No. 15A551

IN THE SUPREME COURT OF THE UNITED STATES

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KELI'I AKINA, ET AL., APPLICANTS

v.

STATE OF HAWAII, ET AL.

_____

ON MOTION FOR CIVIL CONTEMPT

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MEMORANDUM FOR THE STATE OF HAWAI'I AND OFFICE OF HAWAIIAN AFFAIRS RESPONDENTS IN OPPOSITION TO MOTION FOR CIVIL CONTEMPT

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1. Applicants' motion for contempt is plainly improper as to the State of Hawai'i and Office of Hawaiian Affairs respondents because it contains no allegations of any conduct by them at all, much less conduct that violates this Court's injunction pending appeal (which prohibits "counting the ballots cast in, and certifying the winners of," a now-canceled election). As these respondents informed applicants before the filing of this motion, it was Na'i Aupuni that decided to cancel the election it was conducting, and it is Na'i Aupuni that is now organizing a meeting at which Native Hawaiians will gather to discuss issues relating to self-governance. Despite those communications, and without any evidence that these respondents engaged in conduct violating this Court's injunction, applicants nevertheless moved for contempt against these respondents -- in a brazen effort to lump these respondents together with Na'i Aupuni in support of sinister allegations of a "long pattern of recalcitrance" dating back to Rice v. Cayetano, 528 U.S. 495 (2000). But it should go without saying that a party "cannot be held vicariously in contempt." Federal Trade Commission v. Kuykendall, 371 F.3d 745, 759 (10th Cir. 2004).

2. Even if applicants had alleged (and could validly allege) that these respondents took any of the challenged actions, their motion would still be improper. That is for the simple reason that, while this Court enjoined respondents from "counting the ballots cast in, and certifying the winners of, the election described in the application," Na'i Aupuni did not do either of those things. Faced with a time- and resource-

consuming challenge to its election and corresponding loss of momentum in the self-governance process, Na‘i Aupuni decided simply to cancel the election and to invite to the meeting all of the candidates (regardless of whether they would have been "certified" as "winners" if the election had been completed and the ballots counted). Applicants must show that Na‘i Aupuni's conduct contravenes the specific terms of the injunction. See Fed. R. Civ. P. 65(d); Schmidt v. Lessard, 414 U.S. 473, 476 (1974); 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2955, at 351 (3d ed. 2015). Here, Na‘i Aupuni's conduct did not contravene the injunction at all.

3. Applicants appear to be challenging Na‘i Aupuni's decision to invite the candidates from the now-canceled election to attend a meeting at which Native Hawaiians will gather to discuss issues relating to self-governance. But although Na‘i Aupuni has long contemplated that a meeting would occur, applicants have not sought to enjoin the holding of the meeting (as opposed to the now-canceled election leading up to it), whether in their initial motion for a preliminary injunction or in their applications for injunctions pending appeal in the Ninth Circuit or before this Court.

And that is for good reason. Whereas applicants challenged the now-canceled election primarily on Fifteenth Amendment grounds, applicants would have to argue that Na‘i Aupuni's decision to hold a meeting at which Native Hawaiians will gather to discuss issues relating to self-governance violates the Fourteenth Amendment (since the Fifteenth Amendment, which protects

only the "right * * * to vote," is now inapposite). And applicants would have to make that argument even though anyone else could extend exactly the same invitation, to the same individuals, to attend a private meeting to discuss the same issues; even though applicants conceded below that the mere fact that Na'i Aupuni has received funding from the Office of Hawaiian Affairs is insufficient to give rise to state action; and even though an injunction against such quintessentially expressive activity would raise serious First Amendment concerns.

4. If applicants really wish to try to enjoin Na'i Aupuni from holding its meeting in the teeth of those obvious difficulties, the proper forum for doing so is the district court. It speaks volumes that applicants are attempting to obtain injunctive relief in this Court that they have not sought below to this day -- much less to do so through the extraordinary mechanism of a motion for contempt of an injunction pending an appeal that, in light of the cancellation of the election, is now likely moot. (In aid of their litigate-in-this-Court-first strategy, applicants have gone so far as to seek repeated extensions of the filing of their brief in the underlying appeal.) This Court is "a court of final review and not first view." Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (citation omitted). The notion that the Court would consider the propriety of injunctive relief in the first instance and in this unorthodox context -- much less to award attorney's fees, order judicial preclearance, and so on -- is simply preposterous.

Respectfully submitted.

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