No. 98-818

IN THE
Supreme Court of the United States

HAROLD F. RICE,
Petitioner,

v.

BENJAMIN J. CAYETANO,
GOVERNOR OF THE STATE OF HAWAII,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE CAMPAIGN FOR A COLOR-BLIND AMERICA, AMERICANS AGAINST DISCRIMINATION AND PREFERENCES, AND THE UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETTTIONER

RICHARD K. WILLARD
SHANNEN W. COFFIN
Counsel of Record
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-8116
Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 98-818

HAROLD F. RICE,
Petitioner,
v
BENJAMIN J. CAYETANO,
GOVERNOR OF THE STATE OF HAWAII,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE CAMPAIGN FOR A COLOR-BLIND AMERICA, AMERICANS AGAINST DISCRIMINATION AND PREFERENCES, AND THE UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI

The Campaign for a Color-Blind America ("CCBA") is a nationwide legal and educational organization, headquartered in Houston, Texas and dedicated to the cause of educating the public about the injustice of racial preferences in public policy.[1] Since its inception in 1993,

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in

CCBA has actively facilitated and participated in legal challenges to race-conscious public policies, including challenges to race-based admissions policies of educational institutions, racial set-asides in public contracting, and race-conscious voting schemes. CCBA assists potential plaintiffs in these cases by, among other things, finding legal representation and locating expert witnesses. When an important issue affecting its charter comes before this Court, CCBA also appears as *amicus curiae* to assist the Court in deciding the case before it. *See Piscataway Township Board of Educ. v. Taxman*, No. 96-670, Brief *Amici Curiae* of the Institute for Justice and Campaign for a Color-Blind America (filed Oct. 8, 1997), *writ dismissed*, 118 S. Ct. 595 (1997).

Amici Americans Against Discrimination and Preferences ("AADAP") and the United States Justice Foundation ("USJF") are both California-based non-profit organizations dedicated to the preservation and promotion of equal protection of the laws. AADAP is a non-profit public benefit corporation dedicated to disseminating to the public information regarding civil rights guaranteed by the United States Constitution and otherwise to educate the public about the effects of discrimination and preferential treatment on American society. Similarly, USJF is a non-profit foundation dedicated to the promotion and preservation of constitutional rights. Since its inception in 1979, USJF has regularly assisted individuals and classes, not only to redress individual acts of injustice, but also to analyze important public policy matters affecting constitutional rights. Further, USJF routinely

whole or in part and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to *amici*'s filing in letters of consent on file with the Office of the Clerk of this Court.

files, or joins, friend of the court briefs to promote and protect the civil rights of all U.S. citizens.

Amici respectfully submit this brief to share with the Court their views on the proper application of the Fifteenth Amendment to the challenged Hawaiian voting scheme and to demonstrate the potential dangers of affirming the Ninth Circuit's decision in this case. Despite respondent State of Hawaii's ("Hawaii") characterization of this dispute as "unique to Hawaii," Respondent's Brief in Opposition at 12 ("Resp. Opp."), *amici* and their members believe that this Court's adoption of the Ninth Circuit's rationale would have potentially widespread ramifications beyond the Hawaiian Islands and could, in fact, be used by other States to deprive the elective franchise to large segments of society and otherwise to justify the very invidious racially-discriminatory state action that the Civil War Amendments were adopted to eliminate. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) ("central purpose" of Civil War Amendments "was to eliminate racial discrimination emanating from official sources in the States").

SUMMARY OF ARGUMENT

" 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . .' " *Shaw v. Reno*, 509 U.S. 533, 555 (1964) (citation omitted). In order to guarantee that right to all races, the States ratified in 1870 the Fifteenth Amendment to the Constitution, which provides that no State may "den[y] or abridge[]" the right of citizens of the United States to vote "on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. That Amendment, "by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections . . . , clearly shows that the

right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States." *Ex Parte Yarborough*, 110 U.S. 651, 664 (1884). As a result, this Court has interpreted the Fifteenth Amendment as a *per se* rule against racial discrimination in voting.

The Hawaiian voting scheme challenged in this case is facially inconsistent with the clear prohibition contained in the Fifteenth Amendment. The Hawaiian statute that defines eligible voters for the Office of Hawaiian Affairs ("OHA") contains on its face a racial restriction, limiting qualified electors to "Hawaiians," as defined by race. "[A] more direct and obvious" violation of the plain language of the Fifteenth Amendment can hardly be imagined. *Cf. Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927) (invalidating under Fourteenth Amendment race-based voting restriction contained in state statute). Moreover, none of the State's justifications for the racial classification contained in the statute overcome the Fifteenth Amendment's prohibition against race-based voting systems—a prohibition that is both absolute and self-executing. *See, e.g., Neal v. Delaware*, 103 U.S. (13 Otto.) 370, 389 (1880) (invalidating race-based voting restriction contained in state constitution).

