No. 98-818

In the Supreme Court of the United States

HAROLD F. RICE, PETITIONER

v.

BENJAMIN J. CAYETANO,
GOVERNOR OF HAWAII

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Hawaii limits the right to vote for the trustees of the Office of Hawaiian Affairs to the "descendant[s] 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. Const. Art. XII, § 5; Haw. Rev. Stat. § 10-2 (1993). The question presented is whether that voting requirement discriminates on the basis of race in violation of the Fourteenth or Fifteenth Amendments to the Constitution.

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INTEREST OF THE UNITED STATES

The United States has a special responsibility for the welfare of the Native peoples of the United States, including Native Hawaiians. Pursuant to that responsibility, Congress has enacted many statutes for the benefit of Native Hawaiians. Congress has also delegated broad authority to administer a portion of the federal trust responsibility to the State of Hawaii, which enacted the voting provision at issue here in carrying out that responsibility. The United States therefore has a direct interest in the resolution of the question presented in this case.

STATEMENT

1. a. The Hawaiian Islands were originally settled by Polynesians from the Western Pacific. *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 232 (1984). In 1778, the first

documented encounter between Native Hawaiians and Europeans occurred when Captain James Cook sailed into Hawaiian waters. R. Tabrah, *Hawaii A History* 11 (1st ed. 1984). The native people Cook encountered "lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion." Pub. L. No. 103-150, 107 Stat. 1510.[1] Even though indigenous Hawaiians were all one people with a common language, ancestry, and religion, at that point the eight islands were governed by four independent chiefdoms. Tabrah 13-14. Cook and his crew referred to the Hawaiian people as "Indians." See G. Daws, *Shoal of Time* 2 (1968).

In 1810, Kamehameha I united the islands into the Kingdom of Hawaii and became its first King. 107 Stat. 1510. Between 1826 and 1893, the United States recognized the Kingdom as a sovereign nation and signed several treaties with it. *Ibid.* During that same period, Americans gained increasing influence over the Kingdom's economy, acquiring control of three-fourths of Hawaii's commerce and most of its available land. S. Rep. No. 681, 55th Cong., 2d Sess. 78 (1898). Americans also began to dominate the Kingdom's political affairs. S. Doc. No. 16, 55th Cong., 3d Sess. 3 (1898). The social and economic changes in Hawaii had a "devastating" effect on the Native Hawaiian population and on their "health and well-being." 107 Stat. 1512. Foreigners brought new diseases to Hawaii, and the Native Hawaiian population plummeted. Tabrah 42.

In 1893, Queen Lili'uokalani threatened to reestablish Native Hawaiian control over governmental affairs. Tabrah 99. Fearing a loss of power, a group representing American commercial interests overthrew the monarchy and estab-

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[1] The quotation is from the 1993 Joint Resolution of Congress to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians. That resolution recites pertinent history.

lished a provisional government. 107 Stat. 1510. The overthrow was aided by the United States Minister to Hawaii, who caused armed naval forces to invade Hawaii. *Ibid.* The United States Minister immediately recognized the provisional government, which sought annexation to the United States. *Ibid.*

President Cleveland refused to recognize the legitimacy of the provisional government and called for restoration of the monarchy. 107 Stat. 1511. Congress enacted a joint resolution annexing Hawaii, however, and in 1898 President McKinley signed the resolution. *Id.* at 1512. At the time of annexation, the provisional government ceded 1,800,000 acres of crown, government, and public lands to the United States. *Ibid.* In the Hawaiian Organic Act, ch. 339, § 91, 31 Stat. 159, Congress established the Territory of Hawaii, placed the ceded lands under its control, and directed that proceeds from the lands be used for the benefit of the inhabitants of Hawaii.

b. The condition of Native Hawaiians, however, continued to deteriorate, and in 1920 territorial representatives sought assistance from Congress. Noting that Hawaiian people had been "frozen out of their lands and driven into the cities," and that "Hawaiian people are dying," the representatives recommended allotting land to the Hawaiians so that they could reestablish their traditional way of life. H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920). The Secretary of the Interior echoed that recommendation, informing Congress that Native Hawaiians are "our wards * * * for whom in a sense we are trustees," that they "are falling off rapidly in numbers" and that "many of them are in poverty." *Ibid.* Those recommendations led to the enactment of the Hawaiian Homes Commission Act, 1920 (HHCA), ch. 42, 42 Stat. 108, which designated 200,000 acres of lands for homesteading by "Native Hawaiians." Congress found constitutional precedent for the HHCA in previous enactments granting Indians special privileges in using public lands.

H.R. Rep. No. 839, *supra*, at 11. In 1938, Congress again exercised its trust responsibility by granting Native Hawaiians exclusive fishing rights in the Hawaii National Park. Act of June 20, 1938, ch. 530, § 3(a), 52 Stat. 784.

In 1959, Hawaii was admitted into the Union. In the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4, Congress required Hawaii to adopt the HHCA as part of the state constitution and transferred authority to the State to administer the HHCA lands. § 4, 73 Stat. 5. Congress also placed an additional 1.2 million acres of lands acquired through annexation into a trust to be managed by the State for one or more of five specified purposes, including "the betterment of the conditions of native Hawaiians." § 5(f), 73 Stat. 6.

Since Hawaii's admission into the Union, Congress has continued to accept responsibility for the welfare of Native Hawaiians. Congress has established special Native Hawaiian programs in the areas of health care, education, employment, and loans.[2] It has enacted statutes to preserve Native Hawaiian culture, language, and historical sites.[3] And, by classifying Native Hawaiians as "Native Americans" under numerous federal statutes, Congress has extended to Native Hawaiians many of "the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities." 42 U.S.C. 11701(2) and

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[2] Native Hawaiian Health Care Improvement Act, 42 U.S.C. 11701-11714; Native Hawaiian Education Act, 20 U.S.C. 7901-7912; Workforce Investment Act of 1998, Pub. L. No. 105-220, § 166, 112 Stat. 1021 (to be codified at 29 U.S.C. 2911 (Supp. IV 1998)); Native American Programs Act of 1974, 42 U.S.C. 2991-2992.

