
Na'i Aupuni.
745 Fort Street, Suite 800
Honolulu, Hawaii 96813
Telephone: 808.628.7535
Email: meheula@smlhawaii.com
Attn: William Meheula

16. Assignability; Binding Effect. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns; provided, however, that this Agreement and the rights and obligations of Client hereunder shall not be assigned by Client without the prior written consent of E-A.

17. No Third Party Beneficiaries. Except as set forth in Section 10, nothing in this Agreement creates, or will be deemed to create, third party beneficiaries of or under this Agreement. E-A has no obligation to any third party (including, without limitation, Client's employees, shareholders or members) by virtue of this Agreement.

18. Non-Hire/Work Product. During the term of this Agreement, Client shall not solicit the employment of any E-A employee who has been involved in furnishing Election Services hereunder. Client further agrees that any and all improvements, inventions, discoveries, developments, creations, formulae, processes, methods, or designs, and any documents, things, or information relating thereto, whether or not patentable or eligible for copyright or trademark registration (individually and collectively, "Work Product") used or owned by E-A and/or used or created in connection with the performance of the Election Services or any other services hereunder shall remain the sole and exclusive property of E-A and Client shall have no right, title or interest in any such Work Product.

19. Waivers and Amendments; Non-Contractual Remedies; Preservation of Remedies. This Agreement may be amended, superseded, renewed or extended, and the terms hereof may be waived, only by a written instrument signed by the parties or, in the case of a waiver, by the party waiving compliance. No delay on the part of either E-A or Client in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any waiver on the part of either E-A or Client of any such right, power or privilege, or any single or partial exercise of any such right, power or privilege, preclude any further exercise thereof or the exercise of any other such right, power or privilege.

20. Severability. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall (to the full extent permitted by law) not invalidate or render unenforceable such provision in any other jurisdiction.

21. GOVERNING LAW. THE INTERPRETATION AND PERFORMANCE OF THIS AGREEMENT SHALL BE CONTROLLED BY AND CONSTRUED UNDER THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO CONFLICTS OF LAWS PRINCIPLES.

22. **ARBITRATION.** ALL DISPUTES, CLAIMS OR CONTROVERSIES ARISING OUT OF, CONNECTED WITH OR RELATING TO THIS AGREEMENT SHALL BE RESOLVED BY BINDING ARBITRATION WITH JAMS UNDER ITS ARBITRATION RULES THEN IN EFFECT. THE ARBITRATION SHALL BE CONDUCTED IN NEW YORK, NEW YORK. ANY AWARD OR FINAL DECISION

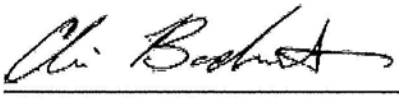
RENDERED PURSUANT TO SUCH ARBITRATION MAY BE ENTERED FOR ENFORCEMENT, AND ENFORCEMENT OBTAINED IN ANY COURT OF COMPETENT JURISDICTION.

23. Entire Agreement. This Agreement and the attached Schedules constitute the entire Agreement among the parties hereto with respect to the subject matter hereof and thereof and supersede all prior agreements, written or oral, with respect thereto.

24. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be an original but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, E-A and Client have caused this Agreement to be executed by their duly authorized representative as of the date set forth below their signatures.

Election America

BY: 

NAME: Christopher Backert
TITLE : CEO
DATE: Thursday, June 18, 2015

Client

BY: 
NAME: S. KUHIG ASAM
TITLE: President
DATE: 06-22-2015

ELECTION SERVICES PLANNING SCHEDULE: PAYMENT

Date: Tuesday, June 23, 2015

Client: Na'i Aupuni

Client agrees to pay E-A for its performance of the Election Services as set forth in this Election Services Payment Schedule for Client's Election.

Payment Schedule

I. $9,400.80, which is ten percent (10%) of the total cost of the Election, excluding postage (the "Total Cost"), upon signing of this Election Services Agreement.

II. $69,802.40, which is thirty percent (30%) of the Total Cost and fifty percent (50%) of the estimated postage for Candidate Registration Services, which is due on Client's Mail Date of printed materials.

III. $69,802.40, which is thirty percent (30%) of the Total Cost and fifty percent (50%) of the estimated postage for Voting Services, which is due on Client's Mail Date of printed materials.

IV. $28,202.40 , which is thirty percent (30%) of the Total Cost, **plus** all fees and costs incurred with all Election Change Orders due on Client's Tabulation/Results date.

***Total Cost of Election Services*: $94,008.00**
***Total Estimated Postage:* $83,200.00**

Candidate Registration Services	
Administration, registration website, candidate review	$14,900.00
Consultation and design services	Included
Print and mail (***suggested design***)	$21,350.00
Estimated Postage (est. 100,000 mailers)	$41,600.00
Voting Services	
Administration, election website/paper ballots, tabulation and certification	$37,943.00
Consultation and design services	Included
Print and mail	$19,815.00
Estimated Postage (est. 100,000 mailers)	$41,600.00

ELECTION SERVICES PLANNING SCHEDULE:- STATEMENT OF WORK

Project Details:

Election project details are included in the attached proposal.

Project Management and Accountability

- Develop a project timeline and task plan that specifies deliverables, commitment dates, and accountability.
- Secure Client concurrence with the planning timeline.