The Ninth Circuit's recognition of Hawaii's race-based justification for the discriminatory voting scheme turns the Fifteenth Amendment on its head and would permit broad-based racial discrimination by any number of other States. Simply by declaring an "historical trust relationship" with a native population, as defined by race, States could justify the very invidious voting schemes that the Fifteenth Amendment was designed to condemn. If the Ninth Circuit's rationale is affirmed by this Court, States such as Texas, California and Louisiana—States that could equally

demonstrate an historical trust relationship with a native racial group—could deprive the franchise to the vast majority of their citizens, all in the name of promoting that unique relationship. The Fifteenth Amendment does not permit the exclusive grant of the franchise to a favored race. Consequently, under this Court's jurisprudence, the racial limitation on eligible voters for the OHA is invalid.

ARGUMENT

I. THE CHALLENGED HAWAIIAN VOTING SCHEME VIOLATES THE FIFTEENTH AMENDMENT

A. The OHA Election Scheme Is *Per Se* Invalid Under the Fifteenth Amendment.

The Fifteenth Amendment's proscription against racial discrimination in state voting laws is as clear as it is absolute: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend XV, § 1. "[T]he command of the Amendment [is] self-executing and reache[s] without legislative action the conditions of discrimination against which it was aimed. . . ." *Guinn v. United States*, 238 U.S. 347, 363 (1915); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966). Consequently, any state statutory or constitutional provision that denies to any citizen of the United States the right to vote on account of race or color is "destroyed by the self-operative force of the Amendment." *Guinn*, 238 U.S. at 364. Under this Amendment, the challenged Hawaiian voting scheme, which on its face denies the elective franchise in elections for board members of the OHA to *all* but a narrow, racially defined class of "Hawaiians," *see* Haw. Const. Art. XII, § 5; Haw. Rev. Stat. §§ 10-2, 13D-3, is *per se* invalid.

Although the Fourteenth and Fifteenth Amendments are often treated by litigants as co-extensive when applied to racially discriminatory voting schemes, a close examination of this Court's jurisprudence demonstrates that the Fifteenth Amendment even more stringently protects the franchise from race-based classifications. The Equal Protection Clause of the Fourteenth Amendment demands strict scrutiny of a facially racial statutory classification. *See, e.g., Shaw v. Reno*, 509 U.S. at 642 ("Express racial classifications are immediately suspect. . . ."); *Hunt v. Cromartie*, No. 98-85, slip op. at 4 (U.S. May 17, 1999) ("[A]ll laws that classify citizens on the basis of race . . . are constitutionally suspect and must be strictly scrutinized."). "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (opinion of O'Connor, J.). Under that rigid equal protection standard, a racial classification "must serve a *compelling* governmental interest, and must be *narrowly tailored* to further that interest." *Adarand Constructors*, 515 U.S. at 235 (emphasis added).

While this standard admittedly presents a significant hurdle to upholding a facially racial statutory classification,[2] the Fifteenth Amendment is even more demanding.

[2] This Court has only identified one "compelling governmental interest" that satisfies the strict scrutiny standard: the remedying of "'pervasive, systematic, and obstinate discriminatory conduct.'" *Adarand*, 515 U.S. at 237 (citation omitted). Even there, the Court has demanded that a State do more than rely on "an amorphous claim that there has been past discrimination in a particular" field of conduct. *J.A. Croson Co.*, 488 U.S. at 469.

Where state voting legislation runs afoul of the plain terms of the Fifteenth Amendment, it is *per se* invalid, *regardless of the interest served by the racial classification or the scope of application of the classification*: "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960); *see also Katzenbach*, 383 U.S. at 325 (Fifteenth Amendment "has repeatedly been construed, without further legislative speculation, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice."). The difference in scrutiny lies in the fundamental nature of the right protected by the Fifteenth Amendment, a right that this Court has described as the very "essence of a democratic society." *Shaw v. Reno*, 509 U.S. at 639 (internal quotations omitted; citation omitted).

Thus, the analysis under the Fifteenth Amendment is simple. The Court asks a single question: "Does the challenged statute, on its face or in its effect, deny any U.S. citizen the right to vote 'on account of race, color, or previous condition of servitude'?" If the answer is "yes," the inquiry is complete, and the discriminatory terms of the statute are struck as invalid. *See Ex parte Yarborough*, 110 U.S. at 665.

