No. 15A551

In the Supreme Court of the United States

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

v.

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

REPLY IN SUPPORT OF MOTION FOR CIVIL CONTEMPT

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The oppositions to the Motion for Civil Contempt ("Mot.") submitted by Respondents Na'i Aupuni and the Akami Foundation ("Na'i Aupuni Opp.") and State of Hawaii and the Office of Hawaiian Affairs ("State Opp.") are long on indignation but short on substance. Instead of addressing Movants' arguments as to why they have violated the Temporary Injunction, Respondents suggest that the Motion seeks to newly enjoin them from holding a private gathering. But that is not now—nor has it ever been—the issue in this case. From the outset, the issue has been the state-run, race-based process that Respondents used to select convention delegates in violation of the Constitution. Respondents' ingenious plan to seat all delegates instead of some of them does not alter this basic set of facts.

Misdirection aside, Respondents can barely defend their actions. Their only argument for why this was not a certification of an election result is that they did not count ballots. But ballots become irrelevant when expanding the number of spots to equal the number of candidates makes everyone a winner. Nor could Respondents justify their actions even if this were not an election. A racially-exclusive, state-run nomination process violates the Fourteenth Amendment for the same reasons the election violates the Fifteenth Amendment. Respondents thus are left to weakly argue that they have complied under a hypertechnical reading of the Temporary Injunction. But this Court has held that parties may not nullify an injunction and avoid citation for contempt. The object of the injunction was to preserve the status quo while the Ninth Circuit heard this appeal. Respondents did not comply with that decree. The Motion should be granted.

1. Respondents' defense rests principally on a strawman argument: that Movants seek "to stop Na'i Aupuni from convening a gathering of individuals to discuss political issues." Na'i Aupuni Opp. 13; State Opp. 2. That was not the relief sought in the Application, nor is it the conduct challenged in the Motion for Civil Contempt. Private individuals and groups are free to hold any "gathering" they wish. Movants have challenged the racially-discriminatory *process* that these state actors have used to select who may participate in a convention as a delegate. The Contempt Motion is clear: "the Court should instruct Respondents to withdraw the December 15, 2015 certification *of the delegates* and cease and desist in any effort *to send delegates* to the convention." Mot. 16-17 (emphasis added).

The race-based process Respondents used to select the delegates is the centerpiece of this case. Act 195 created the Role Commission and directed that the roll "shall serve as the basis for eligibility of qualified Native Hawaiians … to participate in the organization of the Native Hawaiian governing entity." Haw. Rev. Stat. § 10H-4(b). Only individuals on the "certified list of Native Hawaiians" were eligible to participate in the selection of convention delegates. App. 412a ¶ 14(d). This process advanced in two steps. First, only individuals on the certified roll of Native Hawaiians were offered the opportunity to register (or were involuntarily registered) to vote for convention delegates. Second, registered voters who were nominated by 10 other registered voters were offered the opportunity to run as a delegate candidate. Mot. 3-4. In sum, only "Native Hawaiians" could participate in the selection of delegates as candidates and voters. *Id.*

The steps Na'i Aupuni took on December 15, 2015 changed *nothing* about this process. As Respondents concede, only the "candidates who stood for election would be invited to attend an 'aha to be convened in February 2016." Na'i Aupuni Opp. 4; State Opp. 2 (acknowledging that Na'i Aupuni invited only "the candidates" to "attend a meeting at which Native Hawaiians will gather to discuss issues relating to self-governance"). Only those individuals who satisfied Respondents' race-based criteria for participating in the election of delegate candidates, in other words, will participate in the next phase of this state-run process. The only thing that has changed is that all of the delegate candidates—instead of 40 of them—will be seated at the convention. Mot. 6-7.

Importantly, this race-based process has been Movants' focus from the outset. The complaint challenged "Act 195 and defendants' registration procedures" under "the Fifteenth Amendment" as well as "under the Fourteenth Amendment." App. 168a-169a. The complaint also challenged on constitutional grounds "the process for determining who may be a candidate for the proposed constitutional convention" because it "restricts candidacy to Native Hawaiians, as defined by Hawaii law" and, as a result, "the nominating process for candidates is structured to ensure that only Native Hawaiians will become candidates." App. 172a. Finally, the prayer for relief sought, *inter alia*, "preliminary and permanent relief enjoining" both "the use of the Roll that has been developed using these procedures," and "the calling, holding, or certifying of any election utilizing the Roll." App. 177a.

