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THE AKAMAI FOUNDATION and NA'I AUPUNI

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

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

Plaintiffs,

CIVIL NO. 15-00322 JMS-BMK

DEFENDANT NA'I AUPUNI'S
ANSWER TO COMPLAINT FILED
AUGUST 13, 2015;
CERTIFICATE OF SERVICE

[Caption continued on next page]

vs.

THE STATE OF HAWAII;
GOVERNOR DAVID Y. IGE, in his
official capacity; ROBERT K. LINDSEY
JR., Chairperson, Board of Trustees,
Office of Hawaiian Affairs, in his official
capacity; COLETTE Y. MACHADO,
PETER APO, HAUNANI APOLIONA,
ROWENA M.N. AKANA, JOHN D.
WAIHE'E IV, CARMEN HULU
LINDSEY, DAN AHUNA,
LEINA'ALA AHU ISA, Trustees,
Office of Hawaiian Affairs, in their
official capacities; KAMANA'OPONO
CRABBE, Chief Executive Officer,
Office of Hawaiian Affairs, in his official
Capacity; JOHN D. WAIHE'E III,
Chairman, Native Hawaiian Roll
Commission, in his official
Capacity; NĀ'ĀLEHU ANTHONY,
LEI KIHUI, ROBIN DANNER,
MĀHEALANI WENDT,
Commissioners, Native Hawaiian Roll
Commission, in their official capacities;
CLYDE W. NĀMU'O, Executive
Director, Native Hawaiian Roll
Commission, in his official capacity;
THE AKAMAI FOUNDATION; and
THE NA'I AUPUNI FOUNDATION;
and DOE DEFENDANTS 1-50,

Defendants.

**DEFENDANT NA‘I AUPUNI’S ANSWER TO
COMPLAINT FILED AUGUST 13, 2015**

Defendant NA‘I AUPUNI (incorrectly named as THE NA‘I AUPUNI FOUNDATION) (“Na‘i Aupuni”), by and through its counsel, McCorriston Miller Mukai MacKinnon LLP and Sullivan Meheula Lee LLLP, hereby submits the following as its Answer to the Complaint filed on August 13, 2015 (“Complaint”) by Plaintiffs KELI‘I AKINA, KEALII MAKEKAU, JOSEPH KENT, YOSHIMASA SEAN MITSUI, PEDRO KANA‘E GAPERO, and MELISSA LEINA‘ALA MONIZ (collectively, “Plaintiffs”):

INTRODUCTION

1. In response to Paragraph 1 of the Complaint, Na‘i Aupuni states that the Complaint speaks for itself and on that basis denies the allegations contained therein.

2. In response to Paragraph 2 of the Complaint, Na‘i Aupuni states that the Complaint speaks for itself and on that basis denies the allegations contained therein. Na‘i Aupuni further states that although Plaintiffs purport to pursue the claims identified, Na‘i Aupuni denies that Plaintiffs are entitled to any recovery under any such claims against Na‘i Aupuni, or at all.

JURISDICTION AND VENUE

3. In response to Paragraph 3 of the Complaint, Na‘i Aupuni states that the allegations call for a legal conclusion and, as such, Na‘i Aupuni denies the allegations.

4. In response to Paragraph 4 of the Complaint, Na‘i Aupuni states that the allegations call for a legal conclusion and, as such, Na‘i Aupuni denies the allegations.

5. In response to Paragraph 5 of the Complaint, Na‘i Aupuni states that the allegations call for a legal conclusion and, as such, Na‘i Aupuni denies the allegations.

PARTIES

6. In response to Paragraph 6 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations that Plaintiff Akina “is a citizen and resident of the State of Hawaii, and a registered voter” and Akina “is a descendent of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands,” and on that basis denies them. Further responding, Na‘i Aupuni denies the allegations contained in the third sentence of Paragraph 6 of the Complaint and states that the Native Hawaiian Roll Commission’s (“Roll”) Declaration One does not prevent

Akina from registering with the Roll.¹ Upon information and belief, the Roll has and will continue to register Native Hawaiians who refuse to attest to Declaration One. Alternatively, Native Hawaiians have and may continue to register with the Office of Hawaiian Affairs' ("OHA") Hawaiian Registry program, which does not require attestation of Declaration One. Pursuant to Hawai'i Revised Statutes ("HRS") § 10H-3(a)(2)(A)(iii), Native Hawaiians who registered through OHA's Hawaiian Registry would be included on the Roll. On August 30, 2015, the Honolulu Star-Advertiser published an op-ed by Na'i Aupuni that stated in part:

Two of the Native Hawaiian Grassroot plaintiffs complain they were deprived of the opportunity to register with the Roll Commission because they do not agree with the Commission's declaration to affirm the "unrelinquished sovereignty of the Native Hawaiian people and an intent to participate in the process of self-governance."