Applying this simple but stringent standard here, the challenged Hawaiian voting scheme cannot withstand constitutional scrutiny. The Hawaii statute that sets the qualifications for voting for the OHA trustees contains on its face a racial limitation on electors: "No person shall be eligible to register as a voter for the election of board members unless the voter meets the following qualifications: (1) The person is Hawaiian." Haw. Rev. Stat. § 13D-3(b). That is, in order to qualify as a voter for

the OHA elections, a person must be a "descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples hereafter have continued to reside in Hawaii." *Id.* § 10-2. In effect, the statute limits the right to vote to all but a limited class of native Hawaiians of Polynesian origin, who can trace their bloodline to the race of people that inhabited the island before Captain James Cook's "discovery" of the islands in 1778. *See* Ralph S. Kuykendall, *A History of Hawaii* 54 (1927). The statute's definition thus forbids *all other races*—black, white, Hispanic, or any other race that did not inhabit the Hawaiian Islands prior to 1778—from voting for OHA board members.[3] Because the statute differentiates among qualified and non-qualified voters "on account of race," U.S. Const. amend XV, § 1, it is invalid.

This *per se* rule of invalidity is demonstrated by a long line of cases beginning with *United States v. Reese*, 92

[3] The fact that non-Hawaiian Polynesians are excluded from the statute's preferred classification—and thus that all Polynesians are not benefited by the statute—does nothing to detract from the conclusion that the statute's scope is defined principally by race. While "Polynesians" may be regarded as a racial classification for purposes of the Fifteenth Amendment, the same is equally true of the narrower class of Polynesian Hawaiians that inhabitated the islands prior to arrival of "outsiders" from Europe, Asia and America beginning in 1778: "The Hawaiians as found by Captain Cook (1778) were already a people of mixed racial origin but they had been isolated for so long a time that they may be regarded as a people or stabilized race mixture and they had a stable social organization." Romanzo Adams, *Interracial Marriage in Hawaii* 69 (1937). "What we sometimes refer to as historic races, that is to say, races that have actually existed and had a history, are merely peoples who have acquired distinctive and distinguishing racial traits through long periods of isolation and continued inbreeding." *Id.* at vii. Thus, while its ultimate conclusion was erroneous, the Ninth Circuit's characterization of the Hawaiian statute as containing a racial classification on its face was correct.

U.S. 214 (1875). There, the Court explained the Fifteenth Amendment's absolute prohibition against race discrimination in voting, reasoning that the Amendment "prevents the States . . . from giving preference . . . to one citizen of the United States over another on account of race, color, or previous condition of servitude." *Id.* at 217. Prior to adoption of the Amendment, this form of discrimination was permissible under the Constitution: "It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, or education." *Id.* at 217-18. As a result of adoption of the Amendment, however, "[i]f citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be." *Id.* at 218. "It follows," reasoned the Court, "that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination . . . on account of race, color, or previous condition of servitude." *Id.; see also United States v. Cruikshank*, 92 U.S. 542, 555 (1875).

Shortly thereafter, the Court held that any racially discriminatory state statute or constitutional provision that pre-dated the adoption of the Fifteenth Amendment was automatically invalidated by the plain language of the Amendment, without regard to the purpose or interests served by the classification. *See Neal v. Delaware*, 103 U.S. (13 Otto.) 370. In *Neal*, the Court held that a provision of the Delaware state constitution that limited eligible state voters to "white males" was rendered invalid by the Fifteenth Amendment to the extent it contained the racial limitation: "Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution or render inoperative, the pro-

vision which restricts the right of suffrage to the white race." *Id.* at 389. The remedial effect of the statute, therefore, was to strike the word "white" from the state constitutional provision, permitting all races to enjoy equally the right to vote in Delaware elections. *Id.; see also Myers v. Anderson*, 238 U.S. 368, 376 (1915). The Court later noted that a facially discriminatory state election provision that post-dated the enactment of the Fifteenth Amendment would be equally invalid. *Ex parte Yarborough*, 110 U.S. at 665.[4]

It is difficult to understand, under these plain rules, how the challenged Hawaiian voting scheme, which contains no less invidious a racial classification than the Delaware constitutional provision struck down in *Neal*, could survive the pellucid prohibition of the Fifteenth Amendment. The Hawaiian law "singles out a readily isolated segment of a racial minority"—Hawaiians—"for special discriminatory treatment," *Gomillion*, 364 U.S. at 346—to the exclusion of all other eligible voters. Under the rule of *Neal* and *Yarborough*, the racial limitation contained in the Hawaiian voting statute must be struck as invalid under the Fifteenth Amendment.

