JON M. VAN DYKE #1896
2515 Dole Street
Honolulu, HI 96822
Tel.: 956-8509

Attorney for Defendant HSEC Members in their Official Capacities, and for Defendants Solomon Kahoohalahala, Analu Berard, Olani Decker, Sherry Evans Allen Hoe, Barbara Kalipi, Natalie Kama, Kinau Kamali'i, Sabra Kauka, Bruss Keppeler, William Meheula, Michael Minn, Ann Nathaniel, and Ao Pohaku Rodenhurst in their Individual Capacities.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

CLARA PILA AKANA LEONG KAKALIA, STEPHEN TERUO KUBOTA LELA MALINA HUBBARD AND BILLIE MARTHA MARY AH UNG KAWAIOLA FERNANDEZ BEAMER, Plaintiffs, vs. BENJAMIN CAYETANO, GOVERNOR OF THE STATE OF HAWAII, SAMUEL CALLEJO, COMPTROLLER OF THE STATE OF HAWAII, SOLOMON KAHOOHALAHALA, DAVIANNA McGREGOR, ULULANI BEIRNE, ANALU BERARD, OLANI DECKER, SHERRY EVENS, ALLEN HOE, BARBARA KALIPI, NATALIE KAMA, KINAU KAMALI'I, MAHEALANI KAMAUU, KAIPO KANAHELE, KAWEHI KANUI-GILL, SABRA KAUKA, BRUSS KEPPELER, POKA LAENUI, WILLIAM MEHEULA, MICHAEL MINN, ANN NATHANIEL, AND AO POHAKU RODENHURST, ALL OF WHOM ARE SUED BOTH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, Defendants	CIVIL NO. 96-00616 DAE HSEC DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR TEMPORARY AND PERMANENT INJUNCTIONS; AFFIDAVITS OF DAVIANNA McGREGOR AND JON M. VAN DYKE; EXHIBITS A-H; CERTIFICATE OF SERVICE Hearing: Date: August 16, 1996 Time: 1:30 p.m. Judge: David A. Ezra

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Material--Hawaii

Statutory Material--United States

International Documents

Other Authorities

HSEC DEFENDANTS' MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTIONS FOR TEMPORARY AND PRELIMINARY INJUNCTIONS

I. Preliminary Statement

This Memorandum in Opposition is filed on behalf of all the members of the Hawaiian Sovereignty Election Council (HSEC) who have been named as Defendants in this lawsuit in their official capacities, and also on behalf of 14 members of the Council named as Defendants in their individual capacity.[1] Although the Department of the Attorney General is also participating in this lawsuit on behalf of some of the named Defendants, the members of HSEC have decided to have separate representation and to file their own papers in order to ensure that their position is asserted vigorously and thoroughly and also to emphasize their independent status in relationship to the State of Hawai'i. See Exhibit A for the Resolution adopted by HSEC on August 12, 1996. The separate and distinct status of HSEC is described clearly in Section 2 of Act 200 (1994), which states that the Legislature has created "an independent entity to carry out the purposes of this Act" (emphasis added). Throughout its operation HSEC has operated as an independent body and has not allowed the State to interfere with its work.

HSEC consists of 20 persons of Hawaiian ancestry who were appointed by the Governor from among the 100 nominations submitted

---

[1] The 14 HSEC members who are represented in their individual capacities are Defendants Solomon Kahoohalahala, Analu Berard, Olani Decker, Sherry Evans, Allen Hoe, Barbara Kalipi, Natalie Kama, Kinau Kamali'i, Sabra Kauka, Bruss Keppeler, William Meheula, Michael Minn, Ann Nathaniel, and Ao Pohaku Rodenhurst.

to him by more than 50 native Hawaiian organizations representing more than 100,000 members. According to the governing statutes, four of the HSEC members were to be designated from the Office of Hawaiian Affairs (OHA), Ka Lahui Hawaii (which has declined to participate), the State Council of Hawaiian Homestead Assocations, and the Association of Hawaiian Civic Clubs. The Council has at least one member from the islands of Kaua'i, Ni'ihau, Maui, Moloka'i, Lana'i, O'ahu, and Hawai'i, and one representation of native Hawaiians living outside the State of Hawai'i. The members of HSEC were originally appointed to serve as members of the Hawaiian Sovereignty Advisory Commission in 1993, and continued in 1994 to serve as HSEC members when the first organization was terminated and the Legislature created a new and more independent organization.[2] HSEC has been charged in Section 2(1) of Act 140 (1996) with coordinating the Native Hawaiian Vote "to determine the will of the Native Hawaiian people for self-governance of their own choosing." If a majority of the ballots cast indicate support for this process, the Council is then authorized by Section 2(2) of Act 140 (1996) to "provide for a fair and impartial process to resolve

---

[2] In response to concerns that they were not elected by the native Hawaiian people, the members of the then-Hawaiian Sovereignty Advisory Commission submitted legislation in January 1994 to have new members selected (by Hawaiian organizations) for the newly-established Hawaiian Sovereignty Elections Council (HSEC). H.B. 3630, 1st draft, SLH 1994. At the Hawaiian Organization Conference on February 4, 1994, however, the overwhelming consensus of the 200 organizations represented was that selecting new members would be a waste of time and money and that the Commission members should continue providing leadership in this process. The legislation adopted in 1994 (Act 200), therefore, changed the nature and name of the organization but made no changes in the composition of its membership.

the issues relating to form, structure, and status of Hawaiian self-governance." And then, according to Section 4(d) of Act 140 (1996), HSEC shall cease to exist on December 31, 1996.

II. Introduction

This Memorandum opposes Plaintiffs' Motions for Temporary and Preliminary Injunctions to stop the counting of the ballots and the announcement of results in the Native Hawaiian Vote. This Memorandum demonstrates that Plaintiffs have not presented a procedurally appropriate "case or controversy" to this Honorable Court and that its four "Claims for Relief" are not supported by substantive precedents or logic.[3] The HSEC Defendants thus submit that Plaintiffs have no "likelihood for success" whatsoever in this case. Because their claims are totally meritless and completely frivolous, Plaintiffs should receive no relief, temporary, preliminary, or otherwise.

Plaintiffs in the Kakalia case consist of one non-Hawaiian (Stephen T. Kubota), and three persons of Hawaiian ancestry--one of whom is a member of Ka Lahui Hawaii (Clara P.A.L.Kakalia), and one of whom is a Trustee of the Office of Hawaiian Affairs (Billie M.M.A.U.K.F.Beamer). The Plaintiff in the Rice case, which has been consolidated for purposes of these motions, is a non-Hawaiian.

---

[3] The HSEC Defendants also wish to note that service on them has been erratic, and in some situations nonexistent. Despite this Honorable Court's order that all service be completed by July 31, 1996, some of the HSEC Defendants have still not been served, and some service has been improper or highly irregular. The HSEC Defendants wish to reserve their position that service has in some situations been inadequate and irresponsible. Plaintiffs' lack of diligence in this matter provides evidence of the unclean hands they bring to this Court.

The Complaint in Kakalia[4] lists four "Claims for Relief": first, that the expenditures to support the Native Hawaiian Vote authorized by Act 359 (1993), Act 200 (1994), and Act 140 (1996) somehow violates Article VI, Clause 2 (the Supremacy Clause of the U.S. Constitution), apparently because, in Plaintiffs' view, any state assistance to native peoples is prohibited; second, that conducting the Native Hawaiian Vote violates Plaintiffs' rights under the 1959 Admission Act, Pub.L. 86-3, 73 Stat.4, apparently by allegedly violating an asserted trust relationship between the State of Hawaii and non-Hawaiians; third, that conducting a vote solely for the native Hawaiian people violates the Equal Protection Clause of the U.S. Constitution; and fourth, that the conduct of this vote somehow interferes with the Plaintiffs' rights to petition the U.S. government to form a "government for Hawaiians" through a process of Plaintiffs' own choosing (paragraph 61).