Voter List Services

- Analyze the Client's voter file to confirm counts, to identify possible duplicates, to identify missing or invalid data.
- Create an eligible voter registry and secure database from the Client's eligible voter list.

Nomination Services

- Configured nominations website with required questions/format.
- Administrative access to oversee and review nominations submissions.

Printing & Mailing Services

Quantity	Description: Election Notice Mailer
Up to 100,000	6x9 Envelope printed 2 colors
	8.5x11, 8 page booklet printed 2 colors

Quantity	Description: Ballot Mailer
Up to 100,000	#10 Window Envelope printed 2 colors
	8.5x11, printed 4 colors, variable 1-side, perforation
	8.5x11, printed 4 colors, static
	#9 Return Envelope, printed blank

- Design, produce and mail
- The Client reviews and approves all materials prior to distribution.
- Mail all materials at Client's desired USPS rate

Online Voting Services

- Support 24-hour online voting.
- Ensure that each eligible voter casts a single valid vote (one member-one vote).
- Ensure that electronic returns are directed to a secure database in our system and remain encrypted (locked) until the tabulation process begins.

Tabulation Services

- Tabulate both paper and electronic ballots.

Privacy Services

- Ensure that each voter will have anonymity and protect the privacy of each vote.
- Certify that all Client data is purged from Election-America systems upon completion of the project.

Client Responsibilities

- Provide E-A with a project liaison to ensure timely resolution of any issues.
- Confirm all dates in the timeline for critical deliverables.
- Provide a complete list of eligible voters and their mailing addresses in approved format.
- Provide timely approval for each deliverable.

ELECTION SERVICES PLANNING SCHEDULE:- TIMELINE

E-A will mail or email Notice of Election to known electorate	July 15, 2015
Deadline for submitting Delegate Candidate Applications	September 15, 2015
Deadline for E-A to determine eligibility of Delegate Candidates	September 30, 2015
Deadline for additions to electorate	October 15, 2015
Ballots mailed and/or emailed to known electorate	November 1, 2015
Deadline for ballots to be received	December 1, 2015

Election-America
In the business of perfection

Proposal for
Election Services

Date: Thursday, June 18, 2015
From: Election-America, Inc.
1425 K St., NW Ste 350
Washington, DC 20005

Kenneth Marek,
Director of Election Partnerships

To: Na'i Aupuni
via William Meheula

Thank you for the opportunity to provide you with Election-America's proposal for your upcoming election.

Election-America (E-A) is an election specialist company. We provide more than just "holding" an election. E-A is the only election service and management provider in the market today with the most advanced election systems technology and proven experience. We provide secure reliable and accurate handling of elections involving paper and online balloting processes. Our team of dedicated experts, having over 50 years of combined election administration and management experience, provide personalized hands on attention to each project and to each client. E-A will provide a unique array of configurable, innovative tools and services to make your process a success. As your election partner, we will design, produce and conduct an independent, accurate, secure participatory election process. This is a proposal based on the information identified below which we have obtained by your authorized agents.

Project Details and Requirements

Election-America understands Na'i Aupuni's purpose to help establish a path for Hawaiian self-determination. E-A will support that goal by providing advice and assistance in apportioning delegates, registering candidates, and conducting an election of delegate who will the convention, or 'Aha; and potentially conducting a ratification vote.

Election-America understands that Kana'iolowalu, a project of the Native Hawaiian Roll Commission, currently maintains a list of roughly 100,000 Native Hawaiians collected through registration as well as the combination of previous registries using a verification process with the criteria set forth in Act 195, as amended. All Native Hawaiians certified under the Kana'iolowalu program and who are 18 years of age as of October 31, 2015 will be eligible to participate in the election.

Election-America understands that it will receive the Native Hawaiian Roll Commission's current certified registry of eligible Native Hawaiians from which E-A will create a single eligible voter list to ensure each person is eligible to vote only once. We will review the supplied electorate file for any potential duplicates, work to correct any potential postal or email errors to the extent reasonably possible and achieve the lowest possible postage rates.

Rolling Eligibility

Election-America understands that after receipt of the current certified registry of eligible Native Hawaiians that the Native Hawaiian Roll Commission will allow registrants to be added to the eligible

 [1]

electorate list until October 15, 2015, and that E-A will add these additional registrants to the eligible voter list.

Delegate Apportionment

Na'i Aupuni, having considered the many options for apportioning 40 elected delegates to attend the 'Aha, have decided to apportion based on the current geographic distribution of population derived from the Commission's current registry, which results in the following apportionment:

O'ahu – will be represented by 20 delegates
Hawai'i – will be represented by 7 delegates
Maui – will be represented by 3 delegates
Kaua'i – will be represented by 2 delegates
Moloka'i & Lana'i – will combined be represented by 1 delegate
Outside of the State of Hawaii combined be represented by 7 delegates

Notice of Election

On July 15, 2015, all eligible voters will be mailed or emailed a Notice of Election packet. This mailer will include information about this important process, instructions on how to register as a delegate candidate and a timeline for each aspect.

The suggested design for this mailer is as follows:

Quantity	Description
Up to 100,000	6x9 Envelope printed 2 colors
	8.5x11, 8 page booklet printed 2 colors

Additionally for electorate in which an email address is provided, Election-America can provide custom email communications.

