IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 15-17134

KELII AKINA, et al.,
Plaintiffs/Appellants

v.

STATE OF HAWAII, et al.
Defendants/Appellees.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL RIGHTS UNION AND CATO INSTITUTE

On Appeal from the United States District Court
For the District of Hawaii

No. 15-00332 JMS-BMK
The Honorable J. Michael Seabright,
Judge, U.S. District Court

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CORPORATE DISCLOSURE STATEMENT

American Civil Rights Union, Inc., hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

The Cato Institute also states that it has no parent companies, subsidiaries, or affiliates, and that it does not issue shares to the public.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

For a second time, Hawaii has conducted a racially discriminatory voter registration procedure to facilitate a racially exclusionary election. The first time this occurred, the U.S. Supreme Court held that Hawaii's racially discriminatory policies violated the U.S. Constitution. *Rice v. Cayetano*, 528 U.S. 495, 499 (2000). Things are no different this time. Hawaii's voter registration scheme again makes eligibility contingent upon ancestry and bloodlines, which are nothing more than proxies for race. Such a discriminatory scheme is *per se* unconstitutional under the Fifteenth Amendment.

Amicus curiae American Civil Rights Union (ACRU) is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long-time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues and election matters in cases nationwide.

The members of the ACRU's Policy Board are former U.S. Attorney General Edwin Meese III; former Assistant Attorney General for Civil Rights William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Ambassador to Costa Rica Curtin Winsor, Jr.; former Ohio Secretary of State J. Kenneth Blackwell; former Voting Rights Section attorney, U.S. Department of Justice, J. Christian Adams; former Counsel to the Assistant Attorney General for Civil Rights and former member of the Federal Election Commission Hans von Spakovsky; and former head of the U.S. Department of Justice Voting Rights Section Christopher Coates.

Amicus curiae Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests *amici* because it implicates their strong belief that all citizens should be treated equally before the law, not least in the context of preserving the integrity of American elections.

No party counsel authored any portion of this brief. No party, party counsel, or person other than *amici* or their counsel paid for this brief's preparation or submission. Appellants have consented to the filing of this brief. The State Appellees take no position on the filing of this brief. Counsel for the remaining Appellees did not respond to requests for their position on the filing of this brief. With respect to a similar motion filed with this Court, however, all Appellees did not object to the motion. Fed. R. App. P. 29(a); Circuit Advisory Committee Note to Rule 29-3.

ARGUMENT

I. Ancestral and Bloodline Qualifications for Voting are *Per se* Unconstitutional.

As a threshold matter, this Court should reverse the district court because the Fifteenth Amendment prohibits *all* voting qualifications based on ancestry *or* race. This is a *per se* prohibition that applies here because of the very definition of "qualified Native Hawaiian."

A "qualified Native Hawaiian" is defined as one who is "a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands, the area that now constitutes the State of Hawaii," Haw. Rev.

Stat. § 10H-3(a)(2)(A). There can be no dispute that this definition uses ancestry and bloodline to vest eligibility to participate in a government-run election.

The Fifteenth Amendment strictly forbids a government from administering a voter registration procedure that brazenly discriminates on the basis of race. When Hawaii denies the right to register to vote and participate in an election where a public issue is decided, the Fifteenth Amendment is squarely implicated.[1] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.[2] The Constitution plainly speaks of a "right . . . to vote" without qualification.

> The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. . . . The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. A resolve so absolute required language as simple in command as it was comprehensive in reach.

Rice, 528 U.S. at 511-12.

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[1] The Supreme Court has foreclosed the argument that Fifteenth Amendment protections cannot reach elections regarding public issues conducted by a private entity. *See Morse v. Republican Party*, 517 U.S. 186 (1996) (Section 5 of Voting Rights Act required preclearance of election changes pertaining to fees to attend and vote in privately-run republican nominating convention).

[2] This provision applies "not only to the physical act of voting but to the entire voting process," "including the matter of registration where registering is required in advance of voting." *United States v. Dogan*, 314 F.32d 767, 771 (5th Cir. 1963).

The Supreme Court has repeatedly considered cases in which ancestry and bloodline were used as a proxy for race, and the Court has repeatedly and consistently concluded that, supposedly neutral language notwithstanding, such transparently race-motivated eligibility criteria are unconstitutional. The Supreme Court has already considered the issue of a Native Hawaiian designation and, "[r]ejecting the State's arguments that the classification in question is not racial," found a violation of the Fifteenth Amendment. *Rice*, 528 U.S. at 499. In no uncertain terms, the Court found that "[a]ncestry can be a proxy for race. It is that proxy here. Even if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification." *Rice*, 528 U.S. at 514; *see also, id*. at 516 (noting comments from the drafters that although the "word 'peoples' has been substituted for "races" in the definition of 'Hawaiian'…this substitution is merely technical, and [] 'peoples' does mean 'races.'").