[4] In *Yarborough*, the Court explained that, while the Fifteenth Amendment's protections were "mainly designed for citizens of African descent," 110 U.S. at 665, the protections of the Amendment extend to all races. "The principle . . . that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination." *Id.* Thus, in this case, because the Hawaiian voting scheme benefits one race to the exclusion of all others, the race of the plaintiff challenging the scheme is irrelevant.

B. The Ninth Circuit's Rationale for Upholding the Hawaiian Voting Scheme Is Inconsistent with This Court's Fifteenth Amendment Jurisprudence.

Despite its recognition that both the Hawaii constitutional and statutory provisions challenged here "contain a racial classification on their face," *Rice v. Cayetano*, 146 F.3d 1075, 1079 (9th Cir. 1998)—an admission that effectively dooms the voting scheme at issue in this case—the Ninth Circuit held that the voting classification did not violate the Fifteenth Amendment. Held up to the light of this Court's Fifteenth Amendment jurisprudence, however, the Ninth Circuit's tortured rationale for upholding the voting scheme cannot survive.

1. The Fifteenth Amendment Applies to Elections for the Office of Hawaiian Affairs.

The Ninth Circuit's principal reason for holding that the Fifteenth Amendment was inapplicable in this case is that the OHA elections are not "a general election for government officials performing governmental functions of the sort that has previously triggered Fifteenth Amendment analysis." 146 F.3d at 1081. Because "[t]he special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity," *id.*, the court reasoned, the Fifteenth Amendment is not even implicated by the OHA voting scheme. The lower court's circumvention of the Fifteenth Amendment in this manner completely distorts this Court's jurisprudence.

This Court has *never* held that the Fifteenth Amendment applies only to "general" elections for state officials who perform "general governmental functions." "Clearly the Amendment includes *any election in which public issues are decided or public officials selected.*" *Terry v.*

Adams, 345 U.S. 461, 468 (1953) (opinion of Black, J.) (emphasis added) (footnote omitted); *see also Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to *all phases of state elections*. . . .") (emphasis added); *Smith v. Allwright*, 321 U.S. 649, 657 (1944) (Fifteenth Amendment "specifically interdicts *any denial or abridgement* by a State of the right of citizens to vote on account of color") (emphasis added); *United States v. Mississippi*, 380 U.S. 128, 138 (1965) ("The Fifteenth Amendment protects the right to vote regardless of race against *any denial or abridgement* by the United States or by any State.") (emphasis added).

Indeed, a comparison of the plain language of the Fifteenth Amendment to that of Section Two of the Fourteenth Amendment, adopted just two years prior, confirms the expansive scope of the Fifteenth Amendment's prohibition. Section Two of the Fourteenth Amendment was a stopgap measure directed at voting discrimination, designed to penalize discriminating States by requiring the reduction in a State's proportionate congressional representation whenever the State "denie[s] to any of the male inhabitants of such State" the right to vote. U.S. Const. amend. XIV, § 2. However, Section Two specifically defines the scope of elections to which it applies, expressly limiting its application to "any election for the choice of electors for the President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or members of the Legislature thereof." *Id.* In stark contrast, the Fifteenth Amendment does not specifically limit its application to elections for any particular office, instead securing generally "[t]he right of citizens of the United States to vote." U.S. Const. amend. XV, § 1. In light of the Fourteenth Amendment

model, "the failure of the framers of the Fifteenth Amendment to insert any words limiting the number and kind of elections referred to indicated that they intended it to apply to all elections held under the authority of the constitution and laws of the United States or of the States." John M. Mathews, *Legislative and Judicial History of the Fifteenth Amendment* 38 (1909). "It was, in fact, well understood in Congress at the time the Amendment was under consideration that it applied to any election, from that for presidential elector down to the most petty election for a justice of the peace or a fence-viewer." *Id.* at 38 (footnote omitted). As one of the opponents of the Fifteenth Amendment complained during the debates leading up to its adoption:

> This amendment applies to the election of members of the Legislature and judges, comptrollers, justices of the peace, and constables; *it applies to all elections* . . . . If it were designed only to apply this provision to that which relates to the General Government, then it should be restricted and framed to refer only to elections for electors of President and Vice President and Representatives in Congress. It provides that the States shall *in no elections* disqualify any one on the ground of race, color, or former condition.

Cong. Globe, 40th Cong., 3d Sess., at 905 (1869) (remarks of Sen. Vickers) (emphasis added).

