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 FOR PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Fourteenth and Fifteenth Amendments to the United States Constitution permit an explicit racial classification restricting the right to vote in statewide elections for state officials.

PARTIES TO THE PROCEEDINGS

All of the parties to the proceedings in the court of appeals are listed in the caption.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 146 F.3d 1075. The opinion of the district court (Pet. App. 19a-43a) is reported at 963 F. Supp. 1547.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1998. A petition for rehearing was denied on August 20, 1998. Pet. App. 44a. The petition for a writ of certiorari was filed on November 17, 1998, and was granted on March 22, 1999. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Fourteenth and Fifteenth Amendments to the United States Constitution, the Constitution of the State of Hawaii, the Hawaii Admission Act, and the Hawaii Revised Statutes are reproduced at App. 1a-8a.

STATEMENT OF THE CASE

The State of Hawaii has violated two of our Nation's most fundamental constitutional guarantees: the right to vote, and the right to be free from government-sponsored race discrimination. Hawaii imposes an explicit racial restriction on the right to vote in statewide elections for the governing board of the Office of Hawaiian Affairs (OHA). Under Hawaii law, only descendants of the races that inhabited the Hawaiian Islands before 1778—the year Captain Cook arrived in the Islands—may vote in those elections. Haw. Rev. Stat. §§ 10-2,

13D-3. OHA is a state agency that receives millions of dollars of legislative appropriations from general tax receipts as well as revenues from public lands. It uses those funds to provide services and financial assistance to two racially defined classes of Hawaiian citizens: "native Hawaiians," defined as those descendants of the "races inhabiting the Hawaiian Islands previous to 1778" of not less than 50 percent "Hawaiian blood"; and "Hawaiians," defined as those with any "Hawaiian blood." Petitioner—whose family has resided in Hawaii since the mid-nineteenth century and who himself was born and lives in Hawaii as a citizen, taxpayer, and qualified elector of the United States and the State of Hawaii—was denied the right to vote in the 1996 election for OHA's board *solely* because he does not meet the State's racial definition of "Hawaiian."

A. Hawaii And Its Public Lands

In 1778, at the time of Captain Cook's voyage to the Hawaiian Islands, governance of the Islands was fragmented among numerous groups, which were often at war with each other. Hawaii was first organized as a unified, sovereign, independent kingdom in 1810, and remained as such until 1893, when its monarch abdicated and was replaced by a provisional government. The provisional government declared itself the Republic of Hawaii and ultimately sought annexation to the United States. In 1898, Hawaii became a territorial possession of the United States.

As a result of annexation, approximately 1,800,000 acres of "public, Government, or Crown lands"—*i.e.*, lands previously owned either by the government of the Hawaiian Kingdom or the Hawaiian monarchy in its official capacity—were ceded by the Republic of Hawaii to the United States. J. Res. 55, 55th Cong., 30 Stat. 750 (1898) (Annexation Resolution). At the time of their transfer, these "public lands" were held by the Republic of Hawaii free and clear of any encumbrances or trust obligations. None of the former citizens of the Hawaiian

kingdom held any cognizable interest in these lands. *See In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 1864 WL 2485, at *2-5 (1864) (detailing division of land rights among the Crown, the nobility, and the citizenry); *see also Hawaiian Homes Commission Act, 1920: Hearings on H.R. 13500 Before the Senate Comm. on Territories*, 66th Cong., 3rd Sess. 134 (1921) ("There can be no doubt . . . that when these Crown lands were ceded to and accepted by the United States, they were ceded and accepted free and clear of any trust whatever.") (statement of Hawaiian attorney general); *Liliuokalani v. United States*, 45 Ct. Cl. 418, 426-29 (1910) (Hawaiian law limited all interest in the Crown lands to the office of the monarch, and "[w]hen the office ceased to exist [in 1893] they became as other lands of the Sovereignty and passed to the [United States]" without encumbrance).