We understand that the Roll Commission has registered and certified voters – and will continue to do so – even if these voters refuse to agree to this declaration.

Alternatively, such voters have the option of registering with OHA's Hawaiian Registry program, which does not include this declaration.

7. In response to Paragraph 7 of the Complaint, Na'i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the

¹ Upon information and belief, Declaration One provides: "I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance." Declaration Two provides: "I have a significant cultural, social or civic connection to the Native Hawaiian community."

allegations that Plaintiff Makekau “is a citizen and resident of the State of Hawaii, and a registered voter” and Makekau “is a descendent of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands,” and on that basis denies them. Further responding, Na‘i Aupuni denies the allegations contained in the third sentence of Paragraph 7 of the Complaint and states, for the reasons set forth above, that Declaration One does not prevent Makekau from registering with the Roll.

8. In response to Paragraph 8 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them. Further responding, Na‘i Aupuni admits that if Plaintiff Kent is not a Native Hawaiian as that term is defined in federal law, Kent does not qualify to register on the Roll. See 1993 Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (“As used in this Joint Resolution, the term ‘Native Hawaiian’ means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai‘i[.]”).

9. In response to Paragraph 9 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them. Further responding, Na‘i Aupuni admits

that if Plaintiff Mitsui is not a Native Hawaiian as that term is defined in federal law, Mitsui does not qualify to register on the Roll.

10. In response to Paragraph 10 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them. Further responding, Na‘i Aupuni alleges that Plaintiff Gapero is not required to vote in any process that uses the Roll’s certified list and that Gapero may also take himself off of the Roll’s list by simply informing the Roll that he is opting out.

11. In response to Paragraph 11 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them. Further responding, Na‘i Aupuni alleges that Plaintiff Moniz is not required to vote in any process that uses the Roll’s certified list and that Moniz may also take herself off of the Roll’s list by simply informing the Roll that she is opting out.

12. In response to Paragraph 12 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

13. In response to Paragraph 13 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

14. In response to Paragraph 14 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

15. In response to Paragraph 15 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

16. In response to Paragraph 16 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

17. In response to Paragraph 17 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

18. In response to Paragraph 18 of the Complaint, Na‘i Aupuni admits the allegations in the first sentence. In response to the second sentence of Paragraph 18, Na‘i Aupuni understands that it has entered into written contracts with OHA and/or Defendant AKAMAI FOUNDATION; to the extent that the allegations in the second sentence are inconsistent, not included, or quoted out of context with the language in such documents, Na‘i Aupuni states that the documents speak for themselves, and therefore denies them.

19. In response to Paragraph 19 of the Complaint, Na‘i Aupuni admits that it is a domestic, nonprofit organization, with its principle place of business at 745 Fort Street, Honolulu, Hawai‘i 96813. Further responding, Na‘i Aupuni states that its primary purpose is to provide a process for Native Hawaiians to vote for Native Hawaiian delegates to convene to consider organizing a governing entity and possible ratification vote. All remaining allegations in Paragraph 19 are denied.

20. In response to Paragraph 20 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

FACTUAL ALLEGATIONS

Background

21. In response to Paragraph 21 of the Complaint, Na‘i Aupuni states that the Hawaiian Homes Commission Act speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

22. In response to Paragraph 22 of the Complaint, Na‘i Aupuni states that the Hawai‘i Admission Act speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

23. In response to Paragraph 23 of the Complaint, Na‘i Aupuni states that the Hawai‘i Admission Act speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

24. In response to Paragraph 24 of the Complaint, Na‘i Aupuni states that the Hawai‘i Constitution and HRS speak for themselves, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said documents.

25. In response to Paragraph 25 of the Complaint, Na‘i Aupuni states that the Hawai‘i Constitution and HRS speak for themselves, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said documents.

26. In response to Paragraph 26 of the Complaint, Na‘i Aupuni states that Rice v. Cayetano, 528 U.S. 495 (2000), speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

27. In response to Paragraph 27 of the Complaint, Na‘i Aupuni states that Arakaki v. Hawai‘i, 314 F.3d 1091 (9th Cir. 2002), speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such

allegations are inconsistent with, not included in, or quoted out of context in said document.

Act 195

28. In response to Paragraph 28 of the Complaint, Na‘i Aupuni states that 2011 Haw. Sess. Laws Act 195 (“Act 195”) speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document. Further responding, Na‘i Aupuni admits that it is not bound by Act 195 or controlled by the Roll. Na‘i Aupuni decided to use the Roll’s certified list as augmented by OHA’s lists, pursuant to 2013 Haw. Sess. Laws Act 77 (“Act 77”), because it was and is expensive and time consuming to develop a list of a near majority of verified Native Hawaiian adults. In addition, the Roll is the only organization that has such a list, which is available to any independent body, like Na‘i Aupuni, that intends to use the list to further Native Hawaiian self-determination. Upon information and belief, the Roll has and will continue to register Native Hawaiians who refuse to attest to Declaration One and alternatively Native Hawaiians have and may continue to register with OHA’s Hawaiian Registry program, which does not require attestation of Declarations One and Two.