[3] See 16 U.S.C. 396d(a) (establishing "a center for the preservation, interpretation, and perpetuation of traditional native Hawaiian activities and culture"); 20 U.S.C. 4441 (providing funding for Native Hawaiian arts and cultural development); Native American Languages Act, 25 U.S.C. 2901-2906 (1994 & Supp. III 1997); National Historic Preservation Act of 1966, 16 U.S.C. 470a(d)(6).

(19).[4] Those enactments reflect Congress's view that "[t]he authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of * * * Hawaii." 42 U.S.C. 11701(17). They are also premised on congressional findings that the conditions of Native Hawaiians in such areas as health and education continue to lag seriously behind those of non-Natives. 42 U.S.C. 11701(22); 20 U.S.C. 7902(17).

In 1993, Congress enacted a Joint Resolution to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians. 107 Stat. 1510. In that Joint Resolution, Congress acknowledged that the overthrow of the Kingdom of Hawaii was "illegal," "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people," and deprived Native Hawaiians of their rights to "self-determination," *id.* at 1513; that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States," *id.* at 1512; that the provisional government ceded lands to the United States

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[4] See, *e.g.*, American Indian Religious Freedom Act, 42 U.S.C. 1996 *et seq.*; Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001-3013; Native American Programs Act of 1974, 42 U.S.C. 2991-2992; National Museum of the American Indian Act, 20 U.S.C. 80q *et seq.*; Comprehensive Employment and Training Act, 29 U.S.C. 872; Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U.S.C. 1177; Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, 42 U.S.C. 4577(c)(4); Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 958, 104 Stat. 4422; National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*; Older Americans Act of 1965, 42 U.S.C. 3001 *et seq.*; Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*; Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1987, Pub. L. No. 100-146, § 502(a)(2), 101 Stat. 857; Disadvantaged Minority Health Improvement Act of 1990, 42 U.S.C. 201 *et seq.*; Indian Health Care Amendments of 1988, 25 U.S.C. 1601 *et seq.*

"without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government," *ibid.*; and that "the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions," *id.* at 1512-1513. In light of those findings, Congress "express[ed] its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." *Id.* at 1513. In other recent statutes, Congress has recognized Native Hawaiians as "a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago," 42 U.S.C. 11701(1); 20 U.S.C. 7902(1), with whom the United States has a "special" "trust" relationship, 42 U.S.C. 11701(15), (16), (18), and (20); 20 U.S.C. 7902(8), (10), (11), (13), and (14).

Early federal statutes, such as the HHCA, defined "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." HHCA § 201(a)(7), 42 Stat. 108. All federal statutes enacted since 1974, however, have defined "Native Hawaiian" as any descendant of the aboriginal people of the Hawaiian Islands. See, *e.g.*, Native American Programs Act of 1974, 42 U.S.C. 2992c; 107 Stat. 1513; Native Hawaiian Education Act, 20 U.S.C. 7912(1).

c. In 1978, Hawaii amended its Constitution to establish the Office of Hawaiian Affairs (OHA). Haw. Const. Art. XII, § 5. OHA is the principal public agency responsible for the administration of programs relating to Native Hawaiians and Hawaiians. Haw. Rev. Stat. § 10-3 (1993). "Native Hawaiian" is defined as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the [HHCA]." *Id.* § 10-2.

"Hawaiian" is defined as "any 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." *Ibid.* The latter definition was added to bring state law "in line with the current policy of the federal government to extend benefits for Hawaiians to all Hawaiians regardless of blood quantum." J.A. 46.

OHA administers two public trusts. The first consists of 20% of the proceeds from the public lands held in trust by the State under Section 5(f) of the Admission Act. That fund is administered for the benefit of "Native Hawaiians." Haw. Rev. Stat. § 10-13.5 (1993). The second trust consists of money appropriated by the state legislature and is administered for the benefit of "Hawaiians." Pet. App. 6a. OHA also administers federal funds made available to it for Native Hawaiians or Hawaiians. Haw. Rev. Stat. § 10-6(a)(8) (1993). The Hawaii Constitution establishes that OHA shall be managed by a board of trustees, who shall be "Hawaiians" and who shall be elected by "Hawaiians." Haw. Const. Art. XII, § 5.

Congress has recognized OHA's role in administering programs for Native Hawaiians, finding that OHA "serves and represents the interests of Native Hawaiians," 16 U.S.C. 470w(18), that OHA "has as a primary and stated purpose the provision of services to Native Hawaiians," *ibid.*, and that OHA has "expertise in Native Hawaiian affairs," 20 U.S.C. 80q-11(a)(2). See also 25 U.S.C. 3001(11). Congress has also made OHA eligible to administer federal programs on behalf of Native Hawaiians. 20 U.S.C. 4441(c)(2)(B), 7904(b)(3) and (f); 42 U.S.C. 2991b-1(a), 11711(7)(A)(ii). Congress has been fully aware that OHA's trustees are elected by indigenous Hawaiians. See S. Rep. No. 580, 100th Cong., 2d Sess. 32 (1988) (concluding that the election of the OHA trustees by Native Hawaiians represents "a rational means of effectuating the state's obligations under the trust re-

lationship to Native Hawaiians"); S. Rep. No. 140, 100th Cong., 1st Sess. 28 (1987) (same).

