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.

MOTION FOR CIVIL CONTEMPT

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To the Honorable Justices of the Supreme Court of the United States:

On December 2, 2015, the Court enjoined Respondents "from counting the ballots cast in, and certifying the winners of, the election described in the application, pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit." Supplemental Appendix ("Supp. App.") 427a. That election was the means by which Respondents were to select delegates for a convention concerning whether Native Hawaiians would seek federal tribal status. By prohibiting Respondents from certifying the winners, the Court ensured that Applicants Yoshimasa Sean Mitsui and Joseph William Kent—who, because of their race, could not run as delegate candidates or vote in that election—would not lose the right to participate in this process while their appeal was heard. The injunction preserved the status quo "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan v. Carland*, 217 U.S. 268, 280 (1910).

Respondents have violated the Temporary Injunction and should be held in civil contempt. On December 15, 2015, Na'i Aupuni announced that every individual who ran as a candidate for delegate in the election will be seated at a convention to begin on February 1, 2016. Supp. App. 432a. Thus, instead of counting the ballots and seating the 40 candidates receiving the most votes, Na'i Aupuni declared every candidate running for delegate to be the winner and seated them all. Even worse, Respondents' actions are the latest in a long pattern of recalcitrance. Civil contempt is the only way to bring them into compliance, thwart willful circumvention of the Temporary Injunction, and ensure respect for the rule of law.

BACKGROUND AND PROCEDURAL HISTORY

A. Statement of Facts

As previously set forth, *see* Application for Temporary Injunction Pending Appeal ("Application") at 6-14, Hawaii passed Act 195 "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. To that end, Act 195 established a Native Hawaiian Roll Commission ("Commission") within the Office of Hawaiian Affairs ("OHA"). *Id.* § 10H-3. The Commission is responsible for "[p]reparing and maintain[ing] a roll of qualified Native Hawaiians; certifying that the individuals on the roll of qualified Native Hawaiians meet the definition of qualified Native Hawaiians; … [and] receiving and maintaining documents that verify ancestry[.]" *Id.* § 10H-3; *id.* § 10H-3(a)(2) (defining racial ancestry criteria). Act 195 also required the Commission to "includ[e] in the roll of qualified Native Hawaiians all individuals already registered with the State" as verified "Hawaiians" or "Native Hawaiians." *Id.* § 10H-3(a)(4); *id.* § 10-2. Finally, Act 195 required the Commission to publish a roll to "serve as the basis for the eligibility of qualified Native Hawaiians … to participate in the organization of the Native Hawaiian governing entity." *Id.* § 10H-4. Publication was "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." *Id.* § 10H-5.

On December 23, 2014, an organization called Na'i Aupuni was incorporated in Hawaii "to provide a process for Native Hawaiians to further self-determination

and self-governance for Native Hawaiians." Application Appendix ("App.") 367a. On April 27, 2015, OHA, the Akamai Foundation (a non-profit organization), and Na'i Aupuni entered into a contract in which OHA granted the Akamai Foundation $2,598,000 on the condition that the Akamai Foundation "direct the use of the grant to [Na'i Aupuni] so it may facilitate an election of delegates, election and referendum monitoring, a governance 'Aha [convention], and a referendum to ratify any recommendation of the delegates arising out of the 'Aha." App. 374a. In July 2015, Na'i Aupuni announced a process for carrying out the delegate election, convention, and referendum. App. 62a.

"One of the initial decisions that [Na'i Aupuni] made was that the voter[s] for election of delegates and the delegates should be limited to Native Hawaiians." App. 361a. Na'i Aupuni announced that it would determine eligibility to run as a delegate and vote in the election based on the Commission's roll of qualified Native Hawaiians. App. 4a; Supp. App. 445a ("Na'i Aupuni will utilize the roll certified by the Commission" to determine "who can serve as a delegate."). Na'i Aupuni determined that the "election and convention process should be composed of Native Hawaiians" so that only "Native Hawaiian delegates" would make membership and governance decisions. App. 361a.

On August 3, 2015, Na'i Aupuni, through a vendor, "sent to approximately 95,000 certified Native Hawaiians a Notice of the election of delegates that included information about becoming a delegate candidate." App. 21a. The Notice was sent "to persons who have been certified by [the Commission] as of July 16, 2015." Supp.

