No. 07-1372

In the

Supreme Court of the United States

HAWAII, et al.,
Petitioners,
v.
OFFICE OF
HAWAIIAN AFFAIRS, et al.,
Respondents.

On Writ of Certiorari
to the Supreme Court of Hawaii

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE CATO INSTITUTE, AND THE CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. The question here is whether this symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—29% of the total land area of the State and almost all the land owned by the State—unless and until it reaches a political settlement with native Hawaiians about the status of that land.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF),the Cato Institute, and the Center for Equal Opportunity submit this brief amicus curiae in support of Petitioners State of Hawaii, et al.[1]

For 35 years, Pacific Legal Foundation has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Most notably, PLF participated as amicus curiae in support of petitioner Harold F. Rice in *Rice v. Cayetano*, 528 U.S. 495 (2000). Both *Rice* and the present case concern Article XII, Section 5, of the

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Hawaii Constitution, which established the State of Hawaii's Office of Hawaiian Affairs (OHA). In *Rice*, this Court found that the terms "native Hawaiian" and "Hawaiian," as used by the OHA, are racial classifications, and that a race-based scheme that allowed only statutorily-defined "Hawaiians" to vote for trustees of OHA was unconstitutional.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files amicus briefs. It also filed a brief in *Gratz* and *Grutter*, and published a *Review* article on *Parents Involved*. The instant case is of central concern to Cato because it implicates the Institute's strong belief that all citizens should be treated equally before the law.

The Center for Equal Opportunity is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports colorblind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education and voting. Officials from CEO testified before the Hawaii State Advisory Committee to the United States Commission on Civil Rights regarding the Native Hawaiian Government Reorganization Act of 2007.

Despite *Rice*, and Justice John Marshall Harlan's admonition 112 years ago that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), OHA and the State of Hawaii continue to treat "native Hawaiians" and "Hawaiians" as different classes among Hawaiian citizens. This practice has spawned numerous lawsuits, finally culminating in the present legal crisis in which the State of Hawaii's sovereign authority to manage its land for the good of all of its citizens has been replaced with a court-imposed duty to hold the land for the benefit of one racial class. The decision of the state court below is based upon its tortured interpretation of a United States Congressional Joint Resolution, an interpretation which ignores constitutional principles of equal protection.

This Court announced in *Rice* the unwavering principle that "[t]he Constitution of the United States . . . has become the heritage of all the citizens of Hawaii." *Rice*, 528 U.S. at 524. Amici file this brief to argue that Hawaii, once and for all, is required to abandon its racial classifications and treat all of its citizens with the equality to which they are entitled under the United States Constitution.

STATEMENT OF THE CASE

The administration of the ceded lands trust and the Apology Resolution can be understood only in the context of Hawaii's pervasive race-based laws and entitlements. By a joint resolution adopted by Congress on July 7, 1898, known as the Newlands Resolution, the Hawaiian Islands were annexed as a part of the territory of the United States. *Territory of Hawaii v. Mankichi*, 190 U.S. 197, 209 (1903). Formal

transfer was made on August 12, 1898, "when . . . the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States." *Id.* at 210. The Republic of Hawaii became the "territory of Hawaii" on June 14, 1900, when the islands were formally incorporated by act of Congress. *Id.* at 211. By this act the Constitution was formally extended to Hawaii. *Id.* "[U]nder the Newlands resolution, any new legislation must conform to the Constitution of the United States." *Id.* at 215.

Unfortunately, this restriction has been widely and systematically ignored. New legislation was enacted and implemented which did *not* conform to Constitutional principles of equal protection. Those laws directly led to a state-wide violation of the Fifteenth Amendment which necessitated this Court's intervention and resolution in *Rice*. *Rice*, 528 U.S. at 517 ("The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve."). In *Rice*, this Court overturned Hawaii's race-based voting scheme but did not disturb the state's "implementation of a congressional directive to allocate trust distributions to people with little biological relationship to aboriginal Hawaiians." L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 770 n.428 (2001). All but one of those trust-distribution laws remain in place today.

The race-based congressional directive, and the laws that have been passed by Hawaii for its implementation, remain in effect and are

unquestionably the direct root of the problem at hand. The Hawaii Supreme Court declared that the individual plaintiffs in this case are "clearly beneficiaries of the ceded lands trust" only by virtue of their racial status as native Hawaiians. *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i*, 177 P.3d 884, 905 (Haw. 2008) (*OHA*). The holding below is thus premised on an incorrect interpretation of the Apology Resolution and race-based government actions that cannot be squared with the Constitution's guarantee of race-neutral government.

