Gillmor
9-19-00

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, EVELYN C. ARAKAKI, PATRICK BARRETT, SANDRA P. BURGESS, EDWARD U. BUGARIN, PATRICIA A. CARROLL, ROBERT M. CHAPMAN, BRIAN L. CLARKE, KENNETH R. CONKLIN, MICHAEL Y. GARCIA, TOBY M. KRAVET, THURSTON TWIGG-SMITH and JEAN YOKOYAMA, Plaintiffs, vs. STATE OF HAWAII, BENJAMIN J. CAYETANO, in his official capacity as the GOVERNOR OF THE STATE OF HAWAII, DWAYNE D. YOSHINA, in his official capacity as CHIEF ELECTION OFFICER OF THE STATE OF HAWAII, Defendants, and OFFICE OF HAWAIIAN AFFAIRS, Intervenor.	CIVIL NO. 00-00514 HG-BMK ORDER GRANTING PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The 1978 State of Hawaii Constitutional Convention resulted in the creation of the Office of Hawaiian Affairs ("OHA"). The Hawaiian Constitution was amended to include Section 5 of Article 12 requiring that the "board [of trustees of the Office of

Hawaiian Affairs] shall be Hawaiians." See also Hawaii Revised Statutes ("HRS") § 13D-2. OHA is directed by nine publicly-elected trustees and is charged with administering certain programs and assets for the benefit of Hawaiians[1] and native Hawaiians.[2] See Hawaii Const., Art. XII, §§ 4, 6; HRS §§ 10-1(a), 10-3, 10-4, 10-5, 10-6.

Plaintiffs are challenging the State of Hawaii's constitutional and statutory mandate that trustees of OHA be Hawaiian. They believe such a mandate to be improper under the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act, 42 U.S.C. § 1973. Plaintiffs submit that the requirement that trustees of the Office of Hawaiian Affairs be elected solely from a class of persons belonging to one race is in discord with this nation's constitutional and statutory provisions aimed at eliminating barriers based on color.

The Court is presented with the question of whether the United States Constitution allows the racial restriction on OHA trustees as one of the means by which the State of Hawaii may

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[1] "Hawaiian" is defined as "any descendent of the aboriginal peoples inhabiting the Hawaiian islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which people thereafter have continued to reside in Hawaii." HRS § 11-1.

[2] "Native Hawaiian" is defined as "any descendent of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778 . . ." HRS § 10-2.

effectuate the goal of bettering the conditions and restoring and maintaining the culture of Hawaiians. In considering the questions presented by the parties, the Court is mindful that ours is a political system that strives to govern its citizens as individuals rather than as groups. The Supreme Court's brightest moments have affirmed this idea, see, e.g., Brown v. Board of Education, 347 U.S. 483 (1954) (holding that establishing separate schools by race violates the U.S. Constitution), Bolling v. Sharpe, 347 U.S. 497 (1954) (same), Cooper v. Aaron, 358 U.S. 1 (1958); while its darkest moments have rejected this concept. See, e.g., Dred Scott v. Sandford, 19 How. 393 (1856) (denying citizenship to blacks), Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (permitting separate train cars for blacks and whites), Bradwell v. Illinois, 83 U.S. 130 (1872) (upholding state law that barred women from practicing law), Korematsu v. United States, 323 U.S. 214 (1944) (upholding the internment of persons of Japanese ancestry during World War II).

The Fourteenth and Fifteenth Amendments to the U.S. Constitution were enacted as part of the effort to exorcize race as a factor upon which the government may base its treatment of its people. See Shaw v. Reno, 509 U.S. 630, 657 (1993) (stating that a goal of our political system is to make race no longer matter). Racial classifications are particularly harmful when used with respect to voting, as they threaten to "balkanize us

into competing racial factions." See id.

The United States Supreme Court, in its decision in Rice v. Cayetano, ___ U.S. ___, 120 S. Ct. 1044 (2000), recently addressed a question closely related to the one posed by Plaintiffs. The Supreme Court held that the State of Hawaii cannot constitutionally limit, by race, the class of voters who choose the officials of a state agency. As Justice Kennedy wrote for the majority, "[r]ace cannot qualify some and disqualify others from full participation in our democracy." Id. at 1060. To permit a state to prefer one race over another in voting for a trustee of a state agency would endorse the "demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters." Id.

The Court recognizes that the State's purpose in limiting OHA trustees to Hawaiians is an effort to effectuate one of the five purposes of the Admission Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959), the betterment of the conditions of native Hawaiians and Hawaiians. But not all means of accomplishing this laudable goal are open to the State.

One of the most central tenets of our federal constitutional system is full and robust participation in self-government. See U.S. Const. Amends. I, XIV, XV, XVI(1), XIX, XXIII, XXIV, XXVI. Participation in our representative government, whether as a voter or as an elected official, cannot be reserved for one race

and denied to another. The Supreme Court's holding in Rice that the U.S. Constitution prohibits discrimination on the basis of race in *voting* for public office guides this Court's determination that the Constitution also prohibits racial discrimination as to who *serves* in public office. Such discrimination violates the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment and the Voting Rights Act.

FACTUAL BACKGROUND

I. The Ceded Lands and the Creation of the Office of Hawaiian Affairs

At issue in this suit is the ability of non-Hawaiians to run as candidates for the elected position of trustee of the Office of Hawaiian Affairs and to serve if elected. The Office of Hawaiian Affairs administers certain assets, including certain "ceded" lands and proceeds therefrom held in public trust under the Hawaii Constitution. See Hawaii Const., Art. XII, §§ 4, 6. The Supreme Court of the State of Hawaii succinctly explained the history of the ceded lands and the genesis of the Office of Hawaiian Affairs in Trustees of OHA v. Yamasaki, 69 Haw. 154, 159-64 (1987).

When the Republic of Hawaii was annexed by the United States in 1898, certain lands held by the government and the crown were ceded to the United States. See Pele Defense Fund v. Paty, 73 Haw. 578 (1992), Yamasaki, 69 Haw. at 159 (citing 30 Stat. 750

(July 7, 1898)). The government of the newly-annexed Territory of Hawaii maintained possession of the ceded lands and was charged with managing the lands. See Yamasaki, 69 Haw. at 159-60 (citing 31 Stat. 141 and 31 Stat. 159 (1900)).

When Hawaii became a state, the ceded lands were once again transferred. See Pub. L. No. 86-3, 73 Stat. 4, 6 (1959) (hereinafter "Admission Act"). The federal government relinquished ownership of large portions of the lands in favor of the State of Hawaii. See id. at §§ 5(a)-(f). The State was not granted the public lands without strings, however. Section 5(f) of the Admission Act identified five purposes for which the lands should be used and held in a public trust. See also Pele Defense Fund, 73 Haw. at 585-86 (identifying the purposes for which the ceded lands were to be used). Section 5(f) provides in relevant part:

> The lands granted to the State of Hawaii . . . shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.

Although the Admission Act stated five purposes for the ceded lands, the State used the lands and the proceeds therefrom primarily for public education. See Yamasaki, 69 Haw. at 161-62. In 1978, however, the State took direct steps to effectuate other

purposes of the ceded lands. See id. at 162. In that year, the Hawaii Constitution was amended with the purpose of using ceded lands to better the conditions of native Hawaiians, which was one of the five purposes of the public lands trust identified in the Admission Act. See id.; see also Hawaii Const., Art. XII, §§ 4, 5, 6.

The state Constitution was also amended to create the agency charged with administering certain assets, including portions of the ceded lands, for the benefit of Hawaiians and native Hawaiians. See Hawaii Const., Art. XII, § 5;[3] see also Hawaii Revised Statutes ("HRS") § 10-4.[4] The board was to be comprised of nine members, each of whom must be Hawaiian. See Hawaii Const., Art. XII, § 5. The Supreme Court in Yamasaki summarized the intent of the framers in creating OHA:

> The framers intended OHA would be "independent from the

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[3] Article XII, section 5 of the State Constitution, reads in pertinent part:

> There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians.

[4] Hawaii Revised Statutes (HRS) § 10-4, in pertinent part, reads:

> There shall be an office of Hawaiian affairs constituted as a body corporate which shall be a separate entity independent of the executive branch.

> executive branch and all other branches of government although [they contemplated that] it [would] assume the status of a state agency." Stand. Comm. Rep. No. 59, in 1978 Proceedings, at 645. They expressed a concern that "in the past . . . commingling of funds intended for native Hawaiians of one-half blood with other moneys in the state treasury" had occurred. Id. OHA, they thought, would be the answer to such problems, would "provide Hawaiians the right to determine the priorities [that would] effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race," and would "unite Hawaiians as a people." Comm. of the Whole Rep. No. 13, in 1978 Proceedings, at 1018. And the framers believed OHA should be "a receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians, and ... a body that could formulate policy relating to all native Hawaiians and make decisions on the allocation of those assets belonging to [them]." Stand. Comm. Rep. No. 59, in 1978 Proceedings, at 644.

69 Haw. at 163.

Section 6 of Article XII of the Hawaii Constitution was also added during the 1978 Constitutional Convention and empowered the newly-created Office of Hawaiian Affairs to manage and administer the trust assets. See Yamasaki, 69 Haw. at 163-64; see also Hawaii Const., Art. XII, § 6 (granting the board of trustees the power "to manage and administer . . . that pro rata portion of the trust . . . for native Hawaiians and Hawaiians.").

Soon after the Hawaii Constitution was amended, the legislature enacted HRS chapter 10, creating the Office of Hawaiian Affairs as an entity independent of the executive branch. Chapter 10 of the Hawaii Revised Statutes listed the goals to be pursued by OHA. The first such goal identified was

"[t]he betterment of conditions of native Hawaiians." See HRS § 10-3(1). OHA was also directed to better the conditions of Hawaiians, see HRS § 10-3(2), develop and coordinate programs and activities for native Hawaiians and Hawaiians, see HRS § 10-3(3), assess the policies and practices of other state agencies and their effects on native Hawaiians and Hawaiians, see HRS § 10-3(4), as well as other obligations. Voting for the trustees of the Office of Hawaiian Affairs was limited to Hawaiians and the trustees themselves were required to be Hawaiian.

II. Plaintiffs

Plaintiffs are thirteen citizens of the State of Hawaii and registered voters. They represent a broad cross-section of the population of Hawaii, including English, Japanese, Irish, Okinawan, Portuguese, Chinese, Filipino, French, German, Spanish, Scottish and Hawaiian ancestries. (Exhs. 1-7, 9-11 in support of Plaintiffs' Motion for Injunctive Relief). Each wishes to choose from a pool of candidates for trustees of the Office of Hawaiian Affairs that is not limited by the race of the candidate.

