No. 07-1372

In The
Supreme Court of the United States

STATE OF HAWAII, et al.,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

This amicus curiae brief is presented on behalf of Mountain States Legal Foundation, a nonprofit, public-interest law firm with nearly 36,000 members, in support of the Petitioners, State of Hawaii, et al.[1]

INTEREST OF AMICUS CURIAE

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the State of Colorado with nearly 36,000 members. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has been active particularly in the area of individual liberties and civil rights, having been counsel for plaintiffs in every phase of the proceedings in *Adarand Constructors, Inc.*,[2] *Concrete Works of*

[1] Pursuant to Rule 37.3(a), counsel of record states that the parties have consented to the filing of all amicus curiae briefs. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir.

(Continued on following page)

Colorado,[3] *Wygant v. Jackson Board of Education*,[4] and on the petition for certiorari for *Sherbrooke Turf, Inc*.[5] In addition, MSLF has participated in a number of other cases challenging the constitutionality of government-sponsored racial preference programs. MSLF has been dedicated for over twenty-five years to litigating for the equality of all persons, regardless of race, and to applying the same standard of judicial review—strict scrutiny—to all governmental racial classifications. MSLF is, therefore, well-qualified to comment on issues now before this Court.

ARGUMENT

The State of Hawaii did not argue that, if this Court construes the Apology Resolution to confer special benefits on persons of Hawaiian ancestry, the Resolution is unconstitutional because it violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment. Nonetheless, this is

2000), reversed and remanded, *per curiam*, 520 U.S. 16 (2000); *Adarand v. Mineta*, 534 U.S. 103 (2001) (dismissed as improvidently granted).

[3] *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *certiorari denied*, 540 U.S. 1027 (2003) (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari).

[4] *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

[5] *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 541 U.S. 1041 (2004).

one question the Court must answer in construing the meaning and effect of the Apology Resolution. A universal rule of statutory construction is that "statutes should be construed whenever possible so as to uphold their constitutionality."[6] In this case, however, the Apology Resolution and its clear use of a racial classification fail to meet strict scrutiny. Others of the amici will demonstrate that, if the Apology Resolution is construed to confer special privileges on persons of Hawaiian ancestry, the Apology Resolution constitutes a preference for a racial group,[7] an assessment with which MSLF concurs wholeheartedly.

Equal protection of the law, as embodied in the Constitution, is founded on the principle that "distinctions between citizens solely because of their [race or] ancestry are by their vary nature odious to a free people whose institutions are founded upon the doctrine of equality."[8] Thus, "[a] racial classification, regardless of purported motivation, is presumptively invalid and may be upheld only upon an extraordinary justification."[9] Therefore, the use of racial classifications by any government, including the federal government and Congress, is "subject to the most exacting judicial scrutiny [and] it is the government's

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[6] *U.S. v. Vuitch*, 402 U.S. 62, 70 (1971).

[7] See, for example, Amicus Curiae Brief of Pacific Legal Foundation.

[8] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

[9] *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

burden to satisfy the demands of the extraordinary justification."[10] Moreover, that scrutiny requires a "most searching [and 'skeptical'] examination,"[11] in other words, "the strictest judicial scrutiny."[12]

There are only two possible interests that Congress could offer as a compelling interest: (1) that the United States' relationship with and constitutional authority over American Indian Tribes and their members is identical to Congress's relationship with and authority over persons of Hawaiian ancestry; and (2) that the United States has engaged, directly or passively, in discrimination against persons of Hawaiian ancestry, which conduct justifies race-conscious remediation. There is no evidence of either here.

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[10] *Hunter v. Regents of the University of California*, 190 F.3d 1061, 1069 (9th Cir. 1999).

[11] *Adarand 1995*, 515 U.S. at 223, 237. *Accord*, *Wessman v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) (the government bears "a heavy burden of justification [for] their use," because "*Croson* . . . leaves no doubt that only solid evidence will justify allowing race-conscious actions"); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government.").

[12] *Adarand*, 515 U.S. at 224.

I. THERE IS A UNIQUE GUARDIAN-WARD TRUST RELATIONSHIP BETWEEN THE UNITED STATES AND AMERICAN INDIAN TRIBES.

A. CONGRESS'S CLAIM THAT ITS RELATIONSHIP WITH PERSONS OF HAWAIIAN ANCESTRY IS THE SAME AS WITH AMERICAN INDIAN TRIBES IS LEGALLY AND FACTUALLY WRONG.

The United States Congress has made the argument on numerous occasions that it possesses a special, unique, guardian-ward relationship with persons of Hawaiian ancestry that is identical to its relationship with American Indian tribes and their members. Congress reasons that this relationship allows Congress to legislate preferences for persons of Hawaiian ancestry, subject only to rational basis scrutiny. A prime example is the pending Akaka Bill,[13] which declares that the United States has a "special political and legal relationship with the native peoples of the United States, including Native Hawaiians,"[14] and a concomitant interest in ensuring their welfare. It further finds, "the special relationship of

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[13] The Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Congress (2007). It purports to establish a separate governmental entity for persons with Hawaiian ancestry with some, but not all, of the attributes of American Indian tribes and encourages "negotiation" by that entity with the State of Hawaii and the United States to achieve "reconciliation."