These claims are politically-motivated, procedurally flawed, based on undocumented speculation, and devoid of merit. Plaintiffs' lawsuit asks this Honorable Court to freeze an unfolding political process and to prevent a native people--in fact, the largest group of indigenous people in the United States--from taking the first step to organize themselves in order to reestablish an autonomous sovereign nation and to pursue claims

---

4. The HSEC Defendants are not parties to the Rice case and have not been served with the Complaint in that case. This Memorandum does, however, respond to the Memorandum in Support of Plaintiffs Clara Pila Akana Leong Kakalia, et al.'s Motion for Preliminary Injunction Filed July 19, 1996 [hereafter cited as Rice Memorandum], which was filed on July 31, 1996.

that have been recognized as valid by the United States Congress and the Legislature of the State of Hawai'i (as explained below). Every other native group in the United States has had the opportunity to pursue such claims and to form an autonomous sovereign government. Native Hawaiians stand alone among native people in the United States in not yet having control of their resources and the ability to govern themselves.[5]

The Native Hawaiian Vote is a beginning of the long process to restore the Native Hawaiian Nation. It is similar to the first step in the path that other native people have walked down, and no justifications exist for interfering with this process. The U.S. Court of Appeals for the Ninth Circuit has recently ruled in Price v. Akaka, 3 F.3d 1220, 1226 (9th Cir. 1993), that it is appropriate for an organization formed pursuant to state law for the benefit of native Hawaiians to seek the opinions of the Hawaiian community and that the native Hawaiian officials who conducted the poll had qualified immunity from challenge. That case stands as a solid precedent in support of the legitimacy and constitutionality of the Native Hawaiian Vote. This Honorable Court has ruled in Naliielua v. State of Hawaii, 795 F.Supp. 1009 (D.Haw.1990), aff'd, 940 F.2d 1535 (9th Cir. 1991), that state-facilitated programs designed to assist native Hawaiians are constitutional as long as they are rationally related to the legitimate goal of promoting self-

---

5. "The history of Hawaii and its people is the least known and possibly the most egregious of any in the United States." Bradley H. K. Cooper, Comment, A Trust Divided Cannot Stand--an Analysis of Native Hawaiian Land Rights, 67 Temp. L. Rev. 699, 699 (1994).

governance and self-sufficiency and are consistent with federal statutes. These precedents should easily dispose of the central arguments presented by Plaintiffs.

Procedural Defects. Plaintiffs have not established that they have been or will be injured by the Native Hawaiian Vote, and hence they do not have standing to bring this lawsuit. The Vote is designed to measure native Hawaiian sentiment on a simple and direct question. The idea that gauging such sentiment could cause harm--irreparable or otherwise--is hard to fathom. Any consequences that may affect Plaintiffs are totally speculative, and hence this lawsuit is not ripe for judicial review. The Defendant members of HSEC all have qualified immunity for their actions in conducting this Vote, and it is totally frivolous and harassing to sue them in their individual capacity. Another procedural defect is Plaintiffs' failure to name HSEC itself as a Defendant, because the Council is certainly an indispensable party. And the claims of Plaintiffs Beamer and Kakalia should be barred by the doctrine of equitable discretion, because they are trying to accomplish through judicial action what they could have but failed to achieve through the legislative process--Beamer as a Trustee of the Office of Hawaiian Affairs and Kakalia as a potential member of HSEC. Because Plaintiffs have made no showing whatsoever that they will suffer harm, much less irreparable harm, their claim for temporary relief should be rejected. These issues are discussed in more detail below in Sections III-VIII.

Substantive Defects. On the merits, the claims of the Plaintiffs are in direct conflict with 200 years of caselaw which allows legislatures to establish separate and preferential programs for native peoples. State governments as well as the federal government have long maintained such programs, and in the present situation the State's efforts to facilitate native Hawaiian self-determination is certainly consistent with recent federal laws. The argument that the funding of the Native Hawaiian Vote interferes with Plaintiffs' right to petition the government is patently frivolous. Governments from time immemorial have taken positions on issues and tried to encourage their citizens to accept views thought to be meritorious, and--as long as contrary views can also be expressed--such efforts have never been deemed to interfere with the rights of citizens to speak freely or to petition the government.

III. Plaintiffs Do Not Have Standing to Bring this Lawsuit.

Plaintiffs claim standing under a variety of theories, but they do not meet the requirements under any of them. To have standing a bring an action in federal court, a plaintiff must demonstrate that he or she has suffered "'[1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief.'" Fernandez v. Block, 840 F.2d 622, 625 (9th Cir. 1988)(quoting from Allen v. Wright, 468 U.S. 737, 751 (1984)); see also Naliielua v. State of Hawaii, 795 F. Supp. 1009, 1011-12 (D.Haw. 1990), aff'd, 940 F.2d 1535 (9th Cir. 1991).

A. Plaintiffs Do Not Have Standing as Taxpayers.

Plaintiff Kubota[6] claims to have standing as a taxpayer, relying on dicta from the opinion in Doremus v. Board of Education, 342 U.S. 429 (1952), and on the 2-1 decision in Hoohuli v. Ariyoshi, 742 F.2d 1169 (9th Cir. 1984). It has long been established that taxpayers do not have standing to challenge federal spending programs from general funds, Frothingham v. Mellon, 262 U.S. 447, 488 (1923), because a person seeking to invoke the judicial power "must be able to show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the statute's enforcement, and not merely that he suffers in some indefinite way in common with people generally."[7] Taxpayers actions challenging municipal expenditures are sometimes permitted in "a good-faith pocketbook action," Doremus, 342 U.S. at 434, but the link between the taxpayer status and the expenditure through "a direct dollars-and-cents injury" must still be demonstrated. Id. In the present case, Plaintiff Kubota challenges an expenditure of $1,100,000 out of an annual state budget of about $3,157,600,000. The amount complained of is thus 0.035 % of the state budget. If the $1,100,000 were spread out among the population of the State of Hawaii (approximately

---

6. Footnote 17 on page 17 of Plaintiffs' Preliminary Injunction Memorandum acknowledges that Plaintiffs Kakalia, Hubbard, and Beamer do not have the requisite injury to assert taxpayer standing.

7. A narrow exception exists for cases involving challenges under the Establishment Clause, Flast v. Cohen, 392 U.S. 83 (1968).

1,200,000), each resident of the state would receive less than $1.00. The possibility that Plaintiff Kubota will receive any tax refund if he wins this case is nonexistent, and thus his alleged "injury" is not "redressible" by a ruling of this Honorable Court. A claim based on an amount less than a single dollar cannot be viewed as a "good faith pocket book action."

B. Plaintiffs Do Not Have Standing as Non-Hawaiian Beneficiaries of the Public Land Trust.

On page 22 of their Preliminary Injunction Memorandum, Plaintiffs cite to Price v. Akaka, 3 F.3d 1220 (9th Cir. 1993), which reached the correct conclusion that native Hawaiians have standing to bring claims in federal court to protect their rights as beneficiaries of the public land trust. But Plaintiffs then incorrectly assert that non-Hawaiians have similar standing rights. Plaintiffs do not cite to any cases supporting this conclusion, nor can they. The rights of native Hawaiians to protect their interests in the public land trust stems not only from the 1959 Admissions Act, supra, but also from the 1898 Newlands Annexation Resolution, 30 Stat. 750, and the 1900 Organic Act, 31 Stat. 141, which both recognize the special rights of the native inhabitants to the resources of the public lands that were ceded to the United States at the time of annexation (and then transferred in substantial part to the State of Hawaii at statehood in 1959). No similar judicially-protectable rights can be claimed by non-Hawaiians to the resources of this public land trust. The assertion by Plaintiffs on page 21 of their Preliminary Injunction Memorandum that non-Hawaiians are "beneficiaries" who stand in the

same capacity as Hawaiians with regard to the resources of the public land trust and the ability to enforce "rights" under the Admissions Act is simply without foundation.