Plaintiff Conklin is an individual wishing to serve as a trustee of the Office of Hawaiian Affairs. He is not of Hawaiian ancestry. The parties do not dispute that on June 1, 2000 Plaintiff Conklin requested nomination papers from the State of Hawaii Office of Elections but was refused these papers because he is not Hawaiian, as that term is defined under HRS § 11-1.

(Exh. 8 in support of Plaintiffs' Motion for Injunctive Relief).

On August 16, 2000, Plaintiff Conklin received nominations papers from the Office of Elections pursuant to this Court's order of August 15, 2000 temporarily enjoining the Office of Elections from refusing to deny nomination papers solely based on race to any otherwise qualified applicants for the position of trustee of OHA. On August 28, 2000, Plaintiff Conklin filed his nomination papers and took the oath prescribed by HRS § 12-7.[5]

III. Defendants and Intervenor

Defendants are the State of Hawaii (the "State"), the Governor and the Chief Election Officer. Both the Governor and the Chief Election Officer are parties only in their official capacities.

The Intervenor, Office of Hawaiian Affairs, joined the suit pursuant to its motion to intervene. The Court granted OHA's motion to intervene on September 8, 2000, concluding that OHA had

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[5] A candidate is generally required to take the following oath before that candidate's name may appear on the ballot:

> I, ..., do solemnly swear and declare, on oath that if elected to office I will support and defend the Constitution and laws of the United States of America, and the Constitution and laws of the State of Hawaii, and will bear true faith and allegiance to the same; that if elected I will faithfully discharge my duties as ..... (name of office) ..... to the best of my ability; that I take this obligation freely, without any mental reservation or purpose of evasion; So help me God.

HRS § 12-7.

a unique obligation to protect the beneficiaries of the trust. This obligation differed from the obligations of the Defendants who represent the state at large.[6]

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on July 25, 2000. On that same day, Plaintiffs filed their Motion for Temporary Restraining Order and Injunctive Relief ("Plaintiffs' Motion for Injunctive Relief"). A hearing was held before this Court on July 27, 2000, during which the parties agreed that the Court should address Plaintiffs' motion as one seeking a preliminary injunction. The parties made clear the urgency of the matter, as the State normally requires all candidates for elected positions to submit their nominations by September 8, 2000. On the representations by the parties that this matter could be resolved through a review of the law and undisputed facts, the Court permitted the parties to file dispositive motions on an expedited basis.

On August 3, 2000, Defendants filed their Memorandum in

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[6] Although OHA's Motion to Intervene sought the intervention of OHA, the state agency, as well as its nine trustees, this Court only granted the intervention as to OHA. Counsel for OHA agreed that, in light of indications that the nine trustees would shortly resign their positions as trustees, it was unnecessary to permit the trustees to intervene.

On September 8, 2000, the same day that the Court permitted OHA to intervene, the nine trustees did resign their positions.

Since the time of the trustees' resignations, pursuant to state law, the Governor has appointed interim trustees. The Court notes that some of the interim trustees are former trustees who resigned their positions on September 8, 2000. One of the trustees newly-appointed by the Governor is a non-Hawaiian.

Opposition to Plaintiffs' Motion for Temporary Restraining Order and Injunctive Relief and in Support of Defendants' Motion for Summary Judgment. Defendants argued that the racial classification permitting only Hawaiians to serve as trustees of OHA is akin to preferences Congress has provided to native Americans and which require only a rational basis review before the preference would be upheld.

On August 9, 2000, Plaintiffs opposed Defendants' Motion in their Brief in Support of Preliminary Injunction and in Opposition to Summary Judgment for the State. The brief argued that Hawaii's constitutional limitation of OHA trustees may be upheld only if the State may demonstrate both a compelling interest in maintaining the limitation and that the State is unable to accomplish its compelling purpose in a less restrictive manner.

On August 11, 2000, OHA lodged its Motion to Intervene as well as a motion to continue the hearing on Plaintiffs' Motion for Injunctive Relief set for August 15. Although it is a state agency, OHA argued that its interests differ from those of the State. Specifically, OHA submitted that it has a unique obligation to protect the beneficiaries of the trust, whereas the current Defendants -- the State, Governor and Chief Elections Officer -- represent the state at large and therefore have broader constituencies. OHA also argued that it would be

prejudiced by its inability to assert its interests.

A hearing on Plaintiffs' Motion for Injunctive Relief and Defendants' Motion for Summary Judgment was held on August 15, 2000. The Office of Hawaiian Affairs, although not a party at the time, was permitted to attend the hearing. The Court considered the arguments made by the parties and granted Plaintiffs' Motion for Injunctive Relief. The Court found that Plaintiffs' suit involved serious questions and the hardship that would befall Plaintiffs in not being able to file nomination papers substantially outweighed the State's burden in receiving nominations from otherwise qualified, non-Hawaiian candidates.

Also on August 15, the Court granted, over Plaintiffs' objections, OHA's motion to shorten time for hearing on OHA's motion to intervene. A hearing date of September 8, 2000 was set to address OHA's motion to intervene. September 8, 2000 was also set as the date for hearing of Defendants' and Plaintiffs' motions for summary judgment in the action herein. In order to provide for meaningful participation by OHA, should the Court allow OHA to intervene over Plaintiffs' objections, the Court permitted OHA to file a memorandum with respect to Plaintiffs' and Defendants' motions for summary judgment, prior to the September 8 hearing on its motion to intervene.

On August 30, 2000, Plaintiffs filed their Cross Motion for Summary Judgment. Their motion presented substantially similar

arguments as were made in their Motion for Injunctive Relief filed more than one month prior.

On September 5, 2000, Defendants filed their Opposition to Plaintiffs' Cross Motion for Summary Judgment and the proposed-intervenors Office of Hawaiian Affairs filed their Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Cross Motion for Summary Judgment. Defendants' arguments were substantially similar to those put forth in their opposition to Plaintiffs' Motion for Injunctive Relief and Motion for Summary Judgment.

On September 8, 2000, this Court heard the Office of Hawaiian Affairs' motion to intervene. At the hearing, the Court granted OHA's motion to intervene and deemed all submissions by OHA to have been filed as of the date received by the Court. After allowing OHA to intervene, the Court heard arguments by Plaintiffs, Defendants and Intervenor on the two motions for summary judgment. The Court took Plaintiffs' and Defendants' motions for summary judgment under submission for consideration before ruling.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of "identifying for the court the

portions of the materials on file [in the case] that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support its legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on its pleadings, nor can it simply assert that it will be able to discredit the movant's evidence at trial. See T.W. Elec. Serv., 809 F.2d at 630; Fed. R. Civ. P. 56(e). In a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party. State Farm Fire & Casualty Co. v. Martin, 872 F.2d 319, 320 (9th Cir. 1989).

ANALYSIS

All of the Plaintiffs in their capacities as voters and citizens of the State of Hawaii and Plaintiff Conklin in his capacity as a prospective candidate for public office challenge the State's requirement that the publicly-elected officials of OHA, a state agency, be Hawaiian. Plaintiffs argue that such a restriction violates the Equal Protection Clause of the

Fourteenth Amendment, the Fifteenth Amendment and the Voting Rights Act. Each of the Plaintiffs' arguments and the Defendants' and Intervenor's responses are addressed in turn.

I. The Mandate That OHA Trustees Be Hawaiian Violates the Fourteenth Amendment to the United States Constitution

The basis of Plaintiffs' Complaint is that otherwise qualified candidates for public office are denied the ability to serve as OHA trustees because of their race and that such denial violates the Fourteenth Amendment to the U.S. Constitution.[7] Because the Equal Protection Clause prohibits invidious discrimination on the basis of race, the Court holds that the State's scheme prohibiting non-Hawaiians from serving in a particular public office is unconstitutional.

The Supreme Court has repeatedly recognized that individuals have the constitutional right to be considered for public office without the burden of invidious discrimination. See Turner v. Fouche, 396 U.S. 346, 362-63 (1970) (footnote omitted), Anderson v. Martin, 375 U.S. 399, 401-02 (1964) (state law requiring ballots to indicate the race of the candidate violates the Fourteenth Amendment's Equal Protection Clause), McDonald v. Key,

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[7] The Fourteenth Amendment requires in relevant part:

> No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. 14.

224 F.2d 608 (10th Cir.), cert. denied, 350 U.S. 895 (1955) (state law requiring all non-white candidates have their race designated on the ballot violates Equal Protection Clause), Lubin v. Panish, 415 U.S. 709, 716-18 (1974) (state violates Fourteenth Amendment's Equal Protection Clause in barring indigent applicant from running for public office).

The State's requirement that OHA trustees be Hawaiian discriminates on the basis of race. The Supreme Court has clearly stated that the State's definition of Hawaiian, although cloaked in language relating to ancestry, is a restriction based on race. See Rice, 120 S. Ct. at 1055-57 ("Ancestry can be a proxy for race. It is that proxy here.").

A state statute that discriminates on the basis of race will only be upheld against an equal protection challenge if it survives strict scrutiny. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223-24 (1995), Richmond v. J.A. Croson Co., 488 U.S. 469, 493-494 (1989) (plurality opinion). In order for the discriminatory statute to be upheld, the state must show that the statute is narrowly tailored to achieving a compelling state interest. See Adarand, 515 U.S. at 227, Croson, 488 U.S. at 494.

The State represents it has a compelling interest in fulfilling the federally-recognized trust obligation to Hawaiians. In support of this asserted interest, Defendants cite to Williams v. Babbitt and Morton v. Mancari to demonstrate that

a compelling interest has been found in situations where governments deal with Indian tribes. See Babbitt, 115 F.3d 657, 666 n.8 (9th Cir. 1997) and Mancari, 417 U.S. 535, 555 (1974).

The State proposes a second compelling interest in support of the challenged provisions, specifically, redressing the wrongs that have befallen Hawaiians and which Defendants assert have been recognized by Congress. (Defendants' Motion for Summary Judgment at 38-39).[8]

The question of whether there is a trust obligation towards Hawaiians that is similar to the trust obligation with respect to tribal Indians is not a question this Court need reach. As the Court in Rice indicated, such a proposition would "raise questions of considerable moment and difficulty." See Rice, 120 S. Ct. at 1057-58 ("It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. (Citations omitted.)). Justice Breyer, with whom Justice Souter joined in concurrence, openly challenged the concept that a trust relationship exists with respect to native Hawaiians:

> [W]e should reject Hawaii's effort to justify its rules

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[8] Defendants have cited the Apology Resolution, Pub. L. 103-150, 107 Stat. 1510, 1513 (Nov. 23. 1993), passed by the Congress of the United States, as evidence of the wrongs that have been committed upon Hawaiians. The Resolution recognized the "illegal overthrow of the Kingdom of Hawaii on January 17, 1893" and the "suppression of the inherent sovereignty of the Native Hawaiian people" as well as the "deprivation of the rights of Native Hawaiians to self-determination."

