No. 15A551

IN THE SUPREME COURT OF THE UNITED STATES

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KELI'I AKINA, ET AL., APPLICANTS

v.

STATE OF HAWAII, ET AL.

_____

ON APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW

_____

MEMORANDUM FOR THE STATE OF HAWAI'I AND OFFICE OF HAWAIIAN AFFAIRS RESPONDENTS IN OPPOSITION TO APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW

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The State of Hawai‘i and Office of Hawaiian Affairs respondents respectfully file this memorandum in opposition to the application for an injunction pending appellate review.

From the very first line of their application seeking extraordinary relief, applicants rely on an erroneous premise: that this case involves an election held by "the State of Hawaii." App. 1. As the many and diverse judges who have unanimously rejected applicants' requests for injunctive relief in the lower courts have concluded, that premise is demonstrably false. Applicants are seeking nothing less than to halt the private political activity of a group of Native Hawaiians to decide how and whether to move forward with forming a potentially self-governing entity.

Before this Court, applicants specifically seek to enjoin a private non-profit organization, Na‘i Aupuni, from announcing the results of an election to select delegates to a contemplated private convention at which decisions on Native Hawaiian organization will be made. Applicants no longer seek to prevent the election from occurring, for the simple reason that, as a result of applicants' delays in seeking injunctive relief, the election is already well underway. Na‘i Aupuni caused ballots to be delivered to voters on November 1; over the last month, numerous voters have already cast their votes; and the results will be released on December 1 after voting concludes on November 30.

While applicants assert that almost "nothing" about the Na‘i Aupuni election process is private, App. 2, that assertion, too, is demonstrably false. If the State of Hawai‘i and Office

of Hawaiian Affairs respondents were enjoined from doing something (precisely what is unclear), Na‘i Aupuni could carry on receiving ballots, announce the results of the election, and convene the convention of elected delegates -- exactly as it has said it intends to do. That simple thought experiment exposes the application for what it is: an attack on private expressive activity, not on state action.

Their inflammatory rhetoric aside, applicants utterly fail to satisfy the requirements for the extraordinary relief they seek -- an injunction from this Court for the entirety of proceedings before the court of appeals. In light of the unanimity of the judges below in rejecting their requests for injunctive relief, applicants can hardly show that their entitlement to the relief they seek in the underlying appeal -- a preliminary injunction -- is "indisputably clear."

In fact, it is not even close: there is simply no basis for enjoining the private expressive activity at issue here. And even if applicants could show that they have a chance of prevailing on the merits of their underlying preliminary-injunction appeal (much less a clear right to prevail), the balance of equities tips decisively in respondents' favor -- particularly given delays at every stage of this litigation that are entirely of applicants' own making. As a result of those delays, applicants are now in the position of seeking to derail a large, logistically complex, and expensive ongoing election, even as it is rapidly approaching completion. There is no precedent, and no valid justification, for that sort of disruption.

Because applicants satisfy none of the requirements for an injunction pending appellate review, their application should be denied.

STATEMENT

1. Native Hawaiians are the descendants of the indigenous people who founded the sovereign Hawaiian nation. In 1893, a group of non-Hawaiians, aided by the United States military, overthrew the Hawaiian Kingdom. See Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993). In 1898, the United States annexed Hawaii and required Hawaii to cede all former Crown, government, and public lands to the United States. See Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Res. 55, 30 Stat. 750 (1898).

When Hawaii was admitted to the Union, the United States conferred on the State a portion of the federal government's trust responsibility to Native Hawaiians and required the State to administer in trust 1.2 million acres of the ceded lands for purposes that included "the betterment of the conditions" of Native Hawaiians. Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959); see 20 U.S.C. 7512(12)(C). In 1978, Hawaii established the Office of Hawaiian Affairs (OHA) to manage revenue from those lands and to advocate for Native Hawaiians. Congress has continuously reaffirmed the special status of Native Hawaiians

by enacting over 150 statutes that provide them benefits. See, e.g., 42 U.S.C. 11701-11714.