C. Plaintiffs Do Not Have Standing for Claims Based on a Violation of the Equal Protection Clause.

Plaintiffs Kubota and Rice apparently claim injury based on their exclusion from the opportunity to participate in the Native Hawaiian Vote.[8] Their claimed injury goes to the merits of the controversy, i.e., they are "injured" only if they have a right to participate in this election. As explained below in more detail, this election is a first step in the process whereby the native Hawaiian people will exercise their right to self-determination. The right to self-determination is an inherent right belonging to all indigenous people. See Section X below. Because Mr. Kubota and Mr. Rice are not native Hawaiians, they are not part of the "people" who are entitled to exercise this right. And because they do not share in the right of self-determination, they cannot be "injured" by being excluded from the process of exercising that right.

IV. Plaintiffs' Claims Are Not Ripe for Judicial Review

At pages 4-5 of their Preliminary Injunction Memorandum, Plaintiffs cite to provisions of Act 359 (1993) that were subsequently repealed in Act 200 (1994) and allege that a "parade of horribles" will follow from the Native Hawaiian Vote, including

---

8. Plaintiffs Kakalia, Hubbard, and Beamer clearly do not have standing to raise this claim. Naliielua v. State of Hawaii, 795 F. Supp. 1009, 1011-12 (D.Haw. 1990), aff'd, 940 F.2d 1535 (9th Cir. 1991).

an effort to seek independence from the United States and a claim to the public lands of Hawai'i. The claim of the native Hawaiian people to the public lands is strong, and has been confirmed in the 1993 Apology Bill, attached as Exhibit B hereto, but any injury that Plaintiffs may suffer will be in the future and is totally speculative at present. Federal courts do not sit to adjudicate speculative claims, and the "case or controversy" requirements of Article III of the U.S. Constitution require a showing of a real, present injury before the authority of the U.S. courts can be invoked. O'Shea v. Littleton, 414 U.S. 488 (1974); Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976). These cases emphasize that the ripeness doctrine serves the twin goals of (1) ensuring a clear fact situation to sharpen the issues and aid in adjudication and (2) keeping federal courts from intruding unnecessarily and prematurely into state affairs and thus protecting the values inherent in our federal system.

Among the claims of Plaintiffs that are clearly not ripe for judicial review is the "First Claim for Relief," which alleges that a possible future increase in Plaintiffs' tax burden somehow violates the Supremacy Clause of the U.S. Constitution, Art. VI, clause 2, as well as the "Second Claim of Relief," which speculates that Plaintiffs will somehow be injured by some future distribution of the public trust lands. Such conjectural claims have no place in the federal courts of the United States, because they present no "case or controversy" under Article III of the U.S. Constitution. The material on pages 5-11 of the Preliminary Injunction Memorandum

are based on pure undocumented speculation and cannot be the basis for any decision by this Honorable Court.

V. HSEC Is an Indispensable Party to This Lawsuit.

Items 5 and 6 in Plaintiffs' Prayer for Relief at the end of their Complaint ask this Honorable Court to stop the implementation of Act 359 and the tabulation of ballots cast in the Native Hawaiian Vote. These actions are carried out by HSEC as an organization through its staff, and any court order restraining these actions would have to be directed to the organization rather than to individual members of the Council. Plaintiffs' failure to name HSEC as a Defendant means that an indispensable party is missing from this lawsuit and that even if the Court were inclined to rule in Plaintiffs' favor it could not properly "redress" their grievances because it does not have jurisdiction over the relevant organization. This inability to redress Plaintiffs' alleged grievances provides another example of how Plaintiffs lack standing and how this case fails to meet the case-or-controversy requirement.

VI. Plaintiffs Beamer's and Kakalia's Claims Are Barred by the Doctrine of Equitable Discretion.

Because it receives many lawsuits filed by federal legislators, the U.S. Court of Appeals for the District of Columbia has developed the doctrine of "equitable discretion," which holds that the court should exercise its equitable discretion to dismiss an action where a legislative plaintiff can obtain substantial relief from his or her fellow legislators through the enactment, repeal, or amendment of a statute. See, e.g., Riegle v. Federal

Open Market Committee, 656 F.2d 873, 881 (D.C.Cir. 1981). Plaintiff Beamer acknowledges in paragraph 9 of the Complaint that she is a Trustee of the Office of Hawaiian Affairs (OHA). OHA voted to support and provide funds to HSEC and the Native Hawaiian Vote (Complaint, para. 35), and selected Defendant Kinau Kamali'i to sit as its representative on HSEC (Complaint, para. 12). Trustee Beamer failed in her efforts to persuade the majority of the Trustees of her views.[9] Because she has a political remedy within OHA's Board of Trustees to achieve her goals, this Honorable Court should exercise its equitable discretion to dismiss her politically-motivated claim.

Similarly, Plaintiff Kakalia acknowledges in paragraph 6 of the Complaint that she is a member of Ka Lahui Hawaii. Section 7 of Act 200 (1994) explicitly lists Ka Lahui Hawai'i as an organization entitled to designate a member of HSEC, but this organization declined to participate in the HSEC process. Because Plaintiff Kakalia had a political remedy that she could have pursued through her participation (or the participation of a Ka Lahui colleague) as a member of HSEC, this Honorable Court should exercise its equitable discretion to dismiss her politically-motivated lawsuit.

---

9. Exhibit D contains copies of meetings of the Trustees of the Office of Hawaiian Affairs showing that Plaintiff Beamer supported funding for HSEC at a committee meeting, but then opposed funding at the full Board meeting. Despite her opposition, OHA's Board of Trustees voted to provide funding.

VII. Plaintiffs' "Second Claim for Relief" Based on Violation of the Admission Act Is Barred Under Existing Ninth Circuit Decisions, and the HSEC Members Have Qualified Immunity.

It is unclear from Plaintiffs' filings whether they all claim to be entitled to bring the "Second Claim for Relief," or whether only some of them so claim. Based on the title to Section III of their Preliminary Injunction Memorandum and the language therein, it appears that this claim is brought by the non-Hawaiian Plaintiff, Mr. Kubota. But, as explained above in Section III(B) of this Memorandum, no case supports the notion that non-Hawaiians are protected beneficiaries of the public land trust.

Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216 (9th Cir. 1978)(Keaukaha I), and Price v. State of Hawaii, 764 F.2d 623 (9th Cir. 1985), both hold that the Admissions Act does not create a private cause of action and both dismiss the claims brought in those cases. See also Price v. State of Hawaii, 921 F.2d 950, 955 (9th Cir. 1990)(holding that the Admissions Act does not impose "exacting standards of administration" with regard to Hawaii's public trust lands). Although Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 P.2d 1467 (9th Cir. 1984)(Keaukaha II), and Price v. Akaka, 3 F.3d 1220 (9th Cir. 1993), do permit an action under 42 U.S.C. section 1983 based on the Admissions Act, such an action would require the kind of specific harm at issue in the Keaukaha II case (the loss of 25 acres of land). Furthermore, the HSEC members have qualified immunity from suit unless their actions violate "clearly established law," Price v. Akaka, 3 F.3d at 1225 (quoting

from Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), which is certainly not the case in the present lawsuit. The general and amorphous claims brought by Plaintiffs in the present case for violations of the Admissions Act do not present a cause of action under existing Ninth Circuit law, particularly because, as explained in Section III(B) of this Memorandum, non-Hawaiians are not protected beneficiaries of the Admissions Act.

VIII. Plaintiffs Will Not Suffer Irreparable Injury If the Ballots Are Counted and the Results Are Announced.

Plaintiffs seek a Temporary Injunction prohibiting the counting of the ballots that have been cast for the Native Hawaiian Vote and the announcement of the results. No injury is even alleged to follow from the mere counting of the ballots, and so the counting should clearly be permitted.