> through analogy to a trust for an Indian tribe because the record makes clear that (1) there is no "trust" for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe.

See id. at 1061 (Breyer, J., concurring).

It is equally unclear whether redressing alleged past wrongs to Hawaiians is a compelling state interest. Although remedying current effects of past discrimination has been found to constitute a compelling interest, see Adarand, 515 U.S. at 222, Croson, 488 U.S. at 493, the state must present "detailed findings of prior discrimination" with concrete evidence. See Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 713-14 (9th Cir. 1997), Coral Construction Co. v. King County, 941 F.2d 910, 920 (9th Cir. 1991). For a remedial program to have any justification, the state must also demonstrate there are ongoing effects of the proven past discrimination. See Coral, 941 F.2d at 918.

This Court does not reach the question whether the fulfillment of a trust obligation to Hawaiians or the need to remedy past wrongs to Hawaiians are compelling state interests because it is clear that the State could satisfy these interests through non-discriminatory means. See Adarand, 515 U.S. at 227 (requiring discriminatory statute to be narrowly tailored to effectuate its means). Neither Defendants nor OHA have explained why it is necessary that only Hawaiians serve as trustees. If

the Court were to reach the question and find that the State owed a trust obligation to Hawaiians or that the State has a compelling interest in remedying past wrongs to Hawaiians, this Court does not accept the proposition that non-Hawaiians are unable to adequately serve that obligation as trustees. As Defendants argue, the belief that persons of one race are unable to adequately represent the broad spectrum of political viewpoints is an "untenable premise." (Defendants' Motion at 27). This Court agrees. The assertion that non-Hawaiians are incapable of fulfilling the obligations of the public office of OHA trustee is equally untenable. See also Rice, 120 S. Ct. at 1060 ("Hawaii may not assume, based on race, that . . . any other of its citizens will not cast a principled vote."). Because the State has non-discriminatory alternatives available to satisfy its objectives, the requirement that OHA trustees be Hawaiian will not survive strict scrutiny. Accordingly, Section 5 of Article 12 of the State of Hawaii Constitution and HRS § 13D-2 violate the Equal Protection Clause of the Fourteenth Amendment.

II. The Mandate That OHA Trustees Be Hawaiian Violates the Fifteenth Amendment to the United States Constitution and the Voting Rights Act

Plaintiffs claim that the State's exclusion of non-Hawaiians from serving as OHA trustees violates their right to choose from among a pool of candidates for public office that is not limited by race.

The Fifteenth Amendment succinctly states "[t]he 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." In Hadnott v. Amos, 394 U.S. 358 (1969), the Supreme Court held that a state's act of denying black candidates' inclusion on the ballot is an abridgment of the right to vote in violation of the Fifteenth Amendment. In Hadnott, the State of Alabama refused to include candidates from the National Democratic Party of Alabama ("NDPA") on the ballot. The NDPA was comprised mostly of black candidates, while the Democratic Party was mostly white candidates. NDPA candidates were disqualified from appearing on the ballot, ostensibly for non-compliance with the Alabama Corrupt Practices Act ("ACPA"). The Court found that the state had discriminated on the basis of the race of the candidate in enforcing the ACPA in a discriminatory fashion -- black candidates were systematically excluded from the ballot while white candidates were included. The Court went on to declare that "Fifteenth Amendment rights . . . guarantee the right of people regardless of their race, color, or previous condition of servitude to cast their votes effectively . . .". Id. at 364. Alabama's disparate treatment of black candidates violated the Fifteenth Amendment.

Similarly, Hawaii may not exclude a particular race from

serving in public office while permitting another. Under Hadnott, the right to vote is abridged in violation of the Fifteenth Amendment where the state employs invidious discrimination to strip the effectiveness of its citizens' votes. Hawaii's prohibition against non-Hawaiians serving as OHA trustees violates the Fifteenth Amendment.

Plaintiffs also challenge the State's requirement that OHA trustees be Hawaiian under the Voting Rights Act, 42 U.S.C. § 1973 (the "Act"). Section 2(a) of the Voting Rights Act states: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." See 42 U.S.C. § 1973(a). The Act goes on to declare that:

> [a] violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered[.]

See 42 U.S.C. § 1973(b).

The Act serves a remedial purpose and is aimed at

effectuating the goals of the Fifteenth Amendment. See McCain v. Lybrand, 465 U.S. 236, 246 (1984) (the Act must "be interpreted in light of its prophylactic purpose and the historical experience which it reflects"). The Voting Rights Act was aimed at the "subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." See Allen v. State Board of Elections, 393 U.S. 544, 565 (1969).

Consistent with the Act's remedial purposes, the Supreme Court has held a wide variety of election and voting related practices to fit within the term "standard, practice, or procedure." See Perkins v. Matthews, 400 U.S. 379, 388 (1971) (covering the annexation of land to enlarge city boundaries as a practice covered by the Act), Pleasant Grove v. United States, 479 U.S. 462, 467 (1987) (same), Dougherty County Board of Education v. White, 439 U.S. 32, 37 (1978) (requiring employees to take unpaid leaves of absence while campaigning for elective political office was a barrier to candidacy), Allen, 393 U.S. at 567 (altering candidate filing dates), City of Rome v. United States, 446 U.S. 156, 160 (1980) (relating to candidate residency requirements).

The Supreme Court has made clear that, with respect to the Voting Rights Act, Section 2 of the Act may be violated when a state acts in such a way as to block candidates from appearing on

the ballot. The Supreme Court has given a broad interpretation to the right to vote, protected by the Voting Rights Act, recognizing that voting includes "all action necessary to make a vote effective." See Allen, 393 U.S. at 565-66 (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)). State action that has the effect of restricting candidates from running for office reduces the effectiveness of the right to vote. See Allen, 393 U.S. at 567, City of Rome, 446 U.S. at 160. If such a restriction is based on the candidate's race, the state has abridged the right to vote in violation of the Voting Rights Act.

In Dougherty County Board of Education v. White, 439 U.S. 32, the Supreme Court addressed whether a county board of education's rule requiring employees to take an unpaid leave of absence while campaigning for elective office was a "standard, practice, or procedure with respect to voting," such that the requirement would come within the purview of the Voting Rights Act. The Court held that "[b]y imposing substantial economic disincentives on employees who wish to seek elective office, the Rule burdens entry into elective campaigns and, concomitantly, limits the choices available to Dougherty County voters." See id. at 40.

Dougherty clearly indicates that a state act that has the effect of limiting the class of candidates is an abridgment of the right to vote. When the state limits the class of candidates

based on their race, such an abridgment violates Section 2 of the Voting Rights Act. See 42 U.S.C. § 1973(a).

In Dillard v. Town of North Johns, 717 F. Supp. 1471 (M.D. Ala. 1989), the court found the mayor of North Johns to have violated Section 2 of the Voting Rights Act by hand delivering and completing required financial disclosure forms to white candidates for town council while town officials refused to provide the required forms to black candidates. Although the acts of the town restricted only the candidates' ability to run for office and not directly the electorate's ability to vote, such acts violated the Voting Rights Act and constituted an illegal abridgment of the right to vote. See id. at 1477.

When a state acts to exclude candidates from the ballot, as Hawaii has done here, voters' rights have been abridged. See, e.g., Dougherty, 439 U.S. 32, Allen, 393 U.S. 544, City of Rome, 446 U.S. 156. When the basis of the exclusion is the candidate's race, Section 2 of the Voting Rights Act has been violated. See Dillard, 717 F. Supp. 1471. The State of Hawaii's mandate that OHA trustees be Hawaiian, therefore, violates Section 2 of the Voting Rights Act.

III. The Rule Announced in *Morton v. Mancari* Does Not Save the Racial Restriction on Who May Serve as a Trustee of OHA

Defendants and Intervenor argue that this Court should not invalidate the State's requirement that OHA trustees be Hawaiian because such a requirement is justified under the rule announced

in Morton v. Mancari, 417 U.S. 535. In Mancari, the Supreme Court rejected an equal protection challenge to a federal hiring preference for tribal Indians within the Bureau of Indian Affairs ("BIA"), a federal agency. In granting the hiring preference, Congress desired to give tribal Indians "greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." See Mancari, 417 U.S. at 541-42 (footnotes omitted).

In upholding the federal hiring preference, the Supreme Court relied heavily on the fact that tribal Indians have a unique legal status under federal law, including Congress' guardianship relationship with native Americans and its plenary power to legislate with respect to issues involving Indian tribes. See id. at 551-52. In light of this unique relationship, the court applied a rational basis test to uphold a hiring preference within the BIA for certain native Americans.

The scope of the rule announced in Mancari was carefully limited within the text of the decision itself and in the years since it was first decided. See id. at 554 (footnote omitted) (explicitly limiting the application of the rule to tribal Indians: "[T]here is no other group of people favored in this manner[;] the legal status of the BIA is truly sui generis."),

Rice, ___ U.S. ___, 120 S. Ct. at 1057-58. See also Babbitt, 115 F.3d at 663 ("The preference at issue in Mancari only applied to the BIA, an agency created for the purpose of serving Indians.").

Defendants and Intervenor argue that the Mancari doctrine can be extended to uphold the State's requirement that the trustees of OHA be Hawaiian. They argue that Hawaiians, like native Americans, are indigenous people who have a unique trust relationship with the federal government. Such similarities warrant application of Mancari to uphold the statutes at issue here, according to Defendants and OHA.

Defendants' and OHA's arguments fail for several reasons. Each is addressed in turn.

A. *Mancari* Would Not Uphold a Complete Prohibition of Non-Hawaiians to Serve as OHA Trustees

The Court in Rice held that, assuming, arguendo, native Hawaiians shared the same status as Indians in organized tribes, Mancari would not permit Congress to authorize a state to exclude non-Hawaiians from voting for the state's public officials. See Rice, 120 S. Ct. at 1057-58 ("It does not follow from Mancari, however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."). The Court emphasized that OHA elections are the affair of the State and not of a separate quasi-sovereign. The basis of Mancari's allowance of a preference for tribal Indians

was Congress' unique relationship with respect to the quasi-sovereign Indian tribes. See Mancari, 417 U.S. at 554.