29. In response to Paragraph 29 of the Complaint, Na‘i Aupuni states that Act 195 speaks for itself, and therefore Na‘i Aupuni denies the allegations

contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

30. In response to Paragraph 30 of the Complaint, Na‘i Aupuni states that Act 195 speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

31. In response to Paragraph 31 of the Complaint, Na‘i Aupuni states that Act 195 speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

32. In response to Paragraph 32 of the Complaint, Na‘i Aupuni states that Act 195 speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

33. In response to Paragraph 33 of the Complaint, Na‘i Aupuni states that Act 195 speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

The Process of Registering for the Roll

34. In response to Paragraph 34 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

35. In response to Paragraph 35 of the Complaint, Na‘i Aupuni denies the allegations to the extent that, upon information and belief, OHA and the Roll have made and continue to make reasonable efforts to inform OHA registrants that, pursuant to Act 77, OHA was transferring their registration information to the Roll to be included on the Roll’s list, but that each registrant has the right to opt-out of the transfer and that they may be taken off of the Roll’s list at any time. Further answering, Na‘i Aupuni states that pursuant to OHA’s Hawaiian Registry program, registrants may, at the time they sign up, elect not to have their registration submitted to the Roll, see http://19of32x2yl33s8o4xza0gf14.wpengine.netdna-cdn.com/wp-content/uploads/2013/10/29037_OHA_HRP_Form.pdf.

36. In response to Paragraph 36 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

37. In response to Paragraph 37 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

38. Na‘i Aupuni admits the allegations in Paragraph 38 of the Complaint.

39. In response to Paragraph 39 of the Complaint, Na‘i Aupuni states that the Roll’s website speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context on said website.

40. In response to Paragraph 40 of the Complaint, Na‘i Aupuni states that the Roll’s website speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context on said website.

41. In response to Paragraph 41 of the Complaint, Na‘i Aupuni states that the Roll’s website speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context on said website.

42. In response to Paragraph 42 of the Complaint, Na‘i Aupuni states that the Roll’s website speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context on said website.

43. In response to Paragraph 43 of the Complaint, Na‘i Aupuni states that the Roll’s website speaks for itself, and therefore Na‘i Aupuni denies the

allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context on said website.

44. Nai Aupuni denies the allegations contained in Paragraph 44 of the Complaint. Further answering, Na‘i Aupuni states that the Roll has and will continue to register Native Hawaiians who do not want to attest to Declaration One, and, alternatively, Native Hawaiians have and may continue to register with OHA’s Hawaiian Registry program, which does not require attestation of Declaration One.

45. In response to Paragraph 45 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

46. In response to Paragraph 46 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

47. In response to Paragraph 47 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

48. Na‘i Aupuni denies the allegations in Paragraph 48 of the Complaint.

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

49. In response to Paragraph 49 of the Complaint, Na‘i Aupuni states that the Grant Agreement Between the Akamai Foundation and the Office of Hawaiian Affairs for the Use and Benefit of Na‘i Aupuni (“Grant Agreement”) speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document. Further answering, Na‘i Aupuni states that the Grant Agreement between OHA, the Akamai Foundation, and Na‘i Aupuni expressly provides that neither OHA nor the Akamai Foundation “will directly or indirectly control or affect the decisions of [Na‘i Aupuni] in the performance of the” election of delegates, convention and any ratification referendum, which is consistent with Na‘i Aupuni’s comments regarding its autonomy at a February 26, 2015 OHA board meeting. In addition, Na‘i Aupuni does not have any agreements with the Roll, except that the Roll has asked Na‘i Aupuni to pay \$5,000 to the Roll’s IT consultant to cover costs associated with providing an electronic copy of the certified list to Na‘i Aupuni’s election consultant.

50. In response to Paragraph 50 of the Complaint, Na‘i Aupuni states that the April 27, 2015 Fiscal Sponsorship Agreement Between Akamai Foundation and Na‘i Aupuni speaks for itself, and therefore Na‘i Aupuni denies the allegations

contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

51. In response to Paragraph 51 of the Complaint, Na‘i Aupuni states that the Letter Agreement Between Office of Hawaiian Affairs, Na‘i Aupuni, and Akamai Foundation speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

52. In response to Paragraph 52 of the Complaint, Na‘i Aupuni states that the contract between Na‘i Aupuni and Election America, Inc., speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

53. In response to Paragraph 53 of the Complaint, Na‘i Aupuni states that the Honolulu Star Advertiser article, dated July 5, 2015, speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document. Further answering, Na‘i Aupuni denies all further allegations.