The Annexation Resolution provided that all revenues or proceeds of the ceded public lands (except for certain portions reserved for the United States) must "be used solely for the benefit of *the inhabitants of the Hawaiian Islands* for educational and other public purposes." 30 Stat. 750 (emphasis added). The Resolution thus did not impose any race-based restrictions on the use of the ceded public lands or the proceeds therefrom. At that time the population of Hawaii was racially diverse, with only 36.3 percent of the inhabitants identified as racial "Hawaiians" or "Part Hawaiians." *See* Robert C. Schmitt, *Demographic Statistics of Hawaii: 1778-1965* at 74 (1968) (census figures for 1896). The remaining population consisted primarily of individuals who were identified as Caucasian, Portuguese, Chinese, or Japanese. *Id.* at 62-63, 74; *see also* Romanzo Adams, *The Peoples Of Hawaii* 8-9 (1933).

In 1900, Congress formally established the Territory of Hawaii. Hawaiian Organic Act, ch. 339, § 2, 31 Stat. 141. The Organic Act confirmed that the public lands ceded to the United States would remain in the posses-

sion of the territorial government for public works and other public purposes. It also provided that "[a]ll funds arising from the sale or lease or other disposal of [the public] lands shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of *the inhabitants of the Territory of Hawaii* as are consistent with the [Annexation Resolution]." *Id.* § 73, 31 Stat. 155 (emphasis added). Thus, like the Annexation Resolution, the Organic Act provided for administration of the public lands proceeds in entirely race-neutral terms.

In 1921, Congress set aside one-ninth, approximately 200,000 acres, of the ceded public lands for use in a "homestead" leasing program aimed at "rehabilitating the Hawaiian race." H.R. Rep. No. 67-236, at 1 (1921); *see* Hawaiian Homes Commission Act (HHCA), 42 Stat. 108 (1921).[1] These so-called "available lands" were to be made available for long-term, nominal-price leases to "native Hawaiians," a group 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 § 201(7), 42 Stat. at 108. The "available lands" and their proceeds are controlled by the Department of Hawaiian Home Lands, not OHA (Haw. Rev. Stat. § 10-3), and therefore are not subject to the racial voting restriction for OHA board elections.

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[1] During hearings on the HHCA, the Attorney General of the Hawaiian territory, a proponent of the bill, reviewed the history of the crown lands and concluded: "[T]his proposed legislation can be sustained, if at all, not upon any theory that the Hawaiian people ever had any equitable right or title to these lands, but only upon the ... purpose of rehabilitating a race of people who, through circumstances, perhaps beyond their control, are in danger of extermination." *Hawaiian Homes Commission Act, 1920: Hearings on H.R. 13500 Before the Senate Comm. on Territories*, 66th Cong., 3rd Sess. 134.

Hawaii became a State in 1959. Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4. The Admission Act conveyed the ceded public lands (including the 200,000 acres of HHCA "available lands") to the new State of Hawaii, and provided that these public lands would be held by the State in trust for the "public" and would be "managed and disposed of for one or more" of five specified purposes: "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the [HHCA], [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use." *Id.* at § 5(f). Hawaii, however, was not required to undertake to achieve all—or any particular one—of these five purposes. *Id.*

From 1959 until the creation of OHA in 1978, the State administered the public lands (other than the "available lands" subject to the HHCA) for the benefit of all Hawaiian citizens, without regard to race. Most of the public lands proceeds were used for the support of public education. Pet. App. 5a; 80-8 Haw. Att'y Gen. Op., 1980 WL 26216 (July 8, 1980).

B. The Office Of Hawaiian Affairs

Hawaii's treatment of the public lands proceeds changed in 1978, with the creation of OHA. OHA is an agency of the State of Hawaii created to provide services to "[n]ative Hawaiian[s]" (*i.e.*, "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778") and "Hawaiian[s]" (*i.e.*, "any descendant[s] of the aboriginal peoples inhabiting the Hawaiian Islands ... in 1778, and which peoples thereafter have continued to reside in Hawaii"). Haw. Rev. Stat. § 10-2.