Even the announcement of the results of this balloting would not irreparably injure Plaintiffs. Plaintiffs allege on page 2 of their Memorandum in Support of Motion for a Temporary Restraining Order that the release of the tabulation expressing "the will of the native Hawaiian people" will injure them, but they provide no evidence how the announcement of the results of such a poll can constitute an injury. If any of their claims are somehow found to be valid, this Honorable Court's decision protecting Plaintiffs' rights could also correct whatever failures in the self-determination process this Court has found. Because the Native Hawaiian Vote is the first step of a long process, ample time exists to correct any problems that may be discovered. Section 1 of Act 140 (1996) reemphasizes that the purpose of this process is

"to provide a fair, open, and democratic process for all Native Hawaiian people to get involved and make a free choice as to whether to elect delegates who will convene to propose a native Hawaiian government..." The Native Hawaiian Vote is being conducted in that light, and Plaintiffs present no evidence as to how they might be injured by the results of such a tabulation.

IX. Plaintiffs' Claims Challenging the State's Facilitation of Native Hawaiian Self-Determination Are Unsupported by Precedents or Logic.

As explained above in Section III(A) and IV, Plaintiffs lack standing to bring their "First Claim for Relief" and their alleged injury is so totally speculative that this claim cannot be deemed to be ripe for judicial review. And as explained in Sections III(B) and VII, Plaintiffs' "Second Claim for Relief" fails both because Plaintiffs lack standing and because the claim does not present a cause of action under current Ninth Circuit decisions.

Plaintiffs also claim (1) that Act 359 (1993), Act 200 (1994), and Act 140 (1996) violate the 14th Amendment of the U.S. Constitution by discriminating on the basis or race, (2) that the State of Hawai'i is prohibited from acting to assist Native Hawaiians because the field of native rights has been preempted by the federal government, and (3) that the State's facilitation of the Native Hawaiian Vote somehow violates Plaintiffs' rights to free speech and to petition the government. These claims are without merit.

The U.S. Congress has acknowledged in the 1993 Apology Bill[10] (and again in the Native Hawaiian Education Act of 1994, Pub. L. 103-382, 108 Stat. 3794 (1994), discussed below in Section IX(D) and attached hereto as Exhibit (C) that native Hawaiians are an "indigenous people," and hence that a political (rather than racial) relationship exists between the native Hawaiians and the United States government. Among the findings in the Apology Bill are the following:

> Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government....
>
> Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum...(Emphasis added.)

The Apology Bill is explicitly cited by the Hawaii State Legislature in Section 1 of both Act 200 (1994) and Act 140 (1996) as a basis for the legislation, and these State legislative enactments are pursuant to and consistent with the federal legislation on this topic. It should also be noted that the Constitution of the State of Hawai'i recognizes the special and unique status of the native Hawaiian people in numerous provisions,

---

10. Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993). The Senate passed this document on Oct. 27, 1993, the House passed it on Nov. 15, 1993, and President Clinton signed it on Nov. 23, 1993. "Congress drafted the joint resolution with great care because it is an enforceable statute." Lisa Cami Oshiro, Comment, Recognizing Na Kanaka Maoli's Right to Self-Determination, 25 N.M.L.Rev. 65, 86 (1995).

including the Preamble (recognizing "our Hawaiian heritage"), Article X, Section 4 (directing the State to "promote the study of Hawaiian culture, history and language"), Article XII (adopting the Hawaiian Homes Commission Act, establishing the Office of Hawaiian Affairs, and reaffirming and protecting the traditional and customary rights of native Hawaiians), and Article XV, Section 4 (establishing the Hawaiian language as an official language of the State).

A. The Adarand Ruling Does Not Apply to Separate or Preferential Programs Designed to Aid Native People.

Plaintiffs' argument that the decision in Adarand Constructors v. Pena, 115 S.Ct. 2097 (1995), applies to preferential programs designed for native people is undercut by the subsequent decision in Oklahoma Tax Comm'n v. Chickesaw Nation, 115 S.Ct. 2214 (1995), which unanimously reaffirmed a preferential program for a native group (an immunity from state taxation) without any reference to Adarand. The Chickesaw Nation decision thus leaves no doubt about the continuing validity of Morton v. Mancari, 417 U.S. 535 (1974), and its progeny,[11] which state that preferences for native peoples

---

11. Among the many U.S. Supreme Court cases that uphold preferential or separate programs for native peoples are Antoine v. Washington, 420 U.S. 194 (1975); Fisher v. District County Court, 424 U.S. 382 (1976); Moe v. Confederated Salish and Kootanai Tribes of Flathead Indian Reservation, 425 U.S. 463 (1976); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); United States v. Antelope, 430 U.S. 641 (1977); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S.463 (1979); Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); and Washington v. Washington State Commercial Fishing Vessel Association, 443 U.S. 658 (1979). In each of these decisions, the Court ruled unanimously that special treatment for native peoples is permitted as long as the legislative program is rationally related to the government's

are viewed as political rather than racial in nature, and are to be evaluated under the deferential rational-basis level of judicial review rather than under a compelling-state-interest or strict-scrutiny test. The Morton decision is a particularly strong precedent for the present case because the Morton opinion emphasizes that the preference at issue was designed to further the cause of Indian self-government. In upholding a hiring preference for Indians for positions in the Bureau of Indian Affairs, the Court ruled that such a hiring preference was not "racial" but rather was "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency." Id. at 554.

B. The Native Hawaiian People Are Native Americans Recognized by the U.S. Congress as Having Lost Their Sovereignty Through Illegal Action, and Are Thereby Entitled to Pursue Their Right to Self-Determination and Self-Government.

This Honorable Court ruled that the Morton line of cases applied to preferential programs for Native Hawaiians in Naliielua v. State of Hawaii, 795 F.Supp. 1009 (D.Haw. 1990), aff'd, 940 F.2d 1535 (9th Cir. 1991),[12] and Judge Gillmor reached the same decision

---

responsibility to promote the welfare of these groups.

12. In Pai 'Ohana v. United States, 875 F.Supp. 680, 697 n.35 (D.Haw. 1995), aff'd, 76 F.3d 280 (9th Cir. 1996), this Honorable Court quoted from its conclusion in Naliielua that "[a]lthough Hawaiians are not identical to the American Indians whose lands are protected by the Bureau of Indian Affairs, the court finds that for purposes of equal protection analysis, the distinction...is meritless. Native Hawaiians are people

in Silva v. United States, Civ. No. 95-00148 HG (D.Haw. Oct. 19, 1995), attached hereto as Exhibit E. Plaintiffs' attempt to distinguish Naliielua in their Preliminary Injunction Memorandum at 24 by asserting that "the Hawaiian Homes Commission Act of 1920 is Federal, not State legislation." This assertion is incorrect. The Hawaiian Homes Commission Act was "adopted as a law of the State" in Article XII, Section 1 of the Hawaii State Constitution. The Department of Hawaiian Home Lands is part of the State government, and its director and commissioners are appointed by the Governor of the State of Hawai'i.

It is of course true that the Hawaiian Homes Commission Act is consistent with the many federal statutes supporting benefit programs for native Hawaiians, and that this consistency is important to the conclusion that the state-administered Department of Hawaiian Home Lands is constitutional. Similarly, the Native Hawaiian Vote is fully consistent with the 1993 Apology Bill and the many other federal statutes recognizing the analogy between native Hawaiians and other Native Americans, and this consistency is relevant to the conclusion that the state-facilitated Native Hawaiian Vote is fully constitutional.[13]

---

indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States..."

