No. 15A551

In the Supreme Court of the United States

KELIʻI AKINA, ET AL.,

Applicants,

v.

STATE OF HAWAII, ET AL.,

Respondents.

RESPONDENTS NAʻI AUPUNI AND THE AKAMAI FOUNDATION'S OPPOSITION TO APPLICANTS' MOTION FOR CIVIL CONTEMPT

William Meheula
SULLIVAN MEHEULA LEE
A LIMITED LIABILITY LAW PARTNERSHIP
745 Fort Street, Suite 800
Honolulu, Hawaiʻi 96813
(808) 599-9555
meheula@smlhawaii.com

Counsel for Respondents
Naʻi Aupuni and
The Akamai Foundation

David J. Minkin, *Counsel of Record*
Troy J.H. Andrade
MCCORRISTON MILLER MUKAI
MACKINNON LLP
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawaiʻi 96813
(808) 529-7300
minkin@m4law.com
andrade@m4law.com

Counsel for Respondent
Naʻi Aupuni

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RESPONDENTS NA‘I AUPUNI AND THE AKAMAI FOUNDATION’S OPPOSITION TO APPLICANTS’ MOTION FOR CIVIL CONTEMPT

Applicants’ Motion for Civil Contempt fails because it seeks to enforce, through this Court’s power of contempt, terms that do not exist, explicitly or impliedly, in this Court’s injunction. The injunction enjoined Respondents “from counting the ballots cast in, and certifying the winners of, the election described in the application,” pending final disposition of the Applicants’ appeal. Like the injunction itself, all the arguments supporting the motion addressed Applicants’ claim of a violation of their voting rights. After this Court granted the injunction, and even before the deadline for casting ballots, Na‘i Aupuni terminated the election, and it has not counted the ballots or certified any winners of that election. Instead to take advantage of the heightened interest within the Native Hawaiian community generated by the aborted election, Na‘i Aupuni decided to organize an ‘aha,[1] or gathering, of Native Hawaiians who formerly were candidates in the now canceled election, as is their right under the First Amendment. Na‘i Aupuni’s actions are in complete compliance with this Court’s injunction order.

Now, Applicants seek to prevent even this gathering, which the injunction does not remotely preclude. The Motion for Civil Contempt is merely a disguised request for a *new* injunction that Applicants never previously sought from the district court, the Ninth Circuit or this Court. That is why Applicants focus their arguments on Na‘i Aupuni having violated the “spirit” of the Court’s order rather than its actual language. In so doing, Applicants seek to have the Court construe

[1] ‘Aha is defined as a “meeting, assembly, gathering, convention, court, party.” Ulukau Hawaiian Dictionary, *available at* http://wehewehe.org.

its own order in an impermissibly broad manner and to ignore the specific relief actually sought and granted, and Applicants' stated purpose for the specific relief sought. The Court should decline the invitation. With the cancellation of the election, the facts and any remaining legal issues have changed significantly. Applicants should not be permitted to use a contempt motion as a vehicle to have this Court decide those issues in the first instance. The Motion for Civil Contempt should be denied.

BACKGROUND

On August 28, 2015, in the United States District Court for the District of Hawai‘i, Applicants filed a motion for preliminary injunction seeking an order preventing Defendants "from undertaking certain voter registration activities and from calling or holding racially-exclusive elections for Native Hawaiians, as explained in Plaintiffs' Complaint." *See* Application Appendix ("App.") at 6a. By order dated October 29, 2015, the district court denied the motion. *Id.* at 66a.

On October 29, 2015, Applicants filed in the United States Court of Appeals for the Ninth Circuit their Urgent Motion for an Injunction While Appeal is Pending. The motion stated:

> *This motion seeks to stop an unconstitutional, race-based, state-sponsored, Hawaiians-only election.* On November 1, 2015, Defendant Na‘i Aupuni ("NA") will mail out ballots for an election using a registration roll (the "Roll") prepared by two state agencies, Defendants the Office of Hawaiian Affairs ("OHA") and the Native Hawaiian Roll Commission ("NHRC"). At the close of the day on November 30, 2015 - the date on which a decision is respectfully requested for this motion - NA will count all ballots received in that election and certify the results. *Plaintiffs respectfully request that the counting of those ballots be enjoined.*

Id. at 12b (emphasis added). On November 19, 2015, a Ninth Circuit panel denied the motion. *Id*. at 1a-2a.