The Court finds no reasonable distinction between the scheme the Supreme Court outlawed in Rice and the scheme challenged here. Rice excluded Mancari's application to the OHA voting scheme precisely because OHA is an agency of the State. See Rice, 120 S. Ct. at 1059 (citing HRS § 10-3(3) and 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, at 645 ("The committee intends that the Office of Hawaiian Affairs will . . . assume the status of a state agency.")). The fact that the statutes challenged here relate to who may *serve* as a trustee rather than who may *vote* for trustees does not alter the Rice Court's conclusion that Mancari will only apply in connection with the furtherance of Congress' unique relationship with quasi-sovereigns. OHA, a state agency, is not itself a quasi-sovereign, nor does it participate in the governance of a quasi-sovereign.[9] Rice, therefore, explains that Mancari does not apply to the State mandate that OHA trustees be Hawaiian.

B. The Racially-Restrictive Limitation on OHA Trustee

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[9] The recognition of Indian tribes is a power primarily reserved for the political branches of our government. See, e.g., United States v. Sandoval, 231 U.S. 28, 46 (1913). This Court does not address whether Congress may, through appropriate legislation, recognize Hawaiians in a manner similar to the Indian tribes. The validity of such an act, were it to occur, and its effects, are not questions before this Court.

Membership is Not Mandated By Congress

The exceptional rule of Mancari would not save the State's scheme for a more basic reason. Mancari relies on a *federal* statute providing a preference to native Americans, while the statutes and Constitutional provisions at issue here were promulgated by the State of Hawaii. Mancari explicitly relied on the fact that the tribal Indian hiring preference is permissible because of the unique guardianship relationship between Congress and the native Americans and the fact that Congress has plenary power under the Constitution to legislate with respect to the Indian tribes. See Mancari, 417 U.S. at 551-52, see also Washington v. Confederated Bands and Tribes, 439 U.S. 463, 500-01 (1979) ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." (citing Mancari, 417 U.S. at 551-52)). No such federal act is at issue here. The State does not have the same unique relationship with Hawaiians and native Hawaiians as the federal government has with Indian tribes. See Confederated Bands and Tribes, 439 U.S. at 501 ("States do not enjoy this same unique relationship with Indians . . .").

Although it is true, as Defendants have argued, that the Mancari rule extends to state legislation favoring tribal Indians

under certain circumstances, those circumstances are not present here. Congress must grant to a state the "explicit authority" to legislate with regard to Indian tribes before preferential legislation will be upheld. See Confederated Bands and Tribes, 439 U.S. at 501. Here, Defendants argue that Congress has repeatedly recognized the "special relationship" and "trust obligation" the federal government has with Hawaiians, and native Hawaiians and that Congress specifically mandated that the State of Hawaii hold the ceded lands as a public trust, in part for the betterment of the conditions of native Hawaiians. (Defendants' Motion at 18, 37 n.22). According to Defendants, this special relationship and the numerous acts of Congress aimed at bettering the conditions of native Hawaiians is sufficient authority for the State to claim a Congressional mandate to establish a system in which Hawaiians may be afforded a preference.

It is true that Congress has recognized the betterment of the conditions of native Hawaiians to be a legitimate and required objective of the administration of public lands. The State of Hawaii, however, is not at liberty to choose any method to effectuate Congress' objectives. The Admission Act requires that the lands granted to the State of Hawaii be held by the State as a public trust for five purposes, one of which is the "betterment of the conditions of native Hawaiians." See

Admission Act § 5(f).[10] Although Congress envisioned the need for a public trust, it did not authorize the State to restrict the administration of that trust to a particular race.

Defendants suggest that limiting the trustees of OHA to a particular race "flows from" the Congressional mandate that lands be held for the betterment of native Hawaiians. As Confederated Bands and Tribes explains, a state may act upon the "explicit authority" of Congress to regulate in a particular manner with respect to Indian tribes. See 439 U.S. at 501. To the extent the congressional acts cited by Defendants are understood to authorize the State to use public lands for the betterment of native Hawaiians, these statutes are best understood as simply identifying the beneficiaries of these lands. Such congressional acts may not be understood to explicitly authorize the State to discriminate on the basis of race as to who may serve as a state official to administer these lands.

Because the challenged statutes and constitutional

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[10] Section 5(f) of the Admission Act states in relevant part:

> [t]he lands granted to the State of Hawaii . . . *shall be held by said State as a public trust* for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.

provisions are acts of the State and not the federal government and because such acts cannot be understood to have been authorized by Congress, Mancari will not permit the State to permit only Hawaiians to serve as OHA trustees.

C. *Mancari* Does Not Permit Limitations or Preferences Based on Race

Defendants are also unable to rely on Mancari because the hiring preference in Mancari was not for a particular racial group. See Mancari, 417 U.S. at 553 ("[the hiring preference for Indians within the BIA] does not constitute 'racial discrimination.' Indeed, it is not even a racial preference."); see also Regents of the University of California v. Bakke, 438 U.S. 265, 305 n.42 (1978), United States v. Antelope, 430 U.S. 641, 645-46 (1977), Fisher v. District Court, 424 U.S. 382, 390-91 (1976) (exclusive tribal court jurisdiction is based on "quasi-sovereign status" of tribe, not race of party). Because the hiring preference was "not directed towards a 'racial' group consisting of 'Indians,' but rather 'only to members of federally recognized tribes,' . . . 'the preference [was] political rather than racial in nature'." See Rice, 120 S. Ct. at 1058.

The requirement that only Hawaiians serve as trustees of OHA is, however, a racial classification. See id. at 1056. Persons of a particular blood quantum of the indigenous people are permitted to serve as trustees, while those who do not possess that blood quantum are barred. Mancari cannot be read to permit

Congress to discriminate on the basis of race. Such discrimination runs counter to the principles of our Constitution. See Adarand, 515 U.S. 200.

IV. Plaintiffs Have Presented a Live Case and Controversy Properly Before the Court

The Office of Hawaiian Affairs has asked the Court to defer ruling on Plaintiffs' motion for summary judgment in light of the fact that Congress is presently considering a bill related to recognizing native Hawaiians as indigenous people. OHA cites Baker v. Carr, 369 U.S. 186 (1962) in support of their argument. Baker outlined six types of non-justiciable political questions. A political question may be present where: (1) powers are committed to another branch; (2) there is no judicially discoverable and manageable standard to resolve the case; (3) it is impossible to determine the case without an initial policy determination of a kind that is clearly for non-judicial discretion; (4) it is impossible for the Court to take action without showing disrespect to another branch; (5) there is an unusual need to adhere to political decisions already made; and (6) there is the prospect that the government will be embarrassed by multiple decisions by different branches of the government. See id.

OHA argues that the first type of political question is present here. OHA cites United States v. Sandoval, 231 U.S. 28, 46 (1913), for the proposition that the determination of whether

and to what extent native people will be recognized and dealt with under the guardianship and protection of the United States is a question reserved for Congress. According to OHA, since the political branches of government have been expressly granted the power to recognize and regulate the Indian tribes, this Court must refrain from addressing Plaintiffs' Complaint.

Sandoval does stand for the proposition that Congress has the power to enact laws for the benefit and protection of tribal Indians. See Sandoval, 231 U.S. at 48. The federal courts, however, are charged with the interpretation of the United States Constitution. The upcoming OHA election of November 7, 2000 requires the Court to respond to the issue raised by Plaintiffs: Is it constitutionally permissible that only Hawaiians may run for the OHA board? A further exigency is the representation by the State that September 19, 2000, the date of this order, is the last day the Court may rule without causing substantial additional expense in conducting the election. The possible passage of proposed legislation in Congress[11] is not an event that this Court can look to as a reason not to act.

This Court is not finding that Hawaiians may not share the same status as tribal Indians. This Court only holds that OHA elections are the affairs of the State and not of a quasi-sovereign and that Congress has not expressly authorized the

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[11] Senator Akaka has proposed a bill relating to the status of native Hawaiians. See S. 2899, 106th Cong. § 2 (2000).

prohibition against non-Hawaiian trustees. The Court further echoes the conclusions of Rice that the State's mandate is based on race rather than political designations. These are proper judicial determinations that do not impinge upon the concerns expressed in Baker.

V. Further Discovery in This Matter is Unnecessary

OHA has asked for additional time for discovery in the matter, arguing that there is a genuine issue as to whether Plaintiff Conklin is qualified to serve as a trustee of OHA. OHA also argues that no relief be afforded Plaintiff Conklin because he is not qualified to serve as an OHA trustee.

OHA's request for additional time for discovery must be denied. A Rule 56(f) motion may only be granted where the moving party demonstrates by affidavit that the facts expected to be discovered would preclude summary judgment. See Mackey v. Pioneer Nat. Bank, 867 F.2d 520, 524 (9th Cir. 1989). Summary judgment in favor of Plaintiff would be precluded by a showing of a genuine issue of material fact. See Federal Rule of Civil Procedure 56.

OHA's argument that Plaintiff Conklin is not qualified to serve as a trustee is based on the assertion that OHA trustees owe a statutorily mandated fiduciary duty to the beneficiaries of the trust administered by OHA and that Plaintiff Conklin is incapable of upholding this duty. Based on public statements

allegedly made by Plaintiff Conklin, OHA argues he is not willing to fulfill the fiduciary obligations to the trust beneficiaries.

Whether Plaintiff Conklin is unwilling to fulfill the fiduciary duties owed to trust beneficiaries is not a question relevant to this Court's inquiry. HRS § 13D-2 established the qualifications for OHA trustees. The provision states in relevant part:

> No person shall be eligible for election or appointment to the [OHA] board [of trustees] unless the person is Hawaiian and is: (1) qualified and registered to vote under the provisions of section 13D-3, and (2) where residency on a particular island is a requirement, a resident on the island for which seat the person is seeking election or appointment. No member of the board shall hold or be a candidate for any other public office under the state or county governments in accordance with Article II, section 7 of the Constitution of the State; nor shall a person be eligible for election or appointment to the board if that person is also a candidate for any other public office under the state or county governments.

The legislature explicitly outlined the required qualifications for seeking the office of trustee of OHA. The qualifications do not reference the fiduciary obligations of a trustee toward the trust.[12] This Court cannot add additional qualifications for state elected officials to be placed on the ballot. It would be premature to question a candidate's

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[12] OHA cites to HRS § 10-16(c) as evidence of the fiduciary duty imposed on trustees of OHA. That section provides: "In matters of misapplication of funds and resources in breach of fiduciary duty, board members shall be subject to suit brought by any beneficiary of the public trust entrusted upon the office, either through the office of the attorney general or through private council."

willingness to fulfill his obligations as a trustee and would also raise considerable federalism concerns.

