No. 98-818

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD F. RICE
Petitioner

v.

BENJAMIN J. CAYETANO, GOVERNOR OF
THE STATE OF HAWAI'I
Respondent

BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS, KA LAHUI, THE ASSOCIATION OF HAWAIIAN CIVIC CLUBS, COUNCIL OF HAWAIIAN ORGANIZATIONS, NATIVE HAWAIIAN CONVENTION, NATIVE HAWAIIAN BAR ASSOCIATION, NATIVE HAWAIIAN LEGAL CORPORATION, NATIVE HAWAIIAN ADVISORY COUNCIL, HA HAWAI'I, HUI KALAI'AINA, ALU LIKE, INC., AND PAPA OLA LOKAHI AS *AMICI CURIAE* SUPPORTING RESPONDENT

Filed July 28, 1999

QUESTION PRESENTED

Whether the State of Hawai`i, having established the Office of Hawaiian Affairs as a trust to benefit descendants of the aboriginal Hawaiians pursuant to congressional delegation, ratification, and its own inherent power, may, consistently with the Fourteenth and Fifteenth Amendments to the Constitution of the United States, provide that the trustees shall be elected by the beneficiaries of the trust.

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INTEREST OF THE AMICI

The *Office of Hawaiian Affairs* (OHA) was established by amendment to the Hawai`i Constitution to hold title to property "set aside or conveyed to it...in trust for native Hawaiians and Hawaiians." Haw. Const. art. XII, § 5. The issue in this case is whether Hawai`i's determination that members of OHA's Board of Trustees should be elected by the beneficiaries of the OHA trust is consistent with the U.S. Constitution. OHA's interest in the outcome of this case is thus direct and fundamental. Because OHA is "a separate entity independent of the executive branch," Haw. Rev. Stat. § 10-4, with its own litigating authority, it is authorized to state its own views in this litigation.[1] OHA's brief is joined in by the following additional Native Hawaiian organizations:

*Ka Lahui Hawai`i*, a native initiative for self-determination comprising more than 20,000 citizens residing in Hawai`i and several other States;

The Association of Hawaiian Civic Clubs, a coalition of 47 clubs in Hawai`i and five other states (Alaska, California, Colorado, Nevada, and Utah) to promote the culture, spirit, attitudes, and values of the Native Hawaiian people;

The Council of Hawaiian Organizations, an association of registered Native Hawaiian organizations that work together to better conditions of Native Hawaiians and to educate the general public on issues of concern to Native Hawaiian organizations;

The Native Hawaiian Convention, a non-profit entity comprising native delegates who are considering issues of self-determination;

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[1] The parties have consented to the filing of this brief in letters that have been submitted to the Clerk. *See* Sup. Ct. R. 37.3(a). Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

The Native Hawaiian Bar Association, a non-profit organization affiliated with the Hawai`i State Bar Association designed to provide a forum to educate lawyers, the legal community, and the general public on issues of importance to the Native Hawaiian community;

The *Native Hawaiian Legal Corporation* (NHLC), a non-profit public-interest law firm incorporated in 1974 to assert, protect, and defend Native Hawaiian rights;

The *Native Hawaiian Advisory Council* (NHAC), a non-profit organization committed to legislative, administrative, and judicial advocacy of Native Hawaiian cultural, water, gathering, and language rights;

Ha Hawai`i, a non-profit corporation established to promote self-governance among the Native Hawaiian people;

Hui Kalai'aina, a non-profit corporation established to promote a greater understanding of historic and contemporary Native Hawaiian political issues;

Alu Like, Inc., a private, statewide, multi-service community-based non-profit agency assisting Native Hawaiians in their efforts to achieve social and economic self-sufficiency;

Papa Ola Lokahi, a nonprofit organization that addresses the health needs of Native Hawaiians.

Each of the *amici* has an interest in supporting the continuation of OHA, which has worked well for two decades.[2]

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[2] We use the term "Native Hawaiian" in its common usage and as it is used in dozens of federal statutes to refer to the descendants of the inhabitants of the Hawaiian Islands in 1778. When we refer to the more restrictive definition in the Hawaiian Homes Commission Act of 1920 (HHCA), ch.42, 42 Stat. 108, *reprinted at* Haw. Rev. Stat. § 101 *et seq.*, which originally required a 50%-blood quantification (subsequently modified to 25% for heirs), we use the lower case "native" Hawaiian as used in the HHCA, and make reference to that Act.

STATEMENT

a. *Introduction.* Petitioner bases his entire argument on the proposition that he has been denied a right to vote because of his race. That is not so. From its earliest days, the United States has recognized special rights in its aboriginal peoples based on the fact that they once owned and governed the lands that are now the United States. Protection of these rights has been one of the redeeming facts of American history and one of the great achievements of this Court. Such rights are a function of historical relationship to the land, not race.

This case concerns a limited program established by the State of Hawai`i, pursuant to authority delegated by Congress and the State's own power, to assist the indigenous people of Hawai`i by returning to them a small portion of the benefits of the land they lost. The State of Hawai`i – the only State in the Union *required* as a condition of its admission as a State to maintain a program for the benefit of its aboriginal people – created the Office of Hawaiian Affairs as a trust in 1978 through an amendment to the State's Constitution approved by a vote of all its citizens. OHA has now been in existence for more than 20 years, and Congress has repeatedly recognized and ratified its existence. *See infra* pp. 11-13.

This case thus does not involve racial discrimination, but the power of Congress and the State of Hawai`i to fashion a limited program for the aboriginal people of Hawai`i, similar to programs established to benefit aboriginal peoples in other States. The decisions of the courts below upholding that program should be affirmed by this Court.

b. *Hawai`i Before Annexation.* The Hawaiian Islands were settled by Polynesians more than 1000 years before the first Europeans arrived. They established a society and governed the Hawaiian Islands; their descendants are now referred to as "Native Hawaiians." Polynesians who live in Hawai`i today (*i.e.*, Tongans and Samoans) but are not descendants of the aboriginal people are not "Native Hawaiians" and are not beneficiaries of the OHA trust. "Native Hawaiian" is thus not a reference to a racial group, but rather to the descendants of the people who lived in and governed the Hawaiian Islands prior to Western contact.

