15A551

No. ___-_____

In the Supreme Court of the United States

KELII AKINA, et al.,
Applicants,

v.

STATE OF HAWAII, et al.
Respondents.

Emergency Application for Injunction Pending Appellate Review

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF EMERGENCY APPLICATION

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Dated: November 24, 2015

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF APPLICANT

Amicus curiae American Civil Rights Union (ACRU), respectfully requests leave to file the accompanying brief in support of Plaintiff-Appellants' Application under Supreme Court Rule 22 made on Monday, November 23, 2015 by the Plaintiffs-Appellants in *Akina, et al, v. State of Hawaii, et al*, C.A. No. 15-17134 (9th Cir.).

Due to the inherently urgent and unscheduled nature of an application under Rule 22, ACRU was unable to seek consent from the parties in this case. With respect to a similar motion filed with the Ninth Circuit, however, Plaintiffs-Appellants consented to the motion and Defendants-Appellees did not object to the motion.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

ACRU is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long-time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states

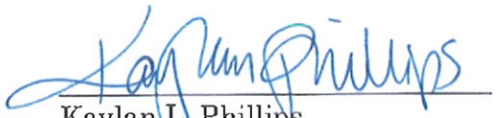
through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues and election matters in cases nationwide.

The members of the ACRU's Policy Board are former U.S. Attorney General Edwin Meese III; former Assistant Attorney General for Civil Rights William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Ambassador to Costa Rica Curtin Winsor, Jr.; former Ohio Secretary of State J. Kenneth Blackwell; former Voting Rights Section attorney, U.S. Department of Justice, J. Christian Adams; former Counsel to the Assistant Attorney General for Civil Rights and former member of the Federal Election Commission Hans von Spakovsky; and former head of the U.S. Department of Justice Voting Rights Section Christopher Coates.

This case is of interest to ACRU because it is concerned with protecting the sanctity and integrity of American elections. ACRU also has unique expertise and access to data and experts related to the law at issue. ACRU's brief is not a duplication of the brief submitted by the applicant and will bring relevant matter to the attention of the Court that has not already been brought to its attention.

For these reasons, *amicus curiae* respectfully requests that the Court grant leave to file this brief.

Respectfully submitted,



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MOTION OF *AMICUS CURIAE*
FOR LEAVE TO FILE BRIEF
IN 8.5 x 11 FORMAT UNDER RULE 33.2

Amicus curiae American Civil Rights Union (ARCU), respectfully requests leave to file the accompanying brief in 8.5 x 11 paper format according to Rule 33.2. Ordinarily, *amicus curiae* briefs are filed in booklet format under Rule 33.1, but because this brief is supporting an application to a specific justice, it is fitting that it should follow the same format as is used for the application itself.

Respectfully submitted,

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No. ___-_____

Brief of American Civil Rights Union
as *Amicus Curiae*
In Support of Emergency Application

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae American Civil Rights Union (ACRU) is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long-time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues and election matters in cases nationwide.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* ACRU states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than ARCU and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

The members of the ACRU's Policy Board are former U.S. Attorney General Edwin Meese III; former Assistant Attorney General for Civil Rights William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Ambassador to Costa Rica Curtin Winsor, Jr.; former Ohio Secretary of State J. Kenneth Blackwell; former Voting Rights Section attorney, U.S. Department of Justice, J. Christian Adams; former Counsel to the Assistant Attorney General for Civil Rights and former member of the Federal Election Commission Hans von Spakovsky; and former head of the U.S. Department of Justice Voting Rights Section Christopher Coates.

This case is of interest to ACRU because it is concerned with protecting the sanctity and integrity of American elections.

ARGUMENT

I. Introduction

For a second time, Hawaii has conducted a racially discriminatory voter registration procedure to facilitate a racially exclusionary election. Voting is currently underway. In another similar matter, the district court refused to enjoin a racially discriminatory voter registration procedure and the resulting election in much the same way it did in this case. *Rice v. Cayetano*, 941 F. Supp. 1529 (D. Haw. 1996). The previous racially discriminatory registration procedure and subsequent election escaped full appellate review. Yet this Court later held that Hawaii's racially discriminatory policies violated the Constitution of the United States. *Rice*

v. Cayetano, 528 U.S. 495, 499 (2000). But by then it was too late to enjoin the racially discriminatory voter registration procedures or the racially exclusive election. The election of delegates had occurred and tens of thousands of Hawaiian residents were denied the right to vote. This Court must not let that happen again and should enjoin the election so that there can be a thorough appellate review of what appears to be a clear violation of the Fifteenth Amendment.

The urgent application for an injunction pending appeal should be granted to permit the full appellate review that escaped the courts in *Rice*. Justice requires such review, lest the residents of Hawaii again face irreparable harm.

II. This Case Presents the Same Issue That Escaped Full Appellate Review in *Rice v. Cayetano*.

In *Rice*, the plaintiffs contested their exclusion from registering and voting (1) in elections for [Office of Hawaiian Affairs] trustees (the "Trustees Election") and (2) in a special election that asked whether the Hawaiian people should elect delegates to propose a native Hawaiian government (the "Special Election"), 528 U.S. at 510. The public issue at stake in *Rice* was thus identical to the public issue in this case: the potential self-governance of the Native Hawaiian people.[2] The only difference is that here, instead of conducting the election itself, the State of Hawaii has equipped a private nonprofit entity with a state-run voter registry and over $2,000,000 in public funds so that it may conduct the very same election.