Additionally, OHA's assertion that Plaintiff Conklin is not qualified because of his beliefs has serious First Amendment implications. In Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974), the Supreme Court held that the First Amendment is violated by a state law mandating political parties file a statement that they will not advocate the overthrow of the government by force or violence. See id. at 450. The Court explained that the concept of a loyalty oath is antithetical to our expectation of unimpaired access to the ballot. In the instant case, even if the Court were to conclude that the State of Hawaii imposes additional qualifications not listed in HRS § 13D-2, barring a candidate from the ballot as a result of that candidate's public comments would strike a blow to one of our system's most fundamental principles -- the right to robust public debate on matters of self-government. See id. ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.") (citing Reynolds v. Sims, 377 U.S. 533, 562 (1964)). The Court need not address the extent to which OHA's arguments touch upon Plaintiff Conklin's First Amendment rights, however, because OHA has not demonstrated that Conklin's political beliefs disqualify him as a candidate under state law.

CONCLUSION

The State of Hawaii's chosen means to effectuate its goal of bettering the conditions and restoring and maintaining the culture of Hawaiians, while laudable, is in discord with the Fourteenth and Fifteenth Amendments to the United States Constitution as well as the Voting Rights Act.[13] As Justice Scalia stated in his concurrence in Adarand, "[t]o pursue the concept of racial entitlement--even for the most admirable and benign of purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred." 515 U.S. at 239 (Scalia, J., concurring).

In accordance with the foregoing, it is HEREBY ORDERED that Plaintiffs' Cross Motion for Summary Judgment is GRANTED and Defendants' Motion for Summary Judgment is DENIED. The State is ordered to permit otherwise qualified non-Hawaiians to run for office and to serve, if elected, as trustees of the Office of Hawaiian Affairs. Section 5 of Article XII of the State

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[13] The Office of Hawaiian Affairs has argued that, were this Court to conclude that the State of Hawaii may not constitutionally exclude non-Hawaiians from serving as OHA trustees, the validity of OHA itself would be called into question. This order, however, is limited to the specific question put before the Court and goes no further. Whether OHA, a state agency aimed at the betterment of Hawaiians as well as the general public, is constitutional, is not a question before this Court.

Constitution and HRS § 13D-2, to the extent they require OHA trustees be Hawaiian, violate the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment and the Voting Rights Act.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 19, 2000.

HELEN GILLMOR
United States District Judge

Gillmore's Revised Opinion

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, EVELYN C. ARAKAKI, PATRICK BARRETT, SANDRA P. BURGESS, EDWARD U. BUGARIN, PATRICIA A. CARROLL, ROBERT M. CHAPMAN, BRIAN L. CLARKE, KENNETH R. CONKLIN, MICHAEL Y. GARCIA, TOBY M. KRAVET, THURSTON TWIGG-SMITH and JEAN YOKOYAMA, Plaintiffs, vs. STATE OF HAWAII, BENJAMIN J. CAYETANO, in his official capacity as the GOVERNOR OF THE STATE OF HAWAII, DWAYNE D. YOSHINA, in his official capacity as CHIEF ELECTION OFFICER OF THE STATE OF HAWAII, Defendants, and OFFICE OF HAWAIIAN AFFAIRS, Intervenor.	CIVIL NO. 00-00514 HG-BMK **SECOND AMENDED ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

SECOND AMENDED ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The 1978 State of Hawaii Constitutional Convention resulted in the creation of the Office of Hawaiian Affairs ("OHA"). The

Hawaiian Constitution was amended to include Section 5 of Article 12 requiring that the "board [of trustees of the Office of Hawaiian Affairs] shall be Hawaiians." See also Hawaii Revised Statutes ("HRS") § 13D-2. OHA is directed by nine publicly-elected trustees and is charged with administering certain programs and assets for the benefit of Hawaiians[1] and native Hawaiians.[2] See Hawaii Const., Art. XII, §§ 4, 6; HRS §§ 10-1(a), 10-3, 10-4, 10-5, 10-6.

Plaintiffs are challenging the State of Hawaii's constitutional and statutory mandate that trustees of OHA be Hawaiian. They believe such a mandate to be improper under the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act, 42 U.S.C. § 1973. Plaintiffs submit that the requirement that trustees of the Office of Hawaiian Affairs be elected solely from a class of persons belonging to one race is in discord with this nation's constitutional and statutory provisions aimed at eliminating barriers based on color.

The Court is presented with the question of whether the

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[1] "Hawaiian" is defined as "any descendent of the aboriginal peoples inhabiting the Hawaiian islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which people thereafter have continued to reside in Hawaii." HRS § 11-1.

[2] "Native Hawaiian" is defined as "any descendent of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778 . . ." HRS § 10-2.

United States Constitution allows the racial restriction on OHA trustees as one of the means by which the State of Hawaii may effectuate the goal of bettering the conditions and restoring and maintaining the culture of Hawaiians. In considering the questions presented by the parties, the Court is mindful that ours is a political system that strives to govern its citizens as individuals rather than as groups. The Supreme Court's brightest moments have affirmed this idea, see, e.g., Brown v. Board of Education, 347 U.S. 483 (1954) (holding that establishing separate schools by race violates the U.S. Constitution), Bolling v. Sharpe, 347 U.S. 497 (1954) (same), Cooper v. Aaron, 358 U.S. 1 (1958); while its darkest moments have rejected this concept. See, e.g., Dred Scott v. Sandford, 19 How. 393 (1856) (denying citizenship to blacks), Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (permitting separate train cars for blacks and whites), Bradwell v. Illinois, 83 U.S. 130 (1872) (upholding state law that barred women from practicing law), Korematsu v. United States, 323 U.S. 214 (1944) (upholding the internment of persons of Japanese ancestry during World War II).

The Fifteenth Amendment to the U.S. Constitution was enacted as part of the effort to exorcize race as a factor upon which the government may base its treatment of its people. See Shaw v. Reno, 509 U.S. 630, 657 (1993) (stating that a goal of our political system is to make race no longer matter). Racial

classifications are particularly harmful when used with respect to voting, as they threaten to "balkanize us into competing racial factions." See id.

The United States Supreme Court, in its decision in Rice v. Cayetano, 528 U.S. 495 (2000), addressed a question closely related to the one posed by Plaintiffs. The Supreme Court held that the State of Hawaii cannot constitutionally limit, by race, the class of voters who choose the officials of a state agency. As Justice Kennedy wrote for the majority, "[r]ace cannot qualify some and disqualify others from full participation in our democracy." Id. at 523. To permit a state to prefer one race over another in voting for a trustee of a state agency would endorse the "demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters." Id.

The Court recognizes that the State's purpose in limiting OHA trustees to Hawaiians is an effort to effectuate one of the five purposes of the Hawaii Statehood Admissions Act, Pub. L. No. 86-3, 73 Stat. 4, 6 (1959), the betterment of the conditions of native Hawaiians and Hawaiians. But not all means of accomplishing this laudable goal are open to the State.

One of the most central tenets of our federal constitutional system is full and robust participation in self-government. See U.S. Const. Amends. I, XIV, XV, XVI(1), XIX, XXIII, XXIV, XXVI.

Participation in our representative government, whether as a voter or as an elected official, cannot be reserved for one race and denied to another. The Supreme Court's holding in Rice that the U.S. Constitution prohibits discrimination on the basis of race in *voting* for public office guides this Court's determination that the Constitution also prohibits racial discrimination as to who *serves* in public office. Such discrimination violates the Fifteenth Amendment and the Voting Rights Act.

FACTUAL BACKGROUND

I. The Ceded Lands and the Creation of the Office of Hawaiian Affairs

At issue in this suit is the ability of non-Hawaiians to run as candidates for the elected position of trustee of the Office of Hawaiian Affairs and to serve if elected. The Office of Hawaiian Affairs administers certain assets, including certain "ceded" lands and proceeds therefrom held in public trust under the Hawaii Constitution. See Hawaii Const., Art. XII, §§ 4, 6. The Supreme Court of the State of Hawaii succinctly explained the history of the ceded lands and the genesis of the Office of Hawaiian Affairs in Trustees of OHA v. Yamasaki, 69 Haw. 154, 159-64 (1987).

When the Republic of Hawaii was annexed by the United States in 1898, certain lands held by the government and the crown were

ceded to the United States. See Pele Defense Fund v. Paty, 73 Haw. 578 (1992), Yamasaki, 69 Haw. at 159 (citing 30 Stat. 750 (July 7, 1898)). The government of the newly-annexed Territory of Hawaii maintained possession of the ceded lands and was charged with managing the lands. See Yamasaki, 69 Haw. at 159-60 (citing 31 Stat. 141 and 31 Stat. 159 (1900)).

When Hawaii became a state, the ceded lands were once again transferred. See Pub. L. No. 86-3, 73 Stat. 4, 6 (1959) (hereinafter "Admissions Act"). The federal government relinquished ownership of large portions of the lands in favor of the State of Hawaii. See id. at §§ 5(a)-(f). The State was not granted the public lands without strings, however. Section 5(f) of the Admissions Act identified five purposes for which the lands should be used and held in a public trust. See also Pele Defense Fund, 73 Haw. at 585-86 (identifying the purposes for which the ceded lands were to be used). Section 5(f) provides in relevant part:

> The lands granted to the State of Hawaii . . . shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.

Although the Admissions Act stated five purposes for the ceded lands, the State used the lands and the proceeds therefrom

primarily for public education. See Yamasaki, 69 Haw. at 161-62. In 1978, however, the State took direct steps to effectuate other purposes of the ceded lands. See id. at 162. In that year, the Hawaii Constitution was amended with the purpose of using ceded lands to better the conditions of native Hawaiians, which was one of the five purposes of the public lands trust identified in the Admissions Act. See id.; see also Hawaii Const., Art. XII, §§ 4, 5, 6.

The state Constitution was also amended to create the agency charged with administering certain assets, including portions of the ceded lands, for the benefit of Hawaiians and native Hawaiians. See Hawaii Const., Art. XII, § 5;[3] see also Hawaii Revised Statutes ("HRS") § 10-4.[4] The board was to be comprised of nine members, each of whom must be Hawaiian. See Hawaii

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[3] Article XII, section 5 of the State Constitution, reads in pertinent part:

> There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians.

[4] Hawaii Revised Statutes (HRS) § 10-4, in pertinent part, reads:

> There shall be an office of Hawaiian affairs constituted as a body corporate which shall be a separate entity independent of the executive branch.