SUMMARY OF ARGUMENT

The core issue of this case is whether a state court, interpreting federal law, may enjoin the State of Hawaii from exercising its sovereign authority to sell, lease, or rent the "ceded lands" for the benefit of all Hawaiian citizens, pending some resolution, as yet unknowable, of the claims of native Hawaiians to those lands. As this Court recognized in *Rice*, 528 U.S. at 505, the Republic of Hawaii ceded all of its former Crown, government, and public lands to the United States upon annexation in 1898. Revenues from the public lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Newlands Resolution, J. Res. 55, 55th Cong., 30 Stat. 750 (1898); *Rice*, 528 U.S. at 505. This is not an academic issue: the Hawaii Supreme Court's judgment will have enormous practical impact because it fundamentally restructures the State's obligations under the Act admitting Hawaii as the 50th State by commanding the State to favor a racially defined class to the exclusion of other beneficiaries of the ceded lands trust.

The decision by the Hawaii Supreme Court represents nothing less than a rewriting of the terms by which Hawaii entered the Union. Hawaii was admitted to the Union in 1959 by an overwhelming majority of its residents.[2] At that time, the United States granted back to Hawaii title to all public lands and public property within the boundaries of the State—the ceded lands—save those which the federal government retained for its own use. Admission Act, Pub. L. No. 86-3, §§ 5(b)-(d); 73 Stat. 4 (1959); *Rice*, 528 U.S. at 507. The lands, and the proceeds and income generated by the ceded lands, were to be held "as a public trust" to be "managed and disposed of for one or more of" five purposes: (1) for the support of the public schools and other public educational institutions; (2) for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act;[3] (3) for the development of farm and home ownership on as widespread a basis as possible;

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[2] The election results from June 27, 1959, show that 94% of voting Hawaii residents favored statehood. Grassroot Institute of Hawaii, 1959 Results of Votes Cast, *available at* http://www.grassrootinstitute.org/documents/HawaiiStateHoodVote.pdf (last visited Dec. 5, 2008).

[3] The Hawaiian Homes Commission Act was created by the United States Congress to set aside over 200,000 acres of ceded lands for exclusive homesteading by native Hawaiians. Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921). As a condition of statehood, the United States required Hawaii to adopt the act as a provision of the state Constitution, *see* Haw. Const. art. XI, § 2 (1959) (renumbered art. XII, § 2 (1978)). The Hawaiian Homes Commission Act defines the term "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," Hawaiian Homes Commission Act § 201(7) of the Hawaiian Homes Commission Act.

(4) for the making of public improvements; and (5) for the provision of lands for public use. Admission Act § 5(f); *Rice*, 528 U.S. at 508.

In 1978, Hawaii amended its Constitution to establish a new State agency, Respondent Office of Hawaiian Affairs. *See* Haw. Const. art. XII, § 5. OHA's race-conscious mission is "[t]he betterment of conditions of native Hawaiians . . . . [and] Hawaiians." Haw. Rev. Stat. § 10-3 (1993). OHA is governed by a nine-member board of trustees, elected by qualified voters in the State. *See* Haw. Const. art. XII, § 5; Haw. Rev. Stat. § 13D-1 (1993). Former statutory provisions that limited eligible voters in OHA trustee elections to citizens of Hawaiian ancestry were repealed after this Court held those provisions to violate the Fifteenth Amendment. *See Rice*, 528 U.S. 495.

State law gives OHA broad authority to administer two categories of funds: a 20% share of the revenue from the ceded lands,[4] which OHA is to administer for "the betterment of conditions of native Hawaiians," Haw. Rev. Stat. § 10-3, and any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" and/or "Hawaiians," Haw. Const. art. XII, § 6. *See generally* Haw. Rev. Stat. §§ 10-1 to 10-16. The terms "native Hawaiians" and "Hawaiians," as used by the OHA, are racial classifications. *Rice*, 528 U.S. at 514 ("Ancestry can be a proxy for race. It is that proxy here.").

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[4] In 1992, the Hawaii Legislature enacted Act 318 (codified as Haw. Rev. Stat. § 10-13.6 (1993)) that set forth a formula to compensate OHA for revenues from ceded lands. Haw. Rev. Stat. § 10-13.6(e) (Supp. 2007). According to Act 318's formula, OHA was to be compensated 20% of the fair market value of the subject lands. Haw. Rev. Stat. § 10-13.6(a).

In 1993, the Congress of the United States passed a Joint Resolution recounting an edited history of Hawaii, and offering an apology to the native Hawaiian people for the overthrow of the Kingdom of Hawaii. Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993); *Rice*, 528 U.S. at 505.

Any claim to ceded lands derived from language in the Apology Resolution or Admission Act, or any other legislation purporting to grant preferences based upon the terms "native Hawaiian" or "Hawaiian," is presumptively invalid. Those terms have already been determined in *Rice* to be racial classifications and government actions relying on those classifications must be subjected to strict judicial scrutiny. The Apology Resolution is intentionally void of any language amending or rescinding the Admission Act, because congressional intent reveals that it was not intended to change any existing laws. Reliance on the Apology Resolution to divest Hawaii of its sovereign authority—and require the State to hold the ceded lands for the benefit of one racial class in possible perpetuity—is therefore misplaced.