Further evidence of the Fifteenth Amendment's universal applicability to all elections is found in this Court's interpretation of the Amendment. In a pair of cases challenging Texas political party primaries in which eligible voters were limited to qualified white citizens, the Court held that a State may not circumvent the proscription of the Fifteenth Amendment by permitting a private

organization to discriminate in its selection of candidates. *Terry*, 345 U.S. at 466 (opinion of Black, J.); *Smith*, 321 U.S. at 664. In striking down the primary voting schemes, the Court did not attempt to confine the reach of the Amendment's prohibition to any particular state office, instead expressing its scope in broad language: "Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color." *Smith*, 321 U.S. at 662. The State could no more accomplish this result indirectly—by permitting a political party that effectively decided the general election result to engage in discriminatory practices—than it could directly:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

Id. at 664 (citation omitted).

Later, in *Gomillion*, the Court held that the Fifteenth Amendment prevented the State of Alabama from redrawing the boundaries of the City of Tuskegee so as to remove all but "four or five of its 400 Negro voters." 364 U.S. at 341. Thus, the Court applied the Fifteenth Amendment to prohibit racial discrimination by the State in municipal elections. Taken together, *Smith*, *Terry*, and *Gomillion* confirm that the Fifteenth Amendment prohibition against race discrimination in voting applies to *any* election for public office over which the State exercises control, whether it be a national, state or local office.

The electoral scheme challenged in this case clearly falls within the broad scope of the Fifteenth Amendment. As the Ninth Circuit explained, the OHA "is a state agency," *Rice*, 146 F.3d at 1078, established by the Hawaiian legislature and given broad authority over state funds. By statute, the Hawaiian legislature has delegated to the OHA several traditional governmental functions. *See* Haw. Rev. Stat. §§ 10-5, 10-6. OHA trustees "have [the] power to manage proceeds and income from whatever source for Native Hawaiians and Hawaiians . . . ; to handle money and property on behalf of OHA; to formulate policy relating to the affairs of native Hawaiians and Hawaiians; to provide grants for pilot projects; and to make available technical and financial assistance and advisory services for native Hawaiian and Hawaiian programs." *Rice*, 146 F.3d at 1080 n.14 (citing Haw. Rev. Stat. § 10-5). Similarly, the OHA board itself has several broad agency and intragovernmental functions: (1) "to develop a master plan for native Hawaiians and Hawaiians;" (2) "to assist in development of other agencies' plans for native Hawaiian and Hawaiian programs and services;" (3) "to maintain an inventory of, and act as clearinghouse for, programs for Native Hawaiians and Hawaiians;" (4) to keep other agencies informed about native Hawaiian and Hawaiian programs;" (5) "and to conduct research, develop models for programs, apply for and administer federal funds and promote the establishment of agencies to serve native Hawaiians and Hawaiians." *Id.*

Hawaii cannot overcome the Fifteenth Amendment's prohibition simply by arguing that the broad governmental functions of an elected state agency official are exercised

for the benefit of a small racial class of "Hawaiians and Native Hawaiians." Nevertheless, the Ninth Circuit's rationale suggests that such a violation of the Fourteenth Amendment Equal Protection Clause, in turn, justifies a violation of the Fifteenth Amendment. But the right to be free from racial discrimination in voting secured by the Fifteenth Amendment would be meaningless if it could be vitiated by the simple device of limiting the scope of an elected public official's functions to serving a particular racial group. As the Court noted in *Lane v. Wilson*, the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." 307 U.S. 268, 275 (1939).

Consequently, the lower court's attempt to liken the OHA elections to "special purpose elections," upheld against Fourteenth Amendment equal protection challenges in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981), must fail. Neither case can possibly be read for the extraordinary notion that the Fifteenth Amendment excepts from its scope an election targeted solely for the benefit of a particular racial class. Neither case even raised the issue of race discrimination, and thus neither implicated the Fifteenth Amendment. Instead, those cases stand for nothing more than the unexceptional principle that the "one person, one vote" concept embodied in the Fourteenth Amendment is not offended where a state limits eligibility to vote in a special purpose election to those landowners who are disproportionately affected by the election, *irrespective of their race*. *See Salyer*, 410 U.S. at 727. To extend the race-neutral principles of *Salyer* into a broad Fifteenth Amendment exception for "preferred race" elections is to destroy the very right guaranteed by the Amendment.