For more than two decades, the federal and state governments have supported Native Hawaiians' efforts to reorganize a self-governing entity. In 1999, the federal government issued a report recommending that "the Native Hawaiian people should have self-determination over their own affairs." Department of the Interior & Department of Justice, From Mauka to Makai: The River of Justice Must Flow Freely 4 (2000). And the Department of the Interior has recently proposed a rule setting out a process for reestablishing a formal government-to-government relationship. App. 234a-313a.

In 2011, in an effort to assist Native Hawaiians' efforts to reorganize a self-governing entity, the Hawaii Legislature passed Act 195. See 2011 Haw. Sess. Laws Act 195 (S.B. 1520), codified at Haw. Rev. Stat. §§ 10H to 10H-9. Act 195 established a Roll Commission, whose sole responsibility was to "[p]repar[e] and maintain[] a roll of qualified Native Hawaiians" and to "[c]ertify[] that the individuals on the roll . . . meet the definition of qualified Native Hawaiians." Haw. Rev. Stat. § 10H-3(a). The Roll Commission began accepting registrations in July 2012. App. 14a.[1]

[1] Applicants incorrectly state that the Roll Commission required individuals to affirm viewpoint-based declarations in order to register and that the Roll Commission certified individuals for the roll without their knowledge or consent. App. 8-9. As the district court found, individuals could in fact register for the roll without making any such declarations, and the Roll Commission and OHA repeatedly informed individuals certified for

Crucially, Act 195 does not mandate that any particular election (whether public or private) be conducted, and the roll created under Act 195 is not a list of voters eligible to vote in any particular election. The roll is simply a list of qualified Native Hawaiians, and the Act states that the roll 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 (emphasis added).

2. Na'i Aupuni is a non-profit corporation that supports Native Hawaiian self-determination. Na'i Aupuni requested and received a grant of trust funds from OHA to facilitate an election of delegates for a Native Hawaiian constitutional convention. The grant agreement explicitly provides that Na'i Aupuni "will not be directly or indirectly controlled or affected by OHA" and that it "has no obligation to consult with OHA" regarding any of its decisions. The grant agreement thus merely provides funds to Na'i Aupuni to run an election; it does not in any way "delegate" the running of an election to Na'i Aupuni. App. 16a-21a, 39a-40a, 42a-43a, 45a, 373a-377a.

The election of delegates is currently ongoing. Na'i Aupuni distributed ballots on November 1; numerous ballots have already been returned, and all remaining ballots must be re-

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the roll of their right to opt out of registration. App. 14a-16a, 57a-59a.

turned by November 30. To decide who could vote in its election, Na‘i Aupuni availed itself of the roll of Native Hawaiians prepared by the Roll Commission. Na‘i Aupuni, not OHA or the Roll Commission, decided to limit voters to those on the roll. After the election, Na‘i Aupuni plans to support a convention at which the elected delegates will decide whether to proceed with forming a self-governing entity. If the delegates decide to proceed, Na‘i Aupuni intends to conduct a referendum on the constitution for such a self-governing entity. Notably, any resulting Native Hawaiian self-governing entity would have no official legal status unless it were recognized by the federal or state government (and the act of recognition survived any constitutional or other challenges). App. 19a-23a, 40a-41a.[2]

3. On August 13, 2015, applicants brought suit in the United States District Court for the District of Hawaii against the State of Hawaii; the Governor of Hawaii; and officers and commissioners of the Roll Commission (collectively, the State of Hawai‘i respondents); officers and trustees of the Office of Hawaiian Affairs (collectively, the Office of Hawaiian Affairs respondents); Na‘i Aupuni; and the Akamai Foundation. Among other things, applicants alleged in their complaint that respondents

[2] Applicants assert that OHA intends to transfer assets to a Native Hawaiian self-governing entity. App. 8. Applicants did not advance this argument in the lower courts, and there is no support in the record for this assertion. The website applicants cite merely suggests that OHA will consider transferring some assets to a Native Hawaiian self-governing entity if and when one is ever formed and recognized by the federal or state government.

had denied applicants the right to vote in violation of the Fourteenth and Fifteenth Amendments of the Constitution. App. 5a, 29a-33a, 146a-178a.