On November 23, 2015, Applicants filed in this Court an Emergency Application for Injunction Pending Appellate Review ("Application"), which argued:

> Injunctive relief under the All Writs Act is necessary to prevent irreparable harm to Applicants during the appellate process, and to preserve this Court's jurisdiction regarding the issues raised in this case. On Monday, November 30, 2015, this election will end, the votes will be counted, and the winners of the delegates to the constitutional convention will be certified on Tuesday, December 1, 2015. At that time, Applicants Joseph William Kent and Yoshimasa Sean Mitsui, along with several hundred thousand other residents of Hawaii, will forever lose their right to participate in this public policy determination in their State. *See Rice [*v. *Cayetano]*, 528 U.S. [495,] 523 [2000] ("All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others."). *The delegates to the planned convention will have been elected without any input whatsoever from these Applicants. In addition, the results of the election from which these Applicants were excluded will be publicized and touted as an expression of the popular will.*

Application at 3-4 (emphasis added). Applicants thus 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." *Id.* at 4-5.

None of Applicants' prior motions for injunctive relief sought to enjoin a convention or any other gathering, and none of Applicants' prior briefs have challenged any gathering of Native Hawaiian attendees convened by an invitation from Na'i Aupuni, rather than through an election, on any theory.

On December 2, 2015, this Court entered its Order enjoining 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 App. at 427a.

On December 15, 2015, before the scheduled end of the voting period on December 21, 2015, Na'i Aupuni terminated the election. *Id.* at 432a. Na'i Aupuni did not count ballots or certify winners of the election. Moreover, because Na'i Aupuni terminated the election before the end of the voting period, the ballots cannot meaningfully be counted, and winners cannot be certified. Also on December 15, 2015, Na'i Aupuni informed all of the 196 candidates of the election's termination, and announced that all of the candidates who stood for election would be invited to attend an 'aha to be convened in February 2016. *See id.* On December 23, 2015, Na'i Aupuni announced the names of the 152 invitees who had confirmed their intent to participate in the 'aha. *See* Na'i Aupuni List of 152 Participants of February 'Aha, at http://naiaupuni.org/docs/REVISED-aiAupuni152ParticipantList-122315.pdf.

ARGUMENT

Applicants' Motion for Civil Contempt fails because Respondents have engaged in none of the acts specified in this Court's Order granting the temporary injunction. Respondents have also not engaged in any other acts that reasonably could be construed to violate the "spirit" of the Order. Applicants instead seek, through this Court's contempt power, to enforce terms that do not exist in the

injunction, and to obtain relief Applicants never previously sought nor supported with any legal authority.

I. Na‘i Aupuni’s Actions Fully Comply With the Order’s Terms.

As Applicants come close to conceding, Na‘i Aupuni has not violated the specific terms of this Court’s injunction. By those specific terms, the injunction prohibits Respondents only from “counting the ballots cast in, and certifying the winners of, the election.” Neither Na‘i Aupuni nor the other respondents have engaged in that prohibited conduct. Instead, to avoid the delay, draining of resources, and loss of organizational momentum that would result from continued litigation over the election, Na‘i Aupuni chose to *terminate* the very election Applicants challenged. Na‘i Aupuni has not counted the votes and, because it terminated the election prior to the end of the voting period, it cannot meaningfully count the votes. And, because the votes have not been and cannot be counted, winners of the election have not been and cannot be certified.[2]

Na‘i Aupuni’s decision to convene and facilitate an ‘aha by inviting the individuals who previously sought to be delegates does not render those persons “winners” of anything, much less of the “election described in the application.” There can be no winners of a contested election that was terminated and never completed. The individuals who previously stood for election (including that unknown set who received the fewest votes in the ballots cast to date) are now invitees of Na‘i Aupuni who will meet to more broadly discuss a *path* forward