2. In March 1996, petitioner applied to vote in the election for the OHA Board of Trustees. Pet. App. 20a-21a. That application was denied on the ground that petitioner is not an indigenous "Hawaiian." *Id.* at 21a. Petitioner filed suit against the Governor of Hawaii (respondent), contending that the denial of his application to vote was based on a racial classification and therefore violated the Fourteenth and Fifteenth Amendments to the United States Constitution. *Id.* at 21a, 23a.

The district court granted respondent's motion for summary judgment. Pet. App. 19a-43a. Relying on *Morton* v. *Mancari*, 417 U.S. 535 (1974), the district court concluded that the voting restriction was based not on race but rather on the status of Native Hawaiians as an indigenous people who have a guardian-ward relationship with the United States and the State of Hawaii. Pet. App. 29a-35a. Applying rational basis scrutiny, the court upheld the voting restriction as a rational means of furthering the State's obligation under federal law to act for the betterment of Native Hawaiians. *Id.* at 35a-37a.

3. The court of appeals affirmed. Pet. App. 1a-18a. Noting that petitioner had not challenged the classification that underlies the trust and OHA, the court concluded that "we must accept the trusts and their administrative structure as we find them, and assume that both are lawful." *Id.* at 9a. In the court's view, it then followed that "the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." *Id.* at 9a-10a. The court stated the OHA voting law appeared to contain a racial classification on its face. *Id.* at 11a, 14a. The court ultimately concluded, however, that, given the nature of petitioner's challenge, and this Court's decision in *Mancari*, "the voting restriction is not

primarily racial, but legal or political." *Id.* at 10a. The court therefore concluded that the voting qualification does not violate the Fourteenth or Fifteenth Amendments. *Ibid.*

SUMMARY OF ARGUMENT

A. The classification in the OHA voting law has its source in federal law and therefore implicates Congress's plenary power to enact legislation on behalf of indigenous people with whom it has established a trust responsibility. Congress has broad power to identify indigenous groups falling within its Indian affairs power, and legislation on behalf of any such group is not to be viewed as discrimination based on race, as long it is rationally tied to the fulfillment of the United States' unique trust obligations.

B. Congress has identified Native Hawaiians as a distinct indigenous group within the scope of its Indian affairs power, and has enacted dozens of statutes on their behalf pursuant to its recognized trust responsibility. Congress's determination that Native Hawaiians constitute a distinct indigenous group for whom it may enact special legislation is entirely rational. Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claim to its sovereignty or its sovereign lands.

Petitioner seeks to derive from the Indian Commerce Clause's reference to "Tribes" a requirement that Congress may only take action on behalf of indigenous groups with present-day tribal governments. To the framers of the Constitution, however, an Indian tribe was simply a distinct group of indigenous people set apart by their common circumstances, a definition that Native Hawaiians satisfied in 1778 and satisfy today. Moreover, Congress has concluded that it has a trust obligation to Native Hawaiians precisely because it bears responsibility for the destruction of their government and their loss of sovereignty over their land.

The Constitution is not so self-defeating as to make the very reasons that Congress has concluded that it has a trust responsibility serve as an obstacle to the fulfillment of that responsibility. Nor is the existence of a tribal government necessary to make legislation on behalf of indigenous people non-racial. Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has established a trust relationship.

C. When Congress delegates authority to a State to administer the federal trust responsibility, state laws that are within the scope of that authority are subject to the same constitutional analysis as legislation enacted by Congress itself. Hawaii has acted under such a delegation of authority here.

In the Admission Act, Congress delegated broad authority to Hawaii to act for the betterment of Native Hawaiians. The OHA voting law betters the conditions of Native Hawaiians in two complementary ways: it promotes self-determination by indigenous Hawaiians, and it helps to ensure that OHA will administer the trust in a way that is responsive to the interests of that indigenous group. Because petitioner's exclusion from the class of persons eligible to vote for the trustees of OHA is based on the State's legitimate desire to pursue those two non-racial goals, and not on petitioner's race, petitioner's Fourteenth and Fifteenth Amendment claims should be rejected.

ARGUMENT

HAWAII'S VOTING LAW DOES NOT DISCRIMINATE ON THE BASIS OF RACE IN VIOLATION OF THE FOURTEENTH OR FIFTEENTH AMENDMENTS

The State of Hawaii limits the right to vote for OHA trustees to "descendant[s] 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 (1993); Haw. Const. Art. XII, § 5. Petitioner contends that the OHA voting law contains a racial classification that is prohibited by the Fifteenth Amendment and subject to strict scrutiny under the Fourteenth Amendment. The line drawn by the State, however, is based on the status of Hawaiians as an indigenous people of a once-sovereign nation with a unique trust relationship to the United States; it is not based on race. It therefore does not implicate the Fifteenth Amendment and is not subject to strict scrutiny under the Fourteenth Amendment. Instead, the relevant constitutional inquiry is whether the voting law is rationally tied to the fulfillment of the United States' unique responsibility towards an indigenous people as to whom it has a trust responsibility. The OHA voting law satisfies that standard.

A. Federal Legislation That Fulfills The Government's Unique Responsibility Towards Indians Does Not Discriminate On The Basis Of Race

Because the State's voting provision is based on a classification that has its source in federal law, petitioner's challenge implicates Congress's power to enact legislation for the benefit of indigenous people, or "Indians" as the Constitution refers to them. We therefore begin with a discussion of that power.

1. The term "Indian" was first applied by Columbus to the native people of the New World based on the mistaken belief that he had found a sea route to India. The term has been understood ever since to refer to the indigenous people who inhabited the New World before the arrival of the first Europeans. See *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832) (referring to Indians as "those already in possession [of the land], either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man"); *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-574 (1823) (referring to Indians as "original inhabitants" or "natives" who occupied the New World before discovery by "the great nations of Europe").