Delegate Applications

Delegate candidates will be representing their Island or region. Delegate candidates will be asked to provide information in an online application form that will be provided at the Client's and E-A's website to the voters along with the ballot and will also be on the Client's website. The online application will request: (a) ***required information*** such as full name, current address and email address, date of birth and current photo, and a commitment that the candidate is willing and able to attend the `Aha or convention in Honolulu for 40-days (eight (8) consecutive weeks Monday to Friday) during February to April 2016; and (b) ***optional information*** relating to Hawaiian ancestry, educational background, employment history, criminal record and a personal statement limited to 300 words. Delegate candidates will be given access to E-A's dedicated online candidacy declaration form. Those seeking to become delegates will be required to be nominated by ten (10) other eligible voters from the entire initial voter registry to be identified on the candidates online application form. The delegate candidate registration website will be available 24/7 from July 15, 2015 to September 15, 2015, and provide simple instructions allowing applicants to enter all information easily.

Election of Delegates

Following the certification of candidacy of those who apply for election as delegates, each eligible voter will be able to cast a ballot for delegates within the boundaries of the apportionment.

And instruction packet will be mailed and/or emailed to each eligible voter providing them with the candidates running for delegate within their designated region as well as instructions for voting. Election-America will offer a secure and private voting method, allowing only eligible electorate to cast either a secret paper ballot or secret electronic ballot. For every voter, a unique record is created. Once a ballot is received, an association is made with the proper voter record such that no voter will be able to cast more than one vote for delegate position. We use the one single list for all voting methods. Like a light switch, that record is then closed preventing any further associations. This secure process prevents duplicate voting attempts by voters, regardless of the method they choose.

Quantity	Description: Ballot Mailer
Up to 100,000	#10 Window Envelope printed 2 colors
	8.5x11, printed 4 colors, variable 1-side, perforation
	8.5x11, printed 4 colors, static
	#9 Return Envelope, printed blank

Online Voting

Online voting is quickly becoming the method of choice for many organizations. Our online voting system is easy-to-use and truly accessible for all users. Eligible voters can easily and securely cast their vote through their smartphone, tablet, or personal computer.

Paper Balloting

Election-America manages all printing, mailing, and scanning of returned ballots. All mail ballots will be processed in our secure operations center and each ballot follows a multi-point checklist for authenticity and accuracy. Paper ballot packages will reflect the voters region based on apportionment and present the ballot and candidates specifically for their region.

Election Administration Services

A comprehensive range of reports are available to you via our Election Manager™ and custom reports are also available based on any demographic data available (Island, region, etc.)

Election-America offers, as an independent third-party, an accurate verification and tabulation of valid cast votes. We will ensure all returned ballots are stored in a secured facility and results are encrypted (locked) until tabulation on December 1, 2015 is authorized by your agent and/or authorized observers or monitors. All results are anonymous and votes cannot be connected with individual voters.

Election-America will work with properly designated observers or monitors to provide a transparent and auditable election process. E-A can assist with having observers or monitors review pre-election activities such as Logic and Accuracy Testing. Observers or monitors can also be given the ability to inspect the official electorate roll as well as ballot materials prior to the election. Finally, E-A can provide final tabulation at a location determined by the Client and/or observers or monitors given sole authority to trigger "decryption" (unlocking) of ballots and beginning the tabulation process.

Participation Consultation Service Options

Election-America will provide its free consultation and strategic planning services using your existing communication resources. Election-America believes it has the mix of tools and strategic planning capabilities to provide the services and vehicles to assist you to achieve your goals.

Social Media Integration

With the popularity of social media services such as Facebook, Twitter, and Tumblr, encouraging your electorate to help promote the election can be a critical source to increase turnout. After voting, your electorate will have the option to share their support for the election with a digital "I Voted" sticker and can encourage others to do so as well.

Tentative Project Timeline

E-A will mail or email Notice of Election to known electorate	July 15, 2015
Deadline for submitting Delegate Candidate Applications	September 15, 2015
Deadline for E-A to determine eligibility of Delegate Candidates	September 30, 2015
Deadline for additions to electorate	October 15, 2015
Ballots mailed and/or emailed to known electorate	November 1, 2015
Deadline for ballots to be received	December 1, 2015

Cost of Services

Candidate Registration Services

Administration, registration website, candidate review	$14,900.00
Consultation and design services	Included
Print and mail (***suggested design***)	$21,350.00
Estimated Postage (est. 100,000 mailers)	$41,600.00

Voting Services

Administration, election website/paper ballots, tabulation and certification	$37,943.00
Consultation and design services	Included
Print and mail	$19,815.00
Estimated Postage (est. 100,000 mailers)	$41,600.00

In the business of perfection

Thank you again for the opportunity to provide you with Election-America's proposal for your upcoming election. Our motto explains the attitude with which we approach every election and hope to apply to yours. Election-America understands that there is no margin of error in the voting process. We have the experience and the dedication to meet all of your election needs. I look forward to discussing Election-America's process, secure system, and complete election services with you.

Kenneth Marek

Election-America, Inc.
Director of Election Partnerships
202-360-4420 ext. 103
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 [5]

Excerpts from Native Hawaiian Roll Commission's
Online Roll Registration

(Page 1)

Native Hawaiian Roll Commission
KANA'IOLOWALU

Register Now

To register for Kana'iolowalu, please complete the form below

Declarations

- **Declaration One**. I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance.
- **Declaration Two**. I have a significant cultural, social or civic connection to the Native Hawaiian community.
- **Declaration Three**. I am a Native Hawaiian: a lineal descendant of the people who lived and exercised sovereignty in the Hawaiian islands prior to 1778, or a person who is eligible for the programs of the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that person.