[2] Indeed, Na‘i Aupuni never even had a process for “certifying” delegates. Applicants borrowed this terminology, with no citation to the record, from cases and statutes discussing actual state-run elections.

regarding self-governance, including whether and how Native Hawaiians might organize and, if so, whether an election of delegates and a constitutional convention should be planned, or to prepare, if the attendees so choose, a constitution and other documents that may be used to seek state or federal recognition.[3]

There is no colorable argument that this change of plan violates this Court's order, and it certainly does not warrant a finding of contempt. A party commits contempt when it "violates a definite and specific order of the court requiring [it] to perform or refrain from performing a particular act or acts." *Hornbeck Offshore Servs., L.L.C.* v. *Salazar*, 713 F.3d 787, 792 (5th Cir. 2013) (quoting *Travelhost, Inc.* v. *Blandford*, 68 F.3d 958, 961 (5th Cir. 1995)).

Rule 65(d) of the Federal Rules of Civil Procedure, governing injunctions, reflects the requirement that an injunction clearly and specifically state the restrained conduct so that it is clear to the enjoined party what conduct is forbidden. The rule states:

> (1) Contents. Every order granting an injunction and every restraining order must:
>
> (A) state the reasons why it issued;
>
> (B) state its terms specifically; and
>
> (C) describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required.

[3] Even if, however, the 'aha results in a constitution of a Native Hawaiian governing entity, and even if such a constitution is ratified, the resulting self-governing entity can have no official legal status unless it is otherwise recognized by the state or federal government. App. at 40a.

Rule 65(d) "embodies the elementary due process requirement of notice." *United States Steel Corp.* v. *United Mine Workers of America*, 519 F.2d 1236, 1246 (5th Cir. 1975). The rule's "requirement of specificity and reasonable detail, based in part on notions of basic fairness, ensures that individuals against whom an injunction is directed receive explicit notice of the precise conduct that is outlawed. *Ala. Nursing Home Ass'n.* v. *Harris*, 617 F.2d 385, 387-88 (5th Cir. 1980) (citing *Marshall* v. *United States*, 414 U.S. 473, 476 (1974); *Gunn* v. *Univ. Committee to End the War in Viet Nam*, 399 U.S. 383, 388 (1970); *Int'l Longshoremen's Ass'n Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 74-76 (1967)); *see also Schmidt* v. *Lessard*, 414 U.S. 473, 476 (1974) ("[B]asic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed."). The rule requires a court to "frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid." *Int'l Longshoremen's Ass'n.*, 389 U.S. at 76. This requirement is not one to cast aside lightly, for "Rule 65(d) is no mere extract from a manual of procedural practice. It is a page from the book of liberty." *H.K. Porter Co., Inc.* v. *Nat'l Friction Prods.*, 568 F.2d 24, 27 (7th Cir. 1977) ("Because of the risks of contempt proceedings, civil or criminal, paramount interests of liberty and due process make it indispensable for the [court] to speak clearly, explicitly, and specifically if violation of [its] direction is to subject a litigant . . . to coercive or penal measures . . . ."). Rule 65(d)'s requirements are therefore "mandatory and must be observed in every instance." *Alberti* v. *Cruise*, 383 F.2d 268, 271-72 (4th Cir. 1967). Accordingly, a "definite and specific order" requiring a

party to "perform or refrain from performing a particular act or acts" is a threshold requirement to a finding of contempt.