Prior to the arrival of Europeans, the Islands supported a population estimated at between 300,000 and 800,000 people. A well-developed system of land use was in effect, with chiefs (*Mo`i*) and sub-chiefs (*Ali`i*) responsible for keeping the lands productive, and the larger class of farmers (*maka`ainana)* living and working on the land. Land was not bought and sold, but was redistributed among the *Mo`i* and *Ali`i* as a result of succession or war, without much effect on the *maka`ainana*, who continued to farm it and provide a portion of the proceeds to their chiefs.[3]

Hawai`i was "discovered" by Captain James Cook on January 18, 1778. In that era (the time of the adoption of the United States Constitution), the word "Indian" was applied to natives of Hawai`i as well as to natives of what is now the continental United States. Cook, as one historian reports, "spent several years among the savages of the Pacific, 'Indians,' as he and everyone else called them."[4]

From 1795 through 1819 a single *Mo`i*, Kamehameha I, unified the Islands, and established a native government that evolved into a constitutional monarchy. The United States entered into treaties and conventions with these monarchs in 1826, 1842,

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[3] This Court has referred to the Hawaiian land system in *Damon v Territory of Hawaii*, 194 U.S. 154 (1904), *Carter v Territory of Hawaii*, 200 U.S. 255 (1906), and *Kaiser Aetna v. United States*, 444 U.S. 164, 166-67 (1979); *see also* Melody K. MacKenzie, *Native Hawaiian Rights Handbook*, ch. 1 (1991) [hereinafter "Historical Background"]; 1 Ralph S. Kuykendall, *The Hawaiian Kingdom* 1-12 (1938); Lilikala Kame`eleihiwa, *Native Land and Foreign Desires* 25-33 (1992); Jon Chinen, *The Great Mahele* (1958).

[4] Gavan Daws, *Shoal of Time, A History of the Hawaiian Islands* 2 (1968); *see also id.* at 19, 23, 52. Multiple references in logs and diaries of Captain Cook and his officers refer to the indigenous people they found in the Hawaiian Islands as "Indians." Cook wrote that his first mate "attempted to land but was prevented by the Indians coming down to the boat in great numbers." J.C. Beaglehole, *The Journal of Captain James Cook on His Voyages of Discovery III* 267 (1967). David Samwell, the surgeon on Cook's flagship *Discovery* wrote, "The Indians opened and made a lane for the Marines to pass." *Id.* at 1161.

1849, 1875, and 1887. *See* Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993) [hereinafter "1993 Joint Resolution"]. Native Hawaiians were thus organized as a nation or tribe as much as any native group of North America.

During the 19th Century, Americans and English came to the Islands in increasing numbers, first for the sandalwood trade, then whaling, then as missionaries, then for sugarcane and pineapple plantations. Beginning in 1848, Kamehameha III, at the urging of missionaries and European and American business interests, participated in a process known as the Mahele (division). The Mahele granted land permanently to the principal *Ali`i* in trust for the people, and later provided that the people could obtain title to individual tracts of land they farmed. The people were to receive a third of the land shared, but they actually received much less. For the first time, non-Hawaiians ("*haole*") were allowed to purchase land.

The Mahele opened the way to the same massive loss of native land that occurred among Indians in North America. There was also a devastating loss of population as Hawaiians, like other aboriginal peoples, succumbed in great numbers to small pox and childhood diseases.

As native population and power diminished, the American-owned plantation economy flourished, and Native Hawaiian land ownership decreased dramatically.

> The 1890 census, the last taken before the overthrow of Hawaii's monarchy, revealed the extent to which land had been concentrated in American and European hands. Of a total population near 90,000, fewer than 5,000 actually owned land. Hawaiians, if they had any lands, owned small acreages.... The relatively small number of Westerners owned over a million acres.... The 1890 census also reflects the severe decimation of the Hawaiian population, which had dropped by two-thirds since the time of Western contact.

Historical Background, *supra* note 3, at 10.

c. *The Overthrow.* In January 1893, a committee of American planters and businessmen, with the active help of the United States Minister in Honolulu and the United States Navy, overthrew the Kingdom of Hawai`i. On December 18, 1893, President Cleveland reported to Congress that a "substantial wrong has...been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair." *See* 1993 Joint Resolution. But the President's call for the restoration of the Hawaiian monarchy was not heeded. In 1898, although the two-thirds Senate majority needed for annexation by treaty could not be obtained, Hawai`i was annexed to the United States by a joint resolution of Congress.[5] One hundred years later, in the 1993 Joint Resolution, Congress acknowledged that the 1893 overthrow of the Kingdom of Hawai`i was "illegal," and that as a result of the overthrow the United States assumed control over some 1.8 million acres of Kingdom lands "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government" and deprived the Native Hawaiians of their "rights...to self-determination." 1993 Joint Resolution, *supra*, Findings and § 1(3).

d. *Hawai`i as a Territory.* Congress established a territorial government for Hawai`i in 1900. *See* Act of April 30, 1900, ch. 339, 31 Stat. 141, 159. Under the Act, the President of the United States appointed the Governor. A local legislature was created, but Congress retained the power to amend or invalidate any territorial law. *See* Act of April 30, 1900, §§ 55, 66, 69. Except for land used by the United States for military and other purposes, the 1.8 million acres of royal lands received by the United States at the time of annexation "remain[ed] in the possession, use, and control of the government of the Territory of Hawaii." Act of April 30, 1900 § 91.

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[5] *See* 1 W. Willoughby, *The Constitutional Law of the United States* § 239, at 427 (2nd ed. 1929); Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 Territorial Sea J. 1, 19-21 (1990).

Queen Lili`uokalani, the last Hawaiian monarch, brought suit in the Court of Claims for the loss of the royal lands. The Court of Claims held that the Queen's lands were not her private property, but instead were part of the public lands of Hawai`i. *See Liliuokalani v. United States*, 45 Ct. Cl. 419 (1910). The Court of Claims relied on an earlier case, *In re Estate of Kamehameha IV*, 2 Haw. 715 (1864), which had held that the King's land "was not his private property...[but] belonged to the chiefs and people in common." *Liliuokalani*, 45 Ct. Cl. at 425.

e. *The Hawaiian Homes Commission Act.* By the early 1900s the Native Hawaiians' plight had become desperate. *See* Daws, *supra* note 4, at 291, 296-97. Congress responded by enacting the Hawaiian Homes Commission Act of 1920, ch. 42, 42 Stat. 108 (1921) [hereinafter HHCA]. The HHCA set aside about 200,000 acres out of the 1.8 million acres of Kingdom lands to provide residences and farm lots for native Hawaiians. The HHCA, as ultimately enacted, restricted benefits to "native Hawaiian[s]," defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian islands previous to 1778." HHCA, ch. 42, § 201(7), 42 Stat. 108 (1921).