(*) = required field

Name

need help?

- **Please enter your current name.**

First Name *(*)*

- **Middle Name** *(optional)*
- **Last Name** *(*)*

EXHIBIT "A"

- **Name Suffix** for example Jr., II, III, Sr. *(optional)*

- **Please enter your name as it appears on your birth certificate.**

First Name (as appears on birth certificate) *(*)*

- **Middle Name** (as appears on birth certificate)

- **Last Name** (as appears on birth certificate) *(*)*

Birth Information

- **Gender** *(*)*

Male Female

- **Date of Birth** (MM/DD/YYYY) *(*)*

- **Repeat Date of Birth** (MM/DD/YYYY) *(*)*

- **Place of Birth** (City, State) *(*)*

- **Ancestral home(s)** (Place, island) *(optional)*

need help?

Contact Information

- **Mailing address & number/apartment** *(*)*

- **City** *(*)*

- **State / Province / Region** *(*)*

- **Zipcode / Postal Code** *(*)*

- **Country** *(*)*

- **Email Address** *(We recommend you include an email address to stay up-to-date)*

- **Daytime Area code and Telephone Number** *(*)*

area code phone number

need help?

Verification of Native Hawaiian Ancestry

Please check all applicable categories. *(at least one is required)*

- ☐ **My birth certificate lists (Part) Hawaiian**
- ☐ **One of my parents birth certificate lists (Part) Hawaiian**
- ☐ **Other official certificate/registry listing (Part) Hawaiian**
- ☐ **Attended The Kamehameha Schools**
- ☐ **Department of Hawaiian Home Lands lessee**, renter, or wait list (verified)
- ☐ **Operation Ohana**
- ☐ **Kau Inoa** (ancestry confirmed)
- ☐ **Kamehameha Schools Ho‘oulu Hawaiian Data Center**
- ☐ **Hawaiian Registry at OHA**
- ☐ **None of these fit but I can prove ancestry through another ancestor**

Click "Confirm Info" to review your registration.

- Confirm Info

About us

Kana‘iolowalu is a project of the Native Hawaiian Roll Commission. It is a campaign to reunify Native Hawaiians in the self-recognition of our unrelinquished sovereignty, by enrolling Native Hawaiians and supporters in this declaration. Those Native Hawaiians who are on the list and are 18 years of age as of the date of certification will be eligible to participate in the organization of a governing entity.

Continue reading →

Latest News

03/11/2015 - NHRC March 2015 Newsletter

02/23/2015 - NHRC Chair Governor John Waihe‘e Responds to Questions by “Judicial Watch”

P.O. Box 75331, Honolulu, HI 96836 | (808) 973-0099

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Excerpts of Keli'i Akina's
First Declaration

(Pages 2, 3, 4, and 6)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KELI'I AKINA, *et al*.,	
Plaintiffs,	
v.	Civil Action No.: 15-00322
THE STATE OF HAWAII, *et al*.	
Defendants.	

DECLARATION OF DR. KELI'I AKINA

Keli'i Akina, 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 a citizen and resident of the State of Hawaii. My address is 135 Prospect Street, Honolulu, Hawaii, 96813. I am a registered voter in the State of Hawaii.
3. I am President and CEO of the Grassroot Institute of Hawaii, an independent research and educational institution devoted to promoting the principles of individual liberty, the free market, and limited and accountable government throughout the state of Hawaii and the Pacific Rim. The Institute, a 501(c)(3) nonprofit organization, seeks to educate and inform Hawaii's policy-makers, news media and the public at large on public policy issues.
4. I am an expert in East-West Philosophy and ethics. I have taught or lectured at universities in China and the United States and am an adjunct instructor at Hawaii Pacific University.

5. The historical background of the Hawaiian people and islands and the United States' relationship to them is well summarized in the opening section of the U.S. Supreme Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), at pages 500-511, which account I respectfully recommend to this Court.
6. Act 195 became law in Hawaii in July 2011. It established the Native Hawaiian Roll Commission and gave it responsibility for maintaining a list of "qualified" Native Hawaiians. The term "qualified" Native Hawaiians in Act 195 has a racial component, in that it is limited to "a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands" or one of the "indigenous, native people of Hawaii who was eligible in 1921 for the program authorized by the Hawaiian Homes Commission Act, 1920, or a direct lineal descendent of that individual." It also requires a Native Hawaiian to have "a significant cultural, social, or civic connection to the Native Hawaiian community."
7. I am a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian Islands.
8. I can provide verification of my Native Hawaiian ancestry.
9. I have significant cultural, social, and civic connections to the Native Hawaiian community and can confirm such ties.
10. I attempted to register online for the Kana'iolowalu Roll, but was denied registration.
11. During the online registration process, I was asked to confirm the following declaration, which was called Declaration One: "I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance."
12. I object to the statement and the principles asserted in Declaration One. I object on the grounds that the purported "unrelinquished sovereignty" of the Hawaiian people is

historically counter-factual in light of the abdication of sovereignty by the last monarch of the Hawaiian Kingdom in 1895 and its annexation in 1898 and the subsequent admission to U.S.A. statehood in 1959. Moreover, as a loyal citizen of the United States of America, I cannot in good conscience affirm or declare allegiance to any other national sovereignty. Therefore, I could not truthfully confirm Declaration One.

