

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 Hawai'i**

**BRIEF OF THE HAWAII
CONGRESSIONAL DELEGATION
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

SRI SRINIVASAN
(Counsel of Record)
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

BRIEF OF THE HAWAI‘I CONGRESSIONAL DELEGATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS 1

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

 I. THE SUPREME COURT OF HAWAI‘I PROPERLY RELIED UPON THE APOLOGY RESOLUTION IN APPLYING STATE LAW 4

 A. The Apology Resolution Settles A Century Of Debate In Both The Legislative And Executive Branches Over The Legality Of—And The United States’ Responsibility For—The Overthrow Of The Kingdom Of Hawai‘i 5

 B. The Supreme Court Of Hawai‘i Properly Relied On The Factual Findings Of The Apology Resolution In Construing The Scope Of State-Law Trust Obligations 12

TABLE OF CONTENTS
(continued)

| | Page |
|---|-------------|
| II. THE PROCESS OF RECON- CILIATION WITH THE NATIVE HAWAIIAN PEOPLE CONTIN- UES TO MOVE FORWARD..... | 17 |
| CONCLUSION..... | 21 |

TABLE OF AUTHORITIES

Page(s)

CASES

| | |
|---|-------------|
| <i>Han v. United States Dep't of Justice</i> , 45 F.3d 333 (9th Cir. 1995)..... | 7 |
| <i>Ishida v. United States</i> , 59 F.3d 1224 (Fed. Cir. 1995)..... | 14 |
| <i>Jacobs v. Barr</i> , 959 F.2d 313 (D.C. Cir. 1992)..... | 14 |
| <i>Murakami v. United States</i> , 52 Fed. Cl. 232 (2002)..... | 14 |
| <i>Office of Hawaiian Affairs v. Housing & Community Dev. Corp. of Hawai'i</i> , 177 P.3d 884 (Haw. 2008)..... | 16 |
| <i>Rice v. Cayetano</i> , 528 U.S. 495 (2000)..... | 4, 5, 7, 14 |

STATUTES AND RESOLUTIONS

| | |
|---|---------------|
| Apology Resolution, Public Law 103- 150, 107 Stat. 1510 (1993)..... | <i>passim</i> |
| Hawai'i Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959)..... | 7 |
| Hawaiian Homes Commission Act (HHCA), Pub. L. No. 67-34, 42 Stat. 108 (1921)..... | 7 |
| Hawaiian Home Lands Recovery Act, Pub. L. 104-42, Title II, 109 Stat. 357 (Nov. 2, 1995)..... | 18 |
| Haw. H.R. Con. Res. No. 179..... | 17 |
| 1993 Haw. Sess. L. 340..... | 17 |
| 1993 Haw. Sess. L. 359..... | 17 |

TABLE OF AUTHORITIES

(continued)

| | Page(s) |
|---|----------------|
| Native Hawaiians Study Commission Act, Pub. L. No. 96-565, Title III, 94 Stat. 3321 (1980)..... | 8 |
| Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3 (Jan. 23, 2004)..... | 19 |
| 50 U.S.C. App. § 1989a | 14 |
| 50 U.S.C. App. § 1989b | 14 |
| LEGISLATIVE MATERIALS | |
| 139 Cong. Rec. S195 (daily ed. Jan. 21, 1993)..... | 9 |
| 139 Cong. Rec. S14477 (daily ed. Oct. 27, 1993) | 11, 12, 15 |
| 139 Cong. Rec. H9627 (daily ed. Nov. 15, 1993) | 11, 12, 15 |
| 146 Cong. Rec. H8146 (daily ed. Sept. 26, 2000) | 19 |
| 152 Cong. Rec. S5576 (daily ed. June 7, 2006)..... | 20 |
| 153 Cong. Rec. H11965 (daily ed. Oct. 24, 2007) | 19 |
| H.R. 505, 110th Cong. (2007)..... | 19 |
| H.R. Doc. No. 66-839 (1920)..... | 6 |
| H.R. Rep. No. 53-243 (1893) | 6 |
| S. 310, 110th Cong. (2007)..... | 19 |
| S. Rep. No. 103-126 (1993)..... | 5 |
| S. Rep. No. 104-119 (July 24, 1995) | 18 |