More than two weeks after filing the complaint, on August 28, applicants filed a motion for a preliminary injunction, requesting an order preventing applicants "from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians." Applicants did not seek expedition of that motion. In light of the ongoing rulemaking proceeding, and with the consent of the parties, the district court called for the views of the Department of the Interior concerning the motion for preliminary injunction. The Department of the Interior filed an amicus brief opposing the motion. The district court then held argument on the motion on October 20, at which time it also heard testimony from three witnesses. App. 6a-7a, 34a, 105a-145a.

4. The district court denied applicants' motion for a preliminary injunction in a detailed oral ruling on October 23, and it issued a 64-page written opinion on October 29. App. 3a-66a. The court determined that applicants had failed to satisfy any of the four requirements for a preliminary injunction set forth in Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008). To begin with, the court determined that applicants had failed to demonstrate a likelihood of success on any of their claims. App. 38a-61a. The court explained that the Fifteenth Amendment was not implicated because "[n]o public official w[ould] be elected or nominated" and "no matters of fed-

eral, state, or local law w[ould] be determined" as a result of the election. App. 39a. Moreover, the court concluded that there was no state action because Na'i Aupuni was "acting completely independently" of the State. App. 45a.

The district court also determined that applicants had failed to satisfy the other three requirements for a preliminary injunction. App. 61a-63a. As to irreparable harm, the court determined that "the harm from being deprived of participation in Na'i Aupuni's election and convention [was] speculative." App. 62a. As to the balance of equities, the court noted that applicants had "no right to participate in a private election," whereas "enjoining a private election process that has already begun . . . would disrupt Native Hawaiian efforts to organize." App. 63a. And as to the public interest, the court explained that "granting an injunction now would potentially affect approximately 100,000 people . . . who might want to participate in a process of self-determination." Ibid.

The district court denied applicants' motion for a temporary injunction pending appeal. App. 101a.

5. On October 26, applicants appealed the district court's order denying their motion for a preliminary injunction. On October 29, applicants filed a motion in the court of appeals seeking an injunction pending appeal. Applicants did not seek resolution of that motion before the start of the election on November 1. As it did before the district court, the Department of the Interior filed an amicus brief opposing the motion. App. 179a-233a.

On November 19, six days after the completion of briefing on the motion, the court of appeals denied the motion in a unanimous order, concluding that applicants "ha[d] not made the required showing" in order to justify an injunction pending appeal. App. 1a-2a.

6. Applicants filed the instant application in this Court for an injunction pending appellate review on November 24. Although applicants did not request this relief in the district court, applicants now seek to enjoin respondents from "counting the ballots cast in and certifying the winners of the election of delegates to the upcoming constitutional convention." App. 28.

ARGUMENT

While this Court has the power under the All Writs Act to grant an injunction pending proceedings in lower courts, the Court's rules make clear that such power is to be used only in exceptional circumstances. See S. Ct. R. 20.1. That is for good reason: because "[the] issuance of an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts," such action "demands a significantly higher justification" than even that required for a stay. Lux v. Rodrigues, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., in chambers) (internal quotation marks omitted). Accordingly, the Court will issue an injunction only when it is "[n]ecessary or appropriate in aid of [this Court's] jurisdiction" and "the legal rights at issue are indisputably clear." Wisconsin Right to Life, Inc. v. Federal Election Com-

mission, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (internal quotation marks and citation omitted); see 28 U.S.C. 1651(a). Moreover, the Court exercises its authority "sparingly and only in the most critical and exigent circumstances." Wisconsin Right to Life, Inc., 542 U.S. at 1306 (citation omitted).

I. APPLICANTS HAVE FAILED TO SHOW THAT THEIR RIGHT TO RELIEF IS INDISPUTABLY CLEAR

In their underlying appeal, applicants are challenging the district court's denial of a preliminary injunction. Accordingly, in order to prevail on that appeal, applicants "must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." Winter, 555 U.S. at 20. In conducting its analysis, moreover, the court of appeals will "owe[] deference" to the district court's factual findings. Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam).