13. Declaration One appears on the following webpage of the Native Hawaiian Roll Commission's online registration website: https://www.kanaiolowalu.org/registernow/.

14. Attached as Exhibit A is a true and correct copy of a screenshot of this webpage. It looks exactly as it did on the day I tried to register.

15. Once I declined to confirm Declaration One on the online registration form, I was unable to register to vote on the Kana'iolowalu Roll.

16. I would like to register and vote in the election that those on the Kana'iolowalu Roll are eligible to vote in.

17. I was denied the right to register and vote in that election because I do not agree with the principles asserted in the registration form for the Kana'iolowalu Roll.

18. I was discriminated against in the registration process for the Kana'iolowalu Roll because of my viewpoint regarding Declaration One.

19. I would like to run for delegate to the 'Aha.

20. Because I cannot register for the Roll, I cannot run as a delegate.

21. I am being discriminated against in my ability to run as a candidate for election to the 'Aha because of my viewpoint regarding Declaration One.

22. Registration for the Roll was opened in about July 2012, then closed and reopened a couple of times since then.

23. On information and belief, based on numerous media reports, only about 40,000 Native Hawaiians in total signed up for the Roll, so the Native Hawaiian Roll Commission, "[t]o bolster the numbers . . . incorporated names from previous native Hawaiian registries, such as Kau Inoa, Operation Ohana and the Hawaiian Registry." "Certified Native Hawaiian roll posted online with 95,690 names," by Susan Essoyan, the Star Advertiser, July 28, 2015.

24. Whatever the reason, the Native Hawaiian Roll Commission has confirmed that it transferred names from other rolls. On its website, in answer to the question "Who is on the Hawaiian Roll," the Commission responds: "Anyone who registered directly with Kanaʻiolowalu as well as ancestrally-confirmed persons who registered with Kau Inoa, Operation ʻOhana and the Hawaiian Registry through the Office of Hawaiian Affairs ("OHA") are on the Roll." (It also notes that "Persons who are deceased remain on the Roll because their descendants may have future rights as a result of their kupuna being on the Roll.") Attached as Exhibit B is a screenshot of this webpage, which is available online at http://kokua.kanaiolowalu.org/support/solutions/articles/192212-who-is-on-the-hawaiian-roll-.

25. On July 5, 2015, I first learned through a media report about a planned schedule for the election of delegates to the ʻAha – including dates for applying to be a candidate, for mailing ballots to registered voters, and for receiving and counting ballots. Before that time there had been various general reports in the media from time to time about when an election might be held, but no schedule.

26. On Naʻi Aupuni's website, at the web address http://www.naiaupuni.org/news.html, under the heading "Key Documents," are four contracts relating to the planned election.

27. Attached as Exhibit C is a true and correct copy of a document posted on Na‘i Aupuni’s website, entitled “Agreement Between Election-America, Inc. and Na‘i Aupuni,” and signed by those two parties. This agreement, which was fully executed on June 22, 2015, contains the dates I referred to above.

28. Attached as Exhibit D is a true and correct copy of a document posted on Na‘i Aupuni’s website, entitled “Fiscal Sponsorship Agreement Between Akamai Foundation and Na‘i Aupuni,” and signed by those two parties on April 27, 2015.

    a. Recital A of that agreement states that the Akamai Foundation, as “Sponsor,” will “act, for the duration of this Agreement, as the fiscal sponsor of restricted funds from the Office of Hawaiian Affairs (OHA) for the Project pursuant to the grant agreement with OHA dated April 27, 2015 that is incorporated herein by reference . . .”

    b. OHA is referred to throughout and has certain defined rights. For example, paragraph 5 on page 3, entitled “Termination,” provides that “In consultation with OHA, this Agreement shall terminate if and when Sponsor and OHA determine that the objectives of the Project can no longer be reasonably accomplished . . .”

    c. Attachment “A” to that document is a projected budget. The last line refers to a “TOTAL BUDGET (as set forth by OHA 1/12/15)” of $2,598,000.

29. Attached as Exhibit E is a true and correct copy of a document posted on Na‘i Aupuni’s website, entitled “Grant Agreement Between the Akamai Foundation and the Office of Hawaiian Affairs for the Use and Benefit of Na‘i Aupuni,” which was signed by representatives from OHA, the Akamai Foundation, and Na‘i Aupuni, and was fully executed on May 4, 2015.

a. The final "Whereas" clause on page 1 states that "OHA has committed to allow the use of its grant funds by AF [the Akamai Foundation] for the benefit of NA [Na'i Aupuni] under the terms and conditions set forth below to allow Hawaiians to pursue self-determination . . ."

b. In paragraph 1 on page 2, it states that the Akamai Foundation "will direct the use of the grant to NA [Na'i Aupuni] so it may facilitate an election of delegates, election and referendum monitoring, a governance 'Aha, and a referendum to ratify any recommendation of the delegates arising out of the 'Aha."

30. Attached as Exhibit F is a true and correct copy of a document posted on Na'i Aupuni's website, entitled "Letter Agreement Between Office of Hawaiian Affairs, Na'i Aupuni, and Akamai Foundation," which was signed by those three parties and was fully executed on May 8, 2015. 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 . . ."

31. Attached as Exhibit G is a true and correct copy of the minutes of OHA's Board of Trustees' meeting of February 26, 2015.