OHA offers a wide range of services to these two racially-defined classes, including identifying "physical,

sociological, psychological and economic needs," organizing and implementing programs to meet those needs, and interacting as a state agency with federal and private entities and with other state agencies. Haw. Rev. Stat. §§ 10-6, 10-4; *see also* OHA Annual Report, 1998 at 10-33 (describing broad range of OHA functions, including health and human services, education programs, housing assistance, and economic development).

Since 1978, the Hawaiian Constitution has required that OHA board members be "elected by qualified voters who are Hawaiians, as provided by law." Haw. Const. art. XII, § 5. OHA's implementing statute also provides that "[n]o person shall be eligible to register as a voter for the election of [OHA] board members unless the person . . . is Hawaiian." Haw. Rev. Stat. § 13D-3(b). In each case, the State has adopted legislation defining "Hawaiian" exclusively in racial terms: descendants of the races inhabiting the Hawaiian Islands prior to 1778. Haw. Rev. Stat. § 10-2; *see* Pet. App. 6a, 15a. Excluded from voting are the more than 85 percent of Hawaiian residents who are Asian, white, black, Hispanic, and other races. *See* United States Department of Commerce, Bureau of the Census, *1990 Census of Population, General Population Characteristics, Hawaii* Table 3 at 5 (1992).

OHA oversees two funds, each administered on racial grounds. The first is composed primarily of legislative appropriations from general tax revenues that are administered by OHA for both "native Hawaiians" and other racial "Hawaiians." *See* OHA Annual Report, 1993-94 at 5. For the last five years for which audited figures are available, legislative appropriations for OHA have totaled $17,735,147. L. 8 at 54, 56; L. 9 at 10; L. 10 at 10, 13 (OHA Financial Statements, 1993-1997).[2]

[2] Twelve copies of all documents with "L." cites have been lodged with the Office of the Clerk of the Court.

The second fund, which contains the bulk of OHA's assets, consists of 20 percent of the proceeds from the ceded public lands. *See* Haw. Rev. Stat. § 10-13.5. During the same five-year period, OHA received a total of $133,989,270 in proceeds from the public lands. L. 8 at 54, 56; L. 9 at 10; L. 10 at 10, 11 (OHA Financial Statements, 1993-1997). While OHA's annual appropriations from the Hawaiian legislature are expended on behalf of both "native Hawaiians" and "Hawaiians," the public lands receipts may be expended *only* for the benefit of "native Hawaiians." *See* 83-2 Haw. Att'y Gen. Op., 1983 WL 41853 (Apr. 15, 1983); L. 6 at 5 (OHA Annual Report, 1993-94) (setting forth OHA's policy of limiting beneficiaries to those with 50 percent or more "native blood" whenever a project is funded solely by public lands proceeds, but opening class of beneficiaries to everyone with any "native blood" if public lands proceeds are matched by funds appropriated by the state legislature or other sources).[3]

Within these race-defined parameters, OHA board members have broad discretion in administering these funds. *See* L. 6 at 5 (OHA Annual Report, 1993-94) ("Although OHA is technically part of the Hawai'i state government, it operates as a semi-autonomous entity. It is run by nine trustees, all Hawaiians elected by Hawaiians. Its operating budget is approved by the state legislature, but trustees have discretion over trust funds."). The amount of funds controlled by OHA is very substantial. As of the end of fiscal year 1997, for example, OHA controlled a total fund balance in excess of $238,000,000, most of which is held for the sole benefit

[3] According to OHA's figures, only approximately 39 percent of racially defined "Hawaiians" (80,953 out of 208,476) pass the 50 percent blood quantum requirement. L. 4 (*Native Hawaiian Data Book 1998*, Table 1.14).

of "native Hawaiians." L. 10 at 6 (OHA Financial Statement, 1996-97 at 10).