As originally introduced, the bill would have provided farm sites to all Native Hawaiians without regard to blood quantum. Senator Smoot, the sponsor of the legislation, explained that "[t]he beneficiaries under the bill are not only Hawaiians but...all who have Hawaiian blood in their veins.... [W]hat we are trying to do is...to say that these lands that were the King's lands ought to have originally gone to these people...that were the subjects of, that King." *Hawaiian Homes Commission Act: Hearings Before the Senate Comm. on the Territories*, 66th Cong. 16-17 (1920). The Hawaiian legislature endorsed the bill as originally introduced, but the plantation owners opposed it. *See id.* at 12.

The plantation owners took the position that only "Hawaiians of the pure blood" should receive land. *Id.* at 15. Because pure-blooded Hawaiians were no longer a numerous group, such a limitation would make more public land available for lease to the plantation owners. *See id.* at 27-29.

Secretary of the Interior Lane testified that the legislation was justified by the history of the Islands and the "moral obligation" of

the United States to care for "people whose islands have come to us." *Organic Act of the Territory of Hawaii: Hearings on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments Before the House Comm. on the Territories*, 66th Cong. 129-30 (1920). Representative Curry, the Chairman of the Committee, said: "[T]he Indians received lands to the exclusion of other citizens. That is certainly in line with this legislation, in harmony with this legislation." *Id.* at 169. In response to a question about whether Native Hawaiians differed from other groups of Indians because "we have no government or tribe or organization to deal with," Chairman Curry said, "[w]e have the law of the land of Hawaii from ancient times right down to the present where the preferences were given to certain classes of people." *Id.* at 170.

The legislative report that accompanied the HHCA described in dramatic terms the Native Hawaiians' loss of their land, their poverty, and their high death rate. *See* H.R. Rep. No. 839 (1920). The Report quoted Interior Secretary Lane's description of Native Hawaiians as "our wards...for whom in a sense we are trustees." *Id.* at 4. The Report concluded: "In the opinion of your committee there is no constitutional difficulty whatever involved in setting aside and developing lands of the Territory for native Hawaiians only," referring to the "numerous congressional precedents for such legislation in previous enactments granting Indians and soldiers and sailors special privileges in obtaining and using the public lands." *Id.* at 11.

Ultimately Congress adopted a compromise defining "native Hawaiian[s]" eligible to participate in the program as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA, ch. 42, 42 Stat. 108 (1920), *reprinted at* Haw. Rev. Stat. § 101 *et seq.*

f. *Hawai`i as a State.* In the 1959 Act admitting Hawai`i to the Union, Congress required the new State of Hawai`i to accept responsibility for the Hawaiian Home Lands as a condition of statehood. *See* Pub. L. No. 86-3, § 4, 73 Stat. 4 (1959); HHCA, ch. 42, § 201(7), 42 Stat. 108 (1920). This was in marked contrast to legislation admitting other States, which typically has required the State to *disclaim* any responsibility for lands held in trust for

Native Americans.[6] To date, Hawai`i is the only State *required* by Congress as a condition of statehood to assume a trust responsibility for its aboriginal peoples. The Admission Act further conveyed 1.2 million acres to the new State[7] and required that these lands be held in trust and used for five broad purposes, including "the betterment of the conditions of the native Hawaiians, as defined in the Hawaiian Homes Commission Act." 1959 Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4. Thus Congress not only required Hawai`i to maintain the Hawaiian Home Lands as a condition of statehood, but authorized it to use revenues from the other public lands for the benefit of native Hawaiians as defined in the HHCA, as well as for other public purposes.[8]

In the 1970s Congress broadened its definition of Native Hawaiians by including Native Hawaiians in legislation concerning Native Americans, and by consistently defining "Native Hawaiian" as "any individual any of whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778."[9]

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[6] *See e.g.*, Act of February 22, 1889, ch. 180, § 4, 25 Stat. 676 (requiring the States of North Dakota, South Dakota, Montana and Washington to disclaim jurisdiction over Indian lands); *see also infra* p. 19 (discussing similar language in the Alaska Statehood Act).

[7] The federal government has retained about 400,000 acres for military and national park purposes.

[8] The five stated purposes are: "for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use." Admission Act of 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 4.

[9] *See* Headstart, Economic Opportunity, and Community Partnership Act of 1974, Pub. L. 93-644, § 813(3), 88 Stat. 2291, 2327; Youth Employment and Demonstration Projects Act of 1977, Pub. L. 95-93, § 303(e)(16), 91 Stat. 627, 650; Comprehensive Employment and Training Act Amendments of 1978, Pub. L. 95-524, 92 Stat. 1909; The (...continued)

g. *The 1978 Hawaiian Constitutional Amendments.* By 1978 it was apparent that the HHCA was in need of supplementation. The HHCA's definition of native Hawaiian was anachronistic, and the best lands were leased to the plantation interests to generate funds to administer the Act.[10] Moreover, the Hawai`i Legislature had not used any revenues from the additional lands transferred pursuant to the Admission Act for the benefit of Native Hawaiians. *See* Historical Background, *supra* note 3, at 19.

The delegates to Hawai`i's 1978 Constitutional Convention proposed a series of amendments concerning Native Hawaiians which were subsequently adopted by a vote of all Hawai`i's citizens at the November 1978 general election. One of the amendments affirmed that the State holds the ceded lands as a Public Land Trust with two named beneficiaries: native Hawaiians as defined in the HHCA and the general public.[11] *See* Haw. Const. art. XII, § 4. A second amendment created OHA to "hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians" and provided for establishment of a board of trustees to be elected by qualified voters who are beneficiaries of the trust. *Id.* art. XII, § 5.

The records of the 1978 Constitutional Convention explain why OHA was created as a trust, and why its beneficiaries were to elect the trustees. The Convention's Hawaiian Affairs Committee was

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National Parks and Recreation Act of 1978, Pub. L. 95-625, § 505(e), 92 Stat. 3467.

[10] *See* Hawaii Advisory Committee to the United States Commission on Civil Rights, *A Broken Trust, The Hawaiian Homelands Program: Seven Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians* (1991).

[11] *See generally* Historical Background, *supra* note 3, at 19-20; Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. Haw. L. Rev. 63 (1985); Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. Haw. L. Rev. 427, 446-51 (1995); Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Policy Rev. 95, 104-10 (1998).

"strongly of the opinion that people to whom assets belong should have control over them." Comm. Rpt. No. 59, 1 *Proceedings of the Constitutional Convention of Hawai`i of 1978* at 644. "[S]uch participation will avoid the much-justified criticism which has been directed at the Hawaiian Homes Commission for, among other things, its inability to respond adequately to the needs of native Hawaiians of one-half blood." *Id.* OHA thus was created in part to provide Native Hawaiian people with a political entity for "self determination and self government." Comm. of the Whole Rpt. No. 13, *id.* at 1019.[12]

The beneficiaries of the trust included all people whose ancestors were natives of the area that consisted of the "Hawaiian Islands previous to 1778." *Id.* at 647. The Committee found that the half-blood requirement

> has proved to be a factor in dividing the Hawaiian community – mothers and fathers from their children, cousins from cousins, friends from friends. Moreover, the removal of a blood qualification will be in line with the current policy of the federal government to extend benefits for Hawaiians to all Hawaiians regardless of blood quantum.