ARGUMENT

I

RACE-BASED GOVERNMENT IS IMPERMISSIBLE UNDER CONSTITUTIONAL PRINCIPLES OF EQUAL PROTECTION

Eight years ago, in *Rice*, this Court struck down as unconstitutional a provision in the Hawaii Constitution prohibiting non-Hawaiian citizens from voting in a statewide election. At that time, the Court reviewed Hawaii's troubled history and Justice

Kennedy, writing for the majority, provided a sound approach to deal with the realities facing that State:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

Rice, 528 U.S. at 524. Justice Kennedy's starting point is just as important today as it was in *Rice*, for it is important to remember that, although Hawaii became this Nation's 50th State only relatively recently in 1959, the territory of Hawaii has been subject to the Constitution and its principles for over 100 years.

A. This Court Already Held in *Rice* That the Terms "Native Hawaiian" and "Hawaiian" Are Racial Classifications

Government action dividing people by race is inherently suspect because such classifications "promote notions of racial inferiority and lead to a politics of racial hostility," *Croson*, 488 U.S. at 493, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno*, 509 U.S. 630, 657 (1993), and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus

contributing to an escalation of racial hostility and conflict." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting).

The Supreme Court of Hawaii, relying on racial classifications imposed by the federal government, the Hawaii Constitution, and implementing statutes, and ignoring the Fifth and Fourteenth Amendments, has implicitly held that native Hawaiians have a legal claim to ceded lands based upon their race. The court held in *OHA*, 177 P.3d at 905, that the State of Hawaii may not sell, exchange, or transfer 1.2 million acres of state land—the ceded lands—unless and until it reaches a political settlement with *native Hawaiians*. In other words, the State of Hawaii must manage the majority of its State-owned land for the benefit of one racial group, and not for the benefit of all citizens of Hawaii.

In *Rice*, this Court found unconstitutional a race-based scheme that allowed only statutorily defined "Hawaiians" to vote for trustees of the OHA, because the statutory definitions of "native Hawaiian" and "Hawaiian" as used by the OHA and by the United States in the Hawaiian Homes Commission Act are racial classifications. The statutory definitions analyzed in *Rice* are the same definitions used by the federal government and the State of Hawaii in regard to the ceded lands. In 1978, Hawaii amended its Constitution to establish the OHA. Haw. Const. art. XII, § 5. The mission of the OHA is "[t]he betterment of conditions of native Hawaiians . . . . [and] Hawaiians." Haw. Rev. Stat. § 10-3.

The term "Hawaiian" is defined in the statute as:

> [A]ny descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

Haw. Rev. Stat. § 10-2. The statute also defines "native Hawaiians" as follows:

> [A]ny descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

Id. When it analyzed a Hawaiian-only voting requirement in *Rice*, this Court found that the statutory definitions were race-based definitions:

> In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and

> respect. The state, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.

Rice, 528 U.S. at 515 (citation omitted).

The Court's analysis in *Rice* of the statutory definitions of "native Hawaiian" and "Hawaiian" as used in Hawaii's constitutional provision creating the OHA (and its implementing statutes) applies directly to this case. That is because the lower court defines "native Hawaiians," as that term applies to the OHA, as beneficiaries of the ceded land trust. *OHA*, 177 P.3d at 905. Further, OHA, "which is charged 'with managing proceeds derived from the ceded lands and designated for the benefit of native Hawaiians,' can be said to be representing the interests of the native Hawaiian beneficiaries to the ceded lands trust." *Id.* (citation omitted). The very premise of the lower court's decision that native Hawaiians have a race-based legal right to the ceded lands is thus suspect.

B. Government Action Providing for Race-Based Claims to the Ceded Lands Fails Strict Scrutiny

The federal government, through the Hawaiian Homes Commission Act of 1920 and the Admission Act of 1959, and the State of Hawaii through its constitutional provision creating the OHA and its implementing statutes, have instituted racial classifications by introducing and defining the terms "native Hawaiian" and "Hawaiian."

The Equal Protection Clause of the Fourteenth Amendment demands strict scrutiny of a facially racial statutory classification. *See*, *e.g.*, *Shaw*, 509 U.S. at 642 ("Express racial classifications are immediately

suspect"); *Hunt v. Cromartie*, 526 U.S. 541 (1999) ("[A]ll laws that classify citizens on the basis of race . . . are constitutionally suspect and must be strictly scrutinized."). "[A]ny 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." *Adarand*, 515 U.S. at 224; *see also Croson*, 488 U.S. at 493-94 (opinion of O'Connor, J.). Under that rigid equal protection standard, a racial classification "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235. The application of strict scrutiny to the Hawaiian Homes Commission Act, the Admission Act, and the laws of Hawaii leads to the conclusion that race-based claims to the ceded lands are unconstitutional.

In the decision below, the Supreme Court of Hawaii based its holding on the Apology Resolution. *OHA*, 177 P.3d at 920:

> The primary question before this court on appeal is whether, in light of the Apology Resolution, this court should *issue an injunction* to require the State, as trustee, to preserve the corpus of the ceded lands in the public lands trust until such time as the claims of the native Hawaiian people to the ceded lands are resolved.

