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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KELI'I AKINA, KEALII) CIVIL NO. 15-00322JMS-BMK
MAKEKAU, JOSEPH KENT,)
YOSHIMASA SEAN MITSUI,) Honolulu, Hawaii
PEDRO KANA'E GAPERO, and) September 29, 2015
MELISSA LEINA'ALA MONIZ,) 10:05 a.m.

Plaintiffs,) STATUS CONFERENCE

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; NA'ALEHU ANTHONY,)
LEI KIHUI, ROBIN DANNER,)
MAHEALANI WENDT,)
Commissioners, Native)
Hawaiian Roll Commission,)
in their official)
capacities; CLYDE W.)
NAMU'O, Executive Director,)
Native Hawaiian Roll)
Commission, in his official)
capacity; THE AKAMAI)

1 FOUNDATION; and THE NA'I)
 2 AUPUNI FOUNDATION; and DOE)
 3 DEFENDANTS 1-50,)
 4 Defendants.)

5 TRANSCRIPT OF PROCEEDINGS
 6 BEFORE THE HONORABLE J. MICHAEL SEABRIGHT,
 7 UNITED STATES DISTRICT JUDGE

8 APPEARANCES:

9 For the Plaintiffs: MICHAEL A. LILLY, ESQ.
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 (By telephone)

12 LAUREN M. BURKE, ESQ.
 (By telephone)

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 (By telephone)

14 Judicial Watch, Inc.
 425 Third Street, SW
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16 H. CHRISTOPHER COATES, ESQ.
 17 (By telephone)
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 21 Foundation: 745 Fort Street, Suite 800
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 23 For Defendant Na'i DAVID J. MINKIN, ESQ.
 Aupuni: Mccorrison Miller Mukai Mackinnon
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1 APPEARANCES (Cont'd.):

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6 For the State DONNA H. KALAMA, ESQ.
7 Defendants: GIRARD D. LAU, ESQ.
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11 For Intervenor- WALTER R. SCHOETTLE, ESQ.
12 Defendants Samuel L. Walter R. Schoettle, a Law Corp.
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20 Official Court Cynthia Fazio, RMR, CRR
21 Reporter: United States District Court
P.O. Box 50131
22 Honolulu, Hawaii 96850

23

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25 Proceedings recorded by machine shorthand, transcript produced
with computer-aided transcription (CAT).

1 TUESDAY, SEPTEMBER 29, 2015 10:26 A.M.

2 THE CLERK: Civil Number 15-322JMS-BMK, Keli'i Akina,
3 et al. versus The State of Hawaii, et al.

4 This case has been called for a status conference.

5 Counsel, please make your appearances for the record.

6 MR. LILLY: Good morning, Your Honor. Michael Lilly
7 representing plaintiffs.

8 THE COURT: Yes, good morning and I guess welcome back
9 from Europe. You were gone for a while.

10 MR. LILLY: It's great to be back.

11 THE COURT: All right. Okay.

12 MR. LILLY: And I have two co-counsel.

13 THE COURT: Oh, yes. Okay. So who is by phone then?

14 MR. POPPER: Your Honor, this is Robert Popper for
15 plaintiffs. I'm here with Lauren Burke, Chris Fedeli, and Eric
16 Lee from our office.

17 THE COURT: All right. Yes. Good morning Honolulu
18 time to you.

19 MR. COATES: Your Honor, this is --

20 MR. MEHEULA: Good morning, Your Honor. Bill
21 Meheula --

22 MR. COATES: -- Christopher Coates and I'm one of the
23 attorneys for the plaintiffs in Charleston, South Carolina.

24 THE COURT: All right. Yes. Again, good morning
25 Honolulu time to you.

1 All right. Mr. Meheula.

2 MR. MEHEULA: Good morning. Bill Meheula and David
3 Minkin for Na'i Aupuni. And I'm also here for Akamai
4 Foundation.

5 THE COURT: Okay.

6 MR. KLEIN: Good morning, Your Honor. Robert Klein
7 representing OHA and the OHA defendants.

8 THE COURT: Yes, good morning.

9 MR. KLEIN: Morning.

10 MS. KALAMA: Good morning, Your Honor. Donna Kalama
11 and Girard Lau for the State defendants.

12 THE COURT: All right.

13 MR. SCHOETTLE: Good morning, Your Honor. Walter
14 Schoettle for the proposed intervenor defendants.

15 THE COURT: Yes. And Mr. Minkin, you've been
16 introduced already I suppose.

17 MR. MINKIN: I will save the words.

18 THE COURT: All right. So, here's the deal: We have
19 people by phone, so we need to use the mikes. It's very
20 important we use the mikes. We have a limited number, so
21 please sort of pass those around as we have our discussion this
22 morning. You can stay seated. This can be informal as far as
23 our discussion back and forth here this morning.