In order to obtain the requested relief here, applicants must show not only that they are likely to prevail in the underlying appeal, but that it is "indisputably clear" that they are entitled to do so: i.e., that it is "indisputably clear" that they will prevail under the Winter standard. See Lux, 131 S. Ct. at 6 (citation omitted). The "indisputably clear" test is stringent, and differences of opinion among courts may them-

selves establish that the standard has not been met. See id. at 7.

Here, of course, not a single one of the judges to have considered applicants' request for injunctive relief in the lower courts has accepted applicants' position. In particular, applicants have given short shrift to the equitable factors for obtaining a preliminary injunction at every stage of this case, including in their application in this Court. Because the lower courts correctly determined that applicants do not satisfy the requirements for injunctive relief, and, in any event, applicants' right to prevail in the underlying appeal is not "indisputably clear," their application for an injunction pending appellate review should be denied.

A. Applicants Are Unlikely To Succeed On The Merits Of Their Underlying Claims

Applicants claim that the ongoing Na'i Aupuni election violates their rights under the Fifteenth Amendment. As the district court correctly determined, that claim lacks merit.

1. The Fifteenth Amendment does not apply to the ongoing Na'i Aupuni election because it is "a private election[] and not a [s]tate election." App. 38a. As applicants acknowledge, this Court has long held that the Fifteenth Amendment precludes discrimination only in "elections to determine public governmental policies or to select public officials, national, state, or local." App. 22 (citing Terry v. Adams, 345 U.S. 461, 467 (1953)). This election will neither determine public governmen-

tal policies nor select public officials, and that is fatal to applicants' Fifteenth Amendment claims.

Having acknowledged that requirement, applicants proceed to ignore it, focusing instead on whether Na'i Aupuni qualifies as a state actor. They assert, for example, that "the only meaningful distinction between the instant case and Rice [v. Cayetano, 528 U.S. 495 (2000),] identified by the district court was [r]espondents' claim that Na'i Aupuni is a private actor." App. 20. But that assertion misses the point. While the district court correctly found that Na'i Aupuni is not a state actor, it rejected applicants' Fifteenth Amendment claims in the first instance because the Na'i Aupuni election would neither determine government policies nor select public officials. See App. 38a-43a. As a result, the Fifteenth Amendment is inapplicable here.

That proposition is illustrated by a comparison of the ongoing Na'i Aupuni election with the ones in Terry and Rice, both of which were elections for public officials. In Terry, the Court held that the Fifteenth Amendment applied to a private entity because it was conducting a primary for public officials, which would effectively select "who shall rule and govern in the county." 345 U.S. at 469. Similarly, in Rice, the Supreme Court held that the Fifteenth Amendment applied to elections for OHA trustee because those elections were an "affair of the State of Hawaii" and would select public officials who would run "a state agency, established by the State Constitution, responsible

for the administration of state laws and obligations." 528 U.S. at 520.

The ongoing Na'i Aupuni election has none of those features. The delegates that Native Hawaiians are selecting for their own expressive purposes bear no resemblance to "public officials" of the sort at issue in Terry and Rice. Indeed, applicants do not even attempt to argue that the delegates will be public officials. As the district court noted, "[n]o public officials will be elected or nominated," App. 39a, and the only decision being made in the ongoing election is the selection of delegates to a private convention, App. 40a.

Further, the ongoing Na'i Aupuni election is not a referendum, and "no matters of federal state, or local law will be determined." App. 39a. Even the ensuing convention "will not -- and cannot -- result in any federal, state, or local laws or obligations by itself." App. 40a. Again, applicants necessarily concede as much, acknowledging that the election and subsequent convention process at most "may lead to a decision to alter the status" of Native Hawaiians. App. 22 (emphasis added).