According to the Court, "racial discrimination is that which singles out identifiable classes of persons solely because of their ancestry or ethnic characteristics." *Rice*, 528 U.S. at 515 (citation and alteration omitted). "The ancestral inquiry mandated by the State," the Court reasoned, "implicates the same grave concerns as a classification specifying a particular race by name," *i.e.*, "it demeans the dignity and worth of a person to be judged by ancestry instead of by

his or her own merit and essential qualities." *Id*. at 517; *see also St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (concluding that race discrimination means that "identifiable classes of persons . . . are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics").

The Court concluded:

> The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment [because] the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. . . . Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. . . . The State's electoral restriction enacts a race-based voting qualification.

Rice, 528 U.S. at 495. This bright line prohibition on ancestral tests applies equally to the present case before this Court.

And *Rice* is not an outlier. The Court has consistently found the use of bloodline as a proxy for race is *per se* unconstitutional. In both *Guinn v. United States*, 238 U.S. 347 (1915), and *Lane v. Wilson*, 307 U.S. 268 (1939), the Supreme Court invalidated facially race-neutral laws imposing various registration requirements, reasoning that the "Fifteenth Amendment secures freedom from discrimination on account of race in matters affecting the franchise" and protects against "onerous procedural requirements which effectively handicap exercise of the franchise." *Lane*, 307 U.S. at 274-75 (invalidating voter qualification intended

to make it more difficult for one racial group to register to vote); *Guinn*, 238 U.S. at 365 (Oklahoma statute that imposed a literacy requirement on voting registration but contained a "grandfather clause" applicable to certain individuals and their descendants was "void from the beginning").

In *Guinn*, the Court held that an ancestral and bloodline voting qualification was *per se* unconstitutional. Much like Hawaii's test for "qualified Native Hawaiian," the ancestral test in *Guinn* set eligibility to register to participate in the political process based on bloodline or ancestry. In particular, the Oklahoma law prohibited anyone from being registered to vote who could not read and write any section of the Oklahoma Constitution on request, but granted an exception to those who were eligible to vote on or before January 1, 1866 and their descendants. *Guinn*, 238 U.S. at 357. Even without "express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude," *id.* at 364, the Court reasoned that the qualification "was stricken with nullity in its *inception* by the self-operative force of the [Fifteenth] Amendment," *id.*at 358 (emphasis added) and cannot stand.

Oklahoma responded by enacting a registration test that allowed anyone to register who voted in 1914, or who registered during a 12-day window ending on May 11, 1916. Both blacks and whites could freely register during the 12 days, and thereafter registration was terminated for everyone forever. In *Lane*, the Court

took up this new qualification statute, and once again found it unconstitutional. It held that the Fifteenth Amendment "nullifies sophisticated as well as simple minded-modes of discrimination," 307 U.S. at 274, and that the "reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions," *id.* at 275.

But unlike Oklahoma, Hawaii is not back before the court with a more "sophisticated" test to consider. Hawaii is using a racially discriminatory registration and voting scheme of the sort based on ancestry that the Supreme Court has already determined is *per se* unconstitutional and has repeatedly struck down. The district court's decision should be accordingly reversed.

II. The Supreme Court's Decision in *Rice* Precludes the District Court's Holding that Hawaii's Racially Discriminatory Voter Registration Procedure Survives Strict Scrutiny.

A. Hawaii Has No "Special Relationship" with the Native Hawaiians that Can Justify a Deprivation of Voting Rights.

In *Rice*, the district court upheld Hawaii's exclusion of non-natives from registering and voting in an election for the trustees of the Office of Hawaiian Affairs because "Congress and the State of Hawaii have recognized a guardian-ward relationship with the native Hawaiians, which the court found analogous to the relationship between the United States and the Indian tribes." *Rice*, 528 U.S. at 511. This Court affirmed on the same basis. *Rice*, 146 F.3d at 1081 (exclusion of

non-natives justified by "special trust relationship between Hawaii and descendants of aboriginal peoples.").