Id.

h. *The Office of Hawaiian Affairs.* The OHA trust is a "body corporate[,]...a separate entity independent of the executive branch." Haw. Rev. Stat. § 10-4. Hawai`i's Supreme Court has described OHA as a "self-governing corporate body." *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446, 451 (Haw. 1987). OHA has the usual powers of a trust or corporation to sue and be sued and enter into contracts in its own name. Haw. Rev. Stat. § 10-4.[13] Although OHA elections are held concurrently

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[12] *See* Melody K. MacKenzie, *Native Hawaiian Rights Handbook* 89 (1991) ("The electoral process for choosing the board of trustees ensures OHA's independence .... [T]he creation of the Office of Hawaiian Affairs is a step toward self-governance.").

[13] Because of its independent trust status, OHA is authorized to sue the State to protect the interest of OHA beneficiaries, and on occasion has (...continued)

with State elections to maximize voter turnout and conserve OHA's funds, OHA has at times conducted separate balloting by mail, paid for with OHA funds, to determine the views of its beneficiaries on particular issues.[14]

The Hawai`i Legislature, as permitted by the Hawai`i Constitution, art. XII, § 6, has allocated a share of income from the Hawai`i ceded lands to OHA for the betterment of the conditions of native Hawaiians as defined in the HHCA. Each year, the Legislature has also provided OHA with additional funds for the use of Native Hawaiians defined without regard to blood quantum. Both types of funds are made available to OHA by vote of legislators elected by all citizens of Hawai`i. OHA receives additional funds from Congress for "Native Hawaiians" defined without regard to blood quantum, and also receives funds from private parties. OHA has used these funds to facilitate agricultural development in Native Hawaiian communities, to provide training for Native Hawaiians in a wide variety of business fields, to assist Native Hawaiian entrepreneurs by providing loans for economic initiatives, to address the health needs of Native Hawaiians, to support the construction of housing for Native Hawaiians on the Hawaiian Homelands and elsewhere, to promote the use of the Hawaiian language by funding immersion programs for students, and to work with governmental and non-governmental bodies to support the needs of Native Hawaiians. *See Waiwai Ho`omau–Perpetuating the Trust*, Fiscal 1998 Annual Report for the Office of Hawaiian Affairs (1998).

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done so. *See Office of Hawaiian Affairs v. State of Hawai`i*, No. 20281 (Haw. Sup Ct. appealed 1997) (concerning revenues from Duty Free Shops); *Office of Hawaiian Affairs v. Housing Fin. Dev. Corp.*, Civ. No. 94-4207-11 (Haw. 1st. Cir. filed 1994) (seeking to prevent the State from transferring ceded lands it holds in trust).

[14] In 1998, 100,163 persons of Hawaiian ancestry were registered to vote for the Trustees of the OHA, and 64,806 persons actually cast ballots at the general election. *See Index of Elections* (visited July 25, 1999) <http://www.state.hi.us/elections/reslt98/general/98swgen5.html>.

i. *Congressional Ratification.* As noted above, Congress began to include "Native Hawaiians," defined without reference to blood quantum, in federal legislation providing benefits for American Indians prior to the establishment of OHA. Congress has also used this broader definition in at least 25 laws enacted since Hawai`i's 1978 Constitutional Convention.[15] For example, the Native Hawaiian Education Act of 1994, 20 U.S.C. §§ 7901-12, using the broader definition, explicitly finds that "Native Hawaiians are a distinct and unique indigenous people," that the United States apologized in 1993 for "the deprivation of the rights of Native Hawaiians to self-determination," and that "Congress affirmed the special relationship between the United States and the Native Hawaiians." Moreover, at least eight Acts of Congress expressly refer to OHA.[16] These federal laws appropriate funds to OHA, delegate authority to OHA, and require consultation with OHA. For example, in the Administration for Native Americans Act, Congress named OHA as the recipient of federal funds to establish a revolving loan program for Native Hawaiian programs and individuals. *See* 42 U.S.C. § 2991b-1.

SUMMARY OF ARGUMENT

The words "Indians" and "Indian Tribes" in the Constitution encompass all the aboriginal peoples of the United States, whether East Coast Indians, Pueblos (who were full citizens of Mexico), Eskimos, other aboriginal peoples of Alaska, or Native Hawaiians. The Court has recognized that Congress has the power to choose which aboriginal peoples it will recognize and the form of its relationship with them. *See United States v. Sandoval*, 231 U.S. 28 (1913). Congress's powers with respect to Native Americans are not limited to members of recognized tribes, as shown by federal legislation dealing with Alaska Natives and decisions of this Court, such as *United States v. John*, 437 U.S. 634 (1978). By enacting

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[15] The laws are listed in Part 1 of the Appendix to this brief. *See also* the Appendix to the *amicus* brief of the Congressional Delegation.

[16] The laws are listed in Part 2 of the Appendix to this brief.

the HHCA, the Admission Act, and numerous Acts concerning Native Hawaiians, Congress has exercised its broad constitutional power to recognize aboriginal Hawaiians as among the aboriginal peoples of the United States and to establish special programs for them.

Allowing OHA's beneficiaries – Native Hawaiians – to elect the OHA trustees does not deny other citizens of Hawaii the right to vote "on account of race." Laws that recognize the special status of aboriginal people are not based on race, but the aboriginal peoples' ownership of land and self-government before Europeans took control of their lands. *See Morton v. Mancari*, 417 U.S. 535, 553-54 (1974). The Civil War Amendments were not addressed to, and did not affect, Congress's power to recognize and deal specially with aboriginal peoples, as shown by many subsequent decisions of this Court. Federal legislation that is "reasonably designed to further the cause of Indian self-government" is thus constitutional, *Mancari*, 417 U.S. at 553-54, without regard to whether the Native Americans subject to the legislation are organized as tribes. *See John*, 437 U.S. at 653.