[14] *Id.* at Section 20(A).

American Indians, Alaska Natives, and Native Hawaiians to the United States arises out of their status as aboriginal, indigenous, native people of the United States."[15]

Another example is from a section of legislation dealing with Native Hawaiian health care, which provides that "the authority of Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii."[16] Indeed, that statute claims that the United States "has a trust responsibility" to Native Hawaiians[17] and possess a "historical and unique legal relationship" with Native Hawaiians that "extends to the Hawaiian people the same rights and privileges accorded to American Indian . . . communities."[18] Finally, if Congress, in enacting the Apology Resolution, did indeed divest the State of Hawaii of its land for the benefit of persons of Hawaiian ancestry, that Resolution is but one more example of Congress's mistaken belief on this subject.

Congress is legally and factually incorrect in its assertions. Congress and the United States have no relationship with persons of Hawaiian ancestry that

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[15] *Id.* at Section 22(D).

[16] 42 U.S.C. § 11701(17).

[17] *Id.* at § 18.

[18] *Id.* at § 19.

would provide a compelling interest to deal specially and separately, on the basis of ancestry, race, or ethnicity, with persons of Hawaiian ancestry. Indeed, there is no similarity whatsoever between persons of Hawaiian ancestry and American Indian tribes and their members vis-à-vis the United States. In fact, the United States has no legally cognizable relationship with persons of Hawaiian ancestry at all, except to the extent that such persons are citizens of the United States.

B. THE RELATIONSHIP BETWEEN THE UNITED STATES AND AMERICAN INDIAN TRIBES, WHICH BEGAN WITH GREAT BRITAIN, IS UNIQUE.

The unique relationship of American Indian tribes and their members with the United States began during the period of European exploration and discovery of the Americas. "The maritime powers of Europe discovered and visited different parts of this continent at nearly the same time."[19] Therefore, "[t]o avoid bloody conflicts . . . it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves."[20] This principle was "that discovery gave title to the government by whose subjects or by whose authority it

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[19] *Worcester v. State of Georgia*, 31 U.S. 515, 543 (1832).

[20] *Id.*

was made . . . which might be consummated by possession."[21]

Thus, the "general law of European sovereigns . . . limited the intercourse of Indians . . . to the particular potentate whose ultimate right of domain was acknowledged by the others."[22] Consequently, for American Indians, "goods indispensable to their comfort were received from the same hand."[23] More importantly, "the strong hand of government was interposed to restrain . . . intrusions into their country, from encroachments on their lands and from those acts of violence which were often attended by reciprocal murder."[24] Hence, the law of discovery regulated title between European powers, but did not "affect the [possessory] rights of those already in possession. . . ."[25] Though it "gave an exclusive right to purchase . . . it did not found that right on a denial of the right of possession to sell."[26]

The United States, after its successful revolution against the monarchy of Great Britain, "succeeded to all the claims of Great Britain, both territorial and political."[27] Great Britain, as did all the European

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[21] *Id.* at 543-44.

[22] *Id.* at 551-52.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 544.

[26] *Id.*

[27] *Id.*

powers, curried favor with American Indian tribes to obtain land and territory and to garner the support of those Indians in its conflicts with other European nations. In exchange, Great Britain provided Indians the food and goods they required as well as protection from other tribes, other European nations, and rogue individuals. Thus, Great Britain's superintendent of Indian Affairs, in a speech delivered in the presence of several Indian persons of distinction, stated:

> I inform you that it is the king's order . . . to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them. . . . But as you know that, as your white brethren cannot feed you when you visit them unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose.[28]

Accordingly, the "Indian nations were . . . necessarily dependent on some foreign potentate for the supply of their essential wants and for their protection from lawless and injurious intrusions into their country."[29] Nonetheless, "this relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[30] When the United States succeeded to Great Britain's position, its relationship

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[28] *Id.* at 546.

[29] *Id.* at 555.

[30] *Id.*

with American Indian tribes did not immediately change.

C. THE UNIQUE RELATIONSHIP BETWEEN THE UNITED STATES AND AMERICAN INDIAN TRIBES GREW OUT OF THE SOVEREIGN, YET DEPENDENT, NATURE OF THE AMERICAN INDIAN TRIBES.

Due to the foregoing, "the condition of the Indians, in relation to the United States is . . . unlike that of any other two people in existence."[31] Indeed, it "is marked by peculiar and cardinal distinctions which exist nowhere else."[32] Thus, "those tribes which reside within the acknowledged boundaries of the United States . . . may more correctly . . . be denominated *domestic dependent nations*," rather than "*foreign nations*."[33] That is, "they are in a state of *pupilage* [and] their relations to the United States resemble that of a *ward to his guardian*."[34] As a result, Indian tribes and their members "look to our government for protection; rely upon its kindness and its power; [and] appeal to it for relief to their wants. . . ."[35]

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[31] *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 16 (1831).