24 First of all, thank you all for coming on short
25 notice. I appreciate that. I think it was just yesterday

1 morning I put the call out to try to get together today. And I
2 wanted to do that and I wanted to do it as soon as I possibly
3 could because of Mr. Schoettle's Motion to Intervene that was
4 filed on the 25th. I learned of it the morning of the 26th
5 when I went through the -- every morning I go through what was
6 filed the day before. And so I saw it for the first time in
7 the morning of the 26th. And then he has filed as well a
8 joinder in the Motion for Preliminary Injunction.

9 So I wanted to sort of share some of my preliminary
10 thoughts and hear from you folks as to this.

11 As to the Motion to Intervene in general, I want to
12 break it down into two different parts. One is, what do we do
13 with the Motion to Intervene in relation to the preliminary
14 injunction, which is coming up fast and there's briefing that's
15 due and so forth. And we're more than halfway through that
16 process as far as briefing because the oppositions are due
17 tomorrow, I believe, and the reply on the 9th.

18 So there's that question. And then there's the larger
19 question of going forward with the Motion to Intervene. My
20 inclination is just to set forth a briefing schedule on the
21 Motion to Intervene for everything but the preliminary
22 injunction in the normal course. I can hear from people
23 regarding their views on that, if they want to share that with
24 me going forward. And the Ninth Circuit test that
25 Mr. Schoettle has set forth what the test is to intervene as a

1 matter of right or permissibly.

2 I'm more concerned and the reason I wanted to get
3 together this morning was because the Motion for Preliminary
4 Injunction is coming up so soon. And I don't know what sort of
5 intervention Mr. Schoettle is contemplating in relation to that
6 as far as briefing and participation if I were to permit it.

7 So, Mr. Schoettle, I think the right place to start
8 with is with you and have you put forth your views just as to
9 the Motion for Preliminary Injunction at this point in time.

10 MR. SCHOETTLE: Yes, Your Honor. I've done whatever I
11 want to do on the preliminary injunction.

12 THE COURT: So, I mean, but your Motion for Joinder
13 says that you're joining the plaintiffs' motion to prevent the
14 defendants from undertaking voter registration activities and
15 from calling or holding an election pursuant to Chapter 10H
16 upon the grounds that said election is illegal as set forth in
17 your Motion to Intervene. That sets forth a very different
18 basis than the plaintiffs' Motion to Intervene. So that's the
19 problem I have.

20 Now, if you want to file something saying you agree
21 with their arguments of Rice versus Cayetano, fine, I don't --
22 I mean there's nothing new there. That would just be the same
23 arguments that are being made already, it seems to me, and it
24 wouldn't disrupt anything necessarily. But for you to raise
25 new arguments and different arguments, I don't know how I could

1 possibly get the briefing in in time to have a meaningful
2 consideration of that, let alone determine if intervention is
3 appropriate.

4 One of the four elements for intervention is
5 timeliness. And I certainly think I have discretion to look at
6 the timeliness issue separately for the case as a whole going
7 forward and this preliminary injunction. I think that would be
8 very readable on my part to look at those matters separately.

9 To be clear on the time frames here, the complaint was
10 filed on August 13th, the Motion for Preliminary Injunction on
11 the 28th of August. Initially the motion was set on
12 October 26th. As I pointed out in our last conference, after I
13 saw the insert in the Star-Advertiser as to the election dates,
14 in particular when the ballots would be provided, as
15 Mr. Meheula made clear last time, either through Internet
16 voting or through mailings, that that date is coming right up
17 and I was concerned about the timing of the motion based on the
18 dates set forth in the public notice of November 1 when those
19 ballots will go out.

20 So we had a status conference based on a lot of
21 considerations, including counsel's schedules and so forth. We
22 were only to move it up a few days to October 20th. And the
23 reply then is due on the 9th and the opposition, as I said, due
24 tomorrow.

25 So, Mr. Schoettle, let me turn back to you then with

1 that.

2 MR. SCHOETTLE: Well, since my clients aren't parties
3 yet, I don't even think we have a right to participate in the
4 preliminary injunction. I just -- I submitted that document as
5 what our position would be, that's all.