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[2] Earlier this year, the Ninth Circuit reaffirmed that excluding non-natives from native-only elections creates a concrete and particularized injury because the outcome of such elections will affect non-natives, who "doubtless[ly] ha[ve] views as to whether change is appropriate, and, if so, what that change should be." *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015).

Nevertheless, the government has been operating a brazenly racially discriminatory voter registration process. Also, like the plaintiffs in *Rice*, the plaintiffs here are excluded from registering to vote with a government office and then voting solely because they do not satisfy the racial classification of a "Native Hawaiian" under Hawaiian law. Thus, Hawaii is attempting to use a private entity as its proxy to conduct the very same election that was condemned by this Court in *Rice*.

In August 1996, the *Rice* plaintiffs sought a preliminary injunction against their exclusion from the Special Election. *Rice*, 941 F. Supp. at 1537. On September 6, 1996, the district court denied relief, holding that the "special relationship which exists between the United States and the Native Hawaiian people" justifies the exclusion of other races from the Special Election. *Id.* at 1542. The district court afforded the plaintiffs three days to seek emergency relief from the Ninth Circuit. *Id.* at 1553.

On September 9, 1996, the plaintiffs appealed the district court's decision and filed their emergency motion for an injunction pending the appeal. *See Rice v. Cayetano*, No. 96-16696, Dkt. 2. Within one day, the Ninth Circuit denied the motion. *Id.* at Dkt. 6. The ballots were then unsealed and the result announced, *see Rice*, 941 F. Supp. at 1553,[3] ending the Special Election and foreclosing the possibility of relief upon full appellate review.

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[3] *See also* Native Hawaiian Vote Favors Sovereignty, New York Times, Sept. 14, 1996, *available at* http://www.nytimes.com/1996/09/14/us/native-hawaiian-vote-favors-sovereignty.html.

The plaintiffs in this case stand to endure the same fate as the *Rice* plaintiffs unless emergency relief is granted. Voting is currently underway and will end on November 30, 2015. If immediate relief is not granted the election may end, foreclosing the possibility of relief upon full appellate review.

III. This Court's Decision in *Rice* Obliterates the District Court's Reasoning Justifying a Racially Discriminatory Voter Registration Procedure.

With full relief no longer possible in the Special Election, the *Rice* plaintiffs moved the district court for summary judgment on the claim that their exclusion from the Trustees Election violated the Constitution and the Voting Rights Act. Relief was again denied, *Rice v. Cayetano*, 963 F. Supp. 1547 (D. Haw. 1997), and the Ninth Circuit affirmed that decision on appeal, *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998), because of the "special trust relationship between Hawaii and descendants of aboriginal peoples." *Id.* at 1081.

In a sweeping decision, this Court reversed, rejecting any reliance on a special relationship allowing discriminatory elections. "The State's argument fails for a more basic reason. Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort." *Rice*, 528 U.S. at 519.

Hawaii's racially exclusive voter registration procedures are plainly prohibited by *Rice*. This Court in *Rice* obliterated the safe harbors on which Hawaii relied then, and relies now. It explicitly disallows the justification the district court

used to deny a preliminary injunction under the Fourteenth Amendment: the alleged "special political and legal relationship" the State enjoys with the Native Hawaiian people. *Akina v. State of Hawaii*, Order Denying Plaintiffs' Motion for Preliminary Injunction at 51 (Dkt. 114, Oct. 29, 2015) (quoting Act 195 § 1).

The Fifteenth Amendment strictly forbids a government from administering a voter registration procedure that brazenly discriminates on the basis of race. When Hawaii denies the right to register to vote and participate in an election where a public issue is decided, the Fifteenth Amendment is squarely implicated. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. The Constitution plainly speaks of a "right . . . to vote" without qualification.

> The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. . . . 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. A resolve so absolute required language as simple in command as it was comprehensive in reach.

Rice, 528 U.S. at 495.[4]

Furthermore, this Court also foreclosed Hawaii's defense that it is permissible to violate the Fifteenth Amendment in order to facilitate a government interest that deliberately grants a political voice to a chosen ancestral class.

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[4] This Court has foreclosed the argument that Fifteenth Amendment protections cannot reach elections regarding public issues conducted by a private entity. *See Morse v. Republican Party*, 517 U.S. 186 (1996) (Section 5 of Voting Rights Act required preclearance of election changes pertaining to fees to attend and vote in privately-run republican nominating convention).

> Hawaii's argument fails on more essential grounds. The State's position rests, in the end, 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. The Amendment applies to "any election in which public issues are decided or public officials selected." *Terry*, 345 U.S. at 468. **There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race.** Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others.

Rice, 528 U.S. at 523 (emphasis added).

This Court's language in *Rice* is sweeping in its scope and unforgiving toward the defenses Hawaii offered in that case, and again offers now. Simply, a fair reading of *Rice* makes it clear that the Court obliterated any excuse that justifies a racially discriminatory voter registration scheme run by the state. Hawaii escaped full review of that policy once before. It should not happen twice.

CONCLUSION

This case presents issues of the greatest constitutional magnitude—racial discrimination in state voter registration procedures. If the people of Hawaii are to be treated differently on account of their race once again, the request for an emergency injunction pending appeal should be granted so that at least full and thorough appellate review can be conducted.

Respectfully submitted,

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