TABLE OF AUTHORITIES

(continued)

| | Page(s) |
|---|----------------|
| S. Rep. No. 107-66 (Sept. 21, 2001) | 19 |
| OTHER AUTHORITIES | |
| Dep't of Interior & Dep't of Defense, <i>From Mauka to Makai: The River of Justice Must Flow Freely</i> (Oct. 23, 2000) | <i>passim</i> |
| Hawai'i Advisory Committee to the U.S. Commission on Civil Rights, <i>Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for the Federal and State Programs Benefiting Native Hawaiians</i> (June 2001) | 9 |
| Native Hawaiian Study Commission, <i>Final Report to Congress on the Culture, Needs and Concerns of Native Hawaiians</i> (June 23, 1983) | 6, 8 |
| Native Hawaiian Study Commission Minority Report, <i>Claims of Conscience: A Dissenting Study of the Culture, Needs, and Concerns of Native Hawaiians</i> (1983) | 8, 9 |
| Speech of Senator Daniel K. Akaka Before AHA Hawai'i 'Oiwai (Sept. 4, 1999) | 9 |
| Statement of Presidential Candidate Sen. Barack Obama (Jan. 21, 2008) | 20 |
| Robbennolt, Jennifer K., <i>Apologies and Legal Settlement: An Empirical Examination</i> , 102 Mich. L. Rev. 460 (2003) | 13 |

TABLE OF AUTHORITIES
(continued)

Page(s)

| | |
|---|----|
| White, Brent T., <i>Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy</i> , 91 <i>Cornell L. Rev.</i> 1261 (2006)..... | 13 |
|---|----|

**BRIEF OF THE HAWAI‘I CONGRESSIONAL
DELEGATION AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

The Hawai‘i Congressional Delegation respectfully submits this brief as *amicus curiae* in support of respondents.¹

INTEREST OF *AMICUS CURIAE*

As the State of Hawai‘i’s congressional delegation, we have a strong interest in the interpretation and application of all statutes, including Public Law 103-150, 107 Stat. 1510 (1993) (the “Apology Resolution”), that address the United States’ special relationship with the indigenous people of Hawai‘i. Additionally, we have a particular interest in effectuating the reconciliation expressly contemplated by the Resolution between the Native Hawaiian people and the governments of the United States and State of Hawai‘i.

Senator Daniel K. Inouye served in the Hawai‘i Territorial Legislature from January, 1955 until July, 1959. In August, 1959, the Senator began his service in the United States House of Representatives, and since January, 1963, he has served in the United States Senate. Senator Inouye has been a

¹ Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a 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 or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties’ blanket consent to the filing of *amicus curiae* briefs are on file with the Clerk.

member of the Senate Committee on Indian Affairs for over twenty years, serving as the Committee's Chairman for eleven years.

Senator Daniel K. Akaka is the first United States Senator of Native Hawaiian ancestry. He represented the State of Hawai'i in the United States House of Representatives from 1977 to 1990, and has served in the United States Senate and as a member of the Senate Committee on Indian Affairs since 1990.

Representative Neil Abercrombie served as a member of the Hawai'i State Legislature from 1974 to 1986, and has represented the State of Hawai'i in the United States House of Representatives since 1991.

Representative Mazie Hirono has represented the State of Hawai'i in the United States House of Representatives since 2007. She served in the Hawai'i State Legislature from 1981 to 1994 and was Lieutenant Governor of the State from 1994-2002.

We fully agree with the arguments pressed by respondents for dismissal of the petition for a writ of certiorari, or alternatively, for vacatur and remand of the Hawai'i Supreme Court's decision. In addition, we write to emphasize the significance of the findings Congress made in the Apology Resolution, especially as they relate to the need for reconciliation with the indigenous Hawaiian people whose lands were taken from them after the overthrow of the monarchy. The Supreme Court of Hawai'i properly considered and relied upon Congress' considered findings in construing the State's fiduciary duties under State trust law, and in suspending the trans-

fer of those lands pending the resolution of the reconciliation process of Native Hawaiians' unrelinquished claims.