54. In response to Paragraph 54 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

55. In response to Paragraph 55 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

56. Na‘i Aupuni denies the allegations in Paragraph 56 of the Complaint.

57. In response to Paragraph 57 of the Complaint, Na‘i Aupuni denies that “[l]egal tasks [the Roll] previously was responsible for have been transferred to [the Akamai Foundation] and [Na‘i Aupuni].” To the contrary, Act 195 does not task the Roll with the determination of whether to conduct an election of delegates, whether to conduct a convention for Native Hawaiian self-determination, or mandate the process to be followed. In addition, the State acknowledged that it should not interfere with Native Hawaiians’ right to “freely determine their political status” as stated in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples.

58. In response to Paragraph 58 of the Complaint, Na‘i Aupuni admits that the February 26, 2015 OHA board meeting occurred and that the meeting minutes speak for themselves, and therefore Na‘i Aupuni denies the allegations to the extent they are factually incorrect, inconsistent with, not included, or quoted out of context in said document. Further answering, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations that “OHA’s trustees intended to achieve the goals of Act 195 but

planned to use nonprofit surrogates in order to do so” and therefore denies the same.

59. Na‘i Aupuni denies the allegations in Paragraph 59 of the Complaint. Further answering, Na‘i Aupuni specifically denies that it is a state actor for several reasons including, but not limited to, the following important factors in this circumstance: (1) the fact that Na‘i Aupuni’s election of delegates is not a state election and thus Na‘i Aupuni is not performing a state function, and (2) that the State does not control Na‘i Aupuni. In addition, the federal government has properly exercised its plenary power by adopting the Admission Act, over 150 Congressional acts providing assistance to Native Hawaiians, including the Hawaiian Homelands Act, Native Hawaiian Education Act – 20 USC § 7512 and the Native Hawaiian Healthcare Act, 42 U.S.C. § 11701, the Apology Resolution, and Department of Interior’s current process to promulgate an administrative rule to facilitate the reestablishment of a government-to-government relationship with the Native Hawaiian community – 79 FR 355296-02. These federal laws have authorized the State to assist Native Hawaiians in their self-determination efforts. Thus, the Roll’s development of a Native Hawaiian registry to assist Native Hawaiian self-determination, and OHA’s grant of public land trust funds to fund Na‘i Aupuni’s election process do not violate constitutional or federal safeguards

and, accordingly, do not contribute to a factual finding that Na‘i Aupuni is a state actor.

60. In response to Paragraph 60 of the Complaint, Na‘i Aupuni states that Rice v. Cayetano, 528 U.S. 495 (2000), speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document. Na‘i Aupuni denies the allegations in Paragraph 60 to the extent that it calls for a legal conclusion.

61. In response to Paragraph 61 of the Complaint, Na‘i Aupuni states that Act 195 speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document. Na‘i Aupuni denies the allegations in Paragraph 61 to the extent that it calls for a legal conclusion.

62. In response to Paragraph 62 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations therein because they speak to OHA’s intentions. However, Na‘i Aupuni states that OHA’s intentions are consistent with the federal government’s authorization of the State to assist Native Hawaiians in their self-determination efforts.

63. In response to Paragraph 63 of the Complaint, Na‘i Aupuni states that OHA’s website speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said website.

64. In response to Paragraph 64 of the Complaint, Na‘i Aupuni states that OHA’s website speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said website.

65. In response to Paragraph 65 of the Complaint, Na‘i Aupuni states that OHA’s website speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said website.

66. In response to Paragraph 66 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations therein because they speak to the Roll’s intentions and, as such, Na‘i Aupuni denies the allegations.

67. In response to Paragraph 67 of the Complaint, Na‘i Aupuni states that the Roll’s website speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said website.

68. In response to Paragraph 68 of the Complaint, Na‘i Aupuni states that the allegations call for a legal conclusion and, as such, Na‘i Aupuni denies the allegations.

69. Na‘i Aupuni denies the allegations in Paragraph 69 of the Complaint.

70. Na‘i Aupuni denies the allegations in Paragraph 70 of the Complaint.

71. In response to Paragraph 71 of the Complaint, Na‘i Aupuni states that the allegations call for a legal conclusion and, as such, Na‘i Aupuni denies the allegations.

72. Na‘i Aupuni denies the allegations in Paragraph 72 of the Complaint.

73. In response to Paragraph 73 of the Complaint, Na‘i Aupuni states that the allegations call for a legal conclusion and, as such, Na‘i Aupuni denies the allegations.