2. The Fifteenth Amendment Does Not Tolerate "Political" Justifications for Race-Based Voting Discrimination.

The Ninth Circuit also relied heavily on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), to support its conclusion that the Fifteenth Amendment was inapplicable to the challenged Hawaiian voting scheme. The lower court cited *Mancari* for the proposition that a State may justify a race-based voting preference by a "unique trust relationship" with a racial class. 146 F.3d at 1080-81. In short, the Ninth Circuit reasoned that such a trust relationship transforms a racial preference contained on the face of a voting statute into a permissible "political" classification. *Id.* at 1081. Because the Ninth Circuit's rationale so obviously distorts the holding of *Mancari*, which was grounded in the federal government's unique relationship with Indian tribes *qua quasi-sovereign governmental organizations*,[5] and because petitioner himself has so clearly demonstrated the limitations of the

---

[5] This Court has frequently recognized the unique *governmental* relationship between the United States and its Indian *tribes*, which are dependent *quasi*-sovereign governments in the federal system. "We have repeatedly recognized the Federal Government's long-standing policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *see Mancari*, 417 U.S. at 552 (relying on Indian Commerce Clause and Treaty Clause of Constitution as "the source of the Government's power to deal with the Indian *tribes*") (emphasis added). "This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *Iowa Mut.*, 480 U.S. at 14 (citation omitted). This *quasi*-sovereignty extends to the "right of reservation Indians to make their own laws and be ruled by them." *Id. Mancari* simply recognized this special governmental relationship and the unique *quasi*-sovereignty enjoyed by the tribes *qua tribes* and thus approved federal preferences directed at "members of 'federally recognized' tribes." *Mancari*, 417 U.S. at 553 n.24 ("The preference is not directed toward a 'racial' group consisting of 'Indians' [ ]").

scope of *Mancari, see* Pet. at 17-20, *amici* will not belabor its analysis of the lower court's reasoning here. Nevertheless, the Ninth Circuit's reliance on the "political" justification for a racial classification bears special attention here. That "political" rationale is thoroughly inconsistent with this Court's prior holdings, which have refused to examine the justifications for facially discriminatory statutory provisions. *See* Lawrence H. Tribe, *American Constitutional Law* 335 n.2 (2d ed. 1988) ("The Supreme Court has held that the fifteenth amendment prohibits state action which on its face discriminates against black voters.").

"No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." *Shaw v. Reno*, 509 U.S. at 642. Once it is established, as in this case, that a voting scheme contains a racial limitation, no further inquiry into the asserted "political" rationale for that limitation is permitted under the Fifteenth Amendment. *Gomillion* demonstrates this principle. There, the Court held that a racial gerrymandering scheme could not be justified by a "political" desire to realign the boundaries of a municipality. In this regard, the State's political power over its subdivisions, "extensive though it is, is met and overcome by the Fifteenth Amendment . . . , which forbids a State from passing any law which deprives a citizen of his vote because of his race." 364 U.S. at 345. Otherwise legitimate political objectives, the Court reasoned, were irrelevant when carried out by race-conscious methods:

> The opposite conclusion . . . would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of realignment of political subdivisions. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Id. (citation omitted). Similarly, here, the State of Hawaii's political justification embraced by the Ninth Circuit—furthering a putative "trust relationship" with a native population—cannot justify the exclusion of *every other racial class in the State* from voting in a statewide election.

In sum, the Hawaiian voting scheme challenged in this case cannot withstand the scrutiny demanded by the Fifteenth Amendment. The governing statute contains on its face a *per se* unlawful racial classification. Under this Court's jurisprudence, that race preference alone dooms the voting scheme. None of the justifications relied upon by the Ninth Circuit or advanced by the respondent in this Court[6]—no matter how benignly characterized by the lower court—can save the OHA scheme from *per se* constitutional invalidity.

II. HAWAII'S RACE-CONSCIOUS JUSTIFICATION FOR ITS VOTING SCHEME WOULD PERMIT BOUNDLESS DEPRIVATIONS OF CONSTITUTIONALLY PROTECTED RIGHTS BY NUMEROUS STATES.

Although respondent characterizes this dispute as "unique to Hawaii," Resp. Opp. at 12, the race-conscious "trust relationship" rationale relied upon by the Ninth Cir-

---

[6] Respondent asserts in the margin that the Fifteenth Amendment does not apply here because petitioner Rice did not "show the required discriminatory intent." Resp. Opp. at 29 n.12. However, the very authority relied upon by respondent for that proposition, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), rebuts that proposition where, as here, the racial discrimination is evident on the face of the statute. *City of Mobile*'s requirement of discriminatory purpose arises only where "action by a State . . . is racially neutral on its face. . . ." *Id.* at 62 (opinion of Stewart, J.).