The Apology Resolution enumerates wrongs purportedly caused to the native people of Hawaii by agents and citizens of the United States leading to the overthrow of the Kingdom of Hawaii and its eventual

annexation.[5] Even if the Apology Resolution is based upon correct history,[6] long past societal discrimination alone cannot serve as the basis for rigid racial preferences. *See*, *e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) ("an effort to alleviate the effects of societal discrimination is not a compelling interest"); *Croson*, 488 U.S. at 498-99; *Wygant*, 476 U.S. at 276 (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy"); *id.* at 288 (O'Connor, J., concurring in part and concurring in judgment) ("a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster").

This Court has recognized that if long past societal discrimination alone can serve as the basis for rigid racial preferences, then the door would be open "to competing claims for 'remedial relief' for every disadvantaged group." *Croson*, 488 U.S. at 505. The promise provided by our Constitution that our government is a Nation where race is irrelevant to personal opportunity and achievement would be

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[5] The Apology Resolution contains a brief opening paragraph, followed by thirty-six short "whereas" paragraphs, but no findings of fact. A "whereas" clause has no operative effect, and the court below could not rely on such clauses as fact. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 n.3 (2008) ("[W]here the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation or the Constitution's preamble, a court has no license to make it do what it was not designed to do.").

[6] The findings of the Apology Resolution have been criticized as bad history. *See*, *e.g.*, Thurston Twigg-Smith, *Hawaiian Sovereignty: Do the Facts Matter?* (1998).

broken in a "mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Id.* at 506. Courts would be required to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those groups whose societal injury is deemed to have "exceed[ed] some arbitrary level of tolerability then would be entitled to preferential classifications". *Bakke*, 438 U.S. at 297. The "result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality." *Croson*, 488 U.S. at 506. Racial classifications must be clearly identified and unquestionably legitimate because such classifications "so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic." *Id.* at 505 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 534 (1980) (Stevens, J., dissenting) (footnotes omitted)).

The Apology Resolution lacks evidence of specific present or past discrimination necessary to compel a race-conscious remedy. *See Croson*, 488 U.S. at 504 ("While the States and their subdivisions may take remedial action when they possess evidence" of past or present discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief."). The Native Hawaiians Study Commission, created by Congress on December 22, 1980 (Pub. L. No. 96-565, § 302; 94 Stat. 3321 (1980)), expressly found that native Hawaiians were not entitled to compensation or reparations on the basis of the historical wrongs they may have suffered. 1 Native Hawaiians Study Commission, *Report on the Culture, Needs and*

Concerns of Native Hawaiians 28 (1983)[7] ("[T]he Commission concludes that, as an ethical or moral matter, Congress should not provide for native Hawaiians to receive compensation either for loss of land or of sovereignty."). And the Apology Resolution does not state that native Hawaiians are entitled to compensation or reparations for the supposed wrongs it enumerates.

Even if the Apology Resolution is factually correct and does provide sufficient evidence of a compelling interest, there is no showing that claims to the ceded lands by every native Hawaiian, including claims to portions of revenues from the sale, lease, or rent from the ceded lands, is a narrowly tailored remedy for individual discrimination. *See Bakke*, 438 U.S. at 299 ("If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently."). The OHA has not shown that it is unable to devise an individualized procedure to "tailor relief to those who truly have suffered the effects" of any prior discrimination. In other words, Respondents must show that preferential treatment afforded to native Hawaiians is not simply a product of "administrative convenience" in grouping together all native Hawaiians. *Cf. Croson*, 488 U.S. at 508. OHA cannot argue that native Hawaiians are entitled to preferences simply because they are members of a particular racial group that has suffered

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[7] *Available at* http://wiki.grassrootinstitute.org/mediawiki/media/9/97/1-497.pdf (last visited Dec. 8, 2009).

discrimination. *See Bakke*, 438 U.S. at 307 ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

Moreover, providing one racial group entitlements to the revenue of the ceded lands could potentially continue indefinitely and therefore is not "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" *Adarand*. 515 U.S. at 238 (citation omitted). Consequently, any "redress of wrongs" argument also fails strict scrutiny. The predicament in which the State of Hawaii and OHA find themselves can be directly traced to the racial classifications being used to this day in the Hawaiian Homes Commission Act of 1920, the Admission Act of 1959, and the State of Hawaii through its constitutional provision creating the OHA and its implementing statutes. Even if the Court finds that the laws providing Hawaii with justification for its race-based preferences are unchallenged here, the Court has an independent obligation to subject those laws to judicial scrutiny and ensure that present and future government action is narrowly tailored to achieve a compelling interest.