C. Hawaii's Denial Of Petitioner's Right To Vote

Petitioner, who was born in Hawaii and whose family has lived in Hawaii since before its annexation by the United States, does not satisfy the *racial* requirements for "native Hawaiian" or "Hawaiian" status. *See* Haw. Rev. Stat. §§ 10-2, 13D-3. In March 1996, he applied to vote in the August 1996 election for the OHA board. The registration form contained the following declaration: "I am also Hawaiian and desire to register to vote in OHA elections." L. 2; Pet. App. 6a-7a. Petitioner crossed off the phrase "am also Hawaiian and," and marked "yes" on the form.[4] Although petitioner meets all requirements for voting except the racial requirement, the State denied his application. *Id.* at 7a.

D. The Proceedings Below

1. Petitioner filed suit in the United States District Court for the District of Hawaii, contending that he had been denied his right to vote in elections for the OHA board because of his race, in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution. Pet. App. 9a, 19a. In his Second Amended Complaint, petitioner sought, *inter alia*, a declaratory

[4] It is undisputed that the reference to "Hawaiian" on this registration form did not encompass all Hawaiian citizens, but was instead limited to racial "Hawaiians." *See* L. 2. Hawaii has since amended the form to make the race requirement even more explicit. L. 3. The forms also require a sworn declaration of the registrant's race, made under the threat of criminal penalties. L. 2, 3; Haw. Rev. Stat § 19-3.5 ("Any person who knowingly votes when the person is not entitled to vote" or "knowingly takes an oath . . . authorized by law and willfully makes any false statement of fact" "shall be guilty of a class C felony" punishable by up to 5 years imprisonment and a $10,000 fine).

judgment that the race-based voting qualification violated the Fourteenth and Fifteenth Amendments, and an injunction barring respondent and all his "officers, agents, employees, attorneys and all those in active concert or participation with him from conducting any election in which the franchise is qualified by race." Second Amended Complaint, p. 8.

On May 6, 1997, the district court entered summary judgment against petitioner. Pet. App. 19a-43a. The court held that because the United States and the State of Hawaii had undertaken a "special relationship" with the descendants of the races that inhabited Hawaii before 1778, the State's restriction on the franchise to individuals with "Hawaiian blood" was merely a "political" distinction, subject only to rational basis review. The court further held that the OHA voting limitation was rationally related to fulfilling Hawaii's "trust responsibility" to racial "Hawaiians," and that the OHA election was a "special purpose" election within the meaning of *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

2. The court of appeals affirmed. Pet. App. 1a-18a. Although the court held that "the Hawaiian Constitution and Haw. Rev. Stat. § 13D-3 contain a racial classification on their face" and that the voting restriction was "clearly racial" (Pet. App. 11a, 15a), it nonetheless rejected petitioner's Fifteenth Amendment claim, concluding that OHA board elections are "special purpose" elections under *Salyer* and therefore are not "general election[s] for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis." *Id.* at 12a, 15a.

The court also held that under *Morton v. Mancari*, 417 U.S. 535 (1974), the race-based voting restriction was primarily "political" and therefore subject only to rational basis review. According to the Court, "the special treatment of Hawaiians and native Hawaiians" involved the "establishment of trusts for their benefit . . .

similar to the special treatment of Indians . . . approved in . . . *Mancari*." *Id.* at 13a-14a.