App. 450a. The Notice stated that "[a]ll eligible voters will have the option to register to become a delegate candidate" and it provided a code and a PIN number that would allow the recipient to register to become a delegate candidate. *Id*. To qualify to be a delegate candidate, a certified voter needed to be "nominated by ten other eligible voters from any region." Supp. App. 452a. The Notice stated that there would be "40 elected delegates" who would be "apportioned based on the current geographic distribution of population within the Roll Commission's current registry." Supp. App. 451a. Certified voters would "select from the candidates representing the area in which the voter resides." *Id*.

On September 30, 2015, a list of 209 Native Hawaiians who had qualified to be delegate candidates was released. *See* App. 367a; Supp. App. 454a-458a. Voting began on November 1, 2015 and was set to end on November 30, 2015. App. 22a. Na'i Aupuni would then announce the winners of the delegate election on December 1, 2015. *Id*.

B. Procedural History

On August 13, 2015, Applicants challenged Act 195 under the First, Fourteenth, and Fifteenth Amendments, as well as under the Voting Rights Act of 1965, 52 U.S.C. § 10301, and 42 U.S.C. § 1983. The district court denied a motion for preliminary injunction and Applicants timely appealed. The Ninth Circuit denied Applicants' motion for an injunction pending appeal on November 19, 2015. App. 1a. On November 23, 2015, Applicants filed with this Court an emergency application for injunction pending appellate review. Applicants asked the Court to "enter an injunction against Respondents under the All Writs Act during the

pendency of this appeal enjoining them from counting the ballots cast in and certifying the winners of the election of delegates to the upcoming constitutional convention." Application at 4-5.

The Application, in particular, explained why Applicants would be irreparably injured if they were excluded from voting in the election of delegates to the convention. Above and beyond the harm that always follows from being denied the right to vote, the election of delegates "is a critical component of a preordained process that will lead to a constitutional convention, the drafting of documents and recommendations, and the subsequent ratification or rejection of these. Applicants' total exclusion from this process denies them the equal opportunity to participate in the entire political process." *Id.* at 16 (citations omitted). "Every step in the process (of which this election is but a single part) inflicts a new injury on Applicants by denying them the equal opportunity to participate in the political process. Every subsequent step—the convention, the creation of documents and recommendations, and the ratification of the delegates' actions—eliminates the Court's ability to return to the status quo ante. Indeed, even a subsequent decision to invalidate the elections or to order new elections will not matter if [the Department of Interior ("DOI")] chooses to honor the results of the current election in its administrative process." *Id.* at 27.

On November 27, 2015, Justice Kennedy issued a temporary injunction "pending further order of the undersigned or of the Court." Supp. App. 428a. On November 30, 2015, Na'i Aupuni issued a press release stating that it was

"extending the deadline to vote to December 21." Supp. App. 439a. The press release claimed that Na'i Aupuni was extending the voting "[b]ecause voters may not have cast their ballots over concerns and questions on the recent U.S. Supreme Court[] … decision to temporarily stop the vote count." *Id.* Na'i Aupuni "strongly encourage[d] those who have not yet voted to cast their ballots." *Id.*

On December 2, 2015, this Court issued the Temporary Injunction. The Order stated: "The application for injunction pending appellate review presented to Justice Kennedy and by him referred to the Court is granted. Respondents are enjoined from counting the ballots cast in, and certifying the winners of, the election described in the application, pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit." Supp. App. 427a.

On December 15, 2015, Na'i Aupuni announced it had "terminated the Native Hawaiian election process but will go forward with a four-week-long 'Aha [convention] in February." Supp. App. 432a; *id.* 437a. Na'i Aupuni stated that "[a]ll 196 Hawaiians who ran as candidates will be offered a seat as a delegate to the 'Aha[.]" Supp. App. 432a; *id.* 436a; *id.* 434a. Accordingly, the convention will go forth as planned except: (1) "the number of delegates … increased from 40 to up to 201";* (2) the convention will begin on February 1, 2016 instead of sometime between February and April; and it will last 20 days instead of 40 days. *Id.* 434a;

* It is unclear precisely how many delegate candidates there were. On September 30, 2015, Na'i Aupuni identified 209 delegate candidates. Supp. App. 454a-458a. On December 15, 2015, however, it simultaneously claimed that there were 196 candidates, Supp. App. 432a, and 201 candidates, *id.* 434a. The precise number does not have relevance to this Motion.