SUMMARY OF ARGUMENT

Contrary to the characterizations of petitioners and the United States, the Apology Resolution is not “simply an apology” devoid of substantive implications. Pet. Br. 30; *see* U.S. Br. 30. The Apology Resolution instead makes several important and historic factual findings that settle a long-standing debate over the legality of the overthrow of the Hawaiian monarchy, the United States' culpability for that takeover, and the unrelinquished claims of Hawai'i's indigenous people (referred to in this brief as “Native Hawaiians”) concerning their national lands.²

The Apology Resolution thus entails more than a “moral” effect. U.S. Br. 30. As the Supreme Court of Hawai'i properly recognized, the Resolution and its findings appropriately guide the State and its courts (as they do Congress, the Executive branch, and the federal courts) as they move forward to effectuate the reconciliation with Native Hawaiians expressly supported by the Resolution. Contrary to petitioners' suggestion, that conclusion is not surprising. Apologies can and do serve valuable, practical functions, and federal courts have interpreted them to shape national obligations under federal law. The Supreme Court of Hawai'i committed no error in

² Like the Apology Resolution, this brief uses the term “Native Hawaiian” to mean “any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.” Apology Resolution, 107 Stat. 1513.

likewise considering the Apology Resolution—in addition to state law—in determining the State’s fiduciary duties under State trust law.

ARGUMENT

I. THE SUPREME COURT OF HAWAI‘I PROPERLY RELIED UPON THE APOLOGY RESOLUTION IN APPLYING STATE LAW

Contrary to the contentions of petitioners and the United States, the Apology Resolution is more than “simply an apology” (Pet. Br. 30) “whose sole effect is a moral one” (U.S. Br. 30). Rather, the Resolution by its terms constitutes an official, definitive recognition and acknowledgment by Congress of the United States’ culpability for the illegal overthrow of the Kingdom of Hawai‘i and of the Native Hawaiians’ unrelinquished claims to their ancestral lands. That acknowledgment differs from other statutes and resolutions that have expressed Congress’ regret for acts that had already been recognized as wrong or unlawful. *See* U.S. Br. 29-30 (describing resolution apologizing for “slavery and Jim Crow”). The Apology Resolution instead ended a long-running debate over the United States’ actions in Hawai‘i over a century ago.³ The Supreme Court of Hawai‘i properly relied on those considered findings, and Congress’ express support of the ongoing reconciliation with

³ The “turbulent history leading up to the creation of the State of Hawaii” (Resp. Br. 3) is set forth in some detail in this Court’s opinion in *Rice v. Cayetano*, 528 U.S. 495, 499-511 (2000) and the Respondents’ Brief, pp. 3-7. This brief discusses that history only as it relates to the Apology Resolution and the debate that preceded it.

the Native Hawaiian people, to inform its ruling below.

A. The Apology Resolution Settles A Century Of Debate In Both The Legislative And Executive Branches Over The Legality Of— And The United States’ Responsibility For—The Overthrow Of The Kingdom Of Hawai‘i

1. The widespread disagreement over the United States’ responsibility for the overthrow of the monarchy of the Kingdom of Hawai‘i and the debate over the corresponding duty (if any) of the federal government toward Native Hawaiians began soon after the overthrow of the monarchy on January 17, 1893. That same year, President Grover Cleveland ordered James Blount, former Congressman and Chairman of the House Committee of Foreign Affairs, to go to Hawai‘i and investigate the events that led to the takeover. Message of the President to the Senate and House of Representatives, reprinted in S. Rep. No. 103-126, at 23-26 (1993). Blount complied with the President’s directive and, upon concluding his investigation, reported that “United States diplomatic and military representatives had abused their authority and were responsible for the change in government.” 107 Stat. 1511.

Based on Blount’s investigation, President Cleveland described the overthrow in a letter to Congress as an “act of war” and “substantial wrong” that the United States “should endeavor to repair.” 107 Stat. 1511; *see Rice*, 528 U.S. at 505 (“President Cleveland . . . denounced the role of the American forces and

called for [the] restoration of the Hawaiian monarchy.”) (citing Message of the President to the Senate and House of Representatives, as reprinted in H.R. Rep. No. 53-243, at 3-15 (1893)). Congress, however, did not act on the President’s recommendation. Instead, after lobbying by members of the Provisional Government that overthrew the monarchy, the Senate Committee on Foreign Relations agreed to conduct a new investigation into the overthrow. 107 Stat. 1511-12. That second inquiry resulted in the “Morgan [R]eport,” an account of the takeover described in 1983 by the Native Hawaiian Study Commission as reaching a conclusion “almost opposite” that of the Blount report with respect to the United States’ responsibility for the Hawaiian monarchy’s overthrow. Native Hawaiian Study Commission, *Final Report to Congress on the Culture, Needs and Concerns of Native Hawaiians* 26 (June 23, 1983) (*Final Report*).