In *Miller v. Johnson*, 515 U.S. 900 (1995), this Court applied its "presumptive skepticism of all racial classifications" to unchallenged Justice Department rulings advanced as a defense to alleged voting rights violations. *Id.* at 922. The Court explained that "the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id.* Similarly, in *Evans v. Newton*, 382 U.S. 296 (1966), the issue of

whether state judicial enforcement of a racial classification would violate the Equal Protection Clause was not properly brought before the Court, but the Court applied analysis under the Fourteenth Amendment anyway. *Evans*, 382 U.S. at 303 (White, J., dissenting). In *Cooper v. Aaron*, 358 U.S. 1 (1958), this Court based its decision on unchallenged but plainly unconstitutional state racial laws, and held that the Fourteenth Amendment "can neither be nullified openly and directly by state . . . officers, nor nullified indirectly by them through evasive schemes." *Id.* at 17. These cases demonstrate that even when the constitutionality of an underlying racial preference is not at issue, that preference may not be used to justify challenged race-based government action.

C. Determining Who Should Be Classified as a "Native Hawaiian" or "Hawaiian" Is Repugnant to Our Constitutional Ideals of Equal Protection

The differing definitions of "native Hawaiian" and "Hawaiian" illustrate another reason why racial classifications are offensive to the Constitution. Determining who is and who isn't a member of some chosen race is divisive, and has always been offensive to our country's notions of equality. *Cf. Plessy*, 163 U.S. at 552 ("Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race."); *see also Takao Ozawa v. United States*, 260 U.S. 178, 197 (1922):

> Manifestly the test afforded by the mere color of the skin of each individual is

> impracticable, as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races.

As Justice Stevens has emphasized, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting). Chief Justice Roberts, when faced with having to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district, sadly observed, "It is a sordid business, this divvying us up by race." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring).

The case exemplifies this concern: both the federal government and the State of Hawaii have enacted numerous laws with varying definitions based on percentage of Hawaiian ancestry for the purposes of determining eligibility for preferences. State and federal laws define Hawaiians differently based upon some "blood quotient" in order to bestow preferential treatment.

Government-imposed racial classifications based upon some imaginary blood quotient at best creates a legal fiction and at worst hearkens to the one-drop rule and Nuremberg Laws. "A person whose blood quantum is as little as one-sixty-fourth that of a full-blooded Polynesian (a figure suggested by Hawaii), and who might ascribe fully to aboriginal Hawaiian culture, is not, in any meaningful sense, a biological

Polynesian." Gould, *supra*, at 739 (see *Rice*, 528 U.S. at 514). Considerable doubt exists whether race can even be quantified scientifically. Prior to the science of genetics, racial characteristics were believed to be inherited by blood. Peter Farb, *Humankind* 276 (1978). The current preoccupation with blood quanta by both the State of Hawaii and the federal government stems from this misconception. *Cf.* Gould, *supra*, at 754 (explaining the preoccupation with blood quanta in the census, and references to Indians as "full-bloods" and "mixed bloods" in the nineteenth century and persisting into the twenty-first).

Racial divisions based on genes are also proving to be unreliable. *Id.* Genetic differences among the three customary groupings, Mongoloids, Negroids, and Caucasoids, are only slightly more pronounced than they are between individuals. *See* Lawrence Wright, *One Drop of Blood*, The New Yorker, July 25, 1994, at 50 (citing research of Masatoshi Nei & Arun K. Roychoudhury, *Gene Differences Between Caucasian, Negro, and Japanese Populations* (1972)). And "[p]ure races do not exist . . . in any . . . sexually-reproducing animal, including humankind." Farb, *supra*, at 275.

There is no taxonomic basis in biology or physiology to support racial distinctions used by the U.S. Census. Barry Edmonston & Jeffrey S. Passel, *How Immigration and Intermarriage Affect the Racial and Ethnic Composition of the U.S. Population*, in *Immigration and Opportunity: Race, Ethnicity, and Employment in the United States* 383 (Frank D. Bean & Stephanie Bell-Rose eds., 1999); *see also United States v. Bhagat Singh Thind*, 261 U.S. 204, 212 (1923) (finding common agreement on what constitutes a

racial division to be practically impossible).[8] Nonetheless, for years the Census Bureau used categories that divided people among five "racial" categories: American Indians and Alaskan Natives, Asian and Pacific Islanders, Blacks, Whites, and Hispanics. Office of Management and Budget, Executive Office of the President, *Statistical Directive* 15 (1977). American Indians, Alaskan Natives, and Asians and Pacific Islanders are not racially distinct from one another. In the 2000 census, "Native Hawaiian" was made a separate category for the first time. Revisions to the Standards for Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782 (Oct. 30, 1997).

Who should be considered a Hawaiian? Because there is no single Hawaiian tribe or nation that can make this determination, the state and federal governments have answered this question with arbitrary distinctions. The State of Hawaii's Office of Hawaiian Affairs defines "Native Hawaiian" (with a capital "N") as a person of Hawaiian ancestry, regardless of blood quantum; and a "native Hawaiian" (with a lower case "n") refers to those with 50% or more *Hawaiian blood*. State of Hawaii Office of Hawaiian Affairs, *Native Hawaiian Data Book—1998, Definitions of Race* 600-01 (1998) (*Native Hawaiian Data Book*);

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[8] The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has 5 races; Keane following Linnaeus, 4; Deniker, 29. The explanation probably is that 'the innumerable varieties of mankind run into one another by insensible degrees, and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.