74. Na‘i Aupuni denies the allegations in Paragraph 74 of the Complaint.

75. In response to Paragraph 75 of the Complaint, Na‘i Aupuni states that the allegations call for a legal conclusion and, as such, Na‘i Aupuni denies the allegations.

76. Na‘i Aupuni denies the allegations in Paragraph 76 of the Complaint.

The Need for Section 3(c) Relief

77. Na‘i Aupuni denies the allegations in Paragraph 77 of the Complaint.

78. Na‘i Aupuni denies the allegations in Paragraph 78 of the Complaint.

CLAIMS

Claims Alleging Race-Based Restrictions and Qualifications Relating to Voting

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

79. In response to Paragraph 79 of the Complaint, Na‘i Aupuni repeats and incorporates its prior responses to Paragraphs 1 through 78 of the Complaint.

80. Na‘i Aupuni denies the allegations in Paragraph 80 of the Complaint. Further answering in response to Count 1 of the Complaint in which Kent and Mitsui allege violations of the Fifteenth Amendment based on Act 195, Na‘i Aupuni states that although its election of delegates and its convention process is limited to Native Hawaiian voters and delegates, the election of delegates itself is not a State election because Na‘i Aupuni is not performing a state function, the State does not control Na‘i Aupuni, and the federal government has authorized the State to assist Native Hawaiians in their self-determination efforts. Accordingly, the Roll’s development of a Native Hawaiian voter registry does not violate the Fifteenth Amendment.

81. Na‘i Aupuni denies the allegations in Paragraph 81 of the Complaint.

82. Na‘i Aupuni denies the allegations in Paragraph 82 of the Complaint.

83. Na‘i Aupuni denies the allegations in Paragraph 83 of the Complaint.

84. Na‘i Aupuni denies the allegations in Paragraph 84 of the Complaint.

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

85. In response to Paragraph 85 of the Complaint, Na‘i Aupuni repeats and incorporates its prior responses to Paragraphs 1 through 84 of the Complaint.

86. Na‘i Aupuni denies the allegations in Paragraph 86 of the Complaint. Further answering in response to Count 2 of the Complaint in which Kent and Mitsui allege violations of the Equal Protection Clause of the Fourteenth Amendment based on Act 195, Na‘i Aupuni states that although its election of delegates and its convention process is limited to Native Hawaiian voters and delegates, the election of delegates itself is not a State election because Na‘i Aupuni is not performing a state function, the State does not control Na‘i Aupuni, and the federal government has authorized the State to assist Native Hawaiians in their self-determination efforts. Accordingly, the Roll’s development of a Native Hawaiian registry does not violate the Equal Protection Clause of the Fourteenth Amendment.

87. Na‘i Aupuni denies the allegations in Paragraph 87 of the Complaint.

88. Na‘i Aupuni denies the allegations in Paragraph 88 of the Complaint.

89. Na‘i Aupuni denies the allegations in Paragraph 89 of the Complaint.

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

90. In response to Paragraph 90 of the Complaint, Na‘i Aupuni repeats and incorporates its prior responses to Paragraphs 1 through 89 of the Complaint.

91. In response to Paragraph 91 of the Complaint, Na‘i Aupuni states that Section 2 of the Voting Rights Act speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document. Further answering in response to Count 3 of the Complaint in which Kent and Mitsui allege violations of Section 2 of the Voting Rights Act based on Act 195, Na‘i Aupuni states that although its election of delegates and its convention process is limited to Native Hawaiian voters and delegates, the election of delegates itself is not a State election because Na‘i Aupuni is not performing a state function, the State does not control Na‘i Aupuni, and the federal government has authorized the State to assist Native Hawaiians in their self-determination efforts. Accordingly, the Roll’s development of a Native Hawaiian registry does not violate Section 2 of the Voting Rights Act.

92. Na‘i Aupuni denies the allegations in Paragraph 92 of the Complaint.

93. Na‘i Aupuni denies the allegations in Paragraph 93 of the Complaint.

94. Na‘i Aupuni denies the allegations in Paragraph 94 of the Complaint.

Claims Alleging Viewpoint-Based Restriction Relating to Voting

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

95. In response to Paragraph 95 of the Complaint, Na‘i Aupuni repeats and incorporates its prior responses to Paragraphs 1 through 94 of the Complaint.

96. In response to Paragraph 96 of the Complaint, Na‘i Aupuni states that Declaration One speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document. Further answering, in response to Count 4 of the Complaint in which Akina and Makekau allege violations of the First Amendment, Fourteenth Amendment, and 42 U.S.C. § 1983 based upon Declaration One, Na‘i Aupuni states that since Akina and Makekau are Native Hawaiians they may register directly with the Roll without attesting to Declaration One through OHA’s Hawaiian Registry program. Therefore, the Roll’s development of a Native Hawaiian registry does not violate the First Amendment, Fourteenth Amendment, or 42 U.S.C. § 1983.