32. Attached as Exhibit H is a true and correct copy of the first page, page 7, and page 35 of the August 2013 edition of Ka Wai Ola, the newsletter of the Office of Hawaiian Affairs. The entire issue is available online at OHA's website, at http://issuu.com/kawaiola/docs/kwo0813_web.

a. Page 7 of that issue (emphasis in the original) states that

> Native Hawaiians who choose not to be included in the official roll risk *waiving their right, and the right of their children and descendants*, to be legally and politically acknowledged as Native Hawaiians and to participate in a future convention to reorganize the Hawaiian nation . . . and as a result may also be excluded from being granted rights of inclusion (citizenship), rights of participation (voting), and rights to

> potential benefits that may come with citizenship (e.g., land use rights, monetary payments, scholarships, etc.).

b. Page 35 of that issue contains a form to allow a Native Hawaiian to decline to have his or her name transferred from another list to the enrollment list. That form contains the following text at the bottom:

> By signing this form, I release and discharge OHA from any and all liability, claims, and demands arising out of OHA's withholding of my name and my other information based upon this written request, including the possible loss of rights and recognitions conferred upon members of the official roll created under Act 195.

33. Attached hereto as Exhibit I is a screenshot of webpages from the website of the Office of Hawaiian Affairs, available at http://www.oha.org/ (under "Governance") and at http://www.oha.org/governance/. On these pages, the Office of Hawaiian Affairs talks openly about its goals relating to the election process based on the Kana'iolowalu Roll. It says, among other things:

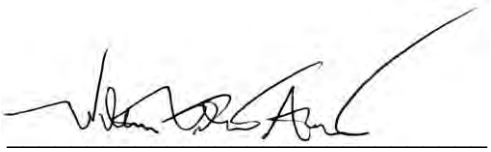
a. That a "key goal of our efforts is to facilitate a process that gives Hawaiians the opportunity to re-develop a government that reaffirms Native Hawaiians as a political rather than racial group."

b. In response to the question "What is our aim?," that it is "the legal transfer of assets and other resources to the new Native Hawaiian governing entity."

c. That the "emergence of a Native Hawaiian government is extremely important to the Office of Hawaiian Affairs."

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

Dated: August 25, 2015



Keli'i Akina

Excerpts of Joseph Kent's
First Declaration

(Pages 3 and 4)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KELI'I AKINA, *et al.*, *Plaintiffs*, *v.* THE STATE OF HAWAII, *et al.* *Defendants*.	Civil Action No.: 15-00322

DECLARATION OF JOSEPH WILLIAM KENT

Joseph William Kent, 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 a citizen and resident of the State of Hawaii. My address is 1326 Matlock Avenue, #202, Honolulu, Hawaii. I am a registered voter in the State of Hawaii.
3. I attempted to register for the Kana'iolowalu Roll online, but was denied registration.
4. During the online registration process, I was required to confirm that I am a "Native Hawaiian," which was defined on the registration website as "a lineal descendant of the people who lived and exercised sovereignty in the Hawaiian islands prior to 1778, or a person who is eligible for the programs of the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that person."
5. I am not a Native Hawaiian by that definition and I could not confirm that statement.
6. During the online registration process, I was also asked to affirm the following: "I have a significant cultural, social or civic connection to the Native Hawaiian community."

7. I also could not confirm that statement.

8. I could not confirm two of the statements required to complete the online registration process for the Kana'iolowalu Roll. As a result, I could not finish the application process and I could not register for the Kana'iolowalu Roll.

9. The address of the website to register for the Kana'iolowalu Roll is https://www.kanaiolowalu.org/registernow/. The page that contains the statements I was asked to confirm, but could not confirm, was https://www.kanaiolowalu.org/registernow/.

10. I am a citizen and registered voter in the State of Hawaii, and I wish to participate in the governance of my State through the democratic process. In particular, I want to participate in the election that those on the Kana'iolowalu Roll will be able to participate in. However, I was denied the right to register and vote in that election on account of my race.

11. It is outrageous that I am unable to sign up for an election in the United States of America because of my race. I believe this violates the U.S. Constitution.

12. I was invited to attend, and did attend, a July 29, 2015, lunch meeting of the Native Hawaiian Bar Association. Attached is a true and correct copy of the flyer for that meeting.

13. At that event, the speaker was Dr. J. Kuhio Asam, President of the Board of Na'i Aupuni. He spoke for about 30 minutes. He was then joined by William Meheula, Na'i Aupuni's legal counsel, for a question-and-answer period that lasted for about 25 minutes.

14. At that July 29, 2015, meeting, Mr. Asam made all of the following statements, in sum or substance:

a. Na'i Aupuni is funded by the Office of Hawaiian Affairs, which gives trust money to Na'i Aupuni's fiscal sponsor, the Akamai Foundation.

b. Na'i Aupuni exists for one reason, which is to establish a path to a possible reorganized Hawaiian government.

c. That path has three parts: an election, a convention or 'Aha, and a possible ratification vote.

d. Those who want to participate as delegates to the convention will come from the certified list of Native Hawaiians kept by the Native Hawaiian Roll Commission.

e. The published dates for the election are subject to change, but they are pretty firm, and he expects that they will hold to those dates. This election "is real, it's happening."

f. The purpose of the convention is to formulate "governance documents" for a Hawaiian nation. The convention can be considered to be a constitutional convention, called for the common good of Hawaiians.

g. If the convention recommends a reorganized Hawiian government, then a ratification or referendum vote will be held. That vote will be open to those who are registered on the Native Hawaiian Roll Commission's enrollment list.

h. Any ratification or referendum vote that might occur is expected to be held two months after the close of the convention, so in about June 2016.

i. This entire process is concerned with "possible nationhood" for Native Hawaiians.

j. All Hawaiians who registered with Kau Inoa, Operation 'Ohana, and the Hawaiian Registry, which projects were run by the Office of Hawaiian Affairs, were automatically included on the enrollment list of Native Hawaiians kept by the Native Hawaiian Roll Commission.