App. 22a. Na'i Aupuni claimed to take these steps because "delays caused by the ongoing litigation … could continue for years" and this convention was "long-overdue." Supp. App. 432a. Na'i Aupuni reaffirmed its "belie[f] that the convening of this leadership group will be the first step toward reorganizing a government that the majority of Hawaiians support." *Id.* 437a. Na'i Aupuni also claimed that its actions meant that "the Akina litigation, which seeks to stop the counting of votes, is moot" and announced that it would "take steps to dismiss the lawsuit." Supp. App. 433a.

On December 21, 2015, Counsel for Applicants notified Respondents that they were in violation of the Temporary Injunction and informed them that absent agreement to come into compliance by 3:30 pm EST on December 22, 2015, Applicants would file a motion for civil contempt in this Court. Counsel for the respective Respondents indicated their opposition. Counsel for Respondents the Akamai Foundation and Na'i Aupuni claimed that, "[i]n compliance with the 11/27/15 Order, Na'i Aupuni did not count the votes or certify election winners. Na'i Aupuni simply offered all candidates an opportunity to associate to discuss self-governance." Supp. App. 429a. Counsel for the State Respondents and for OHA took the position that they had no role in the disputed actions. Supp. App. 459a.

ARGUMENT

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." *Ex parte Robinson*, 86 U.S. 505, 510 (1873); *Shillitani v.*

United States, 384 U.S. 364, 370 (1966) ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt."). The Court should exercise that authority to bring Respondents into compliance with the Temporary Injunction and to end the electoral gamesmanship that continues to cause irreparable harm to Applicants.

I. Respondents Are In Violation of The Letter and Spirit of The Court's Temporary Injunction.

"In a civil-contempt proceeding, proof of the violation must be clear and convincing" and "the court must find that the order violated is clear and unambiguous and that, although the party to be charged had notice of the order, it has not diligently attempted in a reasonable manner to comply. Once a prima facie showing of violation has been made, the charged party has the burden of proving the inability to comply. When the court's order is unclear, or the alleged contemnor has made an effort to comply, the court will not find contempt. But a violation of the decree need not be willful for a party to be held in civil contempt." Wright & Miller, Enforcement of and Collateral Attack on Injunctions, 11A Fed. Prac. & Proc. Civ. § 2960 (3d ed. 2015) (citations omitted).

Here, the only issue is whether Respondents have "violated a definite and specific order of the court requiring [them] to perform or refrain from performing a particular act or acts with knowledge of the court's order." *Glover v. Johnson*, 934 F.2d 703, 707 (6th Cir. 1991) (citation omitted). There is no doubt they have. The Temporary Injunction prohibited Respondents from "certifying the winners" of "the election" to choose convention delegates. Respondents' announcement that it would

seat every delegate candidate violates the letter of that order. Respondents also have violated the spirit of the Temporary Injunction. The Court issued that order to preserve the status quo and thus ensure that Applicants are not denied the right to participate in the process (including the convention) based on their racial ancestry before the Ninth Circuit adjudicates their challenge. Respondents are not permitted to defeat the purpose of the Court's order through gamesmanship.

Announcing that "[a]ll 196 Hawaiians who ran as candidates will be offered a seat as a delegate to the 'Aha," Supp. App. 432a, is certification of those candidates as winners of the election. *First*, these delegates are "winners" of the election. As Na'i Aupuni has acknowledged, all delegates that will be seated at the convention "ran as candidates" in the election that is a subject of this challenge. *Id*. The fact that Na'i Aupuni expanded the number of available delegate spots from 40 to equal the number of candidates—rendering the counting of votes unnecessary—does not mean these candidates are not winners. It means that they are *all* winners. Under Respondents' reasoning, Texas could have evaded *Terry v. Adams*—which held that the "Jaybird primary" violated the Fifteenth Amendment by excluding African Americans—by allowing every candidate in that primary to run "in the Democratic primaries and the general elections that followed," 345 U.S. 461, 463 (1953), instead of counting the ballots and nominating only one winner. It is inconceivable that the Court would have deemed such gamesmanship to constitute compliance with an order preventing the Jaybirds from nominating a candidate through an electoral process pervaded with racial discrimination. So too here.