Const., Art. XII, § 5. The Supreme Court in Yamasaki summarized the intent of the framers in creating OHA:

> The framers intended OHA would be "independent from the executive branch and all other branches of government although [they contemplated that] it [would] assume the status of a state agency." Stand. Comm. Rep. No. 59, in 1978 Proceedings, at 645. They expressed a concern that "in the past . . . commingling of funds intended for native Hawaiians of one-half blood with other moneys in the state treasury" had occurred. Id. OHA, they thought, would be the answer to such problems, would "provide Hawaiians the right to determine the priorities [that would] effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race," and would "unite Hawaiians as a people." Comm. of the Whole Rep. No. 13, in 1978 Proceedings, at 1018. And the framers believed OHA should be "a receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians, and ... a body that could formulate policy relating to all native Hawaiians and make decisions on the allocation of those assets belonging to [them]." Stand. Comm. Rep. No. 59, in 1978 Proceedings, at 644.

69 Haw. at 163.

Section 6 of Article XII of the Hawaii Constitution was also added during the 1978 Constitutional Convention and empowered the newly-created Office of Hawaiian Affairs to manage and administer the trust assets. See Yamasaki, 69 Haw. at 163-64; see also Hawaii Const., Art. XII, § 6 (granting the board of trustees the power "to manage and administer . . . that pro rata portion of the trust . . . for native Hawaiians and Hawaiians.").

Soon after the Hawaii Constitution was amended, the legislature enacted HRS chapter 10, creating the Office of Hawaiian Affairs as an entity independent of the executive

branch. Chapter 10 of the Hawaii Revised Statutes listed the goals to be pursued by OHA. The first such goal identified was "[t]he betterment of conditions of native Hawaiians." See HRS § 10-3(1). OHA was also directed to better the conditions of Hawaiians, see HRS § 10-3(2), develop and coordinate programs and activities for native Hawaiians and Hawaiians, see HRS § 10-3(3), assess the policies and practices of other state agencies and their effects on native Hawaiians and Hawaiians, see HRS § 10-3(4), as well as other obligations. Voting for the trustees of the Office of Hawaiian Affairs was limited to Hawaiians and the trustees themselves were required to be Hawaiian.

II. Plaintiffs

Plaintiffs are thirteen citizens of the State of Hawaii and registered voters. They represent a broad cross-section of the population of Hawaii, including English, Japanese, Irish, Okinawan, Portuguese, Chinese, Filipino, French, German, Spanish, Scottish and Hawaiian ancestries. (Exhs. 1-7, 9-11 in support of Plaintiffs' Motion for Injunctive Relief). Each wishes to choose from a pool of candidates for trustees of the Office of Hawaiian Affairs that is not limited by the race of the candidate.

Plaintiff Conklin is an individual wishing to serve as a trustee of the Office of Hawaiian Affairs. He is not of Hawaiian ancestry. The parties do not dispute that on June 1, 2000 Plaintiff Conklin requested nomination papers from the State of

Hawaii Office of Elections but was refused these papers because he is not Hawaiian, as that term is defined under HRS § 11-1. (Exh. 8 in support of Plaintiffs' Motion for Injunctive Relief).

On August 16, 2000, Plaintiff Conklin received nominations papers from the Office of Elections pursuant to this Court's order of August 15, 2000 temporarily enjoining the Office of Elections from refusing to issue nomination papers solely based on race to any otherwise qualified applicants for the position of trustee of OHA. On August 28, 2000, Plaintiff Conklin filed his nomination papers and took the oath prescribed by HRS § 12-7.[5]

III. <u>Defendants and Intervenor</u>

Defendants are the State of Hawaii (the "State"), the Governor and the Chief Election Officer. Both the Governor and the Chief Election Officer are parties only in their official capacities.

The Intervenor, Office of Hawaiian Affairs, joined the suit

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[5] A candidate is generally required to take the following oath before that candidate's name may appear on the ballot:

> I, ..., do solemnly swear and declare, on oath that if elected to office I will support and defend the Constitution and laws of the United States of America, and the Constitution and laws of the State of Hawaii, and will bear true faith and allegiance to the same; that if elected I will faithfully discharge my duties as ..... (name of office) ..... to the best of my ability; that I take this obligation freely, without any mental reservation or purpose of evasion; So help me God.

HRS § 12-7.

pursuant to its motion to intervene. The Court granted OHA's motion to intervene on September 8, 2000, concluding that OHA had a unique obligation to protect the beneficiaries of the trust. This obligation differed from the obligations of the Defendants who represent the state at large.[6]

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on July 25, 2000. On that same day, Plaintiffs filed their Motion for Temporary Restraining Order and Injunctive Relief ("Plaintiffs' Motion for Injunctive Relief"). A hearing was held before this Court on July 27, 2000, during which the parties agreed that the Court should address Plaintiffs' motion as one seeking a preliminary injunction. The parties made clear the urgency of the matter, as the State normally requires all candidates for elected positions to submit their nominations by September 8, 2000. On the representations by the parties that this matter could be resolved through a review of the law and undisputed facts, the Court permitted the

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[6] Although OHA's Motion to Intervene sought the intervention of OHA, the state agency, as well as its nine trustees, this Court only granted the intervention as to OHA. Counsel for OHA agreed that, in light of indications that the nine trustees would shortly resign their positions as trustees, it was unnecessary to permit the trustees to intervene.

On September 8, 2000, the same day that the Court permitted OHA to intervene, the nine trustees did resign their positions.

Since the time of the trustees' resignations, pursuant to state law, the Governor has appointed interim trustees. The Court notes that some of the interim trustees are former trustees who resigned their positions on September 8, 2000. One of the trustees newly-appointed by the Governor is a non-Hawaiian.

parties to file dispositive motions on an expedited basis.

On August 3, 2000, Defendants filed their Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Injunctive Relief and in Support of Defendants' Motion for Summary Judgment. Defendants argued that the racial classification permitting only Hawaiians to serve as trustees of OHA is akin to preferences Congress has provided to native Americans and which require only a rational basis review before the preference would be upheld.

On August 9, 2000, Plaintiffs opposed Defendants' Motion in their Brief in Support of Preliminary Injunction and in Opposition to Summary Judgment for the State. The brief argued that Hawaii's constitutional limitation of OHA trustees may be upheld only if the State may demonstrate both a compelling interest in maintaining the limitation and that the State is unable to accomplish its compelling purpose in a less restrictive manner.

On August 11, 2000, OHA lodged its Motion to Intervene as well as a motion to continue the hearing on Plaintiffs' Motion for Injunctive Relief set for August 15. Although it is a state agency, OHA argued that its interests differ from those of the State. Specifically, OHA submitted that it has a unique obligation to protect the beneficiaries of the trust, whereas the current Defendants -- the State, Governor and Chief Election

Officer -- represent the state at large and therefore have broader constituencies. OHA also argued that it would be prejudiced by its inability to assert its interests.

A hearing on Plaintiffs' Motion for Injunctive Relief and Defendants' Motion for Summary Judgment was held on August 15, 2000. The Office of Hawaiian Affairs, although not a party at the time, was permitted to attend the hearing. The Court considered the arguments made by the parties and granted Plaintiffs' Motion for Injunctive Relief. The Court found that Plaintiffs' suit involved serious questions and the hardship that would befall Plaintiffs in not being able to file nomination papers substantially outweighed the State's burden in receiving nominations from otherwise qualified, non-Hawaiian candidates.

Also on August 15, the Court granted, over Plaintiffs' objections, OHA's motion to shorten time for hearing on OHA's motion to intervene. A hearing date of September 8, 2000 was set to address OHA's motion to intervene. September 8, 2000 was also set as the date for hearing of Defendants' and Plaintiffs' motions for summary judgment in the action herein. In order to provide for meaningful participation by OHA, should the Court allow OHA to intervene over Plaintiffs' objections, the Court permitted OHA to file a memorandum with respect to Plaintiffs' and Defendants' motions for summary judgment, prior to the September 8 hearing on its motion to intervene.

On August 30, 2000, Plaintiffs filed their Cross Motion for Summary Judgment. Their motion presented substantially similar arguments as were made in their Motion for Injunctive Relief filed more than one month prior.

On September 5, 2000, Defendants filed their Opposition to Plaintiffs' Cross Motion for Summary Judgment and the proposed-intervenors Office of Hawaiian Affairs filed their Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Cross Motion for Summary Judgment. Defendants' arguments were substantially similar to those put forth in their opposition to Plaintiffs' Motion for Injunctive Relief and Motion for Summary Judgment.

On September 8, 2000, this Court heard the Office of Hawaiian Affairs' motion to intervene. At the hearing, the Court granted OHA's motion to intervene and deemed all submissions by OHA to have been filed as of the date received by the Court. After allowing OHA to intervene, the Court heard arguments by Plaintiffs, Defendants and Intervenor on the two motions for summary judgment. The Court took Plaintiffs' and Defendants' motions for summary judgment under submission for consideration before ruling.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to

judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of "identifying for the court the portions of the materials on file [in the case] that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support its legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on its pleadings, nor can it simply assert that it will be able to discredit the movant's evidence at trial. See T.W. Elec. Serv., 809 F.2d at 630; Fed. R. Civ. P. 56(e). In a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party. State Farm Fire & Casualty Co. v. Martin, 872 F.2d 319, 320 (9th Cir. 1989).

ANALYSIS

All of the Plaintiffs in their capacities as voters and citizens of the State of Hawaii and Plaintiff Conklin in his capacity as a prospective candidate for public office challenge the State's requirement that the publicly-elected officials of OHA, a state agency, be Hawaiian. Plaintiffs argue that such a

restriction violates the Fifteenth Amendment, the Voting Rights Act, and the Equal Protection Clause of the Fourteenth Amendment. Each of the Plaintiffs' arguments and the Defendants' and Intervenor's responses are addressed in turn.

I. The Mandate That OHA Trustees Be Hawaiian Violates the Fifteenth Amendment to the United States Constitution and the Voting Rights Act

Plaintiffs claim that the State's exclusion of non-Hawaiians from serving as OHA trustees violates their right to choose from among a pool of candidates for public office that is not limited by race.