To obtain an order of civil contempt, the moving party must prove, and the court must find, by clear and convincing evidence, that the accused party violated a definite and specific order of the court requiring it to perform or refrain from performing a particular act. *Hornbeck,* 713 F.3d at 792 (citing *Travelhost*, 68 F.3d at 961); *see also S. New England Tel. Co.* v. *Global NAPs Inc.*, 624 F.3d 123, 145 (2d Cir. 2010) (contempt for violating court order is appropriate only where order is "clear and unambiguous," and the "proof of non-compliance is clear and convincing"); *United States* v. *Saccoccia*, 433 F.3d 19, 31 (1st Cir. 2005) (In seeking an order of contempt, "the government had the burden of proof to show, by clear and convincing evidence, that the [conduct] fell within the list of activities expressly forbidden by the Order."). "In determining whether a particular act falls within the scope of an injunction's prohibition, particular emphasis must be given to the express terms of the order. An injunction does not prohibit those acts that are not within its terms as reasonably construed." *Ala. Nursing Home Ass'n*, 617 F.2d at 388 (citing *Sierra Club* v. *Callaway*, 499 F.2d 982, 991 (5th Cir. 1974)). Any "ambiguities and omissions in orders redound to the benefit of the person charged with contempt." *Ford* v. *Kammerer*, 450 F.2d 279, 280 (3d Cir. 1971).

Here, the Order, which enjoins "counting the ballots cast in, and certifying the winners of, the election," could not reasonably have put Respondents on notice that terminating the election and instead facilitating a meeting of participants, who

were neither elected nor certified as winners of an election, would violate the Order. Accordingly, Na‘i Aupuni has not violated the terms of the Order, and the Motion for Civil Contempt should be denied.

II. Applicants Misstate the Standard in Arguing that Na‘i Aupuni Violated the “Spirit” of the Order.

A. Applicants Misstate the Applicable Standard.

Applicants come close to conceding that Na‘i Aupuni has not violated the letter of the Order, and so dedicate much of their motion to asking the Court to hold Na‘i Aupuni in contempt for violating the “spirit” of the Court’s Order. But Applicants cite no authority for the proposition that the “spirit” of an order, as distinct from its express terms, can be sufficiently “definite and specific” so as to form the basis for a contempt order. *Cf. Test Masters Educ. Servs.* v. *Robin Singh Educ. Servs.*, 799 F.3d 437, 454 (5th Cir. 2015); *Hornbeck*, 713 F.3d at 792; Motion for Civil Contempt at 8 (reciting the “definite and specific” standard).

This Court has cautioned that an injunctive order is an extraordinary writ, enforceable by the power of contempt, which is a “potent weapon.” *Gunn*, 399 U.S. at 389 (citing *Int’l Longshoremen’s Ass’n*, 389 U.S. at 74). Given the potency of this power, specificity in the terms of decrees “is a predicate to a finding of contempt . . . because ‘a person will not be held in contempt . . . unless the order has given him fair warning.’” *Harris* v. *City of Philadelphia*, 47 F.3d 1342, 1349 (3d Cir. 1995) (citing *Inmates of the Allegheny County Jail* v. *Wecht*, 754 F.2d 120, 129 (3d Cir. 1985), and quoting in part *United States* v. *Christie Indus., Inc.*, 465 F.2d 1002, 1006 (3d Cir. 1972)). “This is reflected in the requirement of [Rule] 65(d) that an

injunction 'shall be specific in terms,' and shall describe 'in reasonable detail' the act or acts sought to be restrained." *Id.*

When an order of contempt "is founded upon a decree too vague to be understood, it can be a deadly one." *Gunn,* 399 U.S. at 389 (quoting *Int'l Longshoremen's Ass'n*, 389 U.S. at 76). Through Rule 65(d), "Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid." *Gunn,* 399 U.S. at 389 (quoting *Int'l Longshoremen's Ass'n*, 389 U.S. at 76). "[P]ersons may not be placed at risk of contempt unless they have been given specific notice of the norm to which they must pattern their conduct." *Harris*, 47 F.3d at 1349 (citing *Int'l Longshoremen's Ass'n*, 389 U.S. at 76); *see also id.* at 1352 (reversing part of a contempt finding because consent decree did not contain "an unambiguous provision" requiring the conduct forming the basis of the contempt allegation). "Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt*, 414 U.S. at 476.