[32] *Id.*

[33] *Id.* at 17 (emphasis added).

[34] *Id.* (emphasis added).

[35] *Id.* at 17.

Furthermore, not only were these Indian tribes dependent sovereigns, but also their sovereignty was limited by the dependent status of the Indian tribes. For example, tribes "are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status:'"[36]

> Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. Their right to complete sovereignty, as independent nations, are necessarily diminished.[37]

In other words, "the power of Indian tribes, are, in general, 'inherent powers of a limited sovereignty. . . .'"[38] Thus, the "retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order," which is that not "implicitly lost by virtue of their dependent status."[39] The status of tribes and their members and their relationship to

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[36] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

[37] *Id.* at 209.

[38] *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

[39] *Duro v. Reina*, 495 U.S. 676, 685-86 (1990).

the United States is truly unique, and like no other relationship.

The Founding Fathers provided for the unique relationship between the new Republic and Indian tribes with the Commerce Clause, which distinguishes between regulating commerce by the states, with foreign nations, and "with the Indian Tribes."[40] Indeed, commerce with American Indian tribes was the exclusive province of the United States within its borders, just as was the case with Great Britain before it. Thus, the Commerce Clause perpetuates early recognition that the Indian tribes were considered "distinct political communities,"[41] but not foreign States or States of the United States. Accordingly, the Constitution provided the United States Government with the power to pass special legislation regarding these Indian tribes and their members as dependent sovereign governments within the territorial jurisdiction of the United States. Over the decades, Congress has done just that, albeit with an evolving understanding of its objective in doing so.

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[40] U.S. Const. art. I, sec. 8, cl. 3.

[41] *Worcester*, 31 U.S. at 556.

D. CONGRESS'S POWER TO DEAL WITH AMERICAN INDIAN TRIBES SPECIALLY HAS EVOLVED, BUT IS BASED FUNDAMENTALLY ON THE UNIQUE GUARDIAN-WARD TRUST RELATIONSHIP.

It is not within the scope of this writing to delineate the changes that have occurred in Congress's view of American Indian tribes, the resultant transformations of United States policy, or the impacts of those modifications on American Indian tribes. It is well known, however, that the United States Government promoted and facilitated westward expansion for the Nation's ever increasing population, which led to the removal of the Indian tribes in the East and Midwest, war with some western Indian tribes, and the Reservation Period. For example, the movement of non-Indian population westward upset the ecological patterns of the Great Plains by destroying large amounts of game, chiefly buffalo, and forced tribes to seek new hunting areas, which in turn led to intertribal conflict and sometimes attacks on and warfare with non-Indians as well. Moreover, the tribes' way of life in the western United States was destroyed.

These considerations led Congress to legislate regarding Indian tribes, not just enter into treaties, as had been the case in the Colonial Period, the 1850s, and even into the 1870s. For example, this Court, addressing the power of Congress to pass the Major Crimes Act, found that Congress had the power

to legislate regarding American Indians, subjecting them and others found on their reservations to the criminal law of the United States, due to the special relationship between Congress and American Indian tribes and the trust status of the tribes:

> From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection and with it the power.[42]

Thus, this Court determined that Congress had the power to deal with American Indian tribes and their members specially, that is, outside the confines of the Constitution, because of this historic and unique trust relationship:

> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.[43]

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[42] *Kagama v. United States*, 118 U.S. 375, 384 (1886).

[43] *Id.* at 384-85.

Moreover, as this Court acknowledged, Congress has powers regarding American Indians under the Indian Commerce Clause and the Treaty Clause.

"American Indian policy" has been through many changes over the decades, which are well-known and may be judicially noticed by this Court, including attempts to: assimilate American Indians, provide for self determination, terminate the reservations, and preserve tribal sovereignty and self government. Each change in policy has been accompanied by various legislative enactments, all of which have treated American Indian tribes and their members as a racial group and provided special preferences for them over other racial groups. This Court's first consideration of this "extra-constitutional" classification occurred in *Morton v. Mancari*.[44]

E. *MORTON v. MANCARI* ON CONGRESS'S UNIQUE HISTORICAL AND CONSTITUTIONAL RELATIONSHIP WITH AMERICAN INDIAN TRIBES.

In *Morton v. Mancari*, a non-Indian challenged the constitutionality of Congress's inclusion, in the Indian Reorganization of Act of 1934, of a hiring preference for American Indians who sought employment with the federal Bureau of Indian Affairs (BIA). This Court, upholding Congress's power to deal

[44] 417 U.S. 535 (1974).

specially with American Indian tribes and their members, found that Congress's purpose was simple:

> [T]o give Indians a greater participation in their own *self-government*; to further the Government's *trust obligation* toward Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect the *Indian tribal life*.[45]

Thus, "[t]he overriding purpose [of the Act] . . . was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically,"[46] and thereby "strengthen tribal government. . . ."[47] Therefore, Congress's authority to adopt the preference:

> [T]urns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status to legislate on behalf of federally recognized tribes.[48]

Specifically, *Mancari* recognized that the Indian Commerce Clause,[49] in giving Congress the power to "regulate Commerce with the Indian tribes[,] . . . singles out Indians as a proper subject for separate

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[45] *Mancari*, 417 U.S. at 541-42 (emphasis added).