The Constitution allocates to Congress "plenary power over Indian affairs." *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998); *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978); *Mancari*, 417 U.S. at 551-552. "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Ibid.* The Indian Commerce Clause, Art. I, § 8, Cl. 3, expressly provides Congress with the power to "regulate Commerce with * * * the Indian Tribes," and the Treaty Clause, Art. II, § 2, Cl. 2, gives the President the power, by and with the consent of the Senate, "to make Treaties," with Indian Tribes. The "existence of federal power to regulate and protect the Indians and their property" is also implicit in the structure of the Constitution. *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943). "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them * * * needing protection * * *. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation." *Ibid.* Thus, "[n]ot only does the Constitution expressly authorize Congress to regulate commerce with the

Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States * * * the power and the duty of exercising a fostering care and protection over all dependent Indian communities." *United States* v. *Sandoval*, 231 U.S. 28, 45-46 (1913); see *United States* v. *Kagama*, 118 U.S. 375, 384-385 (1886) ("From their [the Indians'] very weakness[,] so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. * * * It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."); see also Ordinance of 1787: The Northwest Territorial Government, Art. III, 1 Stat. 52 ("The utmost good faith shall always be observed towards the Indians.").

2. Congress's plenary power over Indian affairs necessarily encompasses broad authority to identify the communities that fall within the scope of that power. For example, even after this Court had concluded that the Pueblo people of New Mexico were too assimilated to constitute an Indian tribe within the meaning of the Intercourse Act, *United States* v. *Joseph*, 94 U.S. 614, 617-618 (1877), the Court nonetheless deferred to Congress's decision to recognize the Pueblos as Indian communities within the Indian affairs power. *Sandoval*, 231 U.S. at 47. The Court explained that "the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection," and that, in light of their Indian lineage, common culture, and relative isolation from the rest of society, "this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling." *Ibid.* Congress may not "bring a community or body of people

within the range of [its Indian affairs power] by arbitrarily calling them an Indian tribe." *Id.* at 46. As long as Congress rationally concludes that a community is "distinctly Indian," however, "the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Ibid.*

Congress's authority to aid Indian communities, moreover, extends to all such communities within the borders of the United States, "whether within its original territory or territory subsequently acquired." *Sandoval*, 231 U.S. at 46. Thus, despite differences in language, culture, religion, race, and community structure, Native people in the East, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), the Plains, *Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867), the Southwest, *Sandoval*, *supra*, the Pacific Northwest, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979), and Alaska, *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962), all fall within Congress's Indian affairs power.

3. The Court has always understood members of traditional Indian communities to share the same or a similar race. *Montoya* v. *United States*, 180 U.S. 261, 266 (1901); *Kagama*, 118 U.S. at 378; *United States* v. *Rogers*, 45 U.S. (4 How.) 567, 573 (1846); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 22 (1831). It has never suggested, however, that congressional legislation that fulfills the United States' unique obligations towards Indians constitutes discrimination on the basis of race.

In *Mancari*, the Court squarely held that distinctions based on the United States' unique trust relationship with indigenous people should not be equated with distinctions based on race that are prohibited by the Constitution. In that case, the Court upheld the constitutionality of a law extending a preference for employment in the Bureau of Indian Affairs (BIA) to members of federally recognized tribes who

have "one-fourth or more degree Indian blood." 417 U.S. at 553 n.24. The Court rested its decision on "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Id.* at 551. The Court emphasized that if laws "designed to help only Indians were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* at 552. Given that unique legal and historical context, the Court concluded that the Indian employment preference was not a "racial preference," because it "is granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 553-554. More generally, the Court held that, "[a]s long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. Because the BIA employment preference rationally served the "non-racial" goals of "further[ing] the cause of Indian self-government" and "mak[ing] the BIA more responsive to the needs of its constituent groups," it did not violate constitutional equal protection principles. *Id.* at 554.

Since *Mancari*, the Court has repeatedly reaffirmed that "federal regulation of Indian affairs is not based upon impermissible [racial] classifications." *United States* v. *Antelope*, 430 U.S. 641, 646 (1977). It is "governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial group consisting of Indians.'" *Ibid.* See also *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979); *Yakima Indian Nation*, 439 U.S. at 500-501; *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 85-90 (1977); *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976);

Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-480 (1976).

B. Congress Has Rationally Identified Native Hawaiians As A Group Falling Within Its Indian Affairs Power

1. Congress long ago identified Native Hawaiians as an indigenous group falling within its Indian affairs power. In 1920, Congress enacted the Hawaiian Homes Commission Act (HHCA), ch. 42, 42 Stat. 108, which designated 200,000 acres of lands for homesteading by "Native Hawaiians." Congress has since enacted dozens of statutes that single out Native Hawaiians for special treatment. Congress has established special Native Hawaiian programs in the areas of health care, education, employment, and loans; it has enacted statutes to preserve Native Hawaiian culture, language, and historical sites; and it has classified Native Hawaiians as "Native Americans" under numerous other statutes, thereby extending to Native Hawaiians many of the same protections accorded to American Indians and Alaska Natives. See pp. 4-5, *supra*. Those enactments reflect Congress's view, expressly articulated in 1992, that "[t]he authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of * * * Hawaii." 42 U.S.C. 11701(17).

Congress's treatment of Hawaiians as a distinct indigenous people falling within its Indian affairs power is entirely rational. In the 1993 Joint Resolution and in recent federal statutes extending educational and health benefits to Native Hawaiians, Congress has found that: (1) Native Hawaiians are "a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago," 42 U.S.C. 11701(1); 20 U.S.C. 7902(1); (2) Native Hawaiians exercised sovereignty over the Hawaiian Islands, 20 U.S.C. 80q-14(11); (3) the overthrow of the Kingdom of

Hawaii was "illegal" and deprived Native Hawaiians of their right to "self-determination," 107 Stat. 1513; (4) the government installed after the overthrow ceded 1.8 million acres of land to the United States "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government," *id.* at 1512; (5) "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States," *ibid.*; and (6) "the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions," *id.* at 1512-1513.