The Constitution allows Native Americans to exercise control over assets set aside for their benefit. Almost every Indian tribe has elections limited to tribal members although their decisions affect funds provided by Congress and impact non-Indians. Similarly, voting in Alaska Native corporations is limited to Alaska Natives although the corporations control vast funds and lands provided by Congress. The people of the State of Hawai`i did not exceed the bounds of the federal Constitution by amending the Hawai`i Constitution in 1978 to create OHA and provide for election of OHA's trustees by Native Hawaiians. Congress delegated substantial authority to Hawai`i by requiring the State to assume the federal government's responsibilities for aboriginal Hawaiians under the HHCA. In addition, Congress has ratified Hawai`i's creation of OHA by enacting statutes that define all descendants of aboriginal Hawaiians as Native Americans and by expressly referring to OHA in federal legislation. Furthermore, States have authority to legislate with respect to Native Americans within their borders, so long as the state law does not conflict with federal law or interfere with tribal self-government.

ARGUMENT

I. THE CONSTITUTION'S PROVISIONS ON INDIANS AND INDIAN TRIBES ENCOMPASS NATIVE HAWAIIANS.

Petitioner contends (Pet. Br. 22-29) that because the Native government of Hawai`i underwent many changes before it was overthrown, and because Hawai`i was a republic at the time it came into the United States, any laws supporting programs for Native Hawaiians – regardless of how defined – are unconstitutional. Petitioner's argument ignores (1) the historical context and purpose of the constitutional provisions concerning Indians and Indian tribes, (2) the broad authority of Congress, recognized by this Court, to establish a special relationship with aboriginal peoples of the United States, and (3) the long experience of the United States in providing varying programs and political structures for aboriginal peoples as their situations changed and new areas were added to the Nation.

A. The Constitution Permits Congress To Establish A Special Relationship With The Aboriginal Peoples Of The United States, Including Native Hawaiians.

The special relationship between Europeans and the aboriginal peoples of the Americas began while Columbus was still alive.[17] As a result of well publicized abuses during the early years of Spanish conquest, the King of Spain established a trust relationship

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[17] Bartolomé de Las Casas, a Dominican Monk who accompanied Columbus on his third voyage, publicized the destruction of the indigenous peoples, which led to the Spanish laws of Burgos of 1512-1513, the first European laws concerning the rights of indigenous peoples. By 1532 Francisco de Vitoria, a Spanish law professor, in a report commissioned by the King, rejected arguments that discovery, the divine right of kings, European Christianity, the power of the Pope, or native paganism made the aboriginal peoples any less than true owners of the lands they occupied. Vitoria's reasoning was followed by later writers and influenced American law. *See, e.g., Johnson and Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 562-71 (1823).

between the Crown and the indigenous peoples, a relationship often ignored but probably responsible for the survival of many native peoples in the Americas.[18] Later the English Crown and other European nations recognized the rights of indigenous peoples to land ownership and self-government. *See Cohen Handbook, supra* note 18, at 53. The Constitution assumes and provides a mechanism for the continuation of this policy.

The aboriginal peoples of the United States are referred to once in the Constitution as "Indians," *see* U.S. Const. art. I, § 2, cl. 3, and once as "Indian Tribes," *see* U.S. Const. art. I, § 8, cl. 3. This constitutional language is broad enough to encompass all the people who inhabited the land before the Europeans came. Of course, Native Americans were not from India, and therefore not literally "Indians." Nor were they all "tribes" in any sense beyond a group of people. Their forms of government varied from the Iroquois Confederation that provided one of the inspirations for a confederation of American states to villages of people living by a river.[19]

When the Constitution was written, Native Hawaiians fit easily within the ordinary meaning of "Indian" and "Indian Tribe." They were a group of aboriginal people with a common language, culture, and tradition, who governed their own land before the coming of Europeans. *See 1993* Joint Resolution, *supra*. There have been many changes since, but in this century Congress has repeatedly recognized Native Hawaiians as an aboriginal people with a special relationship to the United States. *See supra* pp.7-9,13. As we show below, this record of congressional action

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[18] *See* Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1 (1942); Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law* 47-50 (2d ed. 1982) [hereinafter "*Cohen Handbook*"]; Tyler, *Spanish Laws Concerning Discoveries, Pacifications and Settlements among the Indians* (American West Center, Occasional Paper No. 17 1980).

[19] *See* Swanton, *The Indian Tribes of North America* 1-4 (Smithsonian Institution, Bureau of American Ethnology, Bulletin 145, Gov. Printing Office, 1952).

establishes the political status necessary to justify programs benefiting Native Hawaiians.

B. The Constitution's Provisions Concerning Indians And Indian Tribes Apply To Aboriginal Peoples Who Were Citizens Of Another Nation Before They Were Incorporated Into The United States.

The fact that Native Hawaiians were part of a constitutional monarchy that included non-Hawaiians does not deprive Congress of constitutional authority to recognize Native Hawaiians as an aboriginal people of the United States. This is demonstrated by the experience of the Pueblo people, who were full citizens of Mexico before coming into the United States but who were ultimately recognized by this Court as Indians entitled to the special protection of the United States.

In 1848, the United States acquired from Mexico what is now most of California, New Mexico, and Arizona and confirmed its title to Texas. In New Mexico, the Spanish had encountered indigenous villages (*pueblos*) in the late 1500s. By 1848 the Pueblos spoke Spanish, were Catholic, held land under Spanish land grants, and were full citizens of Mexico entitled to "the full recognition by that government of all their civil rights, including those of voting and holding office." *United States v. Joseph*, 94 U.S. 614, 617 (1876). In *Joseph*, the Court recounted these facts and held, as a matter of statutory construction, that the Pueblos were not "Indians" under an 1834 Act that prohibited non-Indians from settling on Indian lands.

In the 1910 New Mexico Enabling Act, however, Congress clearly declared Pueblo lands to be "Indian country." *See* Act of June 20, 1910, ch. 310, §§ 557, 558. Soon thereafter, a person arrested for selling liquor in Indian country contested Congress's power to so classify Pueblo land, since *Joseph* had held that the Pueblos were not Indians. In *United States v. Sandoval*, 231 U.S. 28 (1913), the Court faced the constitutional issue of who is an "Indian." Despite its prior holding in *Joseph*, the Court held that the Pueblos' prior full citizenship in Mexico (a multi-racial nation) did not remove them from the constitutional category of "Indian" if Congress chose to treat them as such. The Court concluded:

> [I]t is not necessary to dwell specially upon the legal status of this people under either Spanish or Mexican rule, for whether Indian communities within the limits of the United States may be subjected to its guardianship...turns upon other considerations. Not 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 as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.

Id. at. 45; *see also United States v Candelaria*, 271 U.S. 432 (1926) (again recognizing the United States' trust responsibility towards all the Pueblo people).