The preliminary-injunction motion made all of these same arguments. It challenged "the exclusion of non-Native Hawaiians from participating in this registration/election/convention process under Act 195," App. 123a, as well as the requirement that "candidates … be qualified according to the same criteria applicable to registrants for the Roll" given that it meant "that candidates will have to meet the ancestry requirements that govern the Roll," App. 125a. After the district court rejected the arguments, App. 38a-49a, Movants raised them in their emergency Ninth Circuit motion, Dkt. Entry 9-1 at 3, No. 15-17134 (Oct. 29, 2015), and before this Court, Application at 8. Just yesterday, moreover, Movants raised these same arguments in their opening brief in the Ninth Circuit appealing the denial of the preliminary injunction. Dkt. Entry 57 at 9, 21, 38-39, 43-44, No. 15-17134 (Jan. 6, 2016).

As should be clear, then, Movants do not seek "a *new* injunction … to stop Na'i Aupuni from convening a gathering of individuals to discuss political issues." Na'i Aupuni Opp. 13. That contention is meant to distract from the issue before the Court. Movants have always challenged every aspect of the state-run, race-based process for selecting delegates. They have challenged the use of the roll of Native Hawaiians to establish the criteria for becoming an eligible voter, for becoming a delegate candidate, for voting in the election, and the resulting exclusion of non-Native Hawaiians from the convention. Movants "seek this relief" because seating all of the delegate candidates does not change the fact that the "composition of

individuals that Na'i Aupuni … has invited to attend" the convention was the result of state-based racial discrimination. *Id.* 13-14.

2. Instead of squarely responding to the claim that they have violated the *letter* of the Temporary Injunction, Respondents mostly pretend that Movants have not leveled that charge. Na'i Aupuni Opp. 5; State Opp. 2. But the contention is not only misplaced—violation of the injunction's express terms is the primary basis upon which relief is sought—it highlights Respondents' inability to respond. By seating the delegates that ran as candidates, and only them, Respondents have certified the winners of the election. Mot. 9-11. Indeed, Respondents do not deny that these individuals will be seated because of their status as candidates. Far from it, they tout the privileged status of these individuals, Na'i Aupuni Opp. 1, 4, 13; State Opp. 2, all of whom were eligible to run for delegate only because they have a certain quantum of Native-Hawaiian blood.

Respondents argue instead that the candidates are not "winners" because Na'i Aupuni "terminated the election prior to the end of the voting period" and "has not counted the votes." Na'i Aupuni Opp. 5. But Respondents are unwilling to confront the consequences of their argument. If Hawaii can seat all that ran without anyone winning merely by expanding the number of spots to equal the number of candidates, Texas could have added every candidate in the Jaybird primary to the general election ballot in the wake of *Terry v. Adams*, 345 U.S. 461 (1953). Mot. 9. But the Fifteenth Amendment, which "nullifies sophisticated as well as simple-

minded modes of discrimination," *Lane v. Wilson*, 307 U.S. 268, 275 (1939), must have more force than that.

The contention that Na'i Aupuni has not certified the result is most revealing of all. There is no magic to certification. It is nothing more than the announcement of the election outcome. Mot. 11. The complaint specifically referenced certification, App. 177a, as did every filing in the Ninth Circuit and in this Court that sought the temporary injunctive relief this Court ultimately granted, Dkt. Entry 9-1 at 1, 20, No. 15-17134 (Oct. 29, 2015); Dkt. Entry 25-1 at 10, No. 15-17134 (Nov. 13, 2015); Application at 3, 4-5, 17, 27, 28; Application Reply at 1, 7, 10, 14. At no point did Respondents contend that the injunctive relief being sought was unavailable or misdirected. Yet, faced with the prospect of contempt, Na'i Aupuni now claims it has "never even had a process for 'certifying' delegates," Na'i Aupuni Opp. 5 n.2, while the State Respondents refuse to take a position on whether the delegate candidates "would have been 'certified' as 'winners'" even "if the election had been completed and the ballots counted," State Opp. 2. Were there any question as to just how far Respondents will go to circumvent the Fifteenth Amendment, suggesting that the concept of an election "certification" is foreign to them should answer it. Na'i Aupuni's own contract with Election-America lists "certification" of the election as a key step in the process. App. 388a, 395a. If anything about this proceeding is "preposterous," State Opp. 5, it is Respondents' head-in-the-sand position on what it means to certify an election result.