Congress took no action on the conflicting reports, and in 1894, the Provisional Government declared itself the Republic of Hawai‘i. 107 Stat. 1512. In 1898, “as a consequence of the Spanish-American war,” a new President, William McKinley, signed the Newlands Resolution, which provided for the annexation of Hawai‘i to the United States. *Id.* The resolution also provided for Hawai‘i to cede to the United States “1,800,000 acres of crown, government, and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people.” *Id.*

2. “[F]rozen out of their lands” and “driven into the cities,” the Native Hawaiian people suffered greatly. H.R. Doc. No. 66-839, at 4 (1920) (quoted in

Department of Interior and Department of Justice, *From Mauka to Makai: The River of Justice Must Flow Freely* 35 (Oct. 23, 2000) (“*From Mauka to Makai*”). In 1921, Congress recognized and sought to respond to the Native Hawaiians’ plight by enacting the Hawaiian Homes Commission Act (HHCA), Pub. L. No. 67-34, 42 Stat. 108 (1921). The HHCA designated approximately 200,000 acres of land as “Hawaiian Homelands” to be made available to Native Hawaiians for homesteading and agricultural use. See *Rice*, 528 U.S. at 507; *Han v. United States Dep’t of Justice*, 45 F.3d 333, 335 (9th Cir. 1995) (per curiam).

Thirty-eight years later, Hawai‘i gained admission to the Union as a State. The Hawai‘i Admission Act, Pub. L. No. 86-3 § 5(b), 73 Stat. 4, 5 (1959) (“Admission Act”), transferred title, from the United States to the State of Hawai‘i, to most of the ceded public lands and public property within the State’s boundaries. Those lands were to “be held by [the] State as a public trust” for five specified purposes, including the “betterment of the conditions of native Hawaiians.” Admission Act § 5(f), 73 Stat. 6. The Act further provided that use of the land “for any other object shall constitute a breach of trust for which suit may be brought by the United States.” *Id.*

Even as Congress provided for Hawai‘i’s admission to the United States and enacted initiatives designed to aid Native Hawaiians, however, Congress failed to resolve definitively the questions surrounding the United States’ responsibility for the original overthrow of the monarchy and the seizure of Native Hawaiian land. Those issues again took center stage

in 1983, when Congress received another pair of dueling reports, this time issued pursuant to the Native Hawaiians Study Commission (NHSC) Act of 1980. That Act created a nine-member Commission to conduct a study and report on “the culture, needs and concerns of the Native Hawaiians.” Pub. L. No. 96-565, Title III, §§ 301-305, 94 Stat. 3321, 3324-26 (1980).

In 1983, the NHSC issued a *Final Report to Congress on the Culture, Needs and Concerns of Native Hawaiians*, which consisted of a majority report (the *Final Report*) and a minority report entitled *Claims of Conscience: A Dissenting Study of the Culture, Needs, and Concerns of Native Hawaiians* (“*Claims of Conscience*”). The Majority Report, following the lead of the Morgan Report, concluded “that the United States bears no legal or moral responsibility or culpability for the actions of American officials at [the] time [of the overthrow of the monarchy].” *From Mauka to Makai* at 42; see, e.g., *Final Report* at 28 (describing the “limited role of United States forces” in the overthrow and concluding, “as an ethical or moral matter,” that the United States was not liable for the native Hawaiians’ loss of land or sovereignty).

The NHSC Minority Report, which was joined by each of the three Hawaiian members of the Commission, dissented from the conclusion reached by the Majority Report. The Minority Report placed on the United States “a significant level of blame for the overthrow of the Hawaiian Monarchy.” *From Mauka to Makai* at 42. The report also noted concerns with the “the historical methodology and objectivity of analysis” used by the majority, including “the selec-

tive and often misleading presentation of the background of events and forces leading to the overthrow of the Kingdom of Hawai'i." *Claims of Conscience* at ix.