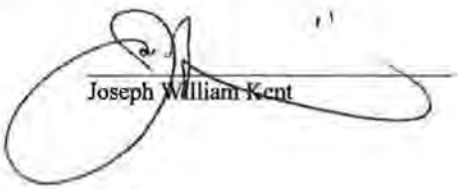
15. In the question-and-answer period at that July 29, 2015, meeting, Mr. Meheula made the following statements, in sum or substance:

a. It is hard to get money from a state organization with no strings attached, but that is what they managed to do with the Office of Hawaiian Affairs. He thinks that this fact means the election process will withstand a 14th Amendment challenge.

b. If the delegates to this convention wished to approach the United Nations first to ask it to recognize any nation they might try to create, the delegates could decide to do so.

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

Dated: August 25, 2015



Joseph William Kent

Excerpts of Melissa Moniz's
Declaration

(Page 1)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KELI'I AKINA, *et al*.,	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 15-00322
THE STATE OF HAWAII, *et al*.	)	
Defendants.	)	

DECLARATION OF MELISSA LEINA'ALA MONIZ

Melissa Leina'ala Moniz, for her 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 a Native Hawaiian who registered with Kau Inoa.
3. I do not currently live in Hawaii and I am not presently registered to vote in the State of Hawaii.
4. I am a resident of Texas. My address is 8907 Redbud Woods, San Antonio, Texas, 78250.
5. I discovered my name on the Kana'iolowalu Roll, to my dismay. I did not sign on to the Kana'iolowalu Roll.
6. I never gave anyone permission to include my name on the Kana'iolowalu Roll.

7. I object to the use of my name on the Kana'iolowalu Roll without my free, prior and informed consent, which was not requested nor given.
8. It is my belief that the Kana'iolowalu Roll is race-based and has caused great division among Hawaiians.
9. I did not consent to placing my name on the Kana'iolowalu Roll and I feel that doing so without my permission violates my rights and provides an unauthorized showing that I support the Kana'iolowalu Roll and its purpose, which I do not.

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

Dated: August 24, 2015

Melissa Leina'ala Moniz

Excerpts of Pedro Gapero's
Declaration

(Page 1)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KELI'I AKINA, *et al*., *Plaintiffs*, *v.* THE STATE OF HAWAII, *et al*. *Defendants*.	Civil Action No.: 15-00322

DECLARATION OF PEDRO KANA'E GAPERO

Pedro Kana'e Gapero, 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 a citizen and resident of the State of Hawaii. My address is 21 One Malia Way, Wailuku, Hawaii. I am a registered voter in the State of Hawaii.
3. I am a Native Hawaiian, descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian Islands.
4. I was registered for the Kana'iolowalu Roll without my knowledge or consent.
5. I never gave anyone permission to include my name on the Kana'iolowalu Roll.
6. I object to the use of my name on the Kana'iolowalu Roll without my free, prior and informed consent, which was not requested nor given.

7. My name was included on the Kana'iolowalu Roll without my knowledge or approval and I feel that doing so violates my rights and provides an unauthorized assertion that I support a position that I did not affirmatively consent to support.

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

Dated: August 21, 2015

Pedro Kana'e Gapero

Excerpts from the October 20, 2015
Hearing for Preliminary Injunction Motion

(Pages 71, 83 and 108)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KELI'I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA'E GAPERO, and MELISSA LEINA'ALA MONIZ, Plaintiffs, vs. THE STATE OF HAWAII; GOVERNOR DAVID Y. IGE, in his official capacity; ROBERT K. LINDSEY, JR., Chairperson, Board of Trustees, Office of Hawaiian Affairs, in his official capacity; 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, in their official capacities; KAMANA'OPONO CRABBE, Chief Executive Officer, Office of Hawaiian Affairs, in his official capacity; JOHN D. WAIHE'E, III, Chairman, Native Hawaiian Roll Commission, in his official capacity; NA'ALEHU ANTHONY, LEI KIHOI, ROBIN DANNER, MAHEALANI WENDT, Commissioners, Native Hawaiian Roll Commission, in their official capacities; CLYDE W. NAMU'O, Executive Director, Native Hawaiian Roll Commission, in his official capacity; THE AKAMAI	CIVIL NO. 15-00322JMS-BMK Honolulu, Hawaii October 20, 2015 9:33 a.m. [47] PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