cuit to evade the command of the Fifteenth Amendment has potentially broad ramifications in other States. Any number of States could claim an equally "unique" historical relationship of trust with a core, native population and seek to justify race-conscious preferences and voting schemes on the basis of that trust relationship.[7] By divorcing the holding of *Mancari* from the special *governmental* relationship between the United States and Indian tribes and extracting instead a race-conscious principle permitting state-sponsored discrimination on the mere showing of a "unique history" of trust between a State and a particular racial group, the Ninth Circuit's reasoning would permit numerous other States to engage in equally invidious behavior under the guise of an historically rooted obligation. While no other State currently limits its franchise in such a manner, affirmance of the Ninth Circuit's rationale could potentially open a Pandora's box of race-based state voter preferences.

Several States besides Hawaii can boast a "unique" historical relationship with some insular racial group. Three obvious, though not exclusive, parallels arise in Texas, California and Louisiana.

Prior to its admission to the Union, Texas, like Hawaii, enjoyed a history as an independent sovereign. *See generally* T.R. Fehrenbach, *Lone Star: A History of Texas and Texans* (1968). After the Mexican Revolution of 1821, Texas became a province of the New Mexican republic. *Id.* at 154. That marriage proved doomed, and in 1836, Texas declared its independence from Mexico

[7] The Ninth Circuit also relied upon Hawaii's trust relationship with Hawaiians to conclude that the OHA voting scheme would constitute a compelling governmental interest under the Fourteenth Amendment. *See Rice*, 146 F.3d at 1082. Thus, adoption of Hawaii's "trust relationship" argument would have equally broad ramifications in the equal protection context.

and won that independence at the Battle of San Jacinto. *Id.* at 219-46. For a short time ending with its admission to the Union in 1845, the Republic of Texas ruled as a sovereign nation. *Id.* at 247-67.

Although at the time of its admission to the Union, a majority of its citizens were of Anglo-Saxon descent, *id.* at 154-73, early Texas history shows a unique relationship between the governments in Texas and a people known as the "Tejanos." *See* Arnoldo De León, *The Tejano Community, 1836-1900* (1982); Fehrenbach, *supra*, at 56. These people were "the product of generations of *mestizaje*, that is, the interracial mixture of European Spaniards" and both Mexican and Texas Indians. *See* De León, *supra*, at 2. The *Tejanos* were recognized as citizens of both Spanish Texas and Mexico, respectively. *See* Fehrenbach, *supra*, at 53, 65. Indeed, upon Mexican secession from Spain, the very "idea of a Mexican nation was centered in the *mestizo* group." *Id.* at 156. But just as the native Hawaiians were "displace[d]" upon their incorporation into the United States, the Tejano people often "lost their lands through a number of subterfuges" when Texas subsequently declared its independence from Mexican rule. De León, *supra*, at 14, 17.

The relationship between early Texas and this racial and cultural group thus bears many of the earmarks relied upon by Hawaii to justify the discrimination in this case. First, the Tejanos have a "unique history" as a native people who preceded "American" migration into the territory. *See* Resp. Opp. at 16.[8] They were the

[8] The fact that the Tejano people were the result of interracial socialization between the Spanish settlers of the territory and the local Indian population does nothing to distinguish them from Native Hawaiians. *See* Adams, *supra*, at vii ("It is no longer a secret, even to the laymen, that there are not now and probably never have been . . . any pure races."). Although Hawaii deems

"former subjects of an independent sovereign nation"—Mexico—that was devoted to their prosperity. *Compare id. with* Fehrenbach, *supra*, at 156. When Texas declared its independence from Mexico, these native *Tejanos* were "displace[d]" and often "disadvantage[d]" by the citizens of the new republic. *See* Resp. Opp. at 16. Thus, all that is left in order to satisfy respondent's lax standard is the declaration of a "special trust relationship" by the State of Texas with this racial group. The Texas state government would not have to "concoct at will," *id.* at 17, this historical antecedent in order to pass muster under the Ninth Circuit's permissive standard.