The ongoing Na'i Aupuni election is also not an affair of the State. Na'i Aupuni is not a state agency, and it is not responsible for the administration of state laws or obligations. The Na'i Aupuni election is not being conducted pursuant to Hawaii's election laws, nor is it being conducted or regulated by the Hawaii Office of Elections. App. 39a. And the Na'i Aupuni election "is not a public election based on Act 195 itself," because Act 195 does not mandate any election. App. 42a-43a.

In short, the ongoing Na'i Aupuni election is "fundamentally different" from the elections at issue in Terry and Rice, App. 38a-39a, and there is no valid basis for concluding that the Fifteenth Amendment applies to such a quintessentially private election.

2. Even if the Fifteenth Amendment were applicable, applicants cannot establish that Na'i Aupuni is engaged in state action under either of the tests for state action on which they rely. See App. 22-25.[3]

a. 'Public function' test. -- First, the holding of an election by a private entity that does not select public officials or determine governmental policies is not a "public function": that is, a function which is "traditionally the exclusive prerogative of the State." Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (citation omitted). In the context of elections, this Court has held that the "public function" theory of state action "encompasses only state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials.' " Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 158 (1978). Applicants concede that, in order to satisfy the "public function" test, they must show that the election determines public governmental policies or selects public officials. See App. 22.

[3] The absence of state action also bars applicants' claims under the Fourteenth Amendment, which applicants pressed below but seemingly do not rely upon in their application in this Court.

Applicants' only argument for why this election meets that standard is that it "may lead to a decision to alter the status of hundreds of thousands of Hawaiians," on the theory that the convention of elected delegates may promote the reorganization of a Native Hawaiian self-governing entity and the eventual recognition of that entity by the federal or state government. App. 22 (emphasis added). But this suit is about the ongoing election, not what the federal or state government might do in the future in response to the election and subsequent convention.

Applicants cite no authority for the proposition that such a speculative chain of events is sufficient to satisfy the "public function" test, and it is completely illogical that it would.[4] The ongoing Na'i Aupuni election is no different from an election held by any other private group that may result in the group's taking a position on a matter of public policy. And it is beyond dispute that "[n]ot every private club, association, or league organized to influence public candidates or political action must conform to the Constitution's restrictions," and "a large area of freedom permits peaceable assembly and concerted

[4] Applicants' reliance on Davis v. Guam, 785 F.3d 1311 (9th Cir. 2015), see App. 22, is seriously misplaced. The only issue in Davis was whether the plaintiffs had standing, and the court expressly refused to address the merits on the ground that "standing doesn't depend on the merits of the plaintiff's contention that particular conduct is illegal." 785 F.3d at 1316 (alteration and internal quotation marks omitted). In any event, the facts of Davis are distinguishable, because the vote at issue was being run by the government of Guam, not by a private and autonomous non-profit. See id. at 1313.

private action for political purposes." Terry, 345 U.S. at 482 (Clark, J., concurring).

b. 'Joint action' test. -- Applicants fare no better under the "joint action" test for state action. Joint action exists where the government has "so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961). No such "interdependence" is present here.

Applicants repeatedly assert that the Na'i Aupuni election is somehow subject to the control of the State of Hawaii through Act 195. See, e.g., App. 24. But Act 195 does not direct that any election take place at all, much less direct that an organization holding such an election must use the roll established by Act 195. App. 42a-43a, 47a. Na'i Aupuni's president, Dr. Asam, was explicit in his testimony -- which the district court credited -- that Na'i Aupuni voluntarily chose to make use of the roll created pursuant to Act 195 and that it did not view its actions concerning the election as in any way controlled by Act 195. App. 20a-21a.

The only state action applicants identify is OHA's grant to, and related agreement with, Na'i Aupuni. See App. 23-24. At the hearing below, however, applicants conceded that OHA's act of public funding was a "red herring" -- a concession that the district court called "well-taken," in light of abundant case law making clear that public funding is insufficient to give rise to state action. See App. 45a (collecting cases).

Nor does the existence of a contractual relationship between OHA and Na‘i Aupuni create joint action, either. See Rendell-Baker, 457 U.S. at 840-841.