Again, Congress took no action to "resolve the differences" between the two reports, or to "reach a conclusion about the appropriateness of the actions of the United States in the overthrow of the Monarchy." *From Mauka to Makai* at 42. And while Congress remained officially undecided, the Majority Report's rejection of responsibility for the 1893 overthrow "played a larger role in enunciating federal policy towards Native Hawaiians than [did] the minority report." Speech of Senator Daniel K. Akaka Before AHA Hawai'i 'Oiwī ("Akaka Speech") (Sept. 4, 1999), available at http://akaka.senate.gov/public/index.cfm?FuseAction=Speeches.Home&month=9&year=1999&release_id=1202.

3. On January 21, 1993, Senator Akaka introduced the Apology Resolution to "admit liability for the 1893 overthrow," and correspondingly to "neutralize the 1983 Native Hawaiians Study Commission's Majority Report conclusion that the U.S. government was not liable for the loss of sovereignty or lands of the Hawaiian people in the 1893 overthrow." Akaka Speech (Sept. 4, 1999); accord Hawai'i Advisory Committee to the U.S. Commission on Civil Rights, *Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for the Federal and State Programs Benefiting Native Hawaiians* 19 (June 2001) (describing underlying goals of Apology Resolution); see 139 Cong. Rec. S195 (daily ed. Jan. 21, 1993) (statement of Sen. Akaka).

The plain text of the Apology Resolution definitively addressed a number of theretofore unresolved questions concerning the overthrow of the Hawaiian monarchy and the claims of Native Hawaiians to their ancestral lands. First, the Resolution “acknowledges” that the overthrow of the Kingdom was “illegal” and “resulted in the suppression of the inherent authority of the Native Hawaiian people.” 107 Stat. 1513. The Resolution also “apologizes to Native Hawaiians” for the illegal overthrow of the Hawaiian monarchy and “the deprivation of the rights of Native Hawaiians to self-determination.” *Id.* The preambulatory findings explained the nature of the “deprivation” of Native Hawaiians’ “right of self-determination” and on the “suppression” of their “inherent sovereignty.” *Id.*

Of particular relevance, Congress expressly recognized that the “self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States,” and also “ceded 1,800,000 acres of” Hawaiian lands “without the consent of or compensation to the Native Hawaiian people or their sovereign government.” 107 Stat. 1512. Relatedly, Congress further recognized that “the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty . . . or over their national lands.” *Id.* And with respect to Native Hawaiians’ unrelinquished claims concerning their lands, Congress explained that the “health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.” *Id.*

Finally, the Resolution expressly “support[s],” “recognizes,” and “commends” the ongoing “reconciliation efforts of the State of Hawaii . . . with Na-

tive Hawaiians.” 107 Stat. 1513. And the Resolution “expresses [Congress]’ commitment to acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.” *Id.* at 1513.

The legislative history of the Act reaffirms Congress’ intention to acknowledge the United States’ culpability in connection with the illegal overthrow of the Hawaiian monarchy; to recognize the ramifications of those actions, including the unrelinquished claims of Native Hawaiians to their lands; and to support the ongoing reconciliation process. *See, e.g.*, 139 Cong. Rec. S14477, 14480 (daily ed. Oct. 27, 1993) (statement of Sen. Inouye) (“We all know that the history and actions of our great country have been less than honorable in dealing with native peoples of this Nation. But, as I have indicated, this fact should not prevent us from acting to recognize and rectify these wrongs.”); 139 Cong. Rec. H9627, 9632 (daily ed. Nov. 15, 1993) (statement of Rep. Mink) (“While history cannot be rewritten, it can—and must—be acknowledged,” and “the United States should—and must—acknowledge its role in overthrowing the legal Government of the Kingdom of Hawai‘i by issuing an official apology.”); *id.* (statement of Rep. Thomas) (“[I]t is high time that the United States acknowledge its role in this regrettable affair.”). Even those Members who opposed the resolution on other grounds noted their agreement “as Members that [the] violent overthrow of [the Kingdom of Hawai‘i] government in an unauthorized way is something we ought to apologize for.” 139

Cong. Rec. S14477, at 14482 (daily ed. Oct. 27, 1993) (statement of Sen. Brown).