In *Sandoval*, it made no difference that the Pueblos owned their land in fee simple and were full voting citizens of Mexico. For constitutional purposes, it was sufficient that the Pueblos were the aboriginal people of part of what is now the United States, and that Congress chose to treat them as Indians. The same is true in Hawai`i. In enacting the HHCA, Congress recognized the aboriginal people of Hawai`i as part of the aboriginal people of the United States. Congress reaffirmed this status in the Admission Act and then broadened the definition of Native Hawaiian in dozens of laws enacted since Statehood. This Court in *Sandoval* held that, if Congress has recognized an aboriginal people, the Court should not substitute its judgment for the essentially political decision made by Congress.

C. The Constitution Does Not Require That Aboriginal Peoples Be Popularly Considered Indians Or Have A Functioning Tribal Government For Congress To Grant Them Special Rights.

It also makes no constitutional difference that the Native Hawaiians are not closely related to North American Indians or that the Native government in Hawai`i was overthrown in 1893.

This is demonstrated by federal legislation concerning Native Alaskans. Native Alaskans include Athabaskans, Aleuts, and Eskimos. Only Athabaskans are closely related to other North American Indians, and most Native Alaskans were not organized in tribes. The Federal Government has nevertheless treated Native Alaskans as a single politically identifiable group. For example, the Act of May 17, 1906, ch. 2469, 34 Stat. 197, authorizing the allotment of non-mineral lands, was applicable to "any Indian or Eskimo of full or mixed blood who resides in and is a native of said district...." [20] As in Hawai`i, no tribal affiliation or blood quantum was required.

The Alaska Statehood Act, unlike the Hawai`i Admission Act passed the next year, did not delegate to the State of Alaska any responsibility for native people, but instead required the State to disclaim all rights and title to "any lands or other property...which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives)." Act of July 7, 1958, Pub. L. 85-508, § 4, 72 Stat. 339. The Alaska Statehood Act thus makes plain that the United States was not dealing with "Indian tribes" in the narrow sense, but rather treated Indians, Eskimos, and Aleuts as a single politically identifiable group called "natives."[21]

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[20] *See also* Act of February 25, 1925, ch. 320, 43 Stat. 978 (authorizing the Secretary of the Interior to establish vocational training for the "aboriginal native people of the Territory of Alaska"); 1978 Fish and Wildlife Improvement Act, 16 U.S.C. § 712 (permitting the taking of migratory birds for subsistence "by the indigenous inhabitants of the State of Alaska") (discussed in *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 940 (9th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988)). *See generally Pence v. Kleppe*, 529 F.2d 135, 138-39 n.5 (9th Cir. 1976) ("In *United States v. The Native Village of Unalakleet*, 1969, 411 F.2d 1255, 188 Ct. Cl. 1 (1969), the Court of Claims...pointed out that the word 'Indian' is commonly used in this country to mean 'the aborigines of America.' We agree.").

[21] "Alaska Natives, including Eskimos and Aleuts, have been considered to have the same status as other federally recognized American Indians" even though "Alaskan Natives have not historically been organized into reservations or into tribal units." *Alaska Chapter, Associated Gen.*

(...continued)

In the 1971 Alaska Native Claims Settlement Act (ANCSA), Congress again treated the aboriginal peoples of Alaska and their descendants together as a single political group. Act of December 18, 1971, Pub. L. 92-203, 85 Stat. 688, 43 U.S.C. §§ 1601 *et seq.* ANCSA extinguished all "aboriginal titles...in Alaska based on use and occupancy," 43 U.S.C. § 1603(b), in exchange for "$962.5 million in state and federal funds and approximately 44 million acres of Alaska land." *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 949 (1998). Congress declared its policy that the settlement should be accomplished "with maximum participation by Natives in decisions affecting their rights and property," but without establishing tribes. 43 U.S.C. § 1601(b); *see also Native Village of Venetie*, 118 S. Ct. at 949.[22] To implement this policy, Congress required Natives to organize as corporations under state law. *See* 43 U.S.C. §§ 1606, 1607; *see Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991 (9th Cir. 1994). Congress restricted voting rights in the corporations to Natives – initially for a period of 20 years and later in perpetuity. *See* 43 U.S.C. §§ 1606(h)(2) & (3)(D)(i), 1629c(d)(7)(A).

The structure of ANCSA closely resembles the OHA trust arrangement at issue in this case. In both Hawai`i and Alaska, government lands and funds have been dedicated exclusively for the benefit of native peoples in the State without respect to current tribal organization. In both cases, a structure was established to handle the lands and funds, and voting control over the use of the assets was vested in the native beneficiaries to the exclusion of other citizens. Neither program is properly regarded as racial. Both are based on the beneficiaries' aboriginal status as descendants of the original owners of the land. Both programs wisely provide that the beneficiaries have significant control over

Contractors of Am., Inc. v. Pierce, 694 F.2d 1162, 1169 n.10 (9th Cir. 1982).

[22] A Native is defined as "a citizen of the United States...of one-fourth degree or more Alaskan Indian...Eskimo, or Aleute blood *** or who is regarded as an Alaska Native by the Native village or native Group of which he claims to be a member...." 43 U.S.C. § 1602(b).

the assets they receive. In neither program was an organized tribal government a prerequisite.

II. LIMITING VOTING FOR OHA TRUSTEES TO THE BENEFICIARIES OF THE OHA TRUST IS NOT A DENIAL OR ABRIDGMENT OF THE RIGHT TO VOTE ON ACCOUNT OF RACE.

A. Laws That Recognize The Special Status Of Aboriginal Peoples Do Not Classify On The Basis Of Race.

Congress's power to accord special political status to the aboriginal peoples of the United States necessarily implies that non-aboriginal peoples are not included in either the benefits or restrictions of aboriginal status. Both before and after the passage of the Civil War Amendments, this Court has upheld laws recognizing the special status of aboriginal peoples, invoking Congress's Treaty and War Powers, its power over public lands, the Indian Commerce Clause, and history. *See Worcester v Georgia*, 31 U.S. (6 Pet.) 515, 549-53 (1832) (Treaty Power); *Board of County Comm'rs of Creek County v. Seber*, 318 U.S. 705, 715 (1943) (War Power and Treaty Power); *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (Indian Commerce Clause, Treaty Power, and War Power).