If anything, the terms of the grant agreement specifically preserved Na‘i Aupuni’s autonomy. The grant agreement provided that OHA “will not directly or indirectly control or affect the decisions of [Na‘i Aupuni]. App. 374a. Moreover, the agreement gave Na‘i Aupuni the right to include in its election additional voters beyond those listed on the roll. Ibid. In the face of those inconvenient provisions, applicants resort to an unusual argument: namely, that Na‘i Aupuni is engaged in joint action because it decided to use the roll for its election before entering into the agreement with OHA. But applicants offer no evidence that OHA influenced or compelled Na‘i Aupuni’s decision in that regard, and the sequence of events more naturally suggests Na‘i Aupuni’s independence from OHA. App. 45a.[5]

Applicants characterize Na‘i Aupuni’s independence as a “sham,” see App. 23, but the district court soundly rejected that insinuation based on the testimony of Dr. Asam and the foregoing language in the grant agreement. The district court

[5] Applicants continue to distort the record by contending that it is “undisputed” that OHA was an “ex officio member” of Na‘i Aupuni at some point in the past. App. 10. As Na‘i Aupuni’s bylaws make clear, that is incorrect. App. 344a-352a. Further, Na‘i Aupuni’s president, Dr. Asam, testified that Na‘i Aupuni is independent of any state agency, and the district court credited his testimony. App. 22a-23a, 45a. And at the hearing, Na‘i Aupuni’s counsel explained why applicants had failed to establish that proposition, and applicants elected to not question Dr. Asam about the issue. App. 425a.

ultimately found that "[a]ll the evidence suggests that OHA has no control over Na'i Aupuni[] and that Na'i Aupuni is acting completely independently." App. 45a. Applicants have not demonstrated that the district court's finding is clearly erroneous.

Finally, applicants cite no support for their implicit argument that state action exists simply because Na'i Aupuni and OHA may share a common desire for Native Hawaiians to be able to organize. It is well settled that the "mere approval or acquiescence of the State" does not convert private conduct into state action. American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40, 52 (1999).[6]

B. Applicants Are Unlikely To Suffer Irreparable Harm Absent An Injunction

The likelihood of success on the merits is just one of the four requirements for the preliminary injunction applicants are seeking below, see Winter, 555 U.S. at 20, 32, and applicants offer no argument as to the three remaining factors. Those equitable factors weigh heavily against a preliminary injunction, and applicants thus cannot show that it is "indisputably clear" that they would prevail in the underlying appeal.

[6] Because applicants seemingly do not rely upon their claims under the Fourteenth Amendment as a basis for the instant application, and because those claims (like applicants' Fifteenth Amendment claims) would fail for a lack of state action, there is no occasion for this Court to consider the district court's statement that the Fourteenth Amendment claims would fail on the merits even under strict scrutiny. See App. 52a-57a.

To begin with, applicants have failed to show that "irreparable injury is likely in the absence of an injunction." Winter, 555 U.S. at 22. The only assertion of harm discernible from the application is that applicants are unable to participate in the ongoing Na'i Aupuni election. See App. 15-16. But applicants cite no authority for the proposition that interference with voting in a private election that has no binding effect on public policy constitutes irreparable harm. The cases they do cite are patently inapplicable. See, e.g., Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (stating that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live" (emphasis added)). Further, as a practical matter, applicants remain free to express their views on the underlying issues in all of the ordinary ways that members of the public do. See p. 26, infra. Thus, as the district court correctly observed, any harm from the exclusion from the Na'i Aupuni election is "speculative," App. 62a -- which is insufficient to justify a preliminary injunction. See Winter, 555 U.S. at 22.

C. The Balance Of Equities Does Not Favor Applicants

On appeal, applicants will bear the burden of showing that they will suffer hardships that "outweigh[]" respondents' interest in having the election "go forward as planned." Southwest Voter Registration Education Project v. Shelley, 344 F.3d 914, 920 (9th Cir. 2003) (en banc). Applicants failed to meet that

burden in district court, with the district court expressly finding that "enjoining a private election process that has already begun . . . would disrupt Native Hawaiian efforts to organize." App. 63a. The district court's finding is entitled to substantial deference. See Gonzalez, 549 U.S. at 5. And the balance tips even more sharply against applicants now that the Na'i Aupuni election is underway, especially given that applicants, at every stage of these proceedings, have failed to articulate exactly what harm will befall them if they are not allowed to participate in someone else's expressive activity.