The Fifteenth Amendment succinctly states "[t]he 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." In Hadnott v. Amos, 394 U.S. 358 (1969), the Supreme Court held that a state's act of denying black candidates' inclusion on the ballot is an abridgment of the right to vote in violation of the Fifteenth Amendment. In Hadnott, the State of Alabama refused to include candidates from the National Democratic Party of Alabama ("NDPA") on the ballot. The NDPA was comprised mostly of black candidates, while the Democratic Party was mostly white candidates. NDPA candidates were disqualified from appearing on the ballot, ostensibly for non-compliance with the Alabama Corrupt Practices Act ("ACPA"). The Court found that the state

had discriminated on the basis of the race of the candidate in enforcing the ACPA in a discriminatory fashion -- black candidates were systematically excluded from the ballot while white candidates were included. The Court went on to declare that "Fifteenth Amendment rights . . . guarantee the right of people regardless of their race, color, or previous condition of servitude to cast their votes effectively . . .". Id. at 364. Alabama's disparate treatment of black candidates violated the Fifteenth Amendment.

Similarly, Hawaii may not exclude a particular race from serving in public office while permitting another. Under Hadnott, the right to vote is abridged in violation of the Fifteenth Amendment where the state employs invidious discrimination to strip the effectiveness of its citizens' votes. Hawaii's prohibition against non-Hawaiians serving as OHA trustees violates the Fifteenth Amendment.

Plaintiffs also challenge the State's requirement that OHA trustees be Hawaiian under the Voting Rights Act, 42 U.S.C. § 1973 (the "Act"). Section 2(a) of the Voting Rights Act states: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." See 42 U.S.C. § 1973(a). The

Act goes on to declare that:

> [a] violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered[.]

See 42 U.S.C. § 1973(b).

The Act serves a remedial purpose and is aimed at effectuating the goals of the Fifteenth Amendment. See McCain v. Lybrand, 465 U.S. 236, 246 (1984) (the Act must "be interpreted in light of its prophylactic purpose and the historical experience which it reflects"). The Voting Rights Act was aimed at the "subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." See Allen v. State Board of Elections, 393 U.S. 544, 565 (1969).

Consistent with the Act's remedial purposes, the Supreme Court has held a wide variety of election and voting related practices to fit within the term "standard, practice, or procedure." See Perkins v. Matthews, 400 U.S. 379, 388 (1971) (covering the annexation of land to enlarge city boundaries as a practice covered by the Act), Pleasant Grove v. United States,

479 U.S. 462, 467 (1987) (same), Dougherty County Board of Education v. White, 439 U.S. 32, 37 (1978) (requiring employees to take unpaid leaves of absence while campaigning for elective political office was a barrier to candidacy), Allen, 393 U.S. at 567 (altering candidate filing dates), City of Rome v. United States, 446 U.S. 156, 160 (1980) (relating to candidate residency requirements).

The Supreme Court has made clear that, with respect to the Voting Rights Act, Section 2 of the Act may be violated when a state acts in such a way as to block candidates from appearing on the ballot. The Supreme Court has given a broad interpretation to the right to vote, protected by the Voting Rights Act, recognizing that voting includes "all action necessary to make a vote effective." See Allen, 393 U.S. at 565-66 (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)). State action that has the effect of restricting candidates from running for office reduces the effectiveness of the right to vote. See Allen, 393 U.S. at 567, City of Rome, 446 U.S. at 160. If such a restriction is based on the candidate's race, the state has abridged the right to vote in violation of the Voting Rights Act.

In Dougherty County Board of Education v. White, 439 U.S. 32, the Supreme Court addressed whether a county board of education's rule requiring employees to take an unpaid leave of absence while campaigning for elective office was a "standard,

practice, or procedure with respect to voting," such that the requirement would come within the purview of the Voting Rights Act. The Court held that "[b]y imposing substantial economic disincentives on employees who wish to seek elective office, the Rule burdens entry into elective campaigns and, concomitantly, limits the choices available to Dougherty County voters." See id. at 40.

Dougherty clearly indicates that a state act that has the effect of limiting the class of candidates is an abridgment of the right to vote. When the state limits the class of candidates based on their race, such an abridgment violates Section 2 of the Voting Rights Act. See 42 U.S.C. § 1973(a).

In Dillard v. Town of North Johns, 717 F. Supp. 1471 (M.D. Ala. 1989), the court found the mayor of North Johns to have violated Section 2 of the Voting Rights Act by hand delivering and completing required financial disclosure forms to white candidates for town council while town officials refused to provide the required forms to black candidates. Although the acts of the town restricted only the candidates' ability to run for office and not directly the electorate's ability to vote, such acts violated the Voting Rights Act and constituted an illegal abridgment of the right to vote. See id. at 1477.

When a state acts to exclude candidates from the ballot, as Hawaii has done here, voters' rights have been abridged. See,

e.g., Dougherty, 439 U.S. 32, Allen, 393 U.S. 544, City of Rome, 446 U.S. 156. When the basis of the exclusion is the candidate's race, Section 2 of the Voting Rights Act has been violated. See Dillard, 717 F. Supp. 1471. The State of Hawaii's mandate that OHA trustees be Hawaiian, therefore, violates Section 2 of the Voting Rights Act.

II. The Rule Announced in *Morton v. Mancari* Does Not Save the Racial Restriction on Who May Serve as a Trustee of OHA

Defendants and Intervenor argue that this Court should not invalidate the State's requirement that OHA trustees be Hawaiian because such a requirement is justified under the rule announced in Morton v. Mancari, 417 U.S. 535 (1974). In Mancari, the Supreme Court rejected an equal protection challenge to a federal hiring preference for tribal Indians within the Bureau of Indian Affairs ("BIA"), a federal agency. In granting the hiring preference, Congress desired to give tribal Indians "greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." See Mancari, 417 U.S. at 541-42 (footnotes omitted).

In upholding the federal hiring preference, the Supreme Court relied heavily on the fact that tribal Indians have a unique legal status under federal law, including Congress' guardianship relationship with native Americans and its plenary

power to legislate with respect to issues involving Indian tribes. See id. at 551-52. In light of this unique relationship, the court applied a rational basis test to uphold a hiring preference within the BIA for certain native Americans.

The scope of the rule announced in Mancari was carefully limited within the text of the decision itself and in the years since it was first decided. See id. at 554 (footnote omitted) (explicitly limiting the application of the rule to tribal Indians: "[T]here is no other group of people favored in this manner[;] the legal status of the BIA is truly sui generis."), Rice, 528 U.S. at 518. See also Williams v. Babbitt, 115 F.3d 657, 663 (9th Cir. 1997) ("The preference at issue in Mancari only applied to the BIA, an agency created for the purpose of serving Indians.").

Defendants and Intervenor argue that the Mancari doctrine can be extended to uphold the State's requirement that the trustees of OHA be Hawaiian. They argue that Hawaiians, like native Americans, are indigenous people who have a unique trust relationship with the federal government. Such similarities warrant application of Mancari to uphold the statutes at issue here, according to Defendants and OHA.

Defendants' and OHA's arguments fail for several reasons. Each is addressed in turn.

A. *Mancari* Would Not Uphold a Complete Prohibition of Non-Hawaiians to Serve as OHA Trustees

The Court in Rice held that, assuming, arguendo, native Hawaiians shared the same status as Indians in organized tribes, Mancari would not permit Congress to authorize a state to exclude non-Hawaiians from voting for the state's public officials. See Rice, 528 U.S. at 520 ("It does not follow from Mancari, however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."). The Court emphasized that OHA elections are the affair of the State and not of a separate quasi-sovereign. The basis of Mancari's allowance of a preference for tribal Indians was Congress' unique relationship with respect to the quasi-sovereign Indian tribes. See Mancari, 417 U.S. at 554.

The Court finds no reasonable distinction between the scheme the Supreme Court outlawed in Rice and the scheme challenged here. Rice excluded Mancari's application to the OHA voting scheme precisely because OHA is an agency of the State. See Rice, 528 U.S. at 520-21 (citing HRS § 10-3(3) and 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, at 645 ("The committee intends that the Office of Hawaiian Affairs will . . . assume the status of a state agency.")). The fact that the statutes challenged here relate to who may *serve* as a trustee rather than who may *vote* for trustees does not alter the Rice Court's conclusion that Mancari

will only apply in connection with the furtherance of Congress' unique relationship with quasi-sovereigns. OHA, a state agency, is not itself a quasi-sovereign, nor does it participate in the governance of a quasi-sovereign.[7] Rice, therefore, explains that Mancari does not apply to the State mandate that OHA trustees be Hawaiian.

B. The Racially-Restrictive Limitation on OHA Trustee Membership is Not Mandated By Congress

The exceptional rule of Mancari would not save the State's scheme for a more basic reason. Mancari relies on a *federal* statute providing a preference to native Americans, while the statutes and Constitutional provisions at issue here were promulgated by the State of Hawaii. Mancari explicitly relied on the fact that the tribal Indian hiring preference is permissible because of the unique guardianship relationship between Congress and the native Americans and the fact that Congress has plenary power under the Constitution to legislate with respect to the Indian tribes. See Mancari, 417 U.S. at 551-52, see also Washington v. Confederated Bands and Tribes, 439 U.S. 463, 500-01 (1979) ("It is settled that 'the unique legal status of Indian

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[7] The recognition of Indian tribes is a power primarily reserved for the political branches of our government. See, e.g., United States v. Sandoval, 231 U.S. 28, 46 (1913). This Court does not address whether Congress may, through appropriate legislation, recognize Hawaiians in a manner similar to the Indian tribes. The validity of such an act, were it to occur, and its effects, are not questions before this Court.

tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." (citing Mancari, 417 U.S. at 551-52)). No such federal act is at issue here. The State does not have the same unique relationship with Hawaiians and native Hawaiians as the federal government has with Indian tribes. See Confederated Bands and Tribes, 439 U.S. at 501 ("States do not enjoy this same unique relationship with Indians . . .").

Although it is true, as Defendants have argued, that the Mancari rule extends to state legislation favoring tribal Indians under certain circumstances, those circumstances are not present here. Congress must grant to a state the "explicit authority" to legislate with regard to Indian tribes before preferential legislation will be upheld. See Confederated Bands and Tribes, 439 U.S. at 501. Here, Defendants argue that Congress has repeatedly recognized the "special relationship" and "trust obligation" the federal government has with Hawaiians and native Hawaiians and that Congress specifically mandated that the State of Hawaii hold the ceded lands as a public trust, in part for the betterment of the conditions of native Hawaiians. (Defendants' Motion at 18, 37 n.22). According to Defendants, this special relationship and the numerous acts of Congress aimed at bettering the conditions of native Hawaiians is sufficient authority for

the State to claim a Congressional mandate to establish a system in which Hawaiians may be afforded a preference.