Applying rational basis review, the court asserted that it is "rational" for the State to prohibit non-racial "Hawaiians" from voting in elections for the OHA board "in light of its trust responsibilities for Hawaiians and native Hawaiians." Pet. App. 17a. In the alternative, the court held that Hawaii's racial voting restriction would survive strict scrutiny because Hawaii has a "compelling" interest in "honor[ing] the trust," and because "the restriction on voter eligibility is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.'" *Id.*

The court justified these conclusions by holding that because petitioner's challenge focused on the denial of his right to vote and was not an across-the-board challenge to the existence of OHA or Hawaii's 1978 racial set-aside of public lands proceeds for "native Hawaiians," those programs "must" be conclusively presumed to be both constitutional and of the utmost importance. Pet. App. 9a. The court thus restated the issue before it as whether elections for OHA's board can legitimately be limited to the beneficiaries of the "trust." In this way, the court purported to transform what it had initially recognized to be a "clearly racial" voting restriction into a classification that is "not primarily racial, but legal or political." *Id.* at 10a.

SUMMARY OF ARGUMENT

Hawaii's racially discriminatory election laws are a direct, open, and undisguised affront to the Fifteenth Amendment. That Amendment—which uncompromisingly declares that the "right of citizens . . . to vote shall not be denied or abridged by the United States or by any State on account of race"—precludes all facially racial voting restrictions. In 1978, Hawaii chose to ignore that

clear prohibition by expressly depriving all racial groups except racial "Hawaiians" of the right to vote in statewide elections for the governing board of OHA, a state agency that annually expends millions of dollars of public funds. No more obvious violation of the Fifteenth Amendment is possible, and there is no construction of the OHA election laws that can cleanse them of their unconstitutional racial content. The Fifteenth Amendment commands that they be struck down.

The court of appeals' holding that the OHA board elections are exempt from review under the Fifteenth Amendment is irreconcilable with this Court's precedents. The court's reliance on the "special purpose" election exception to the Fourteenth Amendment's one-person-one-vote rule announced in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), is entirely misplaced. There is no support for applying *Salyer*—a case that involved neither the Fifteenth Amendment nor race-based classifications—to a case that involves both. The plain terms of the Fifteenth Amendment demonstrate that its prohibition on racial voting restrictions "includes any election in which public issues are decided or public officials selected" (*Terry v. Adams*, 345 U.S. 461, 468 (1953)), a category that plainly encompasses elections for the OHA board.

The OHA racial election laws fare no better under the Fourteenth Amendment. As with its reliance on *Salyer*, the court of appeals' use of *Morton v. Mancari*, 417 U.S. 535 (1974), to shield those laws from strict scrutiny under the Fourteenth Amendment is patently wrong. *Mancari* is predicated upon a constitutionally derived "special relationship" that this Court has expressly limited to federally recognized Indian Tribes, and permits only classifications based on *tribal membership*, not classifications based upon *race*. As respondent has asserted (Opp. 18) and the court of appeals has acknowledged (Pet. App. 14a), the racial "Hawaiians" to whom OHA elections are restricted are not members of a

federally recognized Indian Tribe, and the classification here is racial, not tribal. *Mancari* does not apply.

Strict scrutiny reveals that the State's two purportedly compelling interests in electoral discrimination—honoring the "trust" created by Section 5(f) of the Admission Act, and ensuring adherence to fiduciary principles by the OHA board—are woefully inadequate. There is no record evidence that racial "Hawaiians" suffer the present effects of past or present race discrimination—the only basis for upholding a racial classification recognized by this Court. Nor is there any support in the Constitution or this Court's jurisprudence for the Ninth Circuit's assumption that the mere existence of the OHA laws purporting to define the "trust" in racial terms is sufficient to justify racially discriminatory voting laws. Moreover, neither Section 5(f) nor the overall OHA scheme creates any need whatsoever for raced-based elections, and race is irrelevant to the performance of any fiduciary duties associated with the "trust." In any event, race discrimination at the polls is not narrowly tailored to achieve the proffered interests, especially in light of the ease with which Hawaii administered the "trust" on a race-neutral basis for almost two decades.