[46] *Id.* at 542.

[47] *Id.* at 543.

[48] *Id.* at 551 (emphasis added).

[49] U.S. Const. art. I, sec. 8, cl. 3.

legislation [by Congress]."[50] Similarly, the Treaty Clause[51] authorizes Congress to "deal with Indian tribes."[52] Finally, Congress's special relationship with Indian tribes is grounded, not just in the Constitution, but also in "historical relationships" between the United States government and American Indians and the "solemn commitment of the Government toward Indians[ ]":[53]

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless, and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.[54]

Therefore, the conflict between Congress's special treatment of American Indians—by enacting a hiring preference for the BIA—and the Constitution's equal protection guarantee is resolved by recognizing

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[50] *Mancari*, 417 U.S. at 552.

[51] U.S. Const. art. II, sec. 2, cl. 2.

[52] *Mancari*, 417 U.S. at 552.

[53] *Id.*

[54] *Id*.

Congress's special and unique relationship with American Indians:

> As long as the special treatment [of American Indians] can be tied rationally to the *fulfillment of Congress' unique obligation toward Indians*, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to *further Indian self-government*, we cannot say *Congress*' classification violates due process.[55]

1. *Mancari*'s Political Racial Distinction Is Not The Basis For Its Holding.

Mancari should have left it there. But the Court, quite unnecessarily, added this dicta:

> [T]his preference does not constitute "racial discrimination." It is not even a racial preference. . . . The preference, as applied, is granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities. . . . . . Here the preference is reasonably and legitimately related to a legitimate, nonracially based goal.[56]

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[55] *Id.* at 555 (emphasis added).

[56] *Id.* at 553-54.

Worse yet, the Court inserted more dicta via this footnote:

> The preference is not directed toward a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized tribes." This operates to exclude many individuals who are racially to be classified as "Indians." In this sense the preference is totally political rather than racial in nature.[57]

But *Mancari* is not grounded on such a clearly unconstitutional distinction—it is beyond dispute that tribal membership is based on race, ancestry, or descent—but instead upon Congress's unique historical trust relationship and its plenary and constitutional powers over Indians.

2. *Mancari*'s Dicta Is Without Factual Basis.

Ironically, the Indian Reorganization Act of 1934, which *Mancari* construed, does not afford a preference to "members" of "federally recognized tribes"; instead, it defines "Indian" to require either Indian blood quantum or descent from Indians, regardless of tribal membership:

> The term "Indian" as used in this Act shall include all persons *of Indian descent* who are

[57] *Id.* at 554.

> members of any recognized Indian tribe now under federal jurisdiction; and all persons who are *descendents of such members* who were, on June 1, 1934, residing with the present boundaries of any Indian reservation; and shall further include *all other persons of one-half or more Indian blood*."[58]

Thus, *Mancari*'s dicta is based, not on Congress's statutory definition, but on the erroneous and illegal regulation implementing the Indian preference, which, even so, included an element of race:

> An *Indian* has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an *individual must be one-fourth or more degree Indian blood and* be a member of a federally recognized tribe. It is the policy for promotional consideration that where two or more candidates who met the established qualification requirements are available for filling a vacancy, if one of them is an *Indian* he shall be given preference in filling the vacancy.[59]

It is little wonder that, just three years after *Mancari* was decided, the BIA recognized that it could

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[58] Indian Reorganization Act of 1934, Act of June 18, 1934, c. 576, § 19, 48 Stat. 988 (now codified as 25 U.S.C. § 479) (emphasis added).

[59] *Mancari*, 417 U.S. at 554, n. 24, citing 44 BIA Manual 335, 3.1 (emphasis added).

not alter the express definition adopted by Congress,[60] as it had in its 1974 regulation, and changed that regulation, to mirror the statute:

> For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs a preference will be extended to persons *of Indian descent* who are:
>
> (a) Members of any recognized Indian tribe now under Federal Jurisdiction;
>
> (b) *Descendants of such members* who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;
>
> (c) *All others of one-half or more Indian blood* of tribes indigenous to the United States. . . . [61]

Therefore, because there is no factual basis for the political-racial distinction set forth in *Mancari*'s dicta, federal courts considering the constitutionality of preferential or discriminatory treatment of American Indian tribes or their members may not rely upon *Mancari*'s dicta.

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[60] *Koshland v. Helvering*, 298 U.S. 441, 447 (1936) ("[W]here . . . the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation.").

[61] 25 C.F.R. § 5.1 (43 FR 2393, Jan. 17, 1978) (emphasis added).

3. *Adarand* Limits *Mancari*.

Twenty-one years after *Mancari* was decided, this Court decided *Adarand Constructors v. Peña*,[62] holding that, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[63] Furthermore, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[64] Finally:

> [A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[65]

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[62] 515 U.S. 200 (1995).