The behavior Respondents are engaging in is precisely what the Fifteenth Amendment promised to stop. Respondents initiated a racially-exclusive election to choose 40 convention delegates from roughly 200 Native-Hawaiian candidates on an accelerated timeline in order to avoid judicial review. When the Court issued the Temporary Injunction, and thwarted that plan, Respondents obviated the need to count the ballots by seating every candidate. And, while Respondents claim to have cancelled the election and taken "a different approach," Na'i Aupuni Opp. 13, they have chosen to retain and "seal ballots that have already been received" instead of destroying them, Supp. App. 432a. No doubt they have held onto the ballots in case this gambit fails. It is all gamesmanship. Respondents have certified the winners of the election in every sense relevant to this litigation. They have violated the *letter* of the Temporary Injunction.

3. Respondents also are violating the *spirit* of the Temporary Injunction. Mot. 11-16. Respondents argue that the delegates are "invitees" as opposed to election winners. Na'i Aupuni Opp. 5; State Opp. 2 (arguing that "Na'i Aupuni decided simply to cancel the election and to invite to the meeting all of the candidates"). But even if that were correct, Respondents' scheme would still be unconstitutional. These "invitees" are eligible to attend the convention only because their names appeared on the certified roll of Native Hawaiians created by Act 195 and because they participated in a registration and nomination process that is indisputably state action. Application 6-13; Application Reply 3-4. Irrespective of whether this is an appointment or an election, then, these Native Hawaiian "invitees" were selected

through the very same state-run, race-based process that prompted the Temporary Injunction.

The only difference would be that appointing "invitees" would violate the Fourteenth Amendment instead of the Fifteenth Amendment. A state-run process that "invited" only Native Hawaiians to attend the University of Hawaii or to sit on a jury would be patently unconstitutional under the Fourteenth Amendment for the same reasons that limiting a state-run election to Native Hawaiians violates the Fifteenth Amendment. *See Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2418 (2013) ("'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people.'") (quoting *Rice v. Cayetano,* 528 U.S. 495, 517 (2000)). Respondents continue to protest that, unlike these examples, their process is "private" and does not involve state action. Na'i Aupuni Opp. 14; State Opp. 3. But that is water over the dam for purposes of this proceeding. *See Maggio v. Zeitz*, 333 U.S. 56, 69 (1948) ("It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.").

Respondents also suggest that such a Fourteenth Amendment challenge is beyond the scope of this appeal. Na'i Aupuni Opp. 13-14; State Opp. 2-3. But they are careful to argue that the "arguments in support of their injunction motions focused *almost* entirely on a claimed right to vote under the Fifteenth Amendment." Na'i Aupuni Opp. 14 (emphasis added); State Opp. 2 (arguing that Movants focused

"*primarily* on Fifteenth Amendment grounds") (emphasis added). That is for a good reason. The Fifteenth Amendment, for obvious reasons, has been the lead claim. But that should not obscure that, at every stage of this litigation, Movants have challenged the registration, nomination, and selection process, and have raised the Fourteenth Amendment as a basis for their challenge. *See supra* at 3-4. As the brief filed yesterday in the Ninth Circuit confirms, whether Respondents' process for choosing delegates violates the Fourteenth Amendment is squarely within the scope of the appeal to which the Temporary Injunction pertains.

Respondents are thus left to coyly argue that even if this aspect of the dispute is within the scope of the appeal, it is not within the literal terms of the Temporary Injunction. Na'i Aupuni Opp. 6-9; State Opp. 3. To be sure, the Court could have written the injunction more broadly (just as the Court can amend the Temporary Injunction now and moot this interpretative dispute). But there was no reason to do so. At that juncture, enjoining Respondents from counting the ballots and certifying the result of the delegate election was sufficient to achieve the injunction's object: preservation of the status quo while the Ninth Circuit hears this important appeal. Mot. 16. There was no indication that Respondents would engage in the evasive tactics that have led to this Motion.