Bhagat Singh Thind, 261 U.S. at 212 (footnotes omitted).

but see Bhagat Singh Thind, 261 U.S. at 211 (classifying Polynesians, including native Hawaiians, as Caucasian).[9]

The Department of Hawaiian Home Lands follows the 1921 Hawaiian Homes Commission Act to define "native Hawaiian" as any descendant of not less than one-half of the blood of the races inhabiting the Hawaiian Islands previous to 1778. *Native Hawaiian Data Book* (citing Hawaiian Homes Commission Act). But a homestead lease successor (spouse or child) may be only one-quarter "Hawaiian." Hawaiian Homes Commission Act § 209. Members of the Hawaiian Homes Commission "shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. Hawaiian Homes Commission Act § 202.

There is no rhyme or reason to any of these classifications; the artificial approach used by state and federal authorities only perpetuates and increases racial division. It has also spawned seemingly endless litigation, with the courts forced to undertake the

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[9] The word 'Caucasian' is in scarcely better repute. It is at best a conventional term, with an altogether fortuitous origin, which under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example (*The World's Peoples*, 24, 28, 307, *et seq.*), it includes not only the Hindu, but some of the Polynesians (that is, the Maori, Tahitians, Samoans, Hawaiians, and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black. We venture to think that the average well-informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.

Bhagat Singh Thind, 261 U.S. at 211 (footnotes omitted).

distinctly suspect task of verifying racial bona fides and who properly qualifies as a "Hawaiian,"[10] and whether such classifications are proper. *See*, *e.g.*, *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007) (plaintiffs who claimed at least 50% bloodline asserted exclusive control over state programs to benefit "Hawaiians," currently open to anyone with one drop of Hawaiian blood); *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (limiting candidates for OHA trusteeship to those of Hawaiian ancestry unconstitutional); *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (non-Hawaiian student challenged school's policy of giving preference to students of native Hawaiian ancestry). It is anathema for courts interpreting the Equal Protection Clause to be weighing racial taxonomies and categorizations made thereunder.

II

THE INDIAN COMMERCE CLAUSE DOES NOT PROVIDE A BASIS FOR LAWS THAT GRANT PREFERENCES TO NATIVE HAWAIIANS

The Constitution grants Congress "plenary and exclusive" powers to legislate in respect to Indian tribes. *E.g.*, *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 470-71 (1979); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *see also*

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[10] Most native Hawaiians are of mixed ancestry and it is estimated that fewer than 6,000 *full-blooded* Hawaiians remain. An OHA study from 1984 found that one in three Native Hawaiians had between 50 and 100% blood quantum, while only 1 in 25 native Hawaiians had 100% blood quantum. *Native Hawaiian Data Book* at 30. More than 60% of native Hawaiians had less than 50% blood quantum. *Id.*

William C. Canby, *American Indian Law* 2 (3d ed. 1998) ("the independence of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes").

The Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3,[11] and the Treaty Clause, U.S. Const. art. II, § 2, cl. 2, have been traditionally cited as the sources of that power. *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). The "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The federal government's power to deal with Indian tribes is based upon a "special relationship":

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, s 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation.

Mancari, 417 U.S. at 551-52. Indian tribes thus enjoy a "unique legal status" under federal law and upon the plenary power of Congress. *Id.* at 551.

The Treaty Clause confirms that any special relationship is limited to quasi-sovereign Indian

[11] Congress shall have power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". U.S. Const. art. I, § 8, cl. 3.

Tribes. As Chief Justice Marshall stated for the Court in *Worcester v. Georgia*, 31 U.S. 515 (1832), the Constitution "has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties." *Id.* at 559. Individual native Hawaiians are incapable of entering into treaties with the United States; otherwise the federal government could make treaties with any group of two or more descendants of an indigenous race, regardless of whether that group retains any sovereignty or internal governmental structure, and such "Treaties" would be the "supreme Law of the Land." U.S. Const. art. VI.

In *Mancari*, this Court considered whether an employment preference to Native Americans under the Indian Reorganization Act of 1934 was in fact an unconstitutional racial preference violative of the Fifth Amendment.[12] *Mancari*, 417 U.S. at 537. This Court held that equal protection issues were not implicated, because the "preference, as applied, is granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities"—that is, "the preference is political rather than racial in nature." *Mancari*, 417 U.S. at 554 n.24. To be eligible for the preference under the Indian Reorganization Act, the Indian had to meet a certain blood quantum and be a member of a "Federally-recognized tribe." *Id.* The purpose of laws enacted to give Indians certain

[12] In light of this Court's decision in *Adarand*, 515 U.S. at 227, which held that all racial classifications imposed by federal, state, and local governmental actors must be reviewed under strict scrutiny, it may be the case that *Mancari*, 417 U.S. 535, has been overruled, or that *Mancari* is limited to Congress's "special relationship" with Indian tribes. But the Court need not address the tension between *Adarand* and *Mancari* here.

preferences has been "to give Indians a 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." *Id.* at 541-42 (footnotes omitted). None of these purposes apply in reference to laws granting preferences to native Hawaiians.