The Supreme Court, however, forestalled any reliance on a "special relationship" allowing racially discriminatory elections. "Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes," explained the Supreme Court, "*Congress may not authorize a State to create a voting scheme of this sort*." *Rice*, 528 U.S. at 519 (emphasis added). In fact, Congress has repeated rejected legislation aimed at placing Hawaii Natives on equal ground with Native Tribes.[3]

Notwithstanding the Supreme Court's clear mandate, the district court here adopted the very same rationale to uphold Hawaii's discriminatory registration and voting scheme under the Fourteenth Amendment: the alleged "special political and legal relationship" the State enjoys with the Native Hawaiian people. *Akina v. Hawaii*, 2015 U.S. Dist. LEXIS 146995, *57-58 (D. Haw. Oct. 29, 2015). That rationale plainly did not survive *Rice* and it cannot now serve as a justification for Hawaii to *again* exclude non-natives from its elections on the basis of race.

[3] 106th Congress: S. 2899 (July 20, 2000); H.R. 4904 (July 20, 2000); 107th Congress: S. 81 (January 22, 2001); H.R. 617 (February 14, 2001); S. 746 (April 6, 2001); S. 1783 (December 7, 2001) 108th Congress: S. 344 (February 11, 2003); H.R. 665 (February 11, 2003); H.R. 4282 (May 5, 2004); 109th Congress: S. 147 (January 25, 2005); H.R. 309 (January 25, 2005); S. 3064 (May 25, 2006); 110th Congress: S. 310 (January 17, 2007); H.R. 505 (January 17, 2007).

B. Hawaii Has No Interest in Effectuating the Wishes of a Chosen Ancestral Class that Can Justify A Deprivation of Voting Rights.

The district court further reasoned that "the State has a compelling interest in facilitating the organizing of the indigenous Native Hawaiian community so it can decide for itself, independently, whether to seek self-governance or self-determination." *Akina*, 2015 U.S. Dist. LEXIS 146995 at *61. In other words, the district court believed that Hawaii may lawfully exclude non-natives because the election concerns the self-governance of the Native Hawaiian community. But the Supreme Court has already rejected the notion that citizens of a particular race are more qualified than others to vote on matters of public importance.

> Hawaii's argument fails on more essential grounds. The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment. The Amendment applies to "any election in which public issues are decided or public officials selected." *Terry*, 345 U.S. at 468. *There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race.*

Rice, 528 U.S. at 523 (emphasis added).

C. Hawaii Has No Interest in Creating a Collective Voice of a Particular Race That Can Justify a Deprivation of Voting Rights.

The district also suggested that Hawaii "could be said to have a compelling interest in facilitating a forum that might result in a unified and collective voice amongst Native Hawaiians." *Akina*, 2015 U.S. Dist. LEXIS 146995 at *62. *Rice* leaves no room for this argument that Hawaii may discriminate on the basis of race simply because the outcome of an election will seemingly affect some races more than others.

> Race cannot qualify some and disqualify others from full participation in our democracy. 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.*

Rice, 528 U.S. at 523 (emphasis added).

D. Hawaii Has No Interest in Bettering the Conditions of Its Indigenous People that Can Justify the Deprivation of Voting Rights.

Rice likewise rejects any notion that the betterment of the Native Hawaiians can justify the deprivation of voting rights. The district court found that Hawaii and Congress have demonstrated a history of passing legislation for the benefit of the Native Hawaiian people. *Akina*, 2015 U.S. Dist. LEXIS 146995 at *58-60. From that history, according to the district court, "[i]t follows that the State has a compelling interest in bettering the conditions of its indigenous people and, in

doing so, providing dignity in simply allowing a starting point for a process of self-determination."

Such findings were equally present in *Rice* and yet made no difference. The Supreme Court noted that the Hawaiian Homes Commission Act of 1920 was passed by Congress, in part, "for the betterment of the conditions of native Hawaiians." *Rice*, 528 U.S. at 508. Likewise, the Court noted that the State of Hawaii "amended its Constitution to establish the Office of Hawaiian Affairs . . . which has as its mission the betterment of conditions of native Hawaiians . . . [and] Hawaiians." *Id*. (internal citations and quotations omitted). Notwithstanding these findings, the Court held that Hawaii's challenged statutes were unconstitutional.

The Supreme Court's language in *Rice* is sweeping in its scope and unforgiving toward the defenses Hawaii offered in that case, and again offers now. A fair reading of *Rice* makes it clear that the Court obliterated any excuse that justifies a racially discriminatory voter registration scheme run by the state.

CONCLUSION

Hawaii's racially discriminatory voter registration scheme presents a *per se* violation of the Fifteenth Amendment. The Supreme Court has left absolutely no room for any contrary argument. The district court's decision should be reversed.

Respectfully submitted,

/s/ Joseph A. Vanderhulst

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Dated: December 23, 2015

STATEMENT OF RELATED CASES

Amici are unaware of any related cases presently before this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 2,801 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. Civ. P 32(a)(5) and the type style requirements of Fed. R. Civ. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: December 23, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Joseph A. Vanderhulst
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