Conversely, prohibited conduct will not be implied from an injunction. An injunction "need be obeyed only to the extent it reasonably specifies the conduct prohibited. *Ford*, 450 F.2d at 280. The language of Rule 65(d) "strongly suggests that *prohibited conduct will not be implied from [injunction] orders; that they are binding only to the extent they contain sufficient description of the prohibited or mandated acts*." *Id.* (emphasis added); *see also Gilday* v. *Dubois*, 124 F.3d 277, 282

(1st Cir. 1997) (The party enjoined "must be able to ascertain from the four corners of the order precisely what acts are forbidden."). "The long-standing, salutary rule in contempt cases is that ambiguities and omissions in orders redound to the benefit of the person charged with contempt." *Ford*, 450 F.2d at 280 (reversing order of contempt because, although court's written findings reflected its view that unions' summary punishment violated a statute, the order contained no prohibitory language explicitly addressing summary punishment).

None of the cases Applicants cite stand for the proposition that contempt may be found where a party violates only the unstated "spirit" of an injunction. Applicants cite *Vicksburg* v. *Henson*, 231 U.S. 259, 269 (1913), *see* Motion for Civil Contempt at 12, but that case involved interpretation of a decree, not a motion for contempt. Moreover, in holding that the decree was "to be construed with reference to the issues it was meant to decide," this Court ruled that lower court had thus construed the decree *too broadly*. *Vicksburg*, 231 U.S. at 273-74.

McComb v. *Jacksonville Paper Co.*, 336 U.S. 187, 189 (1949), cited in the Motion for Civil Contempt at 11-12, is also inapposite. The order at issue there enjoined the respondents generally from violating provisions of the Fair Labor Standards Act dealing with minimum wages, overtime, and recordkeeping by reference to the specific statutory provisions at issue. 336 U.S. at 191-92. The Court held that "[d]ecrees of that generality are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown," and that respondents' "record of continuing and persistent violations of the Act would

indicate that that kind of a decree was wholly warranted." *Id.* Here, by contrast, the Order did not enjoin conduct by general reference to specific statutes or by reference to anything else.

John B. Stetson Co. v. *Stephen L. Stetson Co.*, 128 F.2d 981 (2d Cir. 1942), simply is inapposite primarily because the court held the respondent breached the injunction "according to its strict letter." 128 F.2d at 983. The injunction required the defendant to include a notice, "always visible when the name 'Stephen L. Stetson' is visible," to differentiate its merchandise from the plaintiff's. *Id.* But the court found that in some instances, defendant's notice was not "'reasonably legible' even at the minimum distance." *Id.* In invoking the "spirit" of the injunction, the court there simply considered whether the defendant had achieved the degree of "visibility" necessary to comply with the actual terms of the court's order. *Id.* at 983-84.

To the extent the Motion for Civil Contempt rests on the theory that the Court may order contempt for violating an unstated, amorphous "spirit" of its Order, the motion fails as a matter of law.

B. Na‘i Aupuni's Termination of the Election Was a Reasoned Response Simply to Obviate Applicants' Challenge.

Despite the aspersions that Applicants repeatedly cast on Na‘i Aupuni's motivations for canceling the election (which, in any event, are irrelevant), Na‘i Aupuni's termination of the election was not intended to thwart or violate this Court's order—either its words or its "spirit." That decision instead marked a change of course to avoid further delay in its organizational efforts, and to move

forward with organizing a gathering of Native Hawaiians without engaging *at all* in the conduct that Applicants were challenging. This was a reasonable choice given the delay the litigation had created, and to avoid a loss of momentum in the process of fostering a discussion among Native Hawaiians on the question of self-governance.

One of the most difficult obstacles to organizing Native Hawaiians is that there are over 180,000 Native Hawaiian adults who reside in Hawai‘i and Native Hawaiians have been without an organized government since the Hawaiian Kingdom was overthrown in 1893. *See generally* S.B. 1520, 26th Leg., Reg. Session (2011), *available at* http://www.capitol.hawaii.gov/session2011/bills/GM1299_.PDF. Thus, identifying an initial group that can create a procedural path to re-organizing Native Hawaiians is akin to the chicken and egg dilemma. Na‘i Aupuni decided that instead of waiting for the Ninth Circuit decision and any further appeals, it would take a different approach. Rather than hold an election to select delegates to a constitutional convention, it would offer the former candidates the opportunity as a broader based *organizing* group to direct the path forward. Supplemental App. at 432a.