The Civil War Amendments were not intended to end this relationship, and have never been held to have done so. The Fourteenth Amendment expressly excludes "Indians not taxed" and applies only to persons "born or naturalized in the United States *and subject to the jurisdiction thereof*." U.S. Const. amend. XIV, §§ 1, 2 (emphasis added). It is clear that the drafters inserted these limitations to avoid granting immediate equal rights to Indians.[23] Similarly, the Fifteenth Amendment stopped short of granting Indians the right to vote by limiting its application to "citizens of the United States," a status which at that time had not

[23] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2894 (1866) (statement of Senator Trumbull); *id.* at 2895 (statement of Senator Howard); *id.* at 2897 (statement of Senator Williams).

been conferred on any of the aboriginal peoples of the United States. *See* U.S. Const. amend. XV, § 1. Significantly, the applicability of these Amendments did not turn on whether a particular Indian was a member of a tribe. In *Elk v. Wilkins*, 112 U.S. 94 (1884), this Court rejected the argument that an Indian who had severed his tribal relations thereby became a citizen of the United States under the Fourteenth Amendment or was entitled to vote in state elections under the Fifteenth Amendment.

Congress ultimately conferred citizenship upon Indians by statute.[24] But this Court has held repeatedly that citizenship does not extinguish the authority of Congress to enact legislation solely affecting Indians.[25] The special benefits or restrictions, if imposed by federal law, must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. But as the Court observed, "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment." *Id.* at 554-55. In short, differential treatment for Indians is permitted under the Constitution even after adoption of the Fourteenth and Fifteenth Amendments.

In *Mancari,* this Court upheld a preference for Indians in the Bureau of Indian Affairs on both statutory and constitutional grounds. As to the Constitution, this Court held:

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[24] Act of June 2, 1924, ch. 233, 43 Stat. 253. Prior to 1924, Congress naturalized specific tribes or classes of Indians, particularly Indians receiving allotments under section 6 of the General Allotment Act of 1887, § 6, 24 Stat. 390, 25 U.S.C. § 349. *See generally Cohen Handbook, supra* note 18, at 642-45.

[25] *See, e.g., Bryan v. Itasca County, Minn.*, 426 U.S. 373 (1976) (immunity from state personal property tax); *Morton v. Mancari*, 417 U.S. 535 (1974) (preference in employment); *Morton v. Ruiz*, 415 U.S. 199 (1974) (federal welfare benefits); *Board of County Comm'rs of Creek County v. Seber*, 318 U.S. 705 (1943) (exemption of Indian allotment from state taxation); *Brader v. James*, 246 U.S. 88 (1918) (restriction on conveyance of land); *Hallowell v. United States*, 221 U.S. 317 (1911) (Indian liquor laws).

> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial preference." Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," Art I ,§ 3, cl. 3, or that a member of a city council reside within the city governed by the council.

Id. at 553-54. Based on its conclusion that the preference was political rather than racial, this Court applied the rational-basis level of judicial review to the statute and found that it was rationally related to the goal of allowing the people governed to have a role in the governing body – the very goal at issue here.

B. The Applicability of *Mancari* Does Not Turn On Whether Native Hawaiians Are Organized Into Tribes.

Petitioner argues (Pet. Br. 39-45) that the principle of *Mancari* is limited to Indians who are members of federally recognized tribes. This confuses context with principle. *Morton* was decided in the context of a statutory preference for members of federally recognized tribes in the BIA, which provides benefits only to federally recognized tribes. The preference at issue in *Mancari* thus was directed at the people affected by the agency in question. The Court's reference to federally recognized Indian tribes occurs in a footnote as *an additional* reason why the preference is not racial. *See id.* at 553 n.24. The Court's reasoning in *Mancari* applies equally to Hawai`i's program. Just as all "Indians" do not receive a preference in the BIA, all Polynesians do not receive benefits from OHA. *See supra*, p. 3. *Mancari* is not based on a particular form of tribal government but on the broader premise that the Constitution itself "singles Indians out as a proper subject for separate legislation." *Mancari*, 417 U.S. at 551.

This Court has made clear that the principles of *Mancari* are not limited to Indians who are members of a federally recognized

tribe. In *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), the Court upheld a statute that provided for assets to be distributed to the heirs of two recognized tribes without regard to whether the heirs were members of the tribes. The Court held that such action by Congress is constitutional if it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians...." 430 U.S. at 85 (*quoting Mancari*, 417 U.S. at 555). The Court's unanimous opinion in *United States v. John*, 437 U.S. 634 (1978), likewise rejects a constitutional distinction between tribal and non-tribal Indians. In *John*, the Court deferred to Congress's power to create a reservation (and thus a separate regime of federal criminal laws) for Indians remaining in Mississippi, even though they were a "remnant of a larger group of Indians" that had long ago moved to Oklahoma, *id.* at 653, and even though the Solicitor of the Department of the Interior had expressly concluded that these Indians "cannot now be regarded as a tribe." *Id.* at 650 n.20 (*quoting Cohen Handbook*).

Native Hawaiians are in the same position. They once were self-governing and the owners of all the land in Hawai`i. After a period of great loss, they have received federal recognition, assistance, and increasing degrees of self-determination. In light of *Delaware Tribal* and *John* and the history of congressional action in Hawai`i and Alaska, *Mancari* cannot be read to support the proposition that laws benefiting Native Hawaiians are racial legislation because Native Hawaiians are not organized into tribes.

Nor is there is any reason to classify the Native Hawaiian people as non-tribal or non-recognized. Beginning in the period of territorial government and throughout Statehood, the United States has recognized Native Hawaiians as one of its indigenous peoples. Native Hawaiians had their own Native governments and defined territory long before Europeans arrived. Because of this history, Congress has not tried to divide Hawaiians into separate tribes but, as in Alaska, has treated the aboriginal peoples as one political group.

C. The Constitution Allows Native Americans To Exercise Control Over Assets Set Aside For Their Benefit.

Allowing Native Americans to determine how their funds are spent is the rule, not the exception. Almost every Indian tribe in the United States receives funds from Congress. All of the people of the United States, through their representatives, participate in the decision whether to provide such funds. But once provided, the funds are expended essentially as the tribal council determines. The right to vote for members of the tribal council is limited to members of the tribe even if (as is usually the case) non-tribal members live on the tribe's reservation. The same is true in corporations established under ANCSA. Only Native Alaskans vote on the use of lands and moneys initially provided by Congress.

Similarly, in Sections 16 and 17 of the Indian Reorganization Act of 1934 (IRA), Congress authorized Indian tribes in the United States to adopt constitutions establishing tribal councils and to form tribal business corporations. *See* IRA §§ 16, 17, 48 Stat. 984, 987 (codified at 25 U.S.C. §§ 476, 477). Elections to decide whether to re-organize under the IRA – "authorized and called by the Secretary of the Interior" and thus federal elections – were limited to "the adult members of the tribe, or the adult Indians residing on such reservation," 25 U.S.C. § 476, even though many non-Indians reside on reservations and the tribes' revitalization had enormous consequences for neighboring communities and States.