[63] *Id.* at 224. Justice O'Connor repeats Justice Powell's "defense of this conclusion": "When [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J.) (footnote omitted).

[64] *Id.* at 230.

[65] *Id.* at 227.

Thus, *Mancari* provides very little cover for special legislation for American Indian tribes and their members, much less for persons of Hawaiian ancestry. Congress's plenary power and its special relationship with Indian tribes and their members do not provide it an exemption from the Equal Protection Component of the Due Process Clause of the Fifth Amendment. The Bill of Rights explicitly protects persons from overreaching congressional regulation under Congress's other powers. Specifically, the power conferred on Congress to regulate Indian Tribes, "like the other great substantive powers of Congress, is subject to the Fifth Amendment."[66] Thus, because Congress may not protect Tribes, or any group, at the expense of an individual's constitutional rights, Congress's powers to regulate Indian Tribes are subject to strict scrutiny.

Consequently, after *Adarand*, if Congress seeks to legislate specially with regard to American Indians, it must argue that—due to the unique guardian-ward status between Congress and American Indian tribes, Congress's plenary powers over Indians, and Congress's historical relationship with American Indian tribes—it has a compelling interest to further American Indian tribes' self government and sovereignty. No other argument satisfies the Constitution's equal protection guarantee, *Adarand*, and strict

[66] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935).

scrutiny, which requires that legislation be narrowly tailored to achieve a limited and compelling interest. Accordingly, Congress's powers to treat American Indian tribes and their members, much less persons of Hawaiian ancestry, in a special fashion are very limited. Moreover, because Congress has no power over or history of a relationship with Native Hawaiians, even this compelling interest is denied Congress when it seeks to legislate specifically as to persons of Hawaiian ancestry.

II. CONGRESS LACKS A COMPELLING INTEREST FOR PROVIDING PREFERENCES TO PERSONS OF HAWAIIAN ANCESTRY.

A. THE HISTORIES OF NATIVE HAWAIIANS AND AMERICAN INDIAN TRIBES ARE DISSIMILAR.

1. No European Power Colonized Or Occupied The Hawaiian Islands Under Claim Of Ownership.

Unlike the Americas, the Hawaiian Islands were never claimed by the United States or any other European nation as its own under the European law of discovery and were never colonized or occupied. Captain Cook, of Great Britain's Navy, did "discover" the islands in 1778 and found they "were ruled by four different kings, and intra-Hawaiian wars could inflict great loss and suffering."[67] "In 1810 the islands

[67] *Rice v. Cayetano*, 528 U.S. 495, 500 (2000).

were united as one kingdom under the leadership of . . . Kamehameha I,"[68] by force of arms. That Kingdom was recognized diplomatically by the United States in 1826.[69] Indeed, the United States entered into several treaties, conventions, and formal arrangements with the Kingdom from 1826 through 1887.[70] Notably, in none of these treaties or agreements did the Kingdom cede land to the United States, nor did the United States promise protection, food and aid, or protection of and respect for boundaries, key features of treaties between the United States and American Indian tribes.[71]

2. The Kingdom Of Hawaii Was Not A Government For Indigenous Native Hawaiians Only.

After Cook's visit and the publication of several books relating to his voyages, the Hawaiian Islands received many European visitors—explorers, traders, and eventually whalers—many of whom stayed there. The "1800's are a story of increasing involvement of westerners in the economic and political affairs of the Kingdom."[72] Indeed, an "important feature of Hawaiian demographics . . . is the immigration to the islands

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[68] *Id.* at 501.

[69] Apology Resolution, P.L. 103-50, 107 Stat. 1510 (1993).

[70] *Rice*, 528 U.S. at 504.

[71] Pearl Harbor was ceded in 1887, however.

[72] *Rice*, 528 U.S. at 501.

by people of many different races and cultures."[73] Successive waves of immigration brought "Chinese, Portuguese, Japanese, and Filipinos to Hawaii."[74] Indeed, beginning in 1852, the "plantations drew to Hawaii . . . something over 400,000 men, women and children over the next century."[75] Furthermore, with the adoption of the Constitution for the Kingdom of Hawaii in 1840, the principle of equality for all under the law, not just Native Hawaiians, was established.[76]

Therefore, at the time of the Hawaiian Revolution in 1893, the Kingdom of Hawaii was a nation whose subjects represented many nationalities, races, and ethnicities. It was not a nation consisting of indigenous Hawaiians, as were the American Indian tribes at the time of the arrival of the European powers. Indeed, unlike indigenous Hawaiians, American Indian tribes maintained their identity as distinct, dependent, political communities, and as limited sovereigns, long after first contact with Europeans, an identity they retain today.

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[73] *Id.* at 506.

[74] *Id.*

[75] *Id.*

[76] 1840 Constitution of the Kingdom of Hawaii, Section 1 ("God hath made of one blood all nations of men to dwell on the earth in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs, and all people of all lands."); available at http://en.wikipedia.org/wiki/1840_Constitution_of_the_Kingdom_of_Hawaii.