97. Na‘i Aupuni denies the allegations in Paragraph 97 of the Complaint.

98. Na‘i Aupuni denies the allegations in Paragraph 98 of the Complaint.

99. Na‘i Aupuni denies the allegations in Paragraph 99 of the Complaint.

100. Na‘i Aupuni denies the allegations in Paragraph 100 of the Complaint.

101. Na‘i Aupuni denies the allegations in Paragraph 101 of the Complaint.

102. Na‘i Aupuni denies the allegations in Paragraph 102 of the Complaint.

103. Na‘i Aupuni denies the allegations in Paragraph 103 of the Complaint.

104. Na‘i Aupuni denies the allegations in Paragraph 104 of the Complaint.

105. Na‘i Aupuni denies the allegations in Paragraph 105 of the Complaint.

Claims Alleging Race-Based Restriction on Candidates

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

106. In response to Paragraph 106 of the Complaint, Na‘i Aupuni repeats and incorporates its prior responses to Paragraphs 1 through 105 of the Complaint.

107. In response to Paragraph 107 of the Complaint, Na‘i Aupuni states that Act 195 speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document. Further answering, in response to Count 5 of the Complaint in which Akina, Makekau, Kent, Mitsui and Gapero allege violations of the Fifteenth Amendment and 42 U.S.C. § 1983 based upon limiting delegate candidates to Native Hawaiians, Na‘i Aupuni states that although its election of delegate process is limited to Native Hawaiian candidates, the election of delegates is not a State election because Na‘i Aupuni is not performing a state function, the State does not control Na‘i Aupuni, and the federal government has authorized the State to assist Native Hawaiians in their self-determination efforts. Accordingly, Na‘i Aupuni’s decision to limit delegate candidates to Native Hawaiians does not violate the Fifteenth Amendment or 42 U.S.C. § 1983.

108. In response to Paragraph 108 of the Complaint, Na‘i Aupuni states that the June 2015 contract between Na‘i Aupuni and Election America, Inc.,

speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document.

109. Na‘i Aupuni denies the allegations in Paragraph 109 of the Complaint.

110. Na‘i Aupuni denies the allegations in Paragraph 110 of the Complaint.

111. Na‘i Aupuni denies the allegations in Paragraph 111 of the Complaint.

112. Na‘i Aupuni denies the allegations in Paragraph 112 of the Complaint.

COUNT 6: Violation of Section 2 of the Voting Rights

113. In response to Paragraph 113 of the Complaint, Na‘i Aupuni repeats and incorporates its prior responses to Paragraphs 1 through 112 of the Complaint.

114. Na‘i Aupuni denies the allegations in Paragraph 114 of the Complaint. Further answering, in response to Count 6 of the Complaint in which Plaintiffs allege violations of Section 2 of the Voting Rights Act based upon limiting delegate candidates to Native Hawaiians, Na‘i Aupuni states that although its election of delegate process is limited to Native Hawaiian candidates, the election of delegates is not a State election because Na‘i Aupuni is not performing a state function, the State does not control Na‘i Aupuni, and the federal government has authorized the State to assist Native Hawaiians in their self-determination efforts. Accordingly, Na‘i Aupuni’s decision to limit delegate candidates to Native Hawaiians does not violate Section 2 of the Voting Rights Act.

115. Na‘i Aupuni denies the allegations in Paragraph 115 of the Complaint.

116. Na‘i Aupuni denies the allegations in Paragraph 116 of the Complaint.

Claims Alleging Race-Based Restriction on Candidates

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

117. In response to Paragraph 117 of the Complaint, Na‘i Aupuni repeats and incorporates its prior responses to Paragraphs 1 through 116 of the Complaint.

118. In response to Paragraph 118 of the Complaint, Na‘i Aupuni states that Declaration Two speaks for itself, and therefore Na‘i Aupuni denies the allegations contained therein to the extent that such allegations are inconsistent with, not included in, or quoted out of context in said document. Further answering, in response to Count 7 of the Complaint in which Kent and Mitsui allege violations of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 based upon the Roll’s Declaration Two, Na‘i Aupuni states that although the Roll’s process requires an attestation of Declaration Two, OHA’s Hawaiian Registry process does not have this requirement, see <http://www.oha.org/registry>.

119. In response to Paragraph 119 of the Complaint, Na‘i Aupuni is without knowledge or information sufficient to form a belief as to the truth of the allegations and on that basis denies them.

120. Na‘i Aupuni denies the allegations in Paragraph 120 of the Complaint.

121. Na‘i Aupuni denies the allegations in Paragraph 121 of the Complaint.

122. Na‘i Aupuni denies the allegations in Paragraph 122 of the Complaint.

123. Na‘i Aupuni denies the allegations in Paragraph 123 of the Complaint.

Claims Alleging Race-Based Restriction on Candidates

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

124. In response to Paragraph 124 of the Complaint, Na‘i Aupuni repeats and incorporates its prior responses to Paragraphs 1 through 123 of the Complaint.