6 THE COURT: All right. So you're okay with me going
7 forward as is with the preliminary injunction. I'm not going
8 to consider your joinder then because you're not a party yet.
9 And I'll set a normal brief -- a briefing schedule I'll put out
10 for any oppositions and reply to the Motion to Intervene; you
11 have no objection to that?

12 MR. SCHOETTLE: I don't think it would do any good to
13 postpone the injunction after the election has begun. I think
14 the injunction needs to go ahead.

15 THE COURT: All right. So your answer to me is you
16 have no objection to that?

17 MR. SCHOETTLE: No objection.

18 THE COURT: All right. Okay. All right. So I think
19 that settles the -- my concern, which was the Motion to
20 Intervene in relation to the upcoming preliminary injunction.
21 Okay?

22 I will put out a schedule. I can tell you what my
23 thoughts were. A response or opposition to the Motion to
24 Intervene by October 30th and then an optional reply a week
25 after that, November 6th. But I'll put out an EO with those

1 dates. Okay?

2 So, that's settled. We're all here, if anyone has
3 anything they want to raise I'm happy to hear it, if there are
4 any -- I see your hand up, Mr. Meheula.

5 MR. MEHEULA: Yes, Your Honor. This is Bill Meheula.
6 You know, at the last status conference the Court asked about
7 whether or not the parties intended to call any witnesses and
8 we said no. About a week after that I sent an e-mail to all
9 counsel, including the plaintiffs' counsel, and said that upon
10 further reflection that if the reply has some declarations in
11 there that we believe we needed to factually address at the
12 hearing, that we reserve the right to consider that.

13 And what I proposed was after the reply came out that
14 all counsel get on a conference call among ourselves and decide
15 whether or not we need to call any witnesses and then contact
16 the Court and -- or the Court's clerk and give them our
17 inclination or our request in that regard.

18 THE COURT: Okay. And the reply is due October 9th
19 and the hearing is the 20th. What I'd prefer if you do call
20 witnesses is that you do their direct by way of declaration, if
21 at all possible. If everyone can agree to that. If you can't
22 then you can't, okay? But you can make an effort. I know it's
23 only 11 days and it may be difficult, but if you can do that.
24 And of course, Mr. Lilly, you would have to agree to that. If
25 everyone will agree to that then I'd prefer to do it that way

1 and then there could just be cross-examination if appropriate.

2 But if you believe I need to judge the credibility of
3 a witness for some reason or something like that, I'm not at
4 all sure that would happen in this case, but if it did, then
5 obviously I'd give you leeway. Just call the witness and let
6 me eyeball the person. Okay?

7 MR. MEHEULA: So if we did want to do some -- like
8 submit another declaration, for example, of direct examination,
9 when would that be due?

10 THE COURT: Well, I'd want it probably at least a
11 couple days before the hearing.

12 MR. MEHEULA: Okay.

13 THE COURT: What day of the week is the hearing?

14 MR. MEHEULA: It's on Tuesday.

15 MR. MINKIN: It's on Tuesday.

16 THE COURT: Tuesday? So maybe like Friday.

17 MR. MEHEULA: Okay.

18 THE COURT: Give me time to review it. Our hearing is
19 at what time on the 20th?

20 MR. MEHEULA: 9:30.

21 MR. MINKIN: 9:30.

22 THE COURT: And are we clear all day, I believe?

23 Okay. So I've put aside sort of a day. I don't
24 expect it to go really that long. Probably we should talk
25 about some time limits on argument. Maybe give -- let's just

1 talk about that. I mean I'd want to put some structure to
2 this, I think, it might be important given the number of
3 parties involved.

4 MR. LILLY: Your Honor, on the issue of these
5 declarations, I'll let Bob Popper weigh in, but it seems to me
6 that --

7 MR. POPPER: Yeah.

8 MR. LILLY: -- if they submit declarations 2 days
9 before the hearing that are in reply to something we --

10 THE COURT: No, no, it's not in reply. That's the
11 direct testimony that would be offered. Then that witness
12 would have to be here for your cross-examination.

13 MR. LILLY: Because we would presumably need --

14 THE COURT: Do you not agree to that, Mr. Lilly? I
15 don't want to waste time here. Do you not agree to that?

16 MR. LILLY: No, I agree with that, but I'll let Bob do
17 it, but we may need to respond to -- we need some --

18 THE COURT: That's what cross-examination is. The
19 witness has to be here for cross-examination.

20 MR. LILLY: Okay.

21 THE COURT: Okay?

22 MR. LILLY: But we may have a witness --

23 THE COURT: I'm not going to open up new evidence. It
24 would be only declarations that are responsive to your
25 evidence, okay?