The State of California could similarly declare a "trust" relationship to justify race-based state voting measures favoring the native Hispanic population. California, like Texas, was permanently settled as a Spanish mission in the 1760s. *See* Walton Bean & James Rawls, *California, An Interpretive History* 17 (1988); Andrew F. Rolle, *California, A History* 48 (4th ed. 1987). An early pre-American population followed—"descendants of the free settlers from Mexico and the soldiers of the garrisons and Missions," and the local Indian populations. Robert F. Heizer & Alan F. Almquist, *The Other Californians* 139-40 (1971). These native hispanicized Californians have been called by some historians "Californios." *Id.* at 139; *see also* Leonard Pitt, *The Decline of the Californios*

a special relationship with the Polynesian Hawaiians that inhabited the island prior to Captain Cook's arrival, the "Polynesians are not a pure race—all descended from the same ancestors. Like the English, the French, and the Americans, they are a mixed up race made up of men and women of different races who came from different places at different times." Kuykendall, *supra*, at 31 (1927). *See also* Adams, *supra*, at 69. Like the Polynesian Hawaiians, the Tejanos are an identifiable race derived from different origins. Indeed, their descendants are still found today in various regions of Texas, such as Nacogdoches. Fehrenbach, *supra*, at 69.

(1970). Upon Mexico's declaration of independence from Spain, "the Spanish nationals who remained in California automatically became Mexican citizens." Heizer & Almquist, *supra*, at 138. Thus, as in Texas, the native Californios were citizens of a sovereign nation prior to California's incorporation into the United States. *See* Bean & Rawls, *supra*, at 98, 126. However, following California's admission to the Union in 1850, the claims of American squatters and subsequent legal battles often resulted in the displacement of these native Californio landowners from their land. Rolle, *supra*, at 236-37. Again, under the Ninth Circuit's expansive rationale, this history might be sufficient to justify modern voting schemes that limit the vote to a racially-defined group of hispanic Californians.[9]

Louisiana's "special relationship" with the Acadians, or "Cajuns," who migrated to South Louisiana from Nova Scotia during Spanish rule of the Louisiana territory, similarly bears resemblance to the Hawaii-Hawaiians relationship. *See generally*, James Harvey Domengeaux, *Comment: Native-Born Acadians and the Equality Ideal*, 46 La. L. Rev. 1151 (1986); Carl A. Brasseaux, *Acadian to Cajun* (1992). Indeed, motivated by this special relationship, in 1968, Louisiana established a state agency, the Council for the Development of French in Louisiana, dedicated to the "preservation of the French language and Acadian culture." Domengeaux, *supra*, at 1155; *see* La. Rev. Stat. § 25:651-653. While the members of this

[9] Hawaii's reliance on the vague notion of "displacement and resulting disadvantage" of the native Hawaiian population as a result of their loss of sovereignty, *see* Resp. Opp. at 16, is squarely at odds with this Court's Fourteenth Amendment requirement that "'specific instances of discrimination'" or "identified discrimination" are necessary to justify even assertedly "benign" racial classifications. *See J.A. Croson Co.*, 488 U.S. at 495, 497, 505.

organization are appointed by the governor, the Ninth Circuit's rationale could support their race-based election because of the relationship enjoyed between the State of Louisiana and its Cajun citizens.

These examples demonstrate the inherent unreliability of a "special trust relationship" exception to the Fifteenth Amendment's absolute prohibition of racial discrimination in voting. Of course, respondent may argue that dissimilarities in the history or culture of Hawaiians as compared to these other racial groups distinguish the rationale for the OHA voting scheme from these other States. But such an argument misses the point. When the rationale of *Mancari* is divorced from the distinctive governmental status of Indian tribes within our federal system and their equally distinctive relationship with the federal government, and instead used to justify a "special relationship" between a government and a particular race of people, there is, as Justice Powell noted in *Wygant v. Jackson Bd. of Educ.*, "no logical stopping point." 476 U.S. 267, 275-76 (1986). Loosed from the narrowly confined moorings of *Mancari*, the Ninth Circuit's theory, like the race-conscious rationale invalidated in *J.A. Croson Co.*, "could be used to 'justify' race-based decisionmaking essentially limitless in its scope and duration." 488 U.S. at 498 (opinion of O'Connor, J.); *see also Wygant*, 476 U.S. at 276 (warning that, under city's theory, "a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

Once race itself is used as a justification for race-based discrimination in voting, the very protections afforded by the Fifteenth Amendment are rendered meaningless. The result, illustrated by the OHA voting scheme in this case, is the wholesale deprivation by the State of the rights of its citizens to have a voice in conduct of their government. The Fifteenth Amendment, however, was adopted to secure this voice to all races. *See* Mathews, *supra*, at 21-22 (noting "widely held belief" leading to adoption of Fifteenth Amendment "that universal suffrage is the perfect antidote against all the moral and political ills to which society is subject") (footnote omitted). Because it denies the right to participate in the conduct of elected government to all but a small class of individuals, defined by their race, the OHA voting scheme cannot stand.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

RICHARD K. WILLARD
SHANNEN W. COFFIN
Counsel of Record
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-8116
Counsel for Amici Curiae