Thus, the Apology Resolution was passed with broad bi-partisan support: by a roll-call vote of 65-34 in the Senate, and with unanimous consent in the House. *From Mauka to Makai* at 13; 139 Cong. Rec. H9627, 9632 (daily ed. Nov. 15, 1993). On November 23, 1993, President Clinton signed the Resolution. *From Mauka to Makai* at 13. And while Congress certainly had a “moral” purpose in enacting the Resolution, U.S. Br. 30, the text and legislative history make clear that it had in mind an important practical and substantive purpose as well: To acknowledge, once and for all, the illegality of the overthrow of the Kingdom of Hawai‘i and its ramifications for Native Hawaiians, and to support and provide a foundation for the ongoing process of reconciliation with the Native Hawaiian people.

B. The Supreme Court Of Hawai‘i Properly Relied On The Factual Findings Of The Apology Resolution In Construing The Scope Of State-Law Trust Obligations

The text and history of the Apology Resolution make clear that the Resolution is, indeed, a “milestone” in the reconciliation process. Resp. Br. 27. The Resolution articulates Congress’ and the Executive’s previously unannounced acceptance of responsibility for the overthrow of the Kingdom of Hawai‘i and the claims of Native Hawaiians. Petitioners and the United States nonetheless suggest that the Supreme Court of Hawai‘i erred in its consultation of the Resolution, which they dismiss as “simply an

apology.” Pet. Br. 30; *see also* U.S. Br. 30 (grouping apologies with resolutions that are “unmistakably non-substantive”). Petitioners and the United States are mistaken.

That the Apology Resolution constitutes more than “simply an apology” is made clear by Congress’ explicit description of the Resolution’s operative provisions as encompassing both an “*ACKNOWLEDGMENT AND APOLOGY*.” 107 Stat. 1513 (emphasis added). Petitioners and the United States err in attempting to treat the Resolution as if it amounted to nothing more than a statement of regret, and in minimizing the significance of Congress’ “acknowledgments” in the Resolution.

1. “[P]ublic apologies . . . occupy a central role in resolving disputes in modern American culture.” Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 Cornell L. Rev. 1261, 1268 (2006). They allow “the government . . . [to] face its wrongs squarely and accept public responsibility for violating legal norms.” *Id.* at 1281. *See generally* Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. 460, 462 (2003) (distinguishing between “safe” apologies, which are mere “expressions of sympathy,” and actual apologies, which “explicitly accept responsibility for having caused injury” and have “legal consequences”).

Accordingly, federal courts have relied on the terms of a congressional apology when construing the scope of the federal government’s obligations under another federal law. The Federal Circuit, for example, has read the text of a congressional apology

to Japanese individuals interned during World War II to govern the proper interpretation of a reparations program enacted to compensate those individuals. *See Ishida v. United States*, 59 F.3d 1224, 1231 (Fed. Cir. 1995). The Court of Federal Claims likewise has rejected a “bureaucratic hair-splitting” interpretation of the same reparations statute, 50 U.S.C. App. § 1989b, reasoning that the statute “does not merely authorize a garden-variety benefit program, but rather embodies an extraordinary apology for what the Congress clearly viewed as the gravest of violations of ‘basic civil liberties.’” *Murakami v. United States*, 52 Fed. Cl. 232, 240 (2002) (quoting the apology, 50 U.S.C. App. § 1989a(a)).

Courts have relied upon the factual findings supporting an apology in addition to the actual expression of remorse, recognizing, as this Court explained in *Rice*, that a court’s role is to review events “as understood by the lawmakers, thus ensuring that [the court] accord[s] proper appreciation to their purposes in adopting the policies and laws at issue.” 528 U.S. at 500; *see id.* at 505 (citing Apology Resolution); *see also Ishida*, 59 F.3d at 1231 (relying on congressional statement of fact preceding apology in 50 U.S.C. App. § 1989a(a)); *Jacobs v. Barr*, 959 F.2d 313, 319-21 (D.C. Cir. 1992) (upholding internment reparations program against constitutional challenge based in part on congressional statement of historical fact).

Moreover, contrary to the United States’ position in this case (U.S. Br. 27), in *Rice*, the federal government expressly relied on “th[e] findings [of the Apology Resolution]” to assert that “indigenous Hawaiians, like numerous tribes in the continental

United States, have . . . unrelinquished sovereignty and territorial claims.” Br. for United States as *Amicus Curiae* Supporting Respondent, *Rice v. Cayetano*, No. 98-818, at 17 (July 23, 1999). The United States errs in now discounting those findings here.