FOUNDATION; and THE NA'I AUPUNI FOUNDATION; and DOE DEFENDANTS 1-50,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J. MICHAEL SEABRIGHT,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	MICHAEL A. LILLY, ESQ. Ning Lilly & Jones 707 Richards Street, Suite 700 Honolulu, Hawaii 96813
	ROBERT D. POPPER, ESQ. Judicial Watch, Inc. 425 Third Street, SW Washington, DC 20024
	H. CHRISTOPHER COATES, ESQ. Law Office of H. Christopher Coates 934 Compass Point Charleston, South Carolina 29412
For Defendants Na'i Aupuni and The Akamai Foundation:	WILLIAM MEHEULA, ESQ. Sullivan Meheula Lee 745 Fort Street, Suite 800 Honolulu, Hawai'i 96813
For Defendant Na'i Aupuni:	DAVID J. MINKIN, ESQ. McCorriston Miller Mukai MacKinnon Five Waterfront Plaza, 4th Floor 500 Ala Moana Boulevard Honolulu, Hawai'i 96813
For Defendant Office of Hawaiian Affairs:	ROBERT G. KLEIN, ESQ. McCorriston Miller Mukai MacKinnon Five Waterfront Plaza, 4th Floor 500 Ala Moana Boulevard Honolulu, Hawai'i 96813

APPEARANCES (Cont'd.):

For Defendant Office of Hawaiian Affairs:	KANNON SHANMUGAM, ESQ. ELLEN E. OBERWETTER, ESQ. Williams & Connolly LLP 725 Twelfth Street, N.W. Washington, D.C. 20005
For the State Defendants:	DONNA H. KALAMA, ESQ. ROBERT NAKATSUJI, ESQ. Deputy Attorneys General Department of the Attorney General, State of Hawai'i 425 Queen Street Honolulu, Hawai'i 96813
Also Present, for Proposed Intervenor-Defendants Samuel L. Kealoha, Jr., Virgil E. Day, Josiah L. Hoohuli, Patrick L. Kahawaiolaa and Melvin Hoomanawanui:	WALTER R. SCHOETTLE, ESQ. Walter R. Schoettle, a Law Corp. 1088 Bishop Street, Suite 1304 P.O. Box 596 Honolulu, Hawaii 96809-0596
Official Court Reporter:	Cynthia Fazio, RMR, CRR United States District Court P.O. Box 50131 Honolulu, Hawaii 96850

Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

official and put on a form. Your Honor, what could be more important than that?

And, you know, the effect of the election would be far more significant than what occurred in Guam. And the effect of the election would determine arguably the relationship of the Native Hawaiian people to certain trust lands. At least OHA on its website indicates that it thinks that this election will affect that. OHA in its newsletters notified Native Hawaiians that if they don't get onboard with this, if they're not part of this -- and these documents, these newsletters were submitted both by plaintiffs and defendants, if they don't agree to do this, then they could lose their rights under a future sovereign entity, including rights to land. Including rights to property.

And so, they -- you know, and again, this is part of what we've seen since the inception of this case. When they're talking about whether in fact this is a public election, they diminish it.

But when they talk about balance of equities and when they communicate with people who are Native Hawaiians, they don't talk that way. Your Honor, they say -- defendants say in their briefs that this is a matter of public interest. They cite cases saying that the establishment of a Native American tribe is a matter of public interest. We agree. We agree. This is not like the charter school example, Your Honor.

Bill Meheula for Na'i Aupuni and The Akamai Foundation.

Your Honor, I'm going to speak on the facts and law concerning state action and also touch on the Fifteenth Amendment. I'm also going to talk about the Gapero and Moniz claim, First Amendment claim, and also the Akina and Makekau claim and touch a little bit on the balance of harms.

THE COURT: All right.

MR. MEHEULA: I'm going to start off with the facts concerning state action because the reply, I think, misconstrued the situation a little bit. Na'i Aupuni is a private entity, it's not a state -- it's not a state agency or anything like that. They point to Exhibit B of Mr. Akina's reply declaration, and that's the January 8, 2015, minutes of the Office of Hawaiian Affairs board meeting. And on Page -- on Page 11 of that one, there's a reference to -- there's a reference to a consortium now calling themselves Na'i Aupuni. That's not our statement, that's a staffer for the Office of Hawaiian Affairs. And then there's a statement that the consortium is an autonomous independent -- and independent only with OHA providing funding and sitting as an ex-officio member.

From that they conclude, the plaintiffs conclude that the Office of Hawaiian Affairs is an ex-officio member of Na'i Aupuni. And there's no evidence of that. The consortium was that loose organization that was -- that preceded Na'i Aupuni. But Na'i Aupuni is a nonprofit corporation. We have the

MR. KLEIN: Promise I won't use that much, Your Honor.

THE COURT: All right.

MR. KLEIN: May it please the Court. Your Honor, we stand on the cusp of a historic election. Very important to tens of thousands of Hawaiians who have signed up to participate in this election. And what stands in the way of that election is this Motion for Preliminary Injunction. As Your Honor, knows the election will commence on November 1st with the issuance of ballots to all those people who signed up whose names are on the list.

So when we talk about the equities of this case, we're talking about a historic hundred-plus year opportunity that has finally come to the Hawaiian people to engage in discussions about self-determination, about their future, their future in Hawaii, their future in the United States. And so it is a very important point in time for the Hawaiian people and their aspirations that you are now in control of by controlling this motion.

And, Your Honor --

THE COURT: All right. Let's get to the legal principles. I understand what you're saying, but let's get to the legal principles.

MR. KLEIN: Well, there are -- there are four parts of the preliminary injunction that -- the test that the plaintiffs have to meet and they have to be very clear and convincing on