By the time of the Hawaiian Revolution, there was no indigenous Hawaiian government whose subjects were indigenous Native Hawaiians. In fact, the 1900 census, taken just seven years after the Hawaiian Revolution in 1893, showed just 24 percent of persons resident in Hawaii to be either Hawaiian or part Hawaiian.[77] That is, through decades of immigration, the Kingdom of Hawaii had become a multicultural, multiethnic, and multiracial kingdom. More importantly, since 1810, there had not been a race-based government, unlike what was the case with all American Indian tribes.

Moreover, the legislature of the Kingdom of Hawaii, as composed after the Constitution of 1887, was primarily in the hands of the reform party, "which was made up largely of Hawaiian-born Americans and Europeans and [even] resident foreigners . . . [who] held most of the land and a majority of the businesses of the country," though Native Hawaiians also served side by side in the legislature with these persons.[78]

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[77] Census of 1900, Hawaii, tab 26, showing 37,656 persons as Hawaiian or part Hawaiian in a population of 154,001; available at http://www.census.gov/population/www/documentation/twps0056/tab26.pdf.

[78] Native Hawaiians Study Commission Report at p. 291 (1983). This Report was created as a result of under Title III of P.L. 96-565 (96th Congress 1980); available at http://wiki.grassrootinstitute.org/mediawiki/index.php?title=Native_Hawaiians_Study_Commission_Report. The purpose of the Commission was to "conduct a study of the culture, needs and concerns of the

(Continued on following page)

3. The Hawaiian Revolution Was Largely The Result Of The Attempt By The Monarchy To Enlarge Monarchical Power.

The critical cause of the Hawaiian Revolution was Queen Lili'uokalani's plot to revise the Constitution of 1887 and revert to the earlier Constitution of 1864, to re-empower the monarchy, and to restore powers lost to it in the Constitution of 1887.[79] Indeed, she proposed to "exercise monarchical power over the House of Nobles and limit[] the franchise to Hawaiian subjects."[80] Thus, those Hawaiian citizens, both native and Hawaiian born, opposed to the return of a more powerful monarchy, who favored a democratic form of government responded to the Queen's plans by seeking to replace the monarchy with a Republican form of government, with a view toward eventual annexation to the United States.[81] The involvement of the United States was minimal and neutral, the overthrow of the monarchy was bloodless, and not a

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Native Hawaiians." Sec. 303. The Commission published and released to the public a Draft Report of findings on September 23, 1982. Following a 120-day period of public comment, a final report was written and submitted on June 23, 1983, to the U.S. Senate Committee on Energy and Natural Resources and U.S. House of Representatives Committee on Interior and Insular Affairs.

[79] Native Hawaiians Study Commission Report at 292-93.

[80] *Rice*, 528 U.S. at 504.

[81] Native Hawaiians Study Commission Report at 293-94.

shot was fired by United States troops.[82] What involvement there was occurred without official sanction of the United States Congress or the United States Executive Branch.

A Constitution for the Republic of Hawaii was adopted on July 4, 1894.[83] Thereafter, Hawaii functioned as a fully recognized government until March 16, 1898, when, at the request of the legislature of the Republic of Hawaii, a joint resolution was passed by Congress annexing the Republic of Hawaii as a Territory of the United States.

4. The Hawaiian Revolution Did Not Diminish Native Hawaiian Rights Previously Enjoyed.

Neither the Hawaiian Revolution nor the creation of the Republic of Hawaii resulted in even an inch of land being taken from Native Hawaiians. Nor were they deprived of any other rights they held before the change in the form of government. Indeed, the land system remained much as it had before. If any apology were owed by the United States with respect to the Hawaiian Revolution, it was owed equally to Native Hawaiians and non-Native

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[82] *Id.* at 294-96.

[83] *Id.* at 299.

Hawaiians, as both were treated the same under the law by the ousted Queen Lili'uokalani.[84]

What did occur was that the multicultural subjects of the Kingdom of Hawaii replaced a monarchical government, through internal revolution, with a republican form of government and popular sovereignty, much as had the American Revolution and the French Revolution. The United States played no official role. Thus, the history of the United States Government's relationship with the Kingdom of Hawaii and its subjects bears no resemblance whatsoever to the history of the United States Government's relationship with American Indian tribes from the Colonial Period to the present.

B. CONGRESS HAS NO COMPELLING INTEREST TO DEAL SPECIALLY WITH NATIVE HAWAIIANS.

None of the factors that this Court has considered critical for Congress to deal specially with American Indian tribes and their members—factors that have provided Congress arguably with a "compelling interest" for enacting such special legislation—exists as to Native Hawaiians:

- Native Hawaiians have not been the exclusive subjects or members of any

[84] See generally, Hawaiian Kingdom Constitution of 1887; available at http://www.hawaii-nation.org/constitution-1887.html.

sovereign nation since 1810; rather, they have been subjects of a King in a diplomatically recognized Kingdom, as were the many non-Hawaiian subjects of that Kingdom.