Indeed, that Congress expected the findings in the Apology Resolution to be relied upon is evident from the legislative history of the Act. Members of Congress debated not only the appropriateness of the sections expressing remorse but also the meaning and consequences of the factual findings. *See* 139 Cong. Rec. S14481 (daily ed. Oct. 27, 1993) (statement of Sen. Brown) (suggesting that the Resolution should be “clarif[ied]” because, as written (and passed) the “whereases” referred to “communal land tenure” and “unified monarchical government,” and Senator Brown thought “we ought to be clear that we are not here apologizing for democracy or the concept of private property” but rather the “violent, forceful overthrow of government”). And Representative Thomas, for example, supported the Resolution on the ground that it “lays out in graphic detail what happened to Hawaiians and sounds a compelling call for justice.” 139 Cong. Rec. H9627 (daily ed. Nov. 15, 1993); *see also id.* at H9632 (statement of Rep. Richardson) (explaining that the Resolution accomplishes two purposes: it (1) “spell[s] out the events which led to the overthrow of the Government of Hawaii, annexation, and finally to statehood” and (2) “also . . . apologize[s] to the people of Hawaii for the improper actions taken by a representative of this Government”).

Like the federal courts that have relied upon the findings of congressional apologies, the Supreme Court of Hawai‘i was entirely justified in consulting the considered findings of the Apology Resolution, in addition to state law, in determining the State’s fiduciary obligations. See *Office of Hawaiian Affairs v. Housing & Community Dev. Corp. of Hawai‘i*, 177 P.3d 884, 901 (Haw. 2008) (“Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands”); *id.* (Apology Resolution “plainly contemplates future reconciliation with the United States and the State with regard to those claims”); *id.* at 905 (noting Apology Resolution’s recognition that Native Hawaiians are “determined to preserve, develop and transmit to future generations their ancestral territory”) (quoting 107 Stat. 1510). And as respondents explain (Resp. Br. 19-32), the Apology Resolution provides a sound factual basis for the court’s conclusions of State law. Congress not only apologized but also “acknowledged” the “ramifications” of the “illegal overthrow,” including (1) the suppression of the Native Hawaiians’ “inherent sovereignty,” and (2) the loss of their “ancestral territory.” 107 Stat. 1512, 1513. Congress recognized that Native Hawaiians have unrelinquished “claims to their inherent sovereignty” and “over their national lands,” and Congress supported and expressed its commitment to resolution of those claims in the ongoing reconciliation process. *Id.* at 1512.

II. THE PROCESS OF RECONCILIATION WITH THE NATIVE HAWAIIAN PEOPLE CONTINUES TO MOVE FORWARD

As respondents recount (Resp. Br. 8-11), since the 1990s, Native Hawaiians have engaged in a reconciliation process with State officials, seeking to obtain additional recognition as a native people and to resolve their unrelinquished claims to ancestral lands. The State legislature has responded by enacting several measures that facilitate the reconciliation that the Apology Resolution anticipates. For example, in 1993, the legislature itself marked the 100th anniversary of the overthrow of the Kingdom of Hawai'i by acknowledging the illegality of the takeover. *See* Haw. H.R. Con. Res. No. 179. That same year, the legislature established the "Hawaiian Sovereignty Advisory Committee," to facilitate self-government of the Native Hawaiian people. 1993 Haw. Sess. Laws 359, § 2. The legislature also passed a statute that would, upon establishment of a sovereign Native Hawaiian entity, transfer to that entity management and control over the Island of Kaho'olawe. 1993 Haw. Sess. Laws 340, § 2. That island had previously been in the possession of the federal government; "in 1994, Native Hawaiians succeeded in their attempts to have [it] . . . returned to the State." *From Mauka to Makai* at 38. Throughout this reconciliation process, therefore, "[t]he Native Hawaiian people have worked to maintain their traditional social, cultural, religious, and linguistic ties and a cohesive community life." *Id.* at 50.