Those findings, none of which are challenged by petitioner, show that indigenous Hawaiians, like numerous tribes in the continental United States, have both historical and current bonds, as well as unrelinquished sovereignty and territorial claims. Also like tribes in the continental United States, Native Hawaiians, pursuant to Acts of Congress, have substantial lands set aside for their benefit—200,000 acres of Homestead Act land on which there are more than 6,800 leases to Native Hawaiians that furnish homes to an estimated 30,000 Hawaiians (See Hawaii Homes Comm'n, *et al.*, Amicus Br. 1), and a 20% interest in the income generated by 1.2 million acres of public trust lands under the Admission Act. Accordingly, Congress may enact special legislation on behalf of Native Hawaiians, as it may for their counterparts elsewhere in the United States. See *Sandoval*, 231 U.S. at 46-47.

2. Petitioner argues (Br. 39-45) that special legislation for indigenous Hawaiians falls outside Congress's Indian affairs power, because the indigenous Hawaiian community does not have a tribal government recognized by the Department of the Interior. See Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a & note, 479a-1; 25 C.F.R. Pt.

83 (establishing criteria for Interior Department acknowledgment of tribal status). Congress, however, has repeatedly recognized Native Hawaiians as an indigenous group within its Indian affairs power, and the existence of a tribal government recognized by the Department of Interior is not a necessary predicate for the exercise by Congress itself of its unique power to fulfill the Nation's obligation toward indigenous people.

A requirement that there be a recognized tribal government would be particularly unjustified here The United States has concluded that it has a trust obligation to indigenous Hawaiians because it bears a responsibility for the destruction of their government and the unconsented and uncompensated taking of their lands. It would be extraordinarily ironic if the very reasons that the United States has a trust responsibility to the indigenous people of Hawaii served as an obstacle to the fulfillment of that responsibility. Fortunately, the Constitution is not so self-defeating. Congress may fulfill its trust responsibilities to indigenous peoples, whether or not they currently have a tribal government as such.

Petitioner attempts to locate a requirement of a present-day tribal government in the Indian Commerce Clause's use of the term "Tribe," and in this Court's decision in *Mancari*. See Br. 39-49. Neither provides a basis for so shackling Congress's ability to fulfill its trust responsibilities to those indigenous groups whose lands and sovereignty have been taken from them.

When the Constitution was adopted, the term "tribe" meant a "distinct body of people as divided by family or fortune, or any other characteristic." T. Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789); 2 S. Johnson, *A Dictionary of the English Language* (6th ed. 1785) (same). Thus, to the framers of the Constitution, an Indian tribe simply meant a distinct group of indigenous people set apart by their common circumstances. See also

Worcester, 31 U.S. (6 Pet.) at 559 (equating Indian tribe and Indian nation and defining "nation" as a "people distinct from others"); *id.* at 583 (Indians are "a separate and distinct people"). The Constitution does not limit Congress's Indian affairs power to groups with a particular government structure. "[S]ome bands of Indians, for example, had little or no tribal organization, while others * * * were highly organized." *Fishing Vessel Ass'n*, 443 U.S. at 664 (footnote omitted). Nor does the Constitution limit Congress's power to groups that continue to exercise all aspects of sovereignty. European "discovery" and the establishment of the United States necessarily diminished certain aspects of Indian sovereignty, *Johnson*, 21 U.S. (8 Wheat.) at 574; *Cherokee Nation*, 30 U.S. (5 Pet.) at 45, and the Constitution bestows on Congress "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess," *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). Thus, under the Constitution, "[f]ederal regulation of Indian tribes * * * is governance of once-sovereign political communities." *Antelope*, 430 U.S. at 646.

Because Congress found that Hawaiians have a direct historic, cultural, and land-based link to the indigenous people who inhabited and exercised sovereignty over the Hawaiian Islands before the first European contact in 1778, and that they are determined to preserve and to pass on to future generations their native lands and their distinct culture, Congress could reasonably determine that indigenous Hawaiians constitute an "Indian Tribe." Once Congress has determined that an Indian group or community has those characteristics, Congress "has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease." *Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 315 (1911).[5]

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[5] In several statutory contexts, Congress has used the term "tribe" in a narrower sense, distinguishing, for example, between a "tribe" and a

Moreover, the United States' authority over Indian affairs does not emanate from the Indian Commerce Clause alone. Congress would therefore retain ample authority to enact special measures on behalf of Native Hawaiians even if petitioner were correct that the Indian Commerce Clause may be invoked only if there is in existence a tribal government with which the United States may deal. This Court has held that the Constitution implicitly gives Congress plenary power to manage Indian affairs more generally. *Seber*, 318 U.S. at 715; *Sandoval*, 231 U.S. at 45-46; *Kagama*, 118 U.S. at 383- 384. That plenary power does not disintegrate when an indigenous people loses its government, particularly when the United States bears a responsibility for that loss.

In the first place, the loss of a particular form of government is not tantamount to termination of all sovereignty or of the prospect that sovereignty might be given expression in the future through governmental or other structures. In the case of Native Hawaiians, OHA itself furnishes a vehicle for the expression of self-determination over important aspects of Hawaiian affairs, and thus confirms that Native Hawaiians constitute a present-day "political" community.[6]

"band." See, *e.g.*, *Montoya*, 180 U.S. at 266; see also *United States* v. *Candelaria*, 271 U.S. 432, 442 (1926). As discussed above, however, the Constitution uses the term "Tribe" to refer to any distinct indigenous group.