Moreover, the Court should not be forced to craft the injunction in the broadest possible terms (or expand it now) to ensure compliance with its decree. The "narrowest conceivable interpretation of an injunction is not necessarily the correct one. Otherwise an enjoined party could assert an overly literal or hypertechnical

reading of an injunction in order to slip the restraints that it imposes on that party." *Alley v. U.S. Dep't of Health & Human Servs.*, 590 F.3d 1195, 1205 (11th Cir. 2009) (citations and quotations omitted). For example, "the Seventh Circuit rebuffed a veterinarian's attempt to circumvent an injunction barring him from selling an antibiotic 'solution' by selling it in powdered rather than liquid form." *Id.* at 1205-06 (citing *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903, 905-07 (7th Cir. 1995)). Or, "[s]uppose a court enjoins an agency from releasing annual data tied to identified providers. The agency complies with that literal command but achieves the same end by releasing monthly data for each of the twelve months of the year for each provider without totaling it. In a narrow literal sense, the agency would not have disclosed 'annual' data. But any reasonable interpretation of the injunction would lead to the conclusion that the agency had violated the injunction by releasing all the private information necessary to calculate annual totals." *Id.* at 1206. "If narrow literalism is the rule of interpretation," as these examples show, "injunctions will spring loopholes, and parties in whose favor injunctions run will be inundating courts with requests for modification in an effort to plug the loopholes." *Schering Corp.*, 62 F.3d at 906 (citation omitted).

To hold otherwise would "impose an unnecessarily heavy burden on [a] court to draft immaculate orders … and would radically constrict [a] court's inherent power to enforce [its] orders." *TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 887 (Fed. Cir. 2011). "The schemes available to those determined to evade injunctions are many and varied, and no injunction can explicitly prohibit every conceivable plan

designed to defeat it." *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 954-55 (9th Cir. 2014). Respondents are sophisticated parties who should have known that "construing their obligations narrowly to include only refraining from acts specifically enumerated in the injunction, and not acts likely to nullify the injunction" would be contumacious. *Id*. at 955.

The object of the Temporary Injunction, like most interim relief, was "to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *see also* Wright & Miller, § 2904, Injunction Pending Appeal, 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed. 2015) (acknowledging "inherent power of courts to make whatever order is deemed necessary to preserve the status quo and to ensure the effectiveness of the eventual judgment"). In this case, preserving the status quo meant enjoining Respondents from sending delegates selected through a race-based process to the convention before the Ninth Circuit had the chance to adjudicate the merits of the dispute. The Temporary Injunction was not "too vague to be understood" or otherwise deficient. Na'i Aupuni Opp. 10 (citation and quotations omitted). Respondents chose to nullify it because they are determined to achieve sovereign status before the courts can intervene. Mot. 13-14.

4. The State Respondents seek to exculpate themselves by claiming that Na'i Aupuni is solely to blame. State Opp. 1. But they again ignore that the legal predicate for this challenge is that Respondents are engaged in "joint action where 'state officials and private parties have acted in concert in effecting a particular

deprivation of constitutional rights' or where 'the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party.'" Application 23 (quoting *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013)). That allegation is taken as true for purposes of the contempt proceeding. *See supra* at 8.

Regardless, "[a] party may also be held liable for knowingly aiding and abetting another to violate a court order." *Inst. of Cetacean Research*, 774 F.3d at 945 (citing *Regal Knitwear Co. v. NLRB,* 324 U.S. 9, 14 (1945)). The grant agreements authorize use of state funds only to select delegates through an election. Mot. 10-11. In their opposition, though, the State Respondents are notably silent on whether Na'i Aupuni has violated these contracts, whether they are seeking to recoup misspent funds, and whether they will continue to provide funding. Either Na'i Aupuni has violated these agreements or it has conducted an election. Either way, Na'i Aupuni is using state funds to carry out its contumacious maneuver; Na'i Aupuni would not be able violate the Court's decree without this money. If the State Respondents are no longer "in active concert or participation" with Na'i Aupuni, *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 42 (1st Cir. 2000), they should have said so.

5. Finally, Respondents do not challenge the remedies Movants seek. Mot. 16-18. Nor could they. "Respondents could have petitioned the [Court] for a modification, clarification or construction of the order." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949); *United States v. Greyhound Corp.*, 508 F.2d

529, 532 (7th Cir. 1974) ("If a party has doubts as to [its] obligations under an order, [it] may petition the court for a clarification or construction of that order."). But they did not. Respondents "undertook to make their own determination of what the decree meant. They knew they acted at their peril." *McComb*, 336 U.S. at 192. The Court must take the steps necessary to ensure compliance with the Temporary Injunction before the convention begins on February 1.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that the Court grant the Motion for Civil Contempt.

Respectfully submitted,

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