125. Na‘i Aupuni denies the allegations in Paragraph 125 of the Complaint. Further answering, in response to Count 8 of the Complaint in which Plaintiffs allege violations of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 based upon the Roll’s Declarations One, Two and Three, Na‘i Aupuni states that although its election of delegates and convention process is limited to voters and delegates who are Native Hawaiian, the election of delegates is not a State election because Na‘i Aupuni is not performing a state function, the State does not control Na‘i Aupuni, and the federal government has authorized the State to assist Native Hawaiians in their self-determination efforts. Accordingly, limiting delegate candidates to Native Hawaiians does not violate the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. Further responding, neither the Roll nor OHA’s Hawaiian Registry require attestation of Declaration

One, and, although the Roll's process requires an attestation of Declaration Two, OHA's Hawaiian Registry process does not.

126. Na'i Aupuni denies the allegations in Paragraph 126 of the Complaint.

127. Na'i Aupuni denies the allegations in Paragraph 127 of the Complaint.

Claims Alleging Compelled Speech by Virtue of Involuntary Registration

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

128. In response to Paragraph 128 of the Complaint, Na'i Aupuni repeats and incorporates its prior responses to Paragraphs 1 through 127 of the Complaint.

129. In response to Paragraph 129 of the Complaint, Na'i Aupuni states that the allegations call for a legal conclusion and, as such, Na'i Aupuni denies the allegations. Further answering, in response to Count 9 of the Complaint in which Gapero and Moniz allege compelled speech by virtue of involuntary registration in violation of the First Amendment and 42 U.S.C. § 1983 based upon the Roll's publication of a list in July 2015 that includes them, Na'i Aupuni states that for in excess of a year, Gapero and Moniz could have and may now remove themselves from the Roll's list by simply informing the Roll that they want to opt-out. Upon information and belief, Na'i Aupuni also states that Gapero and Moniz have been informed by the Roll of their option to opt-out.

130. Na'i Aupuni denies the allegations in Paragraph 130 of the Complaint.

131. Na'i Aupuni denies the allegations in Paragraph 131 of the Complaint.

132. Na‘i Aupuni denies the allegations in Paragraph 132 of the Complaint.

133. Na‘i Aupuni denies the allegations in Paragraph 133 of the Complaint.

134. Na‘i Aupuni denies the allegations in Paragraph 134 of the Complaint.

135. Na‘i Aupuni denies the allegations in Paragraph 135 of the Complaint.

136. Na‘i Aupuni denies the allegations in Paragraph 136 of the Complaint.

137. Na‘i Aupuni denies the allegations in Paragraph 137 of the Complaint.

PRAYER FOR RELIEF

138. Na‘i Aupuni denies the allegations contained in the “Prayer for Relief” and “WHEREFORE” clause following Paragraph 137 of the Complaint.

Further answering, Na‘i Aupuni denies that Plaintiffs are entitled to any relief sought.

139. All allegations, statements, or comments, as set forth in headings or any unnumbered paragraphs of the Complaint, are denied.

140. Each and every other allegation not heretofore specifically answered is denied.

AFFIRMATIVE DEFENSES

1. The Complaint, and each purported claim alleged therein, fails to state a claim against Na‘i Aupuni upon which relief can be granted.

2. For the reasons stated above, Plaintiffs have not sustained their burden of establishing the likelihood of prevailing on the merits to be entitled to injunctive relief.

3. Plaintiffs have not sustained their burden of establishing the requisite irreparable harm to be entitled to injunctive relief because: (1) the Constitution and the Voter Rights Act do not entitle non-Native Hawaiian Plaintiffs to participate in a Native Hawaiian self-determination election akin to a tribal election; (2) Native Hawaiian Plaintiffs may participate in Na‘i Aupuni’s process as voters and delegate candidates without attesting to Declaration One; (3) Native Hawaiian Plaintiffs may opt-out of the Roll process at any time; and (4) Native Hawaiian Plaintiffs who believe that non-Native Hawaiians should be entitled to membership in any Native Hawaiian governing entity or that there is no need for Native Hawaiian governing entity may vote for like-minded delegates or become a delegate candidate.

4. Plaintiffs have not sustained their burden of establishing the requisite balance of the relative hardships in their favor to be entitled to injunctive relief because any harm to Plaintiffs is less than the continued harm Native Hawaiians have suffered from lack of self-governance since the overthrow, see 1993 Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993); U.S. Dep’t of Justice & U.S. Dep’t of the Interior, *From Mauka to Makai: The River of Justice Must Flow*

Freely (Oct. 23, 2000), available at <https://www.doi.gov/sites/doi.gov/files/migrated/ohr/library/upload/Mauka-to-Makai-Report-2.pdf>; Act 195.