[6] OHA's status as a state-law creation does not diminish its significance as a factor supporting the status of Native Hawaiians as a "Tribe" in the constitutional sense. A number of Tribes that have been formally recognized as such were effectively under state protection for much of their existence. See, *e.g.*, *United States* v. *Wright*, 53 F.2d 300, 303-304 (4th Cir. 1931) (Eastern Band of Cherokee Indians operated under state charter), cert. denied, 285 U.S. 539 (1932); 25 U.S.C. 734(a) (power of Texas to enact legislation benefitting Alabama and Coushatta Indian Tribes); 25 U.S.C. 1721(a)(9) (Passamaquoddy and Penobscot Tribes in Maine); see also *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 501 (1986); *New York ex rel. Cutler* v. *Dibble*, 62 U.S. (21 How.) 366 (1859).

That status is also confirmed by the existence of the myriad Native Hawaiian organizations (many of which have joined in or are described in amicus briefs in this case) that are active in a broad range of Native political, cultural, religious, legal, and land-related matters. Cf. 25 C.F.R. 83.7(c) (discussing political and comparable activity as a criterion for Interior Department acknowledgment). In any event, it is especially at the point at which an indigenous people have been deprived of their land and ability to govern themselves that the United States acquires a heightened trust responsibility to the indigenous people and their remaining institutions. See *Seber*, 318 U.S. at 715 (once the United States overcame the Indians and took possession of their lands, it "assumed the duty of furnishing * * * protection, and with it the authority to do all that was required to perform that obligation"); *Sandoval*, 231 U.S. at 45-46 (United States has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities"); *Kagama*, 118 U.S. at 384 (through its course of dealings with Indian Tribes, the United States acquired a "duty of protection" for the "remnants" of once sovereign nations).

Nor does this Court's decision in *Mancari* call into question the constitutionality of legislation aimed at fulfilling that obligation. *Mancari* holds that an exercise of the Indian affairs power does not violate equal protection principles as long as "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 555. Legislation that provides aid to a distinct indigenous community can satisfy that test, whether or not that community has a federally recognized tribal government. For example, when Congress enacted legislation in 1920 to return some land to indigenous Hawaiian people who were dying in the city so that they could resume their traditional way of life, there was no Hawaiian tribal government in existence. That legislation, however, was plainly tied to the fulfillment of Congress's unique obligation toward

the Indians. See *id.* at 555. The same is true of the many other federal statutes that address the distinct needs of the indigenous Hawaiian people. See pp. 4-5, 16-17, *supra.*

Petitioner emphasizes (Br. 39) that the particular preference approved in *Mancari* extends only to members of federally recognized tribes, making the preference "political" rather than "racial." See 417 U.S. at 553 n.24. The Court did not suggest, however, that the absence of a federally recognized tribal *government* automatically makes legislation designed to fulfill Congress's unique obligation to Indians "racial," and any such argument would be untenable. The Court explained in *Mancari* that the limitation of the preference to members of federally recognized tribes operated to exclude many individuals who might racially be classified as "Indians," and that "[i]n this sense, the preference is political rather than racial in nature." *Ibid.* The same is true here. The definition of "Hawaiian" for purposes of voting eligibility—descendants of the Native people who occupied the Hawaiian Islands in 1778—similarly excludes many people who might be classified as the same race (*i.e.*, Polynesian), but who came to the Hawaiian Islands after European discovery. The classification is therefore "political" in the same sense as in *Mancari*: it turns on the political event of discovery by Europeans in 1778, followed by recognition by the political Branches of the descendants of the aboriginal people of Hawaii as a distinct indigenous community deserving of protection. Congress does not extend benefits and services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has a recognized trust responsibility. Such legislation is just as non-racial as the legislation upheld in *Mancari.*

3. This Court's decisions subsequent to *Mancari* confirm that a federally recognized tribal government is not a predicate for legislation on behalf of indigenous people. For example, in *United States* v. *John*, 437 U.S. 634 (1978), the

Court upheld the power of Congress to provide for a group of Mississippi Choctaw Indians that did not have a federally recognized tribal government. The United States had entered into a treaty under which the Choctaw Indians would leave Mississippi by 1833. *Id.* at 641. In the 1890s, however, the United States became aware that a group of Choctaws had not left Mississippi. *Id.* at 643. Even though the United States did not regard that remaining group as members of a federally recognized tribe, *id.* at 650 n.20, it began to provide services and land to individual Choctaws in Mississippi. *Id.* at 644. In 1939, Congress declared that the lands that had been purchased for individual Choctaws would be held in trust for Choctaw Indians of one-half or more Indian blood, resident in Mississippi, and in 1944, Congress made those lands a reservation. *Id.* at 646. Finally, in 1945, Mississippi Choctaws of one-half or more Indian blood adopted a constitution and bylaws, which were then approved by the appropriate federal officials. *Ibid.*

Against that background, Mississippi argued that Congress lacked constitutional authority to establish federal criminal jurisdiction in the Choctaw Reservation. *John*, 437 U.S. at 652. The Court rejected that argument, explaining:

> [I]n view of the elaborate history * * * of relations between the Mississippi Choctaws and the United States, we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.

Id. at 652-653.

The decision in *Weeks*, *supra*, similarly refutes petitioner's argument that Congress's Indian affairs power extends only

to members of federally recognized tribes. In that case, the Court upheld a statutory scheme to provide financial benefits to descendants of members of the Delaware Tribe. Although the Court recognized that beneficiaries included non-tribal Indians, 430 U.S. at 82 n.14, 84-85, that feature of the scheme did not alter the Court's view of the appropriate level of scrutiny required by the Constitution. The Court applied the standard set forth in *Mancari*, and upheld the distribution scheme on that basis. *Id.* at 85.