Second, these delegates were selected through "the election" in dispute. These individuals became delegates only because they "ran as candidates" in *this* election. And they could be candidates only because they were on "the certified list of Native Hawaiians kept by the Native Hawaiian Roll Commission," App. 412a ¶ 14(d); were "eligible voters," Supp. App. 452a; and were "nominated by ten other eligible voters from any region," *id*. In short, it is impossible to characterize a process by which individuals running for office are seated based on their status as an eligible voter and their ability to obtain the nominations needed from eligible voters to get on the ballot as anything other than an election.

Respondents' contracts confirm that Na'i Aupuni has selected the winners through "the election." The contracts provide that Na'i Aupuni "is an organization whose mission is to provide assistance in the non-political aspects of *an election of Native Hawaiian delegates*, 'Aha [convention], and ratification vote for the purpose of Native Hawaiian self-determination." App. 378a (emphasis added). OHA granted funds so that Na'i Aupuni "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." App. 374a (emphasis added). And Na'i Aupuni "commit[ed] 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." *Id*. (emphasis added). By definition, Na'i Aupuni only had authority to choose delegates via election. There is no indication the State Respondents, OHA, or the Akamai Foundation believe that

Na'i Aupuni is in violation of these agreements or have sought return of the funds used to violate the Temporary Injunction. Any claim that these delegates have been selected via some "new" process would only be further evidence of gamesmanship.

Finally, Na'i Aupuni has "certified" the results of this election. Certification is reasonably understood to be the public release of the official election results. Hawaii law, for example, describes the "certification of results of election" as "[a] certificate of election or a certificate of results declaring the results of the election as of election day." HAW. REV. STAT. ANN. § 11-155. The Application therefore explained, without contradiction from Respondents, that "the winners of the delegates to the constitutional convention will be certified on Tuesday, December 1, 2015." Application at 3. December 1, 2015 was the date on which the "Election results" were to be "announced publicly." App. 22a. If this Court's injunction had not issued, Respondents undoubtedly would have used the exact same certification process; as it did here, Na'i Aupuni would have issued a press release announcing which candidates would attend the convention. When it announced on December 15, 2015 that all the delegate candidates would be seated at the convention, Na'i Aupuni certified the result. Accordingly, the Court need not look beyond the letter of the Temporary Injunction to hold Respondents in contempt.

Respondents' actions also violate the spirit of the Temporary Injunction. Respondents do not "have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined. Such a rule would give tremendous impetus to the program of experimentation with disobedience of the

law." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). Rather, the Court must interpret the Temporary Injunction based on "what the decree was really designed to accomplish." *Mayor of Vicksburg v. Henson*, 231 U.S. 259, 273 (1913). Courts have long refused to "permit defendants to evade responsibility for violating an injunction, by doing through subterfuge a thing which is not in terms a violation, yet produces the same effect by accomplishing substantially that which they were enjoined from doing." *Stodder v. Rosen Talking Mach. Co.*, 141 N.E. 569, 571 (Mass. 1923); *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d Cir. 1942) ("In deciding whether an injunction has been violated it is proper to observe the objects for which the relief was granted and to find a breach of the decree in a violation of the spirit of the injunction, even though its strict letter may not have been disregarded.").

Here, the Court's decree was designed to ensure that Applicants could have their day in court before a Native-Hawaiian convention and referendum were held. Thus, the Temporary Injunction was "in aid of" this Court's appellate jurisdiction. 28 U.S.C. § 1651(a); *McClellan*, 217 U.S. at 280. Without the Temporary Injunction, "[t]he delegates to the planned convention will have been elected without any input whatsoever from these Applicants," and "Applicants and many others will have had no say respecting the documents the delegates will create and the recommendations they will make respecting Native Hawaiian sovereignty." Application at 4. "In other words, if the DOI proceeds as it has indicated, there will be no subsequent state or federal election or ratification in which non Native Hawaiians, like Applicants, will

be allowed to have their say." *Id.* at 17-18 (citation omitted). These delegates, who became eligible to be seated on racially exclusionary terms, therefore will have an indispensable role in a political process "that is guaranteed to affect their lives and the lives of everyone in their State." Application at 16.