Ballots in the Na'i Aupuni election have now been distributed to almost 100,000 registered voters, and voting began on November 1. Numerous ballots have already been returned, and all remaining ballots must be returned by November 30. An injunction at this late date -- regardless of how long it lasts and whether it is confined to the counting of the ballots -- would sow confusion among voters who have not yet voted, casting into doubt the election's accuracy. An injunction would also threaten the viability of any subsequent election by requiring many would-be participants to cast their vote twice.

This Court has intervened to lift a temporary injunction affecting election procedures close to the date of an election, recognizing that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls," particularly "[a]s an election draws closer." Gonzalez, 549 U.S. at 4-5. Applicants cite no authority supporting the even more disruptive remedy they

seek: enjoining an election that is already underway. That is unsurprising, because, while "[i]nterference with impending elections is extraordinary, . . . interference with an election after voting has begun is unprecedented." Southwest Voter Registration Education Project, 344 F.3d at 919; see Campos v. City of Houston, 502 U.S. 1301, 1302 (1991) (Scalia, J., in chambers) (deferring to the "federal judges on the scene" who allowed elections to proceed where the elections are "imminent" and "some people have already cast . . . ballots").

Such a remedy would be especially unprecedented here, because an injunction pending appellate review would irreparably injure respondents. The district court correctly recognized that preventing Na'i Aupuni, a non-profit organization, from formulating its position on the public issue of Native Hawaiian sovereignty and choosing with whom to associate in that process would violate core First Amendment rights. App. 48a-49a & n.9; see Boy Scouts of America v. Dale, 530 U.S. 640, 648 (2000) (explaining that "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"). Applicants have not shown a hardship sufficiently compelling to outweigh the effect on First Amendment rights during the pendency of any injunction.

D. The Public Interest Would Not Be Served By An Injunction

The final factor similarly weighs against the injunction applicants are seeking below. Courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). Where a plaintiff seeks an injunction "which will adversely affect a public interest," a court may withhold relief "though the postponement may be burdensome to the plaintiff." Id. at 312-313 (citation omitted).

The district court correctly found that applicants "have not demonstrated that the public interest would be served by a preliminary injunction." App. 63a. Granting the injunction applicants seek would reach far beyond the parties in this case, affecting almost 100,000 Native Hawaiians who may wish to participate in the process of determining how to organize themselves and whether to seek recognition as a sovereign entity. See ibid. Further, where, as here, the State Legislature has recognized the importance of this very process on an issue of distinct and unique local importance, see Haw. Rev. Stat. §§ 10H-2, 10H-5, the public interest militates strongly against an injunction by a federal court. See Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943) (noting that "it is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy" (internal quotation marks omitted)).

In short, applicants do nothing to demonstrate that the equities support the entry of an injunction, and they are unlikely to succeed on the merits of their underlying appeal. Accordingly, applicants have failed to show an "indisputably clear" right to relief, and their application should be denied.

II. INJUNCTIVE RELIEF IS NEITHER NECESSARY NOR APPROPRIATE IN AID OF THIS COURT'S JURISDICTION

Beyond the absence of an "indisputably clear" right to relief on appeal, applicants fail to demonstrate that an injunction pending appellate review is "[n]ecessary or appropriate in aid of [this Court's] jurisdiction." Wisconsin Right to Life, Inc., 542 U.S. at 1306 (citation omitted). Applicants contend that "once this election is finished and certified the damage is done," and therefore "[t]he Court must act now or it will lose the ability to effectively review this case." App. 27. Applicants are incorrect.