Additionally, since the Apology Resolution was enacted in 1993, members of Congress and the Ex-

ecutive branch have taken a number of steps to advance the process of reconciliation between the federal government and the Native Hawaiian people. In March 1999, for example, both the Department of Interior and the Department of Justice designated officials to represent them “in efforts of reconciliation between the Federal Government and Native Hawaiians.” *From Mauka to Makai* at i. Recognizing that “reconciliation’ requires something more than being nice or showing respect”—it “requires action to rectify the injustices and compensation for the harm”—the Departments ultimately issued a final report (*From Mauka to Makai*) that made five recommendations to facilitate the reconciliation process moving forward. *Id.* at i, 4. One of their recommendations was that “the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes.” *Id.* at 4.

Congress, too, has worked with the Executive Branch in order to further the reconciliation process. In 1995, for example, Congress enacted the Hawaiian Home Lands Recovery Act, Pub. L. 104-42, Title II, §§ 201-209, 109 Stat. 357 (Nov. 2, 1995) (“Recovery Act”). Congress recognized that the federal government had used, and was using, for military purposes, lands that had been set aside as Hawaiian Homelands by the HHCA. *See id.* § 203(b), 109 Stat. 359; S. Rep. 104-119, at 9-10 (July 24, 1995). In enacting the Recovery Act, Congress provided a mechanism for the Secretary of the Interior to exchange for that military land other federal lands that are located in Hawai‘i and under agency control. *Id.* In doing so, Congress again recognized the im-

portance of land to the Native Hawaiian people and took another step toward the reconciliation anticipated in the Apology Resolution.

Additionally, in 2004, Congress passed legislation that provided for the creation of the Office of Native Hawaiian Relations within the Department of Interior. *See* Pub. L. 108-199 § 148, 118 Stat. 3, 445 (Jan. 23, 2004) (appropriating “\$100,000 . . . for the establishment of the Office of Native Hawaiian Relations”). That office “discharges the Secretary’s responsibilities for matters related to Native Hawaiians and serves as a conduit for the Department’s field activities in Hawaii.” Office of Hawaii Relations, <http://www.doi.gov/ohr/index.html>.

Finally, Congress has repeatedly acted upon, although it has not yet passed, legislation introduced by Senator Akaka to “authorize a process for the reorganization of a Native Hawaiian government and to provide for the recognition of the Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship.” S. Rep. No. 107-66, at 1 (Sept. 21, 2001). The House of Representatives passed such legislation in both 2000 and 2007, but the full Senate did not act on it. 146 Cong. Rec. H8146, 8153 (daily ed. Sept. 26, 2000) (passing H.R. 4904); 153 Cong. Rec. H11965, 11973 (daily ed. Oct. 24, 2007) (passing H.R. 505); *see* H.R. 505, 110th Cong. (2007); S. 310, 110th Cong. (2007); *see also* Resp. Br. 11 n.4. Furthermore, we plan to introduce similar legislation in the upcoming 111th Congress, and President Obama has repeatedly stated his support for such legislation, both on the Senate floor and during his presidential cam-

paign. See 152 Cong. Rec. S5576 (daily ed. June 7, 2006) (statement of Sen. Obama) (“I urge my colleagues in the Senate to vote for the Native Hawaiian Government Reorganization Act of 2005. I will be proud to add my vote to the roll call.”); Statement of Presidential Candidate Sen. Barack Obama (Jan. 21, 2008) (“2008 Statement”) (quoted in Office of Hawaiian Affairs, *Obama Supports Akaka Bill* (Jan. 21, 2008), http://www.oha.org/index.php?option=com_content&task=view&id=540&Itemid=224). As then-Senator Obama stated last January, “[t]his is an important bill, and if it is not signed into law this year, I will commit to support it as president.” 2008 Statement, *supra*.

We, the congressional delegation for the State of Hawai‘i, are confident that the time has come to effectuate the reconciliation the Apology Resolution supports and commends, thus restoring to the Native Hawaiians a measure of the sovereignty wrongly taken from them over a century ago. The Supreme Court of Hawai‘i did not err in relying on Congress’ findings and acknowledging this reconciliation to come.

CONCLUSION

For the foregoing reasons, as well as those stated by respondents, the Court should dismiss the petition for a writ of certiorari, or alternatively, vacate and remand the decision of the Supreme Court of Hawai'i.

Respectfully submitted,

SRI SRINIVASAN
(Counsel of Record)
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

January 29, 2009