- Native Hawaiians have never been subjected to the authority of any occupying foreign power, including the United States, that claimed ownership of their land, leaving them with only possessory rights.
- Native Hawaiians have not ceded vast portions of their land to the United States or any other foreign power, nor in any way have been removed from their lands by treaty or by force of arms. In fact, the United States has never taken land from Native Hawaiians, by force, by treaty, or otherwise, nor did the Hawaiian Revolution take lands from Native Hawaiians.
- Native Hawaiians have never been promised, as a result of a treaty with the United States, protection from incursions by other foreign powers or from other non-Native groups of people in Hawaii.
- Native Hawaiians have never been warred against by the United States, nor has the United States fired a single shot at Native Hawaiians.
- Native Hawaiians have not been victimized by actions of the United States in

which the United States, through occupation of the territory of Native Hawaiians, destroyed the ecology of their land, took their means of sustenance, or removed them to enclaves and reservations, and thus reduced them to a state of total pupilage and dependency. Therefore, Native Hawaiians have not needed protection against the selfishness of others and their own improvidence.

- Native Hawaiians were never the exclusive members of a sovereign entity, nor were they ever dependent on the United States for the supply of their essential wants. Indeed, since 1810, Native Hawaiians, as an identifiable group, have not had any sovereignty of any sort.
- Native Hawaiians are not now nor have they ever been in a guardian-ward relationship with the United States that grew out of their historical relationship with the United States.
- Native Hawaiians have never been recognized by the United States as a separate sovereign people or government, nor may Congress constitutionally recognize Native Hawaiians as a sovereign, politically distinct community.
- Native Hawaiians have never entered into a treaty with the United States; in fact, the treaties into which the United States entered—pursuant to the Foreign Nation Clause of the Commerce Clause,

not the Indian Commerce Clause—were with the Hawaiian Kingdom and were applicable with equal force to the Kingdom's subjects, who were persons of many national origins and ethnicities, including Native Hawaiian.

- Native Hawaiians can point to no enumerated constitutional power provided to Congress by which it may deal specially with Native Hawaiians.
- Native Hawaiians have never been subjected to any plenary authority by Congress, nor does Congress have such constitutional authority.
- Native Hawaiians have not been a distinct political community since before 1810.

Thus, the requisite basis for Congress to claim a compelling interest to act specially with regard to Native Hawaiians, even in the limited fashion allowed by *Mancari*, does not exist with respect to Native Hawaiians. That they are indigenous peoples to the Hawaiian Islands, and that their numbers have been reduced over the years, or that they may otherwise be in need of special aid and assistance fails to provide Congress with a compelling interest to act specially toward the racial group to which they belong, any more than it does for any other disadvantaged racial or ethnic group.

C. CONGRESS MAY NOT CREATE A GUARDIAN–WARD RELATIONSHIP WITH NATIVE HAWAIIANS BY SIMPLY DECLARING THAT ONE EXISTS.

Congress apparently believes it may subvert the limitations placed on its actions by equal protection principles and navigate an end run around the Constitution. Congress believes it may provide preferences to Native Hawaiians by simply declaring a special, unique, guardian-ward trust relationship with them even though there is no legal or factual basis to do so. Under this theory, Congress could favor any group of people, including African Americans, Hispanic Americans, Asian Americans, and any other group, by simply declaring a special trust relationship. Indeed, *Adarand* and the requirements of the Due Process Clause of the Fifth Amendment could be thwarted easily in this way.

The guardian-ward status of American Indian tribes and their members arises from the facts set forth above and arises as a matter of law, determined by this Court, and based on the Constitution and historical relationships between Congress and American Indian tribes. Congress may not, in the absence of such a historical record, simply declare such a relationship at any time it chooses, based on what it perceives as past societal wrongs, and then adopt racial preferences for a group. That would render the Equal Protection Clause meaningless.

III. THE ONLY CONSTITUTIONAL BASIS FOR SPECIAL TREATMENT FOR NATIVE HAWAIIANS IS TO REMEDY RACIAL DISCRIMINATION.

The Constitution provides that governments may use racially discriminatory preferences only to remedy "extreme" cases of "systematic" patterns of deliberate racial discrimination so as to "break down patterns of deliberate exclusion,"[85] caused by "pervasive, systematic, and obstinate discriminatory conduct."[86] Even then, however, racial remedies may be used only as a matter of "last resort"[87] because they are "the strongest of medicines" "reserved for those severe cases that are highly resistant to conventional treatment."[88] Racial preferences are proper only as "a remedy for intentional discrimination. . . ."[89] Thus, only extreme cases of pervasive, systematic and obstinate discriminatory treatment justify such a drastic remedy.

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[85] *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 509 (1989).

[86] *Associated General Contractors of Ohio v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000).

[87] *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 893 F.Supp. 419, 424 (E.D. Pa. 1995), *aff'd*, 91 F.3d 586 (3d Cir. 1996); *Croson*, 488 U.S. at 519 (Justice Kennedy concurring).

[88] *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 927 (11th Cir. 1997).