Weeks thus reaffirms that federal legislation governing Indian affairs is constitutional if rationally related to Congress's unique obligation to Indians, whether or not the beneficiaries are, at that time, members of federally recognized tribes. Other cases and federal statutes reflect that same understanding. *Menominee Tribe* v. *United States*, 391 U.S. 404, 410-413 (1968) (members of terminated tribe retain hunting and fishing rights); *Seber*, 318 U.S. at 716-718 (Congress has authority to allot land to individual Indians with special protections against alienation and exemption from state taxation); *United States* v. *McGowan*, 302 U.S. 535, 537, 539 (1938) (Congress established Reno Indian Colony for needy Indians scattered throughout the State); *Taylor* v. *Brown*, 147 U.S. 640 (1893) (Indians who sever relations with their tribe are eligible to receive protected land); Indian Health Care Improvement Act, 25 U.S.C. 1603(c) (extending health care services to members of terminated tribes); Indian Reorganization Act, 25 U.S.C. 461 *et seq.* (authorizing Secretary of Interior to extend federal recognition to Indian tribes that had previously lost federally recognized status); 25 U.S.C. 903-903f (restoring federal recognition to the Menominee Tribe of Wisconsin); 25 U.S.C. 651 (defining "Indians of California" eligible for distribution fund as "all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State").

4. Petitioner's additional grounds for viewing legislation for indigenous Hawaiians as racial and outside Congress's Indian affairs power are also without merit. Petitioner contends (Br. 26-27) that such programs are racial because no similar benefits are extended to the descendants of non-Hawaiians who were citizens of Hawaii when the Hawaiian government was overthrown. But those who came to Hawaii after 1778—whether European, Asian, or Polynesian—have no aboriginal claim to sovereignty or land. Laws that distinguish between a distinct indigenous group, as to whom Congress has undertaken a trust responsibility, and subsequent inhabitants do not make a distinction based on race.

The distinction between indigenous people and subsequent inhabitants has uniformly been respected in federal law. Following the national expansion resulting from the Louisiana Purchase, the federal government undertook trust obligations toward the Indians but not to the French settlers of the region. When the United States purchased Alaska, the United States recognized that it had special obligations to the Native Alaskans but not to the inhabitants of Russian and other descent. In annexing the Hawaiian Islands, Congress recognized its trust obligations to Native Hawaiians. Those obligations do not extend to the non-indigenous inhabitants of Hawaii.

Furthermore, by the time Congress formally annexed Hawaii in 1898, the presence of non-natives (including many Americans) had already caused widespread harm to Native Hawaiians. Congress could reasonably conclude that the United States, through annexation, succeeded to an obligation to account for the consequences of that pre-annexation experience, just as the United States recognized the consequences of England's dealings with the Indians prior to the independence of the United States, see *Johnson* v. *M'Intosh*, *supra*, and Spain's dealings with the Indians prior to the United States' acquisition of territory once held by Spain, see *United States* v. *Candelaria*, *supra*.

Nor does it matter (Pet. Br. 42-43) that Native Hawaiians came into the federal union as citizens. "Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without * * * placing [Indians] beyond the reach of congressional regulations adopted for their protection." *United States* v. *Nice*, 241 U.S. 591, 598 (1916); see *Sandoval*, 231 U.S. at 48 (citing cases). If the rule were otherwise, Congress would have been deprived of all power over Indian affairs in 1924 when all Indians were granted citizenship. See Act of June 2, 1924, ch. 233, 43 Stat. 253.

Thus, Congress has no less authority under its Indian affairs power to enact legislation for the benefit of Native Hawaiians than it has to enact legislation for the benefit of other distinct indigenous groups as to whom it has undertaken a trust responsibility. Such legislation is constitutional as long as it is rationally tied to the fulfillment of Congress's unique obligation toward indigenous Hawaiians. *Mancari*, 417 U.S. at 555.[7]

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[7] Petitioner relies (Br. 41-42) on memoranda prepared by the Office of Legal Counsel in the Department of Justice, as support for his view that the federal government's special relationship with Indians is limited to members of federally recognized tribes. The cited memoranda, however, do no more than note that federal regulation of Indian affairs is based on a classification that is political and not racial in nature; they do not purport to answer the question whether Native Hawaiians qualify for treatment similar to that accorded to other indigenous peoples. While the Department of Justice has from time to time taken different views of that question, see Letter from Andrew Fois, Assistant Attorney Gen., Office of Legislative Affairs, to Hon. Nancy Kassenbaum, Chairwoman, Senate Comm. on Labor and Human Resources (Jan. 11. 1996), it has most recently taken the position that the question is an open one. Letter from L. Anthony Sutin, Acting Assistant Attorney Gen., Office of Legislative Affairs, to Hon. Ben Nighthorse Campbell, Chairman, Senate Comm. on Indian Affairs (July 16, 1998); see also Letter from Christopher H. Schroder, Acting Assistant Attorney Gen., Office of Legal Counsel, to

C. Hawaii's Voting Requirement Is Authorized By Federal Law And Is Rationally Tied To The Fulfillment Of The United States' Obligation To Indigenous Hawaiians

1. While the voting restriction at issue was adopted by Hawaii, rather than the federal government, that does not alter the constitutional analysis in this case. As a general matter, the "States do not enjoy [the] same unique relationship with Indians" as the federal government. *Yakima Indian Nation*, 439 U.S. at 501. When Congress delegates authority to a State to administer the federal trust responsibility to indigenous people, however, state legislation that is within the scope of that authority is subject to the same constitutional analysis as legislation enacted by Congress itself. *Ibid.*[8] Hawaii has acted under such a delegation of authority here.