Having been thwarted in choosing delegates through race-based balloting, Respondents seek to achieve the same result through evasion, *viz.*, to use the same race-based process to select delegates, hold the convention and referendum, and secure tribal status, before Applicants can be heard. App. 368a ("If this process is stalled in the Courts, the [Commission's] list will become stale, OHA's funding may not be available and … it may be decades before funding, a similarly substantial roll, [and] state and federal government support of Native Hawaiian self-governance … converge [again]."); Supp. App. 443a ("After careful consideration of a longer timetable, Na'i Aupuni does not believe delaying this process will improve the outcome as there will always be people seeking to delay the election of delegates and convening an 'Aha or merely stopping them from proceeding altogether. Na'i Aupuni wants to keep to the current timetable to reduce the risk that the process may be stopped."). Na'i Aupuni is candid: it is proceeding despite the Temporary Injunction because "delays caused by the ongoing litigation … could continue for years" and this convention was "long-overdue." Supp. App. 432a.

Indeed, the reason why Respondents are engaged in this gamesmanship is because DOI will "reestablish [a] formal government-to-government relationship" only if "[t]he process by which the Native Hawaiian community drafted the

governing document" "ensure[s] 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." App. 230a-231a (§§ 50.11, 50.16). Respondents are preparing the ground for this very argument. Their intentions are tellingly revealed by their use of particular formulations found in the DOI's proposed regulations, which require participation that is "sufficiently large to demonstrate broad-based community support among Native Hawaiians." App. 231a (§§ 50.16(g), (h)). Na'i Aupuni parrots this language when it tells the candidates that "[o]ne of the main reasons behind this decision to seat all candidates is that you represent a broad-based spectrum of the Native Hawaiian community." Supp. App. 434a. Respondents plainly seek to use the roll of Native Hawaiians and the nominating process for choosing delegates—both of which are challenged in this lawsuit—to meet DOI's "representative" and "broad-based" and "community" requirements, while pointing to the decision not to count the ballots to claim technical compliance with the Temporary Injunction.

The Court should not allow this to stand. Even if the Temporary Injunction does not specifically enjoin this course of conduct, which it does, allowing Respondents to proceed in this fashion would defeat the injunction's object. The racially discriminatory criteria used to select delegate candidates was no less a subject of Applicants' challenge (and their Ninth Circuit appeal) than the use of that same criteria to restrict their right to vote for those candidates. App. 172a-173a. Both aspects of this state-run process exclude those individuals, like two of

the Applicants, who the Commission has not verified as "Native Hawaiian" because of the content of their blood. Even assuming, then, that what has occurred here is not the certification of winners of the election, a state-run process that restricts nomination of delegate candidates based on racial ancestry violates the Fourteenth Amendment for the same reasons the election violates the Fifteenth Amendment. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 198-200, 207-213 (1996) (nominating delegates is the "functional equivalent to the political primary" and exclusion is an "integral part" of the election process); *Smith v. Allwright*, 321 U.S. 649, 662-65 (1944).

The Temporary Injunction cannot "be avoided on merely technical grounds. The language of an injunction must be read in the light of the circumstances surrounding its entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent." *United States v. Christie Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972) (citations omitted). All those factors indicate that Respondents have violated the Court's decree that the status quo should be preserved. Otherwise, this case could become "an excellent illustration of how" to avoid "accountability for persistent contumacy." *McComb*, 336 U.S. at 192. Respondents could avoid "[c]ivil contempt … today by showing that the specific plan [it] adopted … was not enjoined," adopt a new plan not specifically enjoined by a subsequent injunction, and repeat the pattern until "a whole series of wrongs is perpetrated and a decree of enforcement goes for naught." *Id*. at 192-93.