13. Plaintiff Rice's Memorandum in Support argues at pages 12-13 that Naliielua was incorrectly decided because it is inconsistent with the reasoning of Morton v. Mancari, supra, and Price v. State of Hawaii, 764 F.2d 623 (9th Cir. 1985). As explained above, Mancari emphasizes the importance of promoting native self-government and self-sufficiency, so Naliielua (and the Native Hawaiian Vote) is fully consistent with Mancari. Also, this Price decision is simply irrelevant to the present situation,

The Silva ruling involved a challenge (on Equal Protection Clause grounds) to the requirement that the Trustees of the Office of Hawaiian Affairs be of Hawaiian ancestry. Judge Gillmor rejected the claim, relying on Naliielua, and noting that "the limitation on OHA Board membership is permissible because it promotes the legitimate goal of fostering Hawaiian self-government." Slip op. at 7. This reasoning obviously applies squarely to the Native Hawaiian Vote, which is also explicitly and clearly designed to promote "the legitimate goal of fostering Hawaiian self-government."[14]

Plaintiffs concede that "the State may discriminate in favor of native Hawaiians when it is acting as the agent of the United States government in carrying out the purposes of the Admissions Act or the Hawaiian Homes Commission Act of 1920," but asserts that the State's actions must meet the requirements of strict scrutiny

---

because it involved a small Hawaiian 'ohana with no credible claim to tribal status under federal law.

14. Similar decisions have been reached by the Hawaii Supreme Court in Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982)(holding that principles developed in decisions involving American Indians also apply to native Hawaiians), and Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Haw. 425, 903 P.2d 1246 (1995)(recognizing and explaining the traditional and customary rights of native Hawaiians). This Honorable Court similarly reviewed the traditional and customary rights of native Hawaiians in Pai 'Ohana v. United States, 875 F. Supp. 680, 687-88 (D.Haw. 1995), aff'd, 76 F.3d 280 (1996), recognizing the validity of these unique rights in appropriate circumstances.

Attached hereto as Exhibit F is Opinion 80-8 of the Department of the Attorney General which also concludes, after careful analysis, that preferential or separate programs for native Hawaiians should be evaluated under the deferential rational-basis standard of judicial review.

review "when the State acts outside its agency, as it has in Act 359." Preliminary Injunction Memorandum at 24. No citations are offered in support of this view, but if this argument were deemed to have any merit, then ample authorization by the federal government could be found in the 1993 Apology Bill and the Findings in the Native Hawaiian Education Act of 1994, attached hereto as Exhibits B and C. The Apology Bill documents in detail the wrongs done to the Hawaiian people at the time of the illegal overthrow--including "the deprivation of the rights of Native Hawaiians to self-determination" (Section 1(3))--and urges the President of the United States to "support reconciliation efforts between the United States and the Native Hawaiian people" (Section 1(5)). Certainly the Native Hawaiian Vote is an effort to promote such reconciliation by allowing Native Hawaiians to achieve self-determination, and the State's actions are completely consistent with the goals of the federal government. As explained below in Section IX(D), the 1994 Native Hawaiian Education Act describes the "special relationship" existing between the United States and native Hawaiians and thus lays the foundation for actions by the State to facilitate self-determination by the native Hawaiian people. Section IX(D) also lists numerous other federal statutes designed to benefit native Hawaiians, which also illustrate that the State's action facilitating the Native Hawaiian Vote is fully consistent with federal law.

The Rice Memorandum refers at page 5 to the Fifteenth Amendment, but this important constitutional provision does not

help Plaintiffs' claims. The Fifteenth Amendment prohibits discrimination in elections based on "race, color, or previous condition of servitude." As the U.S. Supreme Court has held in Morton v. Mancari and in its many progeny, separate programs for native people--especially when their self-government is at stake--are not based on race but on the unique political status of the concerned native people. The assertions in the Rice Memorandum at page 9 that native Hawaiians are not entitled to the unique status afforded to other native people in the United States, and on pages 14-15 that Congress is prohibited under the U.S. Constitution from recognizing the right of native Hawaiians to self-determination, ~~is~~ are simply wrong in light of the Apology Bill, the 1994 Native Hawaiian Education Act, and the many other federal statutes that recognize the analogy between native Hawaiians and other Native Americans.[15]

---

15. Plaintiff Rice's assertion on page 11 of his Memorandum that the decision in Price v. State of Hawaii, 764 F.2d 623 (9th Cir. 1985), is somehow relevant to this discussion is also difficult to follow. In this 1985 Price decision, the U.S. Court of Appeals for the Ninth Circuit ruled that the Hou Hawaiians, a small but litigious 'ohana of Hawaiians did not meet the criteria that have developed for determining whether an Indian community qualifies as a "tribe." This decision, which was certainly correct on its facts, provides no precedential relevance to the question whether the native Hawaiian people as a whole are entitled to exercise their right to self-determination and, as part of that process, to conduct an election to determine the views of persons of Hawaiian ancestry.

Plaintiff Rice cites on pages 13-14 the case of Hoohuli v. Ariyoshi, 631 F. Supp. 1153 (D.Haw. 1986), and the enigmatic dicta in its footnote 22. The holding of Hoohuli is clear and straight-forward. The court concluded that an alleged discrimination between the 50% Hawaiians and those of less than 50% should be evaluated under the deferential rational-basis level of judicial review, even though this distinction was alleged to be based on race. The holding of Hoohuli is thus directly contrary to the position of the Plaintiffs, and supports the position of Defendants.

Even the Kakalia Plaintiffs disagree with Mr. Rice on this point (see page 16 of their Preliminary Injunction Memorandum).

C. State Governments Are Not Precluded by the Preemption Doctrine from Assisting Native People. State Programs Rationally Related to the Goals of Promoting Self-Determination and Self-Sufficiency for Native People and Consistent with Federal Programs Are Constitutional.

Plaintiffs argue at pages 11-16 of the Preliminary Injunction Memorandum that the State's efforts to facilitate self-determination by native Hawaiians intrude into an area preempted by the federal government. It is true, of course, that states are limited in their ability to regulate activities on lands controlled by autonomous native governments, particularly when the federal government has established a direct relationship with the native government, and the cases cited on pages 13-14 are unremarkable in preventing the states from so regulating. The more recent Chickesaw Nation case, supra, once again reaffirms this result.

The actions of the State of Hawai'i in facilitating the Native Hawaiian Vote are completely different from the cases cited by Plaintiffs. Here we do not have an established native government with an established relationship with the federal government. Instead we have a large population of native people who have been deprived of their lands and right to self-determination by actions of agents of the federal government (see Apology Bill, Exhibit B). The federal government has called for a reconciliation, and the state government is attempting to facilitate this process by helping to fund the Native Hawaiian Vote. Instead of burdening the

native people, as in the cases cited by Plaintiffs, the State is acting to assist in the self-determination process. The present facts are thus completely opposite from those in the cases cited by Plaintiffs.

Plaintiffs' argument that it is improper for states to assist native people is completely unsupportable and is contrary to a long history of relationships between states and the natives within their borders. Attached as Exhibit G is a list of some of the many state-funded organizations designed to assist native communities. Also attached as Exhibit H is a description of state-chartered corporations, state-municipal corporations, and political subdivisions established by states to promote self-governance and self-sufficiency by native people. States have frequently granted a special status to native groups that lack federal recognition. The State of Maine had, for instance, enacted "approximately 350 laws which related specifically to the Passamaquoddy Tribe" between Maine's admission to the Union as a state and 1975. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 374 (1st Cir. 1975). Such actions were deemed appropriate by the U.S. Court of Appeals for the First Circuit, although it did not preclude a claim by the Indians against the federal government: "Voluntary assistance rendered by a state to a tribe is not necessarily inconsistent with federal protection." Id. at 378. See also United States v. John, 437 U.S. 634, 652 n.23 (1978), for references to efforts by the State of Mississippi to assist the Choctaw Indians remaining within its borders, and Prince v. Bd.of

Educ. of Central Consol. Ind. School District No. 22, 543 P.2d 1176, 1183 (N.M. 1975), explaining that the State of New Mexico operated schools and enforced compulsory attendance laws on the Navajo Reservation, with the consent of the tribe and federal government. These materials show that many states have had close and long-established links with their native peoples. No credible arguments have ever been raised that these relationships are inappropriate or unconstitutional. The link between the State of Hawaii and the Native Hawaiian Vote is similar in nature.