When legislation is enacted that classifies Indians according to race, the legislation must still be subject to strict scrutiny. For instance, in *Adarand*, the presumptively disadvantaged groups were " 'Black Americans, Hispanic Americans, *Native Americans*, Asian Pacific Americans, and other minorities.'" *Adarand*, 515 U.S. at 205 (quoting Small Business Act, 15 U.S.C. § 637(d)(2)-(3) (1994)) (emphasis added). In *Croson*, the relevant definition was U.S. citizens who are " 'Blacks, Spanish-speaking, Orientals, *Indians*, Eskimos, or Aleuts.'" *Croson*, 488 U.S. at 478 (citation omitted) (emphasis added). In these cases, this Court never indicated that the benefits for Native American Indians would be subject to rational basis review. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 568 (1996).

Furthermore, as stated above, in *Rice*, this Court held that the statutory definitions of "native Hawaiian" and "Hawaiian" as used by the OHA and by the United States in the Hawaiian Homes Commission Act are racial classifications. *Rice*, 528 U.S. at 515. It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. *Parents Involved*, 127 S. Ct.

at 2751-52 (citing *Johnson*, 543 U.S. at 505-06; *Grutter*, 539 U.S. at 326; and *Adarand*, 515 U.S. at 224).

Only under very specific circumstances may Congress, through its special trust responsibility to Indian Tribes, provide preferences to Indians that are reviewed under rational basis. In *Mancari*, that preference did not apply to all Indians, but only those who were members of a federally recognized tribe. *Mancari*, 417 U.S. at 554 n.24. The legislative language in the OHA, the Hawaii Homes Commission Act, and even the Apology Resolution does not refer to any native Hawaiian tribe, however, but rather to individual native Hawaiians based upon a classification that this Court has held to be racial.

OHA's position would still lack merit if the legislative language did refer to Hawaiian tribes, because there is no single native Hawaiian group that unifies or represents all native Hawaiians. *See* Benjamin, *supra*, at 577-78 n.172 (discussing the multitude of groups that claim to represent native Hawaiians, and the division within the native Hawaiian community over whether there should be a native Hawaiian government). And even if there were a single native Hawaiian tribe or numerous native Hawaiian tribes, the state and federal statutes granting benefits to native Hawaiians must still be subject to strict scrutiny, because those benefits apply to *all* native Hawaiians, not just those with a tribal affiliation. *Id.* at 581.

In short, federal Indian law is a unique compromise with preconstitutional realities—one

based on *political* rather than *racial* classifications—that is inapplicable to Hawaii.

III

THE APOLOGY RESOLUTION NEITHER AMENDS NOR RESCINDS FEDERAL LAW

In 1993, both houses of Congress passed the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii. This Apology Resolution textually precludes OHA's claims here. First, there is no express language in the Apology Resolution which recognizes, identifies, or creates a legal right by native Hawaiians, or any other group defined by race or ancestry, to any of the ceded lands. To the contrary, the Apology Resolution expressly provides that it may not serve as a settlement of any claims against the United States. Apology Resolution § 3.

The Apology Resolution should not be construed in a manner that calls into question its constitutionality, as the lower court has done. This Court has long adhered to the policy stated in *Hooper v. California*, 155 U.S. 648, 657 (1895): "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach also recognizes "that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing

Grenada County Supervisors v. Brown, 112 U.S. 261, 269 (1884)). Indeed, this Court held in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504-07 (1979), that a statute will not be construed in such a way as to call for the resolution of difficult and sensitive constitutional questions. The Apology Resolution does not run into constitutionality problems because it was a wholly symbolic act.

The Apology Resolution provides absolutely no command or direction to any federal or Hawaiian state agency as to any general or specific implementing action. No paragraph in the Apology Resolution states any express instruction in regard to the ceded lands. Nor is there any paragraph that excuses any federal or state agency from enforcing existing laws or regulations, and therefore no implementing action can be implied. The executive branch has never issued any presidential or regulatory guidance on how federal or state agencies should address the resolution or pursue follow-on actions.