[89] *Builders Association of Greater Chicago v. County of Cook*, 256 F.3d 642, 644 (7th Cir. 2001).

A. IN ITS APOLOGY RESOLUTION, CONGRESS DID NOT MAKE THE FINDINGS REQUIRED BY THIS COURT.

"[R]acial characteristics . . . seldom provide a relevant basis for disparate treatment, and "classifications based on race are . . . harmful to the entire body politic."[90] Therefore, because "our history [of societal discrimination] will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a 'piece of the action' for its members,"[91] government must "identify" the invidious discrimination to be remedied "with some specificity before [it] may use race-conscious relief."[92] These findings must be detailed sufficiently to "define both the scope of the injury and the extent of the remedy necessary to cure its effects."[93] "Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics."[94] "Unless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the court should not uphold" a racially discriminatory statute because "[r]acial classifications are simply too pernicious to

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[90] *Croson*, 488 U.S. at 505.

[91] *Id.* at 510-511.

[92] *Id.* at 504.

[93] *Id.* at 509.

[94] *Id.* at 510.

permit any but the most exact connection between justification and classification."[95]

In its Apology Resolution, Congress did not set forth a strong basis in evidence of such discrimination, or passive participation in such discrimination, by the United States. Its only "evidence" was of generalized societal discrimination.

B. SOCIETAL DISCRIMINATION IS NOT A COMPELLING INTEREST.

Societal discrimination is insufficiently particular in source, scope, nature, or impact to "define both the scope of the injury and the extent of the remedy necessary to cure its effects."[96] Accordingly, this Court and the circuit courts have rejected it as a compelling interest. "[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[97] "[S]ocietal discrimination . . . ha[s] little or no probative value in supporting enactment of a race-conscious measure."[98] "Societal discrimination is insufficient and over expansive [and] . . . could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the

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[95] *Adarand 1995*, 515 U.S. at 229.

[96] *Croson*, 488 U.S. 509.

[97] *Id.* at 497 (quoting *Wygant*, 476 U.S. at 498).

[98] *Rothe Development Corporation v. United States Department of Defense*, 262 F.3d 1306, 1306 (Fed. Cir. 2001).

future."[99] "A 'strong basis in evidence' cannot rest on 'an amorphous claim of societal discrimination.'"[100] "Race-based preferences cannot be justified by reference to past 'societal discrimination'. . . . "[101]

In its Apology Resolution, Congress's only evidence was of generalized societal discrimination, which fails to provide Congress with a compelling interest.

C. SOCIETAL DISCRIMINATION REMEDIES CAN NEVER BE NARROWLY TAILORED.

Compelling interest and narrow tailoring are "hand-in-glove" concepts, depending upon and interacting with each other. Only strong evidence of a widespread pattern of particularly identified, purposeful discrimination, so severe that only race-conscious relief can cure it, may serve as a compelling interest. Moreover, that same strong evidence must demonstrate the scope of the narrowly tailored remedy necessary to eliminate the identified discrimination and its impact. This remedy must bear the most exact connection to the identified discrimination.

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[99] *Middleton v. City of Flint, Michigan*, 92 F.3d 396, 403 (6th Cir. 1996) (quoting *Wygant*, 476 U.S. at 276, and *Croson*, 488 U.S. at 497).

[100] *Engineering Contractors*, 122 F.3d at 907.

[101] *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996).

So long as economic and social differences exist in society, societal discrimination will have an impact and will create disproportionately difficult barriers for individuals socially or economically less well off than others. Therefore, there is no narrowly tailored remedy for societal discrimination, the impacts of which are "ageless in their reach into the past and endless in their ability to affect the future."[102]

In its Apology Resolution, Congress sought to remedy the impacts of generalized societal discrimination; therefore its remedy can never be narrowly tailored.

CONCLUSION

If the Apology Resolution is construed to impose on the State of Hawaii a trust on its own land for the benefit of persons of Hawaiian ancestry, then the Resolution is unconstitutional because it violates the Equal Protection Component of the Due Process Clause of the Constitution. The Resolution cannot survive strict scrutiny. Congress can offer no compelling interest to justify such action. Although Congress may claim it has a compelling interest, due to the alleged similarities of Native Hawaiians to American Indian tribes and their members, it does not. It has no relationship to persons of Hawaiian ancestry

[102] *Wygant*, 476 U.S. at 276; *Croson*, 488 U.S. at 497.

except as they may be citizens of the United States. Neither can it demonstrate, by a strong basis in evidence, that the United States has discriminated actively or passively against persons of Hawaiian ancestry in such a manner that a race-conscious remedy is justified. In fact, the only discrimination to which Congress could point is societal discrimination, which does not supply a compelling interest, and as to which a narrowly tailored remedy is impossible.

Therefore, this Court must reverse the Supreme Court of Hawaii and construe the Apology Resolution as having no legal affect whatsoever, much less providing preferences for persons of Hawaiian ancestry. If this Court should affirm the Supreme Court of Hawaii's view of the Apology Resolution, it must hold that the Resolution is an unconstitutional violation of the Equal Protection Component of the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

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