The Rice Memorandum cites to a single case, Tafoya v. City of Albuquerque, 751 F.Supp. 1527, 1530 (D.N.M. 1990), for the proposition that a municipal government does not have the same unique link to natives as the federal government and hence that a preference given to natives by a municipal government must be evaluated under the higher strict-scrutiny level of review. The Tafoya case was not appealed, it is inconsistent with numerous other cases, and its facts are sharply distinguishable from those of the present case because it had nothing to do with self-government or self-determination.

Many cases can be cited to illustrate the legitimacy of state actions to protect and promote the interests of native people. The U.S. Supreme Court summarily rejected arguments that state fishing regulations protecting Indian treaty rights violated equal protection laws in Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979). Because the state was acting in conformity with governing

federal statutes, the actions of the state was allowed under the rational basis level of judicial review. See also Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 500-01 (1979), cited by this Honorable Court for the same proposition in Naliielua v. State of Hawaii, 795 F. Supp. 1009, 1013 n.4 (D.Haw. 1990) .

The U.S. Court of Appeals for the Ninth Circuit issued a similar ruling in Squaxin Island Tribe v. State of Washington, 781 F.2d 715 (9th Cir. 1985), where the court upheld (using rational-basis review) vendor agreements promulgated by the Washington State Liquor Control Board that gave Indian vendors more favorable treatment than non-Indians: "No compelling state interest need be shown since preferential treatment for tribal members is not a racial classification, but a political one." Id. at 722 (citing Morton v. Mancari, supra, 417 U.S. at 553 n.24).

A similar approach was used by the U.S. Court of Appeals for the Fifth Circuit in Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991), which upheld under rational-basis review a Texas law providing an exemption from its peyote laws to Indian members of the Native American Church. This opinion specifically addresses the issue whether states may enact laws providing preferential programs for natives, and rules that such enactments are appropriate if pursuant to "an implied congressional will." Id. at 1219. The opinion also emphasizes "the settled principle of statutory construction that 'statutes passed for the benefit of dependent Indian tribes...are to be liberally construed,

doubtful expressions being resolved in favor of the Indians.'" Id. (quoting from Bryan v. Itasca County, Minnesota, 426 U.S. 373, 392 (1976)).

Livingston v. Ewing, 455 F. Supp. 825 (D.N.M. 1978), aff'd, 601 F.2d 1110 (10th Cir. 1979), cert. denied, 444 U.S. 870 (1979), is incorrectly cited in the Rice Memorandum at page 16 and in fact provides solid support for the State of Hawaii's action in facilitating the Native Hawaiian Vote. Livingston upheld a program established by the Museum of the State of New Mexico in Santa Fe reserving the portal in front of the museum exclusively to Indian merchants selling genuine handmade Indian arts and crafts in order to protect and preserve the culture and economic prosperity of the Indians in the Santa Fe area. Similarly, Kreuth v. Independent Sch. Dist. No. 38, Red Lake, Minn., 496 N.W. 2d 829 (Minn Ct. App. 1993), rev. denied, April 20, 1993, upheld, using rational basis review, a state statute allowing school districts to give preferences to Indians during reductions-in-force, without any explicit federal authorization. Reaching the same result is St. Paul Intertribal Housing Board v. Reynolds, 564 F. Supp. 1408 (D.Minn. 1983), which upholds a Minnesota statute designed to benefit urban Indians with language stating that "[t]his special treatment is rationally related to government's unique obligation to the Indians..." (emphasis added).

D. The Native Hawaiian Vote Is Consistent with Federal Laws and Programs Designed to Benefit Native Hawaiians.

As mentioned above, the 1993 Apology Bill, attached hereto as Exhibit B, provides solid foundation and support for the Native

Hawaiian Vote. This Resolution states explicitly that the Native Hawaiians were deprived of their right to self-determination and urges the President to support efforts to promote reconciliation. The Native Hawaiian Vote is part of such a reconciliation process and is fully consistent with federal law on this subject.

Also of direct and profound significance to the issues raised by Plaintiffs are the Congressional Findings enacted in the Native Hawaiian Education Act of 1994, Pub. L. 103-382 (1994), 108 Stat. 3794, now codified in 20 U.S.C. sec. 7902. These Findings, attached hereto as Exhibit C, reconfirm that "Native Hawaiians are a distinct and unique indigenous people," that the Kingdom of Hawaii was overthrown with the assistance of officials of the United States, that the United States had apologized for "the deprivation of the rights of Native Hawaiians to self-determination," and that "Congress had affirmed the special relationship between the United States and the Native Hawaiians" (emphasis added) through the enactment of the Hawaiian Homes Commission Act, 1920, 42 Stat. 108, the 1959 Admissions Act, supra, and other listed statutes. The reference in these Findings to the "special relationship" between the United States and the Native Hawaiians is particularly significant, because these are the words that have been traditionally used by Congress to delineate the political relationship between the federal government and native people that takes preferential and separate programs for them outside of the racial discrimination category. See, e.g., Morton v. Mancari, supra, 417 U.S. at 552-53.

Numerous other federal laws can be cited to demonstrate the recognition by the U.S. Congress that native Hawaiians are a distinct native people deserving of a "special relationship" and of support. The following laws classify native Hawaiians as Native Americans and include them in benefit programs: the American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978), 42 U.S.C. sec. 1996 ; the Native American Programs Act of 1974, Pub. L. No. 93-644, 88 Stat. 2324 (1975), 42 U.S.C. sec. 2991 et seq.(1976); the Native American Employment and Training Programs in the Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, sec. 302, 92 Stat. 1909 (1978), 29 U.S.C. sec. 872 (1978); the Drug Abuse Prevention, Treatment and Rehabilitation Act, Pub. L. No. 98-24 sec. 5(a)(3), 97 Stat. 183 (1983), 21 U.S.C. sec. 1177 (1983); the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, Pub. L. No. 98-24 sec. 5(a)(2), 97 Stat. 183 (1983), 42 U.S.C. sec. 4577 (1983); the Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990), 25 U.S.C. sec. 3001 et seq.; the Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990); the National Historic Preservation Act of 1966, Pub. L. 89-665, 80 Stat. 915 (1966), 16 U.S.C. sec. 470 et seq.; the National Museum of the American Indian Act, Pub.L. 102-185, 103 Stat. 1336 (1989), 20 U.S.C. sec. 80q et seq.; and the Native American Languages Act, Pub.L. 101-477, 104 Stat. 1153 (1990), 25 U.S.C. sec. 2901 et seq.. See also Act of June 20, 1938, 52 Stat. 781 et seq. (limiting leases and fishing

rights in the National Parks to native Hawaiians and their guests); the Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. sec. 11701 et seq.; Older Americans Act of 1965, 42 U.S.C. sec. 3001 et seq.; Rehabilitation Act of 1973, 29 U.S.C. sec. 701 et seq.; the Developmental Disabilities Assistance Bill of Rights Act Amendments of 1987, Pub.L. 100-146, 101 Stat. 840, codified in scattered sections of 42 U.S.C.; the Disadvantaged Minority Health Improvement Act of 1990, 42 U.S.C. sec. 201 et seq.; Title IV of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub.L. 100-197, 102 Stat. 140 (1988), 20 U.S.C. sec. 4901 et seq. (to develop supplemental educational programs to benefit native Hawaiians); and the Indian Health Care Amendments of 1988, 25 U.S.C. sec. 1601 et seq.

E. The Argument that Preferential Programs Are Permitted Only for Natives that Are Organized into "Tribes" is Meritless.

The Rice Memorandum argues at pages 9-17 that the many cases holding that preferential or separate programs for native peoples are to be evaluated under the deferential rational-basis level of review do not apply to native Hawaiians because native Hawaiians are not organized into tribal units. This view is inconsistent with the statement at page 16 in the Preliminary Injunction Memorandum filed by the four Kakalia Plaintiffs, that "[t]he courts have ruled repeatedly that the term "Indians" in the Constitution is a generic political description which may be applied to all

people who are native to what is now the United States."[16] The HSEC Members agree with the Kakalia Plaintiffs on this matter, but feel obliged to address the argument made in the Rice Memorandum in order to dispose of this contention.