It is true that Congress has recognized the betterment of the conditions of native Hawaiians to be a legitimate and required objective of the administration of public lands. The State of Hawaii, however, is not at liberty to choose any method to effectuate Congress' objectives. The Admissions Act requires that the lands granted to the State of Hawaii be held by the State as a public trust for five purposes, one of which is the "betterment of the conditions of native Hawaiians." See Admissions Act § 5(f).[8] Although Congress envisioned the need for a public trust, it did not authorize the State to restrict the administration of that trust to a particular race.

Defendants suggest that limiting the trustees of OHA to a particular race "flows from" the Congressional mandate that lands be held for the betterment of native Hawaiians. As Confederated Bands and Tribes explains, a state may act upon the "explicit

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[8] Section 5(f) of the Admissions Act states in relevant part:

> [t]he lands granted to the State of Hawaii . . . *shall be held by said State as a public trust* for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.

authority" of Congress to regulate in a particular manner with respect to Indian tribes. See 439 U.S. at 501. To the extent the congressional acts cited by Defendants are understood to authorize the State to use public lands for the betterment of native Hawaiians, these statutes are best understood as simply identifying the beneficiaries of these lands. Such congressional acts may not be understood to explicitly authorize the State to discriminate on the basis of race as to who may serve as a state official to administer these lands.

Because the challenged statutes and constitutional provisions are acts of the State and not the federal government and because such acts cannot be understood to have been authorized by Congress, Mancari will not permit the State to permit only Hawaiians to serve as OHA trustees.

C. *Mancari* Does Not Permit Limitations or Preferences Based on Race

Defendants are also unable to rely on Mancari because the hiring preference in Mancari was not for a particular racial group. See Mancari, 417 U.S. at 553 ("[the hiring preference for Indians within the BIA] does not constitute 'racial discrimination.' Indeed, it is not even a racial preference."); see also Regents of the University of California v. Bakke, 438 U.S. 265, 305 n.42 (1978), United States v. Antelope, 430 U.S. 641, 645-46 (1977), Fisher v. District Court, 424 U.S. 382, 390-91 (1976) (exclusive tribal court jurisdiction is based on

"quasi-sovereign status" of tribe, not race of party). Because the hiring preference was "not directed towards a 'racial' group consisting of 'Indians,' but rather 'only to members of federally recognized tribes,' . . . 'the preference [was] political rather than racial in nature'." See Rice, 528 U.S. at 519-20.

The requirement that only Hawaiians serve as trustees of OHA is, however, a racial classification. See id. at 516-17. Persons of a particular blood quantum of the indigenous people are permitted to serve as trustees, while those who do not possess that blood quantum are barred. Mancari cannot be read to permit Congress to discriminate on the basis of race. Such discrimination runs counter to the principles of our Constitution. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

III. Plaintiffs' Claims under the Fourteenth Amendment to the United States Constitution

The Court has already disposed of Plaintiffs' challenge to the candidacy requirement under the Fifteenth Amendment and the Voting Rights Act, it is therefore unnecessary to reach Plaintiffs' challenge to the candidacy requirement on Fourteenth Amendment grounds.

Plaintiffs do not have standing to challenge the appointment process. Arakaki v. State of Hawaii, 314 F.3d 1091, 1097 & n.8 (9th Cir. 2002).

IV. Plaintiffs Have Presented a Live Case and Controversy

Properly Before the Court

The Office of Hawaiian Affairs has asked the Court to defer ruling on Plaintiffs' motion for summary judgment in light of the fact that Congress is presently considering a bill related to recognizing native Hawaiians as indigenous people. OHA cites Baker v. Carr, 369 U.S. 186 (1962) in support of their argument. Baker outlined six types of non-justiciable political questions. A political question may be present where: (1) powers are committed to another branch; (2) there is no judicially discoverable and manageable standard to resolve the case; (3) it is impossible to determine the case without an initial policy determination of a kind that is clearly for non-judicial discretion; (4) it is impossible for the Court to take action without showing disrespect to another branch; (5) there is an unusual need to adhere to political decisions already made; and (6) there is the prospect that the government will be embarrassed by multiple decisions by different branches of the government. See id.

OHA argues that the first type of political question is present here. OHA cites United States v. Sandoval, 231 U.S. 28, 46 (1913), for the proposition that the determination of whether and to what extent native people will be recognized and dealt with under the guardianship and protection of the United States is a question reserved for Congress. According to OHA, since the

political branches of government have been expressly granted the power to recognize and regulate the Indian tribes, this Court must refrain from addressing Plaintiffs' Complaint.

Sandoval does stand for the proposition that Congress has the power to enact laws for the benefit and protection of tribal Indians. See Sandoval, 231 U.S. at 48. The federal courts, however, are charged with the interpretation of the United States Constitution. The OHA election of November 7, 2000 requires the Court to respond to the issue raised by Plaintiffs: Is it constitutionally permissible that only Hawaiians may run for the OHA board? A further exigency is the representation by the State that September 19, 2000 is the last day the Court may rule without causing substantial additional expense in conducting the election. The possible passage of proposed legislation in Congress[9] is not an event that this Court can look to as a reason not to act.

This Court is not finding that Hawaiians may not share the same status as tribal Indians. This Court only holds that OHA elections are the affairs of the State and not of a quasi-sovereign and that Congress has not expressly authorized the prohibition against non-Hawaiian trustees. The Court further echoes the conclusions of Rice that the State's mandate is based

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[9] Senator Akaka has proposed a bill relating to the status of native Hawaiians. See S. 2899, 106th Cong. § 2 (2000).

on race rather than political designations. These are proper judicial determinations that do not impinge upon the concerns expressed in Baker.

V. Further Discovery in This Matter is Unnecessary

OHA has asked for additional time for discovery in the matter, arguing that there is a genuine issue as to whether Plaintiff Conklin is qualified to serve as a trustee of OHA. OHA also argues that no relief be afforded Plaintiff Conklin because he is not qualified to serve as an OHA trustee.

OHA's request for additional time for discovery must be denied. A Rule 56(f) motion may only be granted where the moving party demonstrates by affidavit that the facts expected to be discovered would preclude summary judgment. See Mackey v. Pioneer Nat. Bank, 867 F.2d 520, 524 (9th Cir. 1989). Summary judgment in favor of Plaintiffs would be precluded by a showing of a genuine issue of material fact. See Federal Rule of Civil Procedure 56.

OHA's argument that Plaintiff Conklin is not qualified to serve as a trustee is based on the assertion that OHA trustees owe a statutorily mandated fiduciary duty to the beneficiaries of the trust administered by OHA and that Plaintiff Conklin is incapable of upholding this duty. Based on public statements allegedly made by Plaintiff Conklin, OHA argues he is not willing to fulfill the fiduciary obligations to the trust beneficiaries.

Whether Plaintiff Conklin is unwilling to fulfill the fiduciary duties owed to trust beneficiaries is not a question relevant to this Court's inquiry. HRS § 13D-2 established the qualifications for OHA trustees. The provision states in relevant part:

> No person shall be eligible for election or appointment to the [OHA] board [of trustees] unless the person is Hawaiian and is: (1) qualified and registered to vote under the provisions of section 13D-3, and (2) where residency on a particular island is a requirement, a resident on the island for which seat the person is seeking election or appointment. No member of the board shall hold or be a candidate for any other public office under the state or county governments in accordance with Article II, section 7 of the Constitution of the State; nor shall a person be eligible for election or appointment to the board if that person is also a candidate for any other public office under the state or county governments.

The legislature explicitly outlined the required qualifications for seeking the office of trustee of OHA. The qualifications do not reference the fiduciary obligations of a trustee toward the trust.[10] This Court cannot add additional qualifications for state elected officials to be placed on the ballot. It would be premature to question a candidate's willingness to fulfill his obligations as a trustee and would

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[10] OHA cites to HRS § 10-16(c) as evidence of the fiduciary duty imposed on trustees of OHA. That section provides: "In matters of misapplication of funds and resources in breach of fiduciary duty, board members shall be subject to suit brought by any beneficiary of the public trust entrusted upon the office, either through the office of the attorney general or through private council."

also raise considerable federalism concerns.

Additionally, OHA's assertion that Plaintiff Conklin is not qualified because of his beliefs has serious First Amendment implications. In Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974), the Supreme Court held that the First Amendment is violated by a state law mandating political parties file a statement that they will not advocate the overthrow of the government by force or violence. See id. at 450. The Court explained that the concept of a loyalty oath is antithetical to our expectation of unimpaired access to the ballot. In the instant case, even if the Court were to conclude that the State of Hawaii imposes additional qualifications not listed in HRS § 13D-2, barring a candidate from the ballot as a result of that candidate's public comments would strike a blow to one of our system's most fundamental principles -- the right to robust public debate on matters of self-government. See id. ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.") (citing Reynolds v. Sims, 377 U.S. 533, 562 (1964)). The Court need not address the extent to which OHA's arguments touch upon Plaintiff Conklin's First Amendment rights, however, because OHA has not demonstrated that Conklin's political beliefs disqualify him as a candidate under state law.

CONCLUSION

The State of Hawaii's chosen means to effectuate its goal of bettering the conditions and restoring and maintaining the culture of Hawaiians, while laudable, is in discord with the Fifteenth Amendment to the United States Constitution and the Voting Rights Act.[11] As Justice Scalia stated in his concurrence in Adarand, "[t]o pursue the concept of racial entitlement--even for the most admirable and benign of purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred." 515 U.S. at 239 (Scalia, J., concurring).

The Court does not reach the merits of Plaintiffs' Fourteenth Amendment claims. The candidacy issue is decided under the Fifteenth Amendment and the Voting Rights Act.

Plaintiffs do not have standing to challenge the appointment process.

In accordance with the foregoing, it is HEREBY ORDERED that Plaintiffs' Cross Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART and Defendants' Motion for Summary Judgment is

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[11] The Office of Hawaiian Affairs has argued that, were this Court to conclude that the State of Hawaii may not constitutionally exclude non-Hawaiians from serving as OHA trustees, the validity of OHA itself would be called into question. This order, however, is limited to the specific question put before the Court and goes no further. Whether OHA, a state agency aimed at the betterment of Hawaiians as well as the general public, is constitutional, is not a question before this Court.

DENIED. The State is ordered to permit otherwise qualified non-Hawaiians to run for office and to serve, if elected, as trustees of the Office of Hawaiian Affairs. Section 5 of Article XII of the State Constitution and HRS § 13D-2 violate the Fifteenth Amendment and the Voting Rights Act, to the extent that they require persons running for OHA trustee positions and serving, if elected, to be Hawaiian.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 22, 2003.

HELEN GILLMOR
United States District Judge