As a preliminary matter, applicants' argument before this Court as to the necessity of an injunction cannot be squared with their position in the court of appeals. There, applicants requested and obtained a one-month extension to file their opening brief on their underlying appeal to December 23 -- well after the ongoing Na'i Aupuni election will be complete. See Akina v. Hawaii, No. 15-17134, Dkt. 31 (9th Cir. Nov. 19, 2015). In their motion for an extension, applicants asserted that the same remedies would remain available if the extension were granted. Id. at 3. Following an adverse judgment in the court of appeals, of course, applicants could file a petition for a

writ of certiorari in this Court. Thus, at least in applicants' view, action on the application should not be necessary in aid of the Court's jurisdiction.

In any event, an injunction is not appropriate because this case will not warrant the Court's review. Cf. Wheaton College v. Burwell, 134 S. Ct. 2806, 2807 (2014) (granting injunction pending appellate review because "[t]he Circuit Courts have divided" on the question presented and "[s]uch division is a traditional ground for certiorari"). The primary questions presented by this case -- whether the Fifteenth Amendment applies to the Na'i Aupuni election and whether Na'i Aupuni is a state actor -- are fact-bound and implicate no division among the court of appeals.

Further, to the extent that the (as yet speculative) reorganization of a Native Hawaiian self-governing entity raises constitutional issues, this case presents an exceptionally poor vehicle for consideration of those issues. If the federal or state government were eventually to recognize a Native Hawaiian self-governing entity, applicants or others could challenge that decision, without the threshold obstacle of the absence of state action. An injunction here is therefore unnecessary to provide the Court with the opportunity to consider those issues, which will surely recur in a timely fashion if and when a Native Hawaiian self-governing entity is reorganized and recognized.

III. APPLICANTS HAVE FAILED TO ESTABLISH CRITICAL AND EXIGENT CIRCUMSTANCES

This Court's power to enter an injunction "should be used sparingly and only in the most critical and exigent circumstances." Fishman v. Schaffer, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers) (citation omitted). The circumstances here are neither.

In particular, applicants have only themselves to blame for the current posture of this proceeding. In February 2015, some six months before they filed this lawsuit, applicants knew that an election was set to occur. See Akina, No. 15-17134, Dkt. 19-3, at 5 (9th Cir. Nov. 5, 2015). Not only did applicants wait until August 13 to file suit, but they waited two weeks more before seeking a preliminary injunction. Inexplicably, given their current claims of exigency, applicants did not request an expedited hearing before the district court, resulting in a hearing date of October 20 -- just twelve days before the start of the election. While the district court acted promptly on applicants' motion, issuing its ruling on October 23, applicants then waited until October 29 -- just three days before the start of the election -- to file their motion for an injunction pending appeal in the Ninth Circuit.

Finally, after the Ninth Circuit rejected applicants' motion on November 19, applicants filed this application on November 24, putting respondents in the position of having to respond to the application in a little over 24 hours and putting this Court in the position of having to act on the application in

just five days (with Thanksgiving in between). There are cases where a party's delay "vitiates much of the force of [its] allegations of irreparable harm," Beame v. Friends of the Earth, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers); here, applicants' delay decisively refutes it.

And it is not just that, as a result of their delay, applicants are seeking to enjoin a private election that is already well underway. Applicants have failed to identify critical circumstances warranting that extraordinary relief. As the district court observed in denying applicants' motion for a preliminary injunction, "much more will need to happen under any scenario before this election leads to any public change at all." App. 42a. In the interim, applicants have all the normal pathways available to them to express their views through the political process as to what if any "public change" should occur, including in the ongoing rulemaking proceedings being conducted by the Department of the Interior.

Not being invited to participate in the activities of a private non-profit organization with no legal authority, formed to allow Native Hawaiians to organize and express themselves, simply does not constitute a critical circumstance warranting the drastic relief applicants are seeking. The lower courts correctly determined that applicants are not entitled to injunctive relief, including an injunction pending appeal. Put simply, applicants have offered no valid reason for the Court to intervene at this juncture.

CONCLUSION

The application for an injunction pending appellate review should be denied.

Respectfully submitted.

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