In short, the Hawai`i statutes limiting to Native Hawaiians the right to vote in elections for OHA Trustees who will administer lands and funds devoted exclusively to their benefit are wholly consistent with the Constitution and federal law.[26]

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[26] Because the OHA Trustees administer the trust solely for the benefit of Native Hawaiians, the State's decision to allow Native Hawaiians to elect the trustees draws additional support from a line of this Court's decisions holding, in the context of the one-person, one-vote requirement of the Fourteenth Amendment, that voting for members of governmental bodies that primarily affect a particular group of citizens may be limited to those (...continued)

III. THE STATE OF HAWAI'I ACTED WITHIN ITS AUTHORITY IN CREATING THE OFFICE OF HAWAIIAN AFFAIRS.

The State of Hawai`i's power to create OHA rests on three distinct but related grounds: Congress's delegation of authority to the State, subsequent Congressional action ratifying the establishment of OHA, and the State's own sovereign powers.

A. Congress Delegated Authority To The State of Hawai`i And Ratified The State's Actions.

Congress has delegated to the State of Hawai`i substantial authority over Native Hawaiians. Rather than requiring Hawai`i to disclaim responsibility for Native Hawaiians, Congress required Hawai`i, as a condition of Statehood, to maintain the HHCA program, and authorized it to use public trust lands to support the program. *See supra*, pp. 8-9. In federal laws enacted both before and after the creation of OHA. Congress expanded the definition of Native Hawaiians to include all descendants of the aboriginal people of Hawai`i.

Hawai`i's decision to provide additional benefits to Native Hawaiians is consistent with the intent of Congress and therefore within the scope of the State's delegated authority to assume responsibility for its aboriginal people. In *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Court interpreted a federal statute authorizing certain States to assume jurisdiction within Indian reservations but requiring them to amend their constitutions to do so. The State of Washington did not amend its constitution, and chose to assume jurisdiction only as to certain topics and certain lands. The Yakima Tribe argued that the State had not adhered to the congressional delegation of authority. The Court held, however, that the State, though not complying with the terms of the Statute, had acted consistently with the intent of Congress and upheld the

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who are particularly affected. *See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); *Ball v. James*, 451 U.S. 355 (1981).

State's assumption of partial jurisdiction. The Court's decision in *Yakima* provides support for the conclusion that Hawai`i has also acted in a way that is consistent with the intent of Congress.

This case, however, is easier than *Yakima*. The Court here need not engage in analysis to discern the intent of Congress. Congress has made its intent clear by enacting numerous statutes that recognize all Native Hawaiians as Native Americans and by enacting multiple statutes that delegate authority or provide funds to OHA. Taken together, these congressional actions amount to a ratification of Hawai`i's creation of OHA. *Cf. Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 356-57 (1962) (subsequent legislation explicitly recognizing the existence of a reservation is persuasive evidence that it was not abolished by earlier legislation); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (relying on "the character of the legislation Congress has enacted in the area" and "the history of [congressional] acquiescence").

Hawai`i's programs for Native Hawaiians are well known to Congress. The only actions taken by Congress have been in support of those programs. This Court should not upset that legislative determination.

B. The State Of Hawai`i Has Independent Authority To Assist Its Aboriginal People.

Acts of Congress and treaties of the United States concerning aboriginal peoples are the supreme law of the land. Thus where Congress has established Indian reservations, state law is necessarily limited. But Congress's power in this field, as in many others, is not exclusive. Many states have enacted laws concerning aboriginal peoples, often providing benefits or protections for them not supplied by Congress.[27]

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[27] States have enacted laws that (1) recognize tribes that are not federally recognized, *see* Conn. Gen. Stat. § 47-59a; Del. Code Ann. Tit. 29 § 105; Ga. Code Ann. § 44-12-300 ; N.C. Gen. Stat. §§ 71-A-1 *et seq.*; Virginia, House Joint Resolution Nos. 5 (1983), 205 (1985) and 390 (1989); (2) establish independent agencies or corporations to manage tribal funds, *see* Fla. Stat. Ann. § 285.19; R.I. Gen. Laws § 37-18-11; (3) establish (...continued)

In *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1858), the Court upheld the right of a State to enact laws concerning Indian tribes if not contrary to a federal treaty with the tribe or federal law. The State of New York had enacted a law making it a criminal offense to intrude upon Indian land. Cutler was arrested for doing so and challenged the constitutionality of the law. This Court upheld the law, stating, "[t]he only question which this court can be called on to decide is, whether this law is in conflict with the Constitution of the United States, or any treaty or act of Congress." *Id.* at 370. The Court held that the State had the power to "preserve the peace of the commonwealth" and protection of the Indians fell within that power. The Court concluded that "[t]he act is, therefore, not contrary to the Constitution of the United States," nor to "any act of Congress, as no law of Congress can be found which authorizes white men to intrude on the possessions of Indians." *Id.*; *accord Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (noting "the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law").[28]

Thus Hawai`i need not depend wholly on authority delegated by Congress or on congressional ratification to support the provisions of Hawai`i's Constitution that address the welfare of its aboriginal peoples. Hawai`i has power to enact such legislation so long as it does not contravene a treaty or Act of Congress. It has acted well within its power here. Hawai`i has preserved the

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councils or commissions to assist tribes; *see* S.D. Codified Laws § 1-4-1; N.J. Stat. Ann. § 52:16A-53; Wyo. Stat. Ann. § 9-2-1904; Rev. Stat. Neb. Ann. § 81-2501; 30 M.R.S. § 6212; Conn. Gen. Stat. § 47-59b; N.C. Gen. Stat. § 143B; and (4) provide scholarships, tax exemptions, and certain protections for the children of tribal members, *see* 8 NYCRR Ch. II, Subpart 1 § 145, 145-4; 18 NYCRR § 431; 20 NYCRR § 529.9.

[28] In *Oneida Nation of New York v. County of Oneida, N.Y.*, 414 U.S. 673, 661 (1974), the Court noted that *Dibble* recognized a state power "to protect Indian possession." *See Cohen Handbook*, *supra* note 18, at 278-79.

HHCA, as required in the Admission Act, and has implemented the Admission Act through the establishment of OHA to ensure that a portion of the proceeds of the public lands are used for the betterment of the conditions of native Hawaiians. Both before and after the creation of OHA, Congress recognized a broader category of Native Hawaiians in legislation conferring federal benefits. In accordance with that legislation, and in furtherance of Congress's promotion of native self-government, the people of the State of Hawai`i have provided funds for the benefit of all Native Hawaiians and have decided that the OHA Trustees should be elected by the beneficiaries of the trust. The Constitution does not require this Court to reject that determination by all the people of Hawai`i.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 1999

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