Nevertheless, the Hawaii Supreme Court interpreted the Apology Resolution to mean that "Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands." *OHA*, 177 P.3d at 901. But that contention overlooks the remarks to the Senate by the senior senator from Hawaii, Senator Daniel Inouye, who spoke to allay fears that the resolution had any implications regarding claims to the ceded lands:

> As I tried to convince my colleagues, this is a simple resolution of apology, to recognize the facts as they were 100 years ago. As to the matter of the status of Native Hawaiians, as my colleague from Washington knows, from

> the time of statehood we have been in this debate. Are Native Hawaiians Native Americans? This resolution has nothing to do with that. **This resolution does not touch upon the Hawaiian homelands. I can assure my colleague of that.**
>
> **It is a simple apology.**

103 Cong. Rec. S14482 (daily ed. Oct. 27, 1993, statement of Senator Inouye) (emphasis added).

That the Apology Resolution does not recognize or create a claim by native Hawaiians or Hawaiians to the ceded lands is further supported by Senate Report No. 103-126, of August 6, 1993. According to that report:

> The purpose of [the Apology Resolution] is to acknowledge the historical significance of the January 17, 1893 overthrow of the Kingdom of Hawaii on the occasion of the 100th anniversary of this event; to offer an apology to [n]ative Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii, with the participation of citizens and agents of the United States; to commend efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with [n]ative Hawaiians; and to urge reconciliation efforts between the United States and the [n]ative Hawaiian people.

S. Rep. No. 103-126 at 1 (1993). The Senate Committee on Indian Affairs also reported that the Apology Resolution was expected to "have no

regulatory or paperwork impact," *id.* at 35, and would "not result in any changes in existing law." *Id.*

The appropriate judicial interpretation of the Apology Resolution was identified at the trial stage in *Rice*, where the district court stated:

> [R]eliance on the 1993 Apology Bill is misplaced. While the United States expressed its deep regret to the [n]ative Hawaiian people for the federal government's participation in the overthrow of the Kingdom of Hawaii, and pledged to support reconciliation efforts, that bill did not create any substantive rights. In fact, the disclaimer at the bottom of the Apology Bill expressly states, that "[n]othing in this joint resolution is intended to serve as a settlement of any claims against the United States." . . . . The Apology Bill creates no specific [n]ative Hawaiian rights. Furthermore, . . . the Apology Bill does not establish a "policy" of reconciliation; it simply pledges U.S. support for such efforts.

Rice v. Cayetano, 941 F. Supp. 1529, 1546 n.24 (D. Haw. 1996), *rev'd on other grounds*, 528 U.S. 495 (2000).

In section 5(f) of the Admission Act, the statute admitting Hawaii as a state, the United States granted title to Hawaii of approximately 1.2 million acres of ceded lands under certain conditions. But the Apology Resolution is completely silent as to the Admission Act. The Apology Resolution merely notes: "Whereas on August 21, 1959, Hawaii became the 50th State of the United States." Apology Resolution.

The Supreme Court of Hawaii wrongly held that the Apology Resolution affected Hawaii's sovereignty over the ceded lands. The Apology Resolution does not contain any language amending, altering, modifying, or rescinding the Admission Act. And Senate Report No. 103-126 concluded that the Apology Resolution would not result in any change in laws. The Admission Act thus still provides Hawaii with the power to sell or otherwise dispose of the ceded lands.

A careful reading of Section 5(f) of the Admission Act does not distinguish native Hawaiians as being the sole beneficiaries of the ceded lands; nor does it require Hawaii to use the ceded lands for the betterment of native Hawaiians. Section 5(f) states that the ceded lands and proceeds from their sale or other disposition shall be held by Hawaii

> 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. **Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide**, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Admission Act § 5(f) (emphasis added). Under the express terms of Section 5(f), the State of Hawaii may provide for the betterment of native Hawaiians, but that section does not compel race-conscious administration of the ceded public lands. Instead, it spells out five possible uses for the lands, without providing that any portion of those lands or the proceeds thereof must be set aside exclusively for the benefit of racial Hawaiians.

Indeed, when the ceded lands were annexed by the United States in 1898, they were committed to use for the benefit of all inhabitants of Hawaii, regardless of race. *See* Newlands Resolution (Revenues from ceded lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."). From its admission to the Union in 1959 until 1978, the State administered the lands and their proceeds in a race-neutral manner, allocating them principally to public education. Hawaii Senate Journal, Standing Committee Rep. No. 784, 1350-51 (1979).

Because the Newlands Resolution "does not touch upon the Hawaiian homelands," or result in "any changes in existing law," the court below incorrectly interpreted it as giving rise to a state duty to preserve the ceded lands for native Hawaiians pending some resolution of their race-based claims. Even if the Newlands Resolution or the Admission Act somehow intended for the ceded lands to be allocated according to race, such a directive is presumptively invalid. When a state governmental entity, such as the OHA, seeks to justify race-based remedies to cure the effects of past discrimination, the Court does not accept the government's mere assertion that the remedial action

is required. *Miller*, 515 U.S. at 922. Instead, the Court insists on a strong basis in evidence of the harm being remedied. *Id.* "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501. Thus, OHA's claim that the State must be enjoined from transferring any part of the ceded lands pending resolution of the claims of native Hawaiians, claims which are based on racial classifications, is subject to judicial strict scrutiny.

CONCLUSION

It is time, once and for all, to put an end to the blatantly unconstitutional state and federal programs in Hawaii that grant race-based preferences in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The judgment of the court below should be reversed.

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Respectfully submitted,

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