In the Hawaii Admission Act, Congress directed the State to hold 1.2 million acres of land in trust and to use the income generated from the land for one of five purposes, including "the betterment of the conditions of native Hawaiians." § 5(f), 73 Stat. 6. Congress has also authorized the State to administer the federal trust "in such a manner" as the State's constitution and laws provide. *Ibid.* The Admission Act therefore conveys broad authority to the State to use the trust funds from the ceded lands in any manner that serves the interests of Native Hawaiians.

The State's decisions to allocate 20% of the fund to programs for Native Hawaiians and to create an Office of Hawaiian Affairs to administer those programs unquestionably

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Jamison S. Borek, Deputy Legal Adviser, U.S. Dep't of State (Nov. 1, 1996).

[8] This case does not present the separate question that might be raised by state laws with respect to Indians that were passed in the absence of congressional authorization. Compare n. 6, *supra*, with *Three Affiliated Tribes* v. *Wold Eng'g*, 467 U.S. 138, 157 (1984).

fall within the scope of the State's authority to operate the land trust "for the betterment of the conditions of native Hawaiians," "in such a manner" as the State may provide. Indeed, as the court of appeals noted (Pet. App. 9a), petitioner has not challenged either decision.

Giving indigenous Hawaiians the right to choose the officials who will operate the trust for their betterment similarly fits within the Admission Act's wide grant of authority. Such an election scheme "better[s] * * * the conditions of native Hawaiians" in two distinct, but complementary ways: it both promotes self-determination by indigenous Hawaiians and helps to ensure that OHA will administer the trust in a way that is responsive to their interests. Those are precisely the reasons the State had for granting to indigenous Hawaiians the right to elect OHA officials. J.A. 39 ("people to whom assets belong should have control over them"); J.A. 53 (election of OHA officials by indigenous Hawaiians would promote "self-determination and self-government"); J.A. 39 ("a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles"); J.A. 40 (trust beneficiaries "would best protect their own rights").

The State's determination that it serves Native Hawaiian interests to allow them to choose the OHA trustees comports with the longstanding congressional commitment to Indian self-determination. In the Indian Self-Determination Act of 1974, which was enacted before Hawaii amended its Constitution to establish OHA, Congress expressed "its commitment to * * * a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. 450a(b). The federal government frequently oversees elections for tribal

governments in which only tribal members may vote. See, *e.g.*, 25 U.S.C. 476, 478, 677e. Hawaii's election law furthers the same self-determination purpose as those federally supervised tribal elections.

The Hawaii election law also bears a resemblance to the BIA employment preference upheld in *Mancari*. The Court upheld that preference because it rationally served the "non-racial" goals of "further[ing] the cause of Indian self-government" and "mak[ing] the [agency] more responsive to the needs of its constituent groups," 417 U.S. at 554—the same two goals that are served by the OHA election law. The difference between the OHA election law and the employment preference upheld in *Mancari* is that the OHA election law serves the interests of self-determination and accountability more directly. Instead of placing power and influence in the hands of the particular individuals selected for employment, it places power and influence in the hands of the trust beneficiaries as a whole. The OHA election law therefore falls squarely within the Admission Act's broad grant of authority to "better[] * * * the conditions of native Hawaiians." § 5(f), 73 Stat. 6.

Congress has also implicitly ratified the OHA election structure. Congress has specifically found that OHA "serves and represents the interests of Native Hawaiians," that OHA "has as a primary and stated purpose the provision of services to Native Hawaiians," 16 U.S.C. 470w(18), and that OHA has "expertise in Native Hawaiian affairs," 20 U.S.C. 80q-11(a)(2). See also 25 U.S.C. 3001(11). Congress has also expressly authorized OHA to administer several programs for Native Hawaiians. 20 U.S.C. 4441(c)(2)(B), 7904(b)(3) and (f); 42 U.S.C. 2991b-1(a), 11711(7)(A)(ii). Those congressional actions reflect a clear approval of OHA's election structure. See S. Rep. No. 580, *supra*, at 32 (finding that the election of OHA trustees by Native Hawaiians represents "a

rational means of effectuating the state's obligations under the trust relationship to Native Hawaiians").[9]

2. Because the OHA election law is authorized by Congress, it is subject to the same standard of review as legislation enacted by Congress that singles out a distinct indigenous group for favorable treatment: it is constitutional as long as it is rationally tied to the fulfillment of Congress's unique trust obligation to Indians. *Mancari*, 417 U.S. at 555. The OHA election law readily satisfies that standard. As discussed above, that law promotes self-determination by indigenous Hawaiians, and it helps to ensure that OHA administers the unchallenged trusts in a way that is sensitive to the interests of the trusts' sole beneficiaries. Petitioner's exclusion from the class of persons eligible to vote for OHA is based on the State's entirely legitimate desire to further those two "non-racial" goals, *id.* at 554, not on petitioner's race. Petitioner's Fourteenth and Fifteenth Amendment challenges to the OHA election law should therefore be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[9] Petitioner argues (Pet. 21) that the election law falls outside the grant of authority in the Admission Act, because it extends voting rights to all descendants of indigenous Hawaiians, not just those with 50% or more blood quantum. OHA administers a separate trust responsibility for all indigenous Hawaiians, however, and in adopting that more inclusive definition, Hawaii was simply following congressional policy. In all programs for the benefit of Native Hawaiians enacted since 1974, Congress has defined Native Hawaiians to include all descendants of indigenous Hawaiians, not just those with 50% or more blood quantum. See p. 6, *supra*. Moreover, all the programs that Congress has authorized OHA to administer provide benefits to all descendants of indigenous Hawaiians. 20 U.S.C. 4441(c)(2)(B), 7904(b)(3) and (f); 42 U.S.C. 2991b-1(a), 11711(7)(A)(ii).

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