1 MR. LILLY: Okay.

2 THE COURT: If you don't agree --

3 MR. POPPER: Your Honor, if I may, this is --

4 THE COURT: Yes.

5 MR. POPPER: -- this is Bob Popper. In addition to --
6 there was -- there were communications between counsel in which
7 we indicated that notwithstanding the fact that we all said,
8 and plaintiffs included, that we didn't anticipate calling
9 witnesses, that we all, plaintiffs included, reserved the right
10 to. And while no one has yet identified a single witness who
11 will fall in this category, it may happen. And the plaintiffs
12 just would like to make sure that in the event that we receive
13 something in the papers tomorrow that suggests to us that we
14 need either to cross-examine someone or to call a direct
15 witness, you know, notwithstanding our preference to do
16 everything on the papers.

17 THE COURT: I'm not -- I'm not --

18 MR. POPPER: We also have the --

19 THE COURT: Just stop. Because I haven't precluded
20 anyone from calling anybody. Let me be clear. Okay. You can
21 call witnesses. I have a whole day set aside. If you want to
22 call a witness, call a witness. It's a preliminary injunction
23 hearing, you have a right to do so.

24 I'm saying if you can do it, I'd rather have direct
25 testimony by way of declaration. That's all I'm saying.

1 Nothing more, nothing less. Okay?

2 So we're done with witnesses. All right. Anything
3 else?

4 MR. POPPER: Yes, Your Honor.

5 THE COURT: How much -- as far as time for argument,
6 Mr. Lilly, a half hour on your side, 40 minutes?

7 MR. LILLY: Mr. Popper?

8 MR. POPPER: Your Honor, I would suggest 40 minutes,
9 ten for rebuttal.

10 THE COURT: Okay. So 30 minutes, ten for rebuttal and
11 then on the defense side how do you want to set it up,
12 30 minutes?

13 MR. MEHEULA: I think three of us are going to argue
14 from this side.

15 THE COURT: So if I give you an hour total does that
16 work?

17 MR. MEHEULA: Yeah, that would be great.

18 THE COURT: Okay? And can sort of split that up how
19 you want. All right?

20 MR. POPPER: Your Honor, this is Robert Popper. Could
21 I go 40/20?

22 THE COURT: I'll give you 30/10. And then I'm going
23 to give -- because there are three defendants, I'm going to
24 give them 60 altogether. Now, if I think more time would be
25 helpful I'm going to give you more time. All right. This

1 isn't going to be a -- this is a general rule to help you
2 prepare when we come in and to have some structure to the
3 argument, but I will be flexible. Okay?

4 MR. POPPER: Understood.

5 THE COURT: And, Mr. Popper, who's going to be
6 organizing this? Are you coming in?

7 MR. POPPER: I'm going to be coming in to argue it,
8 Your Honor.

9 THE COURT: All right. Because I want to make clear,
10 for this argument I will not permit that by phone. It is too
11 important and necessary for you to be here. All right.

12 Anything else then?

13 MR. MINKIN: Just a point of housekeeping. I would
14 assume the Court will want the declarations by the close of
15 business not late night filings that surprise you on Saturday
16 or Sunday?

17 THE COURT: You know, I -- I'm -- I won't be surprised
18 by anything, Mr. Minkin. So it doesn't really matter to me.
19 Just when I say Friday, under our rules now that means
20 midnight. If you folks rather have a 5 p.m. deadline just to
21 have it, I'm happy to put a 5 p.m. deadline on it.

22 All right. People are shaking their heads "yes." So
23 we'll say 5 p.m. Okay?

24 And that would be for both sides. If you intend to
25 call a witness, I'd prefer the direct examination be by

1 declaration, if you -- if you feel you can do that fairly. If
2 not, then just call the witness. Okay? It's that simple.

3 Anything else from anyone, housekeeping or otherwise?

4 MR. POPPER: Nothing from the plaintiffs, Your Honor.

5 THE COURT: No?

6 MR. MEHEULA: No.

7 THE COURT: All right. Thank you all very much.

8 MR. LILLY: Thank you, Judge.

9 MR. POPPER: Thank you.

10 (The proceedings concluded at 10:20 a.m.,
11 September 29, 2015.)

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COURT REPORTER'S CERTIFICATE

I, CYNTHIA FAZIO, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. §753 the foregoing pages is a complete, true, and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, October 16, 2015.

 /s/ Cynthia Fazio
CYNTHIA FAZIO, RMR, CRR