The Ninth Circuit also erred in purporting to seal off from judicial scrutiny the racial classification at issue here by announcing the hitherto unknown proposition that when a challenged law shares a constitutionally suspect attribute with an unchallenged (and therefore presumptively constitutional) law, the challenged law becomes constitutional as well. This sweeping new concept is fatally inconsistent with the doctrine of strict scrutiny and with this Court's settled jurisprudence. Moreover, the court of appeals' theory is irrelevant to this case because such presumptions have no place in Fifteenth Amendment analysis, and because even if the laws establishing the OHA "trust" were presumed constitutional, they could not justify the State's imposition of a race-based voting scheme.

Hawaii's patently race-based denial of the right to vote is the most egregious violation of the Fifteenth Amendment to reach this Court in many decades. The Ninth Circuit's rewriting of this Court's voting rights and equal protection jurisprudence to uphold Hawaii's racial discrimination would lead to the approval of all manner of racially discriminatory laws and amounts to an abdication of meaningful judicial review. The judgment of the court of appeals should be reversed.

ARGUMENT

I. HAWAII'S RACIAL VOTING RESTRICTION VIOLATES THE FIFTEENTH AMENDMENT

The Fifteenth Amendment's command is clear and absolute, and allows for no exceptions or excuses: "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." U.S. Const. amend. XV, § 1.

Despite the plain terms of the Fifteenth Amendment and more than a century of this Court's jurisprudence, the State of Hawaii has imposed a stark race-based restriction on the right to vote in statewide elections for officials who distribute public funds. Indeed, Hawaii goes so far as to require potential voters to certify under penalty of perjury that they satisfy the State's racial blood test for OHA elections. *See* L. 2, 3; Haw. Rev. Stat § 19-3.5. This flagrant racial discrimination in the voting booth plainly violates the Fifteenth Amendment's guarantee of race-neutral voting laws and is patently offensive to two of the most important principles announced by our Constitution and by the decisions of this Court: that the fundamental right to participate fully and equally in elections for public officials may not be abridged by racial classifications, and that government-sponsored racial discrimination is inherently suspect and will not be tolerated.

The Ninth Circuit nevertheless held that Hawaii's facially race-based voting restriction is exempt from the express commands of the Fifteenth Amendment. In reaching that conclusion, the court relied on the "special purpose" election exception to the *Fourteenth* Amendment's one-person-one-vote rule this Court recognized in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973)—a case involving neither race-based voting restrictions nor the Fifteenth Amendment. The Ninth Circuit also held that the racial definitions of "Hawaiian" and "native Hawaiian" are mere "political" classifications. Neither of these propositions withstands analysis.

A. The Fifteenth Amendment Bans All Racial Restrictions On The Right To Vote

As the text of the Fifteenth Amendment makes clear, it prohibits *all* race-based restrictions on the right to vote for public officials. Thus, in *United States v. Reese*, 92 U.S. 214, 218 (1875), this Court declared that the Amendment grants all citizens a constitutional "exemption from discrimination in the exercise of the elective franchise on account of race." *See also United States v. Cruikshank*, 92 U.S. 542, 555-56 (1875) ("exemption from discrimination in the exercise of [the right to vote] on account of race" is "a necessary attribute of national citizenship"); *Terry v. Adams*, 345 U.S. 461, 467 (1953) ("The [Fifteenth] Amendment bans racial discrimination in voting by both state and nation.").

This Court has repeatedly reaffirmed the Fifteenth Amendment's simple and absolute ban on racially discriminatory election laws, even in the face of complex state mechanisms subtly crafted to avoid the Amendment's guarantee. In *Guinn v. United States*, 238 U.S. 347, 360-63 (1915), for example, the Court invalidated an Oklahoma statute that imposed a literacy requirement on voters but contained a "grandfather clause" applicable to individuals and their lineal descendants entitled to vote "on [or prior to] January 1, 1866," a date prior to

the passage of the Fifteenth Amendment. Despite the fact that the grandfather clause contained no express racial limitation, the Court readily concluded that the statute was an impermissible attempt to evade the Amendment's requirements. To dispute that the restriction was a race-based limitation on voting rights would be to "declare that the Fifteenth Amendment['s] ... provisions were wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the prohibitions of the Amendment." *Id.* at 363-64; *accord Myers v. Anderson*, 238 U.S. 368 (1915) (striking down Maryland's grandfather clause).