It is not true that the caselaw reviewing preferences for native people under rational-basis review has been limited to cases involving members of "tribes," and it would be particularly awkward to impose such a limit in a situation involving a native people who are exercising their right of self-determination in order to develop an appropriate form of self-governance. Although it is true that the facts in the seminal case of Morton v. Mancari, 417 U.S. 535 (1974), did involve a preference for members of tribes, subsequent cases such as Delaware v. Weeks, 430 U.S. 73 (1977), and United States v. John, 437 U.S. 634 (1978), do not emphasize this element, indicating that rational-basis review should apply to all statutes establishing preferential or separate programs for native peoples. The opinion in Delaware v. Weeks states, for instance, that if Congress were to distribute tribal assets to nontribal

---

16. Citing Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976); Naliielua v. State of Hawaii, 795 F.Supp. 1009 (D.Haw. 1990).
Other cases treating Alaska Natives as "Indians" for the purpose of using rational-basis review with regard to preferential programs include Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Native Village of Tyonek v. Puckett, 957 F.2d 631 (9th Cir. 1992); Alaska v. Annete Island Packing Co., 289 F. 671 (9th Cir.), cert. denied, 263 U.S. 708 (1923); Cape Fox Corp. v. United States, 4 Cl. Ct. 223 (1983); Aquilar v. United States, 474 F. Supp. 840 (D.Alaska 1979); Eric v. Dept. of H.U.D., 464 F.Supp. 44 (D.Alaska 1978); see also Morton v. Ruiz, 415 U.S. 199, 212 (1974)(noting special status of "Indians" in Alaska, thereby implying that Alaska Natives are "Indians" for purposes of determining the appropriate level of judicial review).

Indians, this action by Congress would be upheld if it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 430 U.S. at 85 (quoting from Morton v. Mancari, 417 U.S. at 555). And in the John case, the Court deferred to Congress's ability to apply special regulations to Indians in a case involving an isolated Indian remaining in Mississippi who was part of a mere "remnant of a larger group of Indians" which had long ago moved to another distant location. 437 U.S. at 653.

Morton v. Mancari emphasizes that the reason for using the more deferential rational-basis review is to promote self-governance for native peoples, thus recognizing the crucial similarity shared by all native peoples--the destruction of sovereign authority over their lands--and thus leading to the conclusion that rational-basis review should apply to all programs promoting self-governance and self-sufficiency of native groups, whether or not they are presently organized into tribal-type units. And, finally, because native Hawaiians were not culturally organized into tribal units in pre-contact periods, it would be insensitive and inappropriate to impose that obligation on them now. They are entitled to exercise their right to self-determination in a manner appropriate to their own culture and history, and preferential programs rationally designed to promote that process must be permitted.

F. Plaintiffs' Assertion That Any Governmental Involvement in the Process of Exercising Self-Determination Taints the Process Is Not Supported by Precedent or Logic.

Plaintiffs argue at pages 24-28 of their Preliminary Injunction Memorandum and at page 2 of their Memorandum in Support of Motion for Temporary Restraining Order that the participation of government-supported bodies in facilitating the exercise of self-determination "taints" the process. This argument is unsupported by precedent or logic. It is in fact commonplace for governments to support efforts of natives to organize themselves. The Menominee Tribe in Wisconsin was restored, for instance, through a series of elections in the 1970s conducted by the Department of Interior. 25 U.S.C. 903b-c (1996). Indeed, recent international law documents require governments to support efforts of native people to achieve self-governance and self-sufficiency, as explained below in section X.

G. The Native Hawaiian Vote Is Rationally Related to a Legitimate Governmental Goal.

The Native Hawaiian Vote is the beginning step of a process that may lead to the restoration of the Native Hawaiian Nation. It is certainly a logical beginning step, a polling of persons of Hawaiian ancestry to determine their views. The U.S. Court of Appeals for the Ninth Circuit ruled in Price v. Akaka, 3 F.3d 1220, 1226 (9th Cir. 1993), that it was reasonable for the OHA Trustees to believe "that a referendum to determine Hawaiian opinion on the proper definition of 'native Hawaiian' was for the 'betterment of the conditions of native Hawaiians' as presently defined." Similarly, it is certainly logical and reasonable for the Hawaii

State Legislature and the members of the Hawaii Sovereignty Election Council to believe that the Native Hawaiian Vote will properly serve to promote self-determination for the native Hawaiian people.

H. The State Has, in Any Event, A Compelling Governmental Interest to Establish the Native Hawaiian Vote.

As explained above, the precedents are clear that preferential or separate programs for native Hawaiians must be evaluated under the deferential rational-basis level of review, but even if a higher level of judicial scrutiny were applied, the Native Hawaiian Vote would withstand such scrutiny. The right to self-determination is the most basic of human rights under U.S. and international law, as explained in the next section, and efforts to facilitate the exercise this right are mandated by fundamental principles of human rights and human decency.

X. The Rights of the Native Hawaiian People Are Informed by Principles of International Law Which Recognize the Rights of Indigenous Peoples.

International law recognizes the right of self-determination of peoples as the most important of all human rights. Article 1 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (which was ratified by the United States on June 8, 1992), states that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." As explained above, native Hawaiians have been recognized as a "people" by the U.S. Congress, and they clearly have a right to self-determination and self-governance.

The international community has recognized the rights of indigenous peoples in the International Labor Organization's Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (1989)[hereafter cited as ILO Treaty 169], and the Draft Declaration of the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1993/29, Annex I, at 50, now under consideration at the United Nations. The principles accepted in these documents are evidence of governing customary international law applicable in U.S. courts. The Paquete Habana, 175 U.S. 677 (1900).

ILO Treaty 169 is explicit in requiring governments to assist native peoples in attaining self-governance and self-sufficiency. Article 2 of the convention calls for governments to play in active role with indigenous peoples in developing and protecting their rights. Article 4 requires governments to take "special measures" to safeguard the institutions, property, and culture of native people, and Article 6.1(c) requires governments, in appropriate situations, to provide the resources necessary to enable native people to establish their own institutions and initiatives.

XI. The Claims of Plaintiffs' That Their Rights to Free Speech and to Petition Their Government Are Infringed Are Patently Frivolous.

Nothing in any of the enactments and actions challenged by Plaintiffs interferes in any way with Plaintiffs' abilities to speak freely, to organize themselves in any way they wish, and to petition their governments for any grievances they may have. It is commonplace for governments to spend money on issues in ways that

may influence the outcome of public debate. Unless such expenditures actually prohibit contrary views from being expressed, it is perfectly acceptable and appropriate for the government to take positions on matters of public importance.

In recent years, for instance, governments have taken positions against teenage smoking, against driving while inebriated, against using public funds to finance abortions, in favor of educational programming for children on television, in favor of saving energy, and so on.[17] The U.S. Supreme Court has recently explained the governing law on this topic as follows:

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permisssible goals, because the program in advancing those goals necessarily discourages alternate goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. sec. 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism. Petitioners' assertions ultimately boil down to the position that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. Regan v. Taxation with Representation of Wash., [461 U.S. 540 (1983)] ; Maher v. Roe, [432 U.S. 464 (1977)]; Harris v. McRae, [448 U.S. 297 (1980)]. Within far broader limits than petitioners are

---

17. The decision in Hussey v. City of Portland, 64 F.3d 1260 (9th Cir. 1995), which Plaintiffs rely upon at page 29 of their Preliminary Injunction Memorandum, is easily distinguishable from the present facts. In Hussey, individuals were offered "thousands of dollars," id. at 1262, to "vote" for annexation into the City of Portland, and the court ruled that such a subsidy unconstitutionally interfered with the right to vote. Id. at 1266. In the present case, in contrast, no subsidy is given to any individual based on how or whether they vote. The State's role is limited to facilitating the balloting process. The Hussey opinion notes that "we acknowledge a state's considerable latitude in matters of suffrage." Id. at 1263.

> willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.

Rust v. Sullivan, 500 U.S. 173, 193 (1991).

In the 1993 Apology Bill (Exhibit B), the federal government urged reconciliation between the United States and the native Hawaiian people, in light of the actions by agents of the United States that deprived the native Hawaiian people of their land and sovereignty. In the statutes challenged by Plaintiffs, the Hawaii State Legislature provides a mechanism to facilitate the first step in moving toward restoration of a sovereign government for the native Hawaiian people. No person of Hawaiian ancestry is excluded from this process. The procedure is designed to be inclusive, and the State's actions are merely facilitative in nature. No options are ruled out, and all views can be considered and debated. The organization represented by Plaintiff Kakalia, Ka Lahui Hawaii (Complaint, para. 6), was explicitly listed as one of the organization that should be represented on the Hawaiian Sovereignty Advisory Commission in Act 359 (1993), Section 4, and on the Hawaiian Sovereignty Elections Council in Act 200 (1994), Section 7, but this organization declined to participate in this process. See Affidavit of Solomon Kahoohalahala.

Plaintiffs complain about the language in Section 14 of Act 200 (1994), asserting in paragraphs 59 and 61 of their Complaint that this language unacceptably restricts the outcome of the self-determination process. This assertion is based on a misunderstanding of the meaning of the language in Section 14.

This section merely restates the obvious that any action taken by the native Hawaiian people alone cannot affect or alter the laws of the State of Hawai'i. The delegates that may be elected if the Native Hawaiian Vote is positive can, however, make proposals that would conflict with the State's laws, and subsequently-elected officials could enter into negotiations with the State that may eventually lead to a restructuring of some of the State's laws. It is, however, first necessary to determine the views of the native Hawaiian people, and the Native Hawaiian Vote is simply the first step in that process. The State's efforts to promote a resolution of this long-festering problem through procedures based on notions of democratic equality should be applauded rather than attacked.

XII. Conclusion

Plaintiffs' claims do not meet the basic procedural requirements of presenting a case or controversy in which the complainant has suffered an injury ripe for review and redressible by judicial action. Some of the claims do not even present a cause of action. None of them are supportable on the merits.

The "First Claim for Relief" fails on grounds of standing (no real injury) and ripeness (totally speculative burdens). The "Second Claim for Relief" does not appear to present a cause of action under governing Ninth Circuit law and none of the Plaintiffs appear to have standing to bring this claim in any event. The "Third Claim for Relief" has been raised periodically over the years and has always been rejected. It must be rejected once again. The "Fourth Claim for Relief" combines a hodge-podge of

ideas that somehow Plaintiffs are injured by the State's facilitative efforts. Plaintiffs have cited no analogous cases supporting their arguments, and surely none can be found. It is not inappropriate for governments to act to aid their citizens, and supportive actions taken on behalf of the native people of this state are surely appropriate.

For the reasons explained above, Plaintiffs' claims are frivolous and without merit, and they are entitled to no relief--temporary, preliminary, or otherwise.

DATED: Honolulu, Hawai'i, August 14, 1996.

Jon M. Van Dyke
Attorney for Defendant HSEC Members in their Official Capacities, and for Defendants Solomon Kahoohalahala, Analu Berard, Olani Decker, Sherry Evans, Allen Hoe, Barbara Kalipi, Natalie Kama, Kinau Kamali'i, Sabra Kauka, Bruss Keppeler, William Meheula, Michael Minn, Ann Nathaniel, and Ao Pohaku Rodenhurst in their Individual Capacities.

Affidavit of Davianna Pomaika'i McGregor

I, DAVIANNA POMAIKA'I MCGREGOR, being first duly sworn on oath, depose and say that:

1. My name is Davianna Pomaika'i McGregor. I am 45 years old and an Associate Professor of Ethnic Studies at the University of Hawai'i, Manoa.

2. I am the O'ahu representative for the Protect Kaho'olawe 'Ohana.

3. I was appointed to the Hawaiian Sovereignty Advisory Commission (HSAC) in August 1993.

4. Under Act 200 the Hawaiian Sovereignty Elections Council (HSEC) was created as an independent entity to facilitate a process to determine the will of the Hawaiian people to restore a nation of their own choosing.

5. Members of the HSAC, including myself, were appointed to serve on the HSEC under Act 200.

6. I served as the Vice-chairperson of the HSAC and serve as the Vice-chairperson of the HSEC.

6. Both the HSAC and the HSEC held many public hearings, and most of those testifying supported proceeding to a vote to determine the view of Native Hawaiians on the self-determination process.

7. The statutes establishing HSAC - Act 359 (1993) and the HSEC - Act 200 (1994) state that Ka Lahui Hawai'i should designate a representative to be appointed as a member of the HSAC and the HSEC. Ka Lahui Hawai'i declined on two occasions to designate a member and to participate in the process- first in the HSAC and then in the HSEC.

Further your affiant sayeth naught.

Davianna Pomaikai McGregor
Davianna Pomaika'i McGregor

Subscribed and sworn to before me
this 14th day of August, 1996.

Denise M Bitsley
Notary Public, State of Hawaii
My commission expires: 05/05/98

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

CLARA PILA AKANA LEONG KAKALIA, STEPHEN TERUO KUBOTA LELA MALINA HUBGARD AND BILLIE MARTHA MARY AH UNG KAWAIOLA FERNANDEZ BEAMER,	CIVIL NO. 96-00616 DAE
Plaintiffs,	AFFIDAVIT OF JON M. VAN DYKE
vs.	
BENJAMIN CAYETANO, GOVERNOR OF THE STATE OF HAWAII, SAMUEL CALLEJO, COMPTROLLER OF THE STATE OF HAWAII, SOLOMON KAHOOHALAHALA, DAVIANNA McGREGOR, ULULANI BEIRNE, ANALU BERARD, OLANI DECKER, SHERRY EVENS, ALLEN HOE, BARBARA KALIPI, NATALIE KAMA, KINAU KAMALI'I, MAHEALANI KAMAUU, KAIPO KANAHELE, KAWEHI KANUI-GILL, SABRA KAUKA, BRUSS KEPPELER, POKA LAENUI, WILLIAM MEHEULA, MICHAEL MINN, ANN NATHANIEL, AND AO POHAKU RODENHURST, ALL OF WHOM ARE SUED BOTH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,	
Defendants.	

AFFIDAVIT OF JON M. VAN DYKE

STATE OF HAWAII)
: SS
CITY AND COUNTY OF HONOLULU)

JON M. VAN DYKE, being first duly sworn under oath, deposes and says that:

1. I am the attorney for the HSEC Defendants in this action.

2. Attached hereto and incorporated herewith by reference are Exhibits A through H, which are more fully described

in the accompanying Memorandum, all of which are true and correct statements and copies of documents as described more fully therein:

A. Resolution adopted by HSEC, August 12, 1996;

B. Apology Bill (1993);

C. Findings of Native Hawaiian Education Act of 1994;

D. Minutes from meetings of the Office of Hawaiian Affairs Trustees;

E. Silva v. United States, Civ. No. 95-00148 HG (D.Haw. Oct. 19, 1995);

F. Attorney General's Opinion 80-8;

G. Excerpts from Jon Van Dyke, The Constitutionality of the Office of Hawaiian Affairs, 7 U. Haw. L. Rev. 63, 81-83 (1985);

H. Excerpts from Noelle M. Kahanu and Jon M. Van Dyke, Native Hawaiian Entitlement to Sovereignty: An Overview, 17 U. Haw. L. Rev. 427, 433-37, 453-61 (1995).

Further your affiant sayeth naught.

Jon M. Van Dyke

JON M. VAN DYKE

Subscribed and sworn to before me
this 14th day of August, 1996.

Denise M. Ritter

Notary Public, State of Hawaii
My commission expires: 05/05/98