III. Applicants' Motion Seeks New Injunctive Relief Based on a New Theory that Is Without Legal Support and that Would, if Granted, Violate Respondents' First Amendment Rights.

Now that the election has been terminated, what Applicants essentially seek through their Motion for Civil Contempt is an entirely *new* injunction: one to stop Na‘i Aupuni from convening a gathering of individuals to discuss political issues. Applicants seek this relief simply because they do not like the composition of

individuals that Na‘i Aupuni—a private non-profit entity—has invited to attend. Applicants have neither sought nor developed a record to support such an injunction, which could not be supported in any event. The Motion for Civil Contempt should be denied because it is improper procedurally and as a matter of law.

A. Applicants' Motion Seeks New Injunctive Relief Based on a New and Unsupported Theory.

The Motion for Civil Contempt is improper, first, because it does not seek enforcement of a previous order, and instead seeks completely new relief. In the history of this case, Applicants have never moved any court to enjoin any convention or any other gathering. The full scope of the temporary injunctive relief they sought—and this Court awarded—related to the election and nothing more. Instead, the Motion for Civil Contempt improperly seeks to have this Court expand the scope of the injunction.

The new injunctive relief Applicants seek is impermissible for the related reason that the record is devoid of any legal basis to support it. The premise of the newly-requested injunction necessarily is that Applicants claim a right to participate in a convention, as distinguished from an election. But Applicants' legal arguments in support of their injunction motions focused almost entirely on a claimed right to vote under the Fifteenth Amendment. Applicants did not cite, and still do not cite, any legal support for the new underlying premise, that they are entitled as a matter of law to participate in some way in any convention or other gathering that Na‘i Aupuni might convene and facilitate without an election of

delegates. Consequently, not only are the legal questions not properly before this Court because they have not been argued or decided below, there is a complete absence of legal support to justify this new injunctive relief. *See Wis. Right to Life, Inc.* v. *Fed. Election Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C. J., in chambers) (The Court may issue an injunction only when it is necessary or appropriate in aid of its jurisdiction and "the legal rights at issue *are indisputably clear*.") (emphasis added).

B. The New Injunctive Relief Applicants Seek Would Violate Respondents' First Amendment Rights.

Applicants' new request for injunctive relief—to prevent the 'aha from occurring without their participation or input—rests on the implicit theory that Applicants have some enforceable *right* to participate, but Applicants have not stated the basis of any such right, and without such a right, the injunction they now seek would raise significant concerns under the Constitution's First Amendment, specifically related to Respondents' rights of association. This Court has recognized that private expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) (citing *Carey* v. *Brown*, 447 U.S. 455 (1980)); *see also Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("Implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

In connection with that private expressive activity, Na‘i Aupuni also has the right to choose whom to invite to participate in that discourse. "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 622; *see also Affordable Housing Dev. Corp.* v. *City of Fresno*, 433 F.3d 1182, 1198 (9th Cir. 2006) (Exercise of First Amendment rights in pursuit of a political objective, including freedom of speech and freedom of association, "is not deprived of protection if the exercise is not politically correct and even if it is discriminatory against others."). Applicants have asserted no legal basis for their demand to participate in the ‘aha, and none exists.

CONCLUSION

For the foregoing reasons, Na‘i Aupuni and the Akamai Foundation respectfully request that this Honorable Court deny the Motion for Civil Contempt in its entirety.

Respectfully submitted.

William Meheula
SULLIVAN MEHEULA LEE
A LIMITED LIABILITY LAW PARTNERSHIP
745 Fort Street, Suite 800
Honolulu, Hawai‘i 96813
(808) 599-9555
meheula@smlhawaii.com

Counsel for Respondents
Na‘i Aupuni and
The Akamai Foundation

David J. Minkin, *Counsel of Record*
Troy J.H. Andrade
MCCORRISTON MILLER MUKAI
MACKINNON LLP
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawai‘i 96813
(808) 529-7300
minkin@m4law.com
andrade@m4law.com

Counsel for Respondent
Na‘i Aupuni

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