In *Smith v. Allwright*, 321 U.S. 649 (1944), the Court rejected another attempt to circumvent the requirements of the Fifteenth Amendment. In that case, the Court considered Texas's "white primary" system, which limited voting in primary elections to members of political parties whose membership requirements were set entirely by the "central committees" of each party. Recognizing this scheme as an attempt to achieve discriminatory ends by leaving the actual discrimination to "private" actors, the Court invalidated the primary system under the Fifteenth Amendment. Because "[t]he United States is a constitutional democracy," declared the Court, "[i]ts organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race." 321 U.S. at 664. The vital right to vote "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." *Id.*

Similarly, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), this Court flatly rejected the State of Alabama's attempt to gerrymander its voting districts so as to create a racially "pure" voting block. The State had redrawn the boundaries of the City of Tuskegee into a "strangely

irregular" and "uncouth twenty-eight sided figure" that excluded nearly all black voters from the city's elections. *Id.* at 340, 341. Although the district redefinition was not written in expressly racial terms, the Court observed that "[t]he result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections." *Id.* at 341. Thus, Alabama's indirect attempt to exclude one race of voters from particular elections violated the Fifteenth Amendment, which "nullifies sophisticated as well as simple-minded modes of discrimination." *Id.* at 342 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

In contrast to the purportedly race-neutral grandfather clauses, white primaries, and gerrymanders invalidated in the foregoing cases, the OHA voting restriction is startlingly "simple-minded." Hawaii closes its election booth to anyone who fails its racial test.

Contrary to the court of appeals' conclusion, moreover, Hawaii's racial restriction cannot be defended on the ground that it merely limits the franchise to "those who are interested parties." Pet. App. 17a. That rationale would just as easily have excused the gerrymander struck down in *Gomillion*. The Court explained that that argument "would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." 364 U.S. at 345 (citation and internal quotation marks omitted). Hawaii's racially restrictive voting scheme, though more blatant, is analogous to the racial gerrymander at issue in *Gomillion*: Both constitute attempts to achieve a "racially pure" voting bloc justified on the ground that the right to vote has merely been limited to those "primarily affected" by the decisions of the elected officials.

The State asserts that as long as it can present itself as motivated by a sincere desire to protect or benefit the racial group in question, it is perfectly free to discriminate on the basis of race, even to the extent of sorting citizens according to the racial content of their "blood" and limiting the elections in which those citizens are permitted to vote on the basis of race. Opp. 1, 29 n.12. But the Fifteenth Amendment plainly prohibits such discriminatory electoral practices, and whether Hawaii restricts the franchise for the purpose of benefiting the preferred race or of injuring one or more of the excluded races is irrelevant. *Cf. Shaw v. Reno,* 509 U.S. 630, 642 (1993) ("No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."); *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (same). Hawaii's denial of the right to vote to all citizens other than racial "Hawaiians" is a clear violation of the Fifteenth Amendment.

B. The "Special Purpose Election" Exception Recognized In *Salyer* Does Not Apply To This Case

The Ninth Circuit held that Hawaii's racial voting restriction is exempt from the requirements of the Fifteenth Amendment on the basis of this Court's Fourteenth Amendment decision in *Salyer*, 410 U.S. 719. That conclusion is wrong.

In *Salyer*, this Court held that an election for a governmental body that serves a "special limited purpose" and whose decisions "disproportionate[ly] [a]ffect" a limited group of landowners may be confined to that group of landowners without violating the one-person-one-vote mandate of the *Fourteenth* Amendment. *Id.* at 728; *see also Ball v. James*, 451 U.S. 355 (1981). *Salyer* says nothing about the Fifteenth Amendment, and contains no suggestion that the "limited purpose" election doctrine has any application to race-based election laws.