Such gamesmanship cannot be tolerated. The Court intervened in this important case to ensure that the status quo would be preserved while Applicants' challenge to the racial criteria for nominating, voting on, and ultimately selecting convention delegates could be heard by the Ninth Circuit. Declaring all of the delegate candidates to be the winners instead of counting the ballots and seating some of them is not preservation of the status quo. Respondents are in violation of the Temporary Injunction.

II. The Court Should Hold Respondents In Contempt And Take All Steps Necessary To Enforce The Temporary Injunction.

Civil contempt is the appropriate means by which to bring Respondents into compliance. "The purpose of contempt proceedings is to uphold the power of the court, and also to secure to suitors therein the rights by it awarded." *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 327 (1904). Civil contempt proceedings are "remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce." *Id.* at 328 (citations and quotations omitted). Civil contempt, in short, "is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance," and because the "purpose is remedial, it matters not with what intent the defendant did the prohibited act." *McComb*, 336 U.S. at 191 (citations omitted).

Applicants ask that the Contempt Order include three specific forms of relief. *First*, 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. The Court should enforce this command through monetary sanctions. As the Court has explained, "civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994). The Court should impose sanctions strong enough to ensure compliance in advance of February 1, 2016—the date on which the convention is scheduled to begin.

Second, the Court should require Respondents to judicially preclear any further steps they seek to take with regard to selection of delegates or holding of the convention while the Temporary Injunction remains in force. "We are dealing here with the power of a court to grant the relief that is necessary to effect compliance with its decree. The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb*, 336 U.S. at 193. Temporary judicial preclearance is appropriate given that coverage under Section 3(c) of the Voting Rights Act is one of the remedies that Applicants expressly seek in their complaint. *See* App. 177a, ¶ 5.

It also is necessary to ensure compliance with the Temporary Injunction. Hawaii has demonstrated its unwillingness to accept this Court's orders as binding. This is the third lawsuit, following *Rice v. Cayetano*, 528 U.S. 429 (2000), and *Arakaki v. State of Hawaii*, 314 F.3d 1091 (9th Cir. 2002), arising out of an attempt

by Hawaiian officials to use race-based criteria to restrict who may participate in the political process. In fact, this current regime was engineered to evade those decisions and has been procedurally orchestrated to avoid judicial review. *See* Application at 6-14. And when the Court stepped in to preserve the status quo, Respondents flouted the Temporary Injunction and once again tried to circumvent the Court's rulings in an effort to evade judicial scrutiny. Preclearance is an anti-circumvention remedy designed to combat recalcitrance of this sort. It ends the gamesmanship and ensures that those individuals, like Applicants, who are the object of this ceaseless racial discrimination no longer must shoulder the burden of bringing challenge upon challenge (or, here, motion upon motion) to ingenious attempts to defy the Fourteenth and Fifteenth Amendments. *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966).

Third, the Court should award to Applicants the attorney's fees and costs incurred in bringing this Motion. "[I]n a civil contempt action occasioned by willful disobedience of a court order an award of attorney's fees may be authorized as part of the fine to be levied on the defendant." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 428 (1923) ("[I]t was not an abuse of discretion in this case to impose as a penalty, compensation for the expenses incurred by the successful party to the decree in defending its rights in the Ohio court."); *see also Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 70, 86 (D.D.C. 2003). Respondents' actions make such an award especially appropriate in this case.

* * *

More is at stake than enforcing compliance with the Temporary Injunction. The Court divided 5 to 4 as to whether this injunction should issue. But there has never been division on the foundational principle underlying this Motion: "all orders and judgments of courts must be complied with promptly." *Maness v. Meyers*, 419 U.S. 449, 458 (1975). This has been an issue of special concern when it comes to State-sponsored racial discrimination. *Cooper v. Aaron*, 358 U.S. 1, 19-20 (1958). "For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society." *Id*. at 22 (Frankfurter, J., concurring).

Civil contempt is reserved for circumstances such as this. It is "necessary to the protection of the court from insults and oppression while in the ordinary exercise of its duty, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors." *Bessette*, 194 U.S. at 333 (citation omitted). "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911). All parties to this litigation understood the Temporary Injunction to preserve the status quo while Applicants' appeal challenging the race-based means of nominating and electing convention delegates was heard. The Court must enforce its decree.

CONCLUSION

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

Respectfully submitted,

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