5. Plaintiffs have not sustained their burden of establishing the requisite public interest in its position to be entitled to injunctive relief as demonstrated by the State of Hawaii's passage Act 195, the fact that the Roll certified over 95,000 Native Hawaiians in July 2015, and that the Department of the Interior is currently moving forward with rule-making to support Native Hawaiian self-determination.

6. Assuming *arguendo* that Act 195 is deemed to have violated Plaintiffs' constitutional and/or Voter Rights Act rights, Plaintiffs are not entitled to injunctive or declaratory rights against Na'i Aupuni because it is not a state actor given that Na'i Aupuni's election of delegates is not a State election and the State does not control Na'i Aupuni.

7. Plaintiffs lack standing to assert some or all of the claims set forth in the Complaint.

8. Some or all of Plaintiffs' claims are not ripe for review and/or adjudication.

9. Plaintiffs' requested relief would violate the political question doctrine.

10. One or more abstention doctrines preclude a determination of this matter.

11. Plaintiffs' request for equitable relief and declaratory is barred by the laches.

12. The U.S. Department of Interior's current rule-making process will likely result in a federal regulation later this year, but before any delegate organic documents can be ratified that specifically authorizes Act 195.

13. Under the circumstances noted above, the Court should refuse to exercise its judicial power and thus reject Plaintiffs' request for declaratory relief. Wilton v. Seven Falls Co., 515 U.S. 277, 286-87 (1995).

14. Na'i Aupuni hereby reserves all rights to bring and assert further defenses, claims, and counter-claims, as discovery and the evidence may merit, and also reserve the right to name additional parties to this action. Furthermore, by alleging the above defenses separately and additionally, Na'i Aupuni intends no alteration of the burden of proof and/or burden of going forward with evidence which otherwise exists with respect to any particular issues at law or in equity. All such defenses are pled in the alternative and do not constitute an admission of liability or that the Plaintiffs are entitled to any relief whatsoever.

15. Na'i Aupuni gives notice that it intends to rely upon any other matter constituting an avoidance or affirmative defense as set forth in Rule 8(c) of the Federal Rules of Civil Procedure, and that it intends to seek leave to amend its

answer to allege those defenses of which it may become aware during the course of discovery or trial of this action.

WHEREFORE, Na‘i Aupuni prays for relief as follows:

1. That Plaintiffs take nothing by this action;
2. That judgment be entered against Plaintiffs and in favor of Na‘i Aupuni;
3. That Na‘i Aupuni be awarded its costs incurred in this action, including, where applicable under the law, reasonable attorneys’ fees; and
4. That this Court grant such other relief as the Court deems just and proper.

DATED: Honolulu, Hawai‘i, September 15, 2015.

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THE AKAMAI FOUNDATION and
NA‘I AUPUNI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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

Plaintiffs,

vs.

THE STATE OF HAWAII;
GOVERNOR DAVID Y. IGE, in his
official capacity; ROBERT K. LINDSEY
JR., Chairperson, Board of Trustees,
Office of Hawaiian Affairs, in his official
capacity; COLETTE Y. MACHADO,
PETER APO, HAUNANI APOLIONA,
ROWENA M.N. AKANA, JOHN D.
WAIHE'E IV, CARMEN HULU
LINDSEY, DAN AHUNA,
LEINA'ALA AHU ISA, Trustees,
Office of Hawaiian Affairs, in their
official capacities; KAMANA'OPONO
CRABBE, Chief Executive Officer,
Office of Hawaiian Affairs, in his official
Capacity; JOHN D. WAIHE'E III,
Chairman, Native Hawaiian Roll
Commission, in his official
Capacity; NĀ'ĀLEHU ANTHONY,
LEI KIHUI, ROBIN DANNER,
MĀHEALANI WENDT,
Commissioners, Native Hawaiian Roll
Commission, in their official capacities;
CLYDE W. NĀMU'O, Executive
Director, Native Hawaiian Roll
Commission, in his official capacity;
THE AKAMAI FOUNDATION; and

CIVIL NO. 15-00322 JMS-BMK

CERTIFICATE OF SERVICE

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

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date noted below, a true and correct copy of the foregoing document was duly served upon the following parties by the method of service indicated below at their last known address:

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DATED: Honolulu, Hawai‘i, September 15, 2015.

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Keli‘i Akina, et al. vs. The State of Hawaii, et al., Civil No. 15-00322 JMS-BMK;
CERTIFICATE OF SERVICE [DEFENDANT NA‘I AUPUNI’S ANSWER TO
COMPLAINT FILED AUGUST 13, 2015]