The court of appeals held that OHA's mandate to deliver governmental services to racial "Hawaiians" satisfies the "special limited purpose" prong of *Salyer*, and that the effects of OHA's services are sufficiently focused on those individuals to satisfy the "disproportionate effect" prong. Pet. App. 12a-13a, 15a-16a. Thus, although the court below "recognize[d] that the [OHA] qualification has to do with race instead of ownership of land, as in *Salyer*," it nonetheless relied on *Salyer* in concluding that an OHA election "isn't a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis." *Id.* at 13a, 15a.

The court of appeals' analysis would create an infinitely elastic loophole in the Fifteenth Amendment's prohibition of racially discriminatory voting laws. So long as an official exercises something that can be characterized as "limited" governmental authority and serves only a racially identifiable subset of the population, the reasoning applied by Ninth Circuit would condone a wide variety of racial restrictions on the right to vote. Any reading of the Fifteenth Amendment that would render it so "susceptible of being rendered inapplicable by mere forms of expression" must be rejected. *Guinn*, 238 U.S. at 363-64.[5]

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[5] In this regard, the OHA voting restriction is similar to the "white primary" scheme struck down in *Smith*, 321 U.S. at 662-63. There, as here, the State attempted to shift important governmental functions to an institution that, under the State's theory, would be insulated from the Fifteenth Amendment's strict prohibition of race-based election laws. This Court's response in *Smith* is equally applicable here: The Fifteenth Amendment "is not to be nullified by a state through casting its electoral process in a form which permits . . . racial discrimination in the election. *Constitutional rights would be of little value if they could be thus indirectly denied.*" *Id.* at 664 (emphasis added).

As this Court repeatedly has held, moreover, the plain terms of the Fifteenth Amendment demonstrate that its prohibition against race-based election laws "*includes any election in which public issues are decided or public officials selected.*" *Terry*, 345 U.S. at 468 (emphasis added). Thus, in *Gray v. Sanders*, 372 U.S. 368 (1963), a case involving primary elections, the Court held that "[t]he concept of political equality in the voting booth contained in the Fifteenth Amendment *extends to all phases of state elections.*" *Id.* at 380 (emphasis added); *accord Smith*, 321 U.S. at 657 ("[T]he Fifteenth Amendment specifically interdicts *any denial* or abridgment by a state of the right of citizens to vote on account of color.") (emphasis added); *Guinn*, 238 U.S. at 362-63 (Fifteenth Amendment's restriction on race-based election laws "is coincident with the power [of States to govern voting] and prevents its exertion in disregard to the command of the Amendment").[6]

Prior to the rulings by the courts below, *no* court had held that the *Salyer* exception to the *Fourteenth*

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[6] This understanding of the Amendment's scope is also confirmed by judicial interpretations of Section 2 of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965). In *Chisom v. Roemer*, 501 U.S. 380 (1991), this Court declared that Section 2 as originally enacted "was unquestionably coextensive with the coverage provided by the Fifteenth Amendment," and "protected the right to vote . . . *without making any distinctions or imposing any limitations as to which elections would fall within its purview.*" 501 U.S. at 392 (emphasis added); *accord City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (Stewart, J.). The Court in *Chisom* quoted with approval the statement of Attorney General Katzenbach that "'[e]very election in which registered electors are permitted to vote would be covered' under § 2." 501 U.S. at 392. (quoting *H.R. 6400 and Other Proposals To Enforce the Fifteenth Amendment to the Constitution of the United States: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 21 (1965)).

Amendment's one-person-one-vote rule applied to the *Fifteenth* Amendment's ban on race-based election laws, or indeed to *any* race-based voting scheme. To the contrary, in *Quinn v. Millsap*, 491 U.S. 95, 106 (1989), this Court rejected a broad interpretation of the *Salyer* exception precisely because it "would render the Equal Protection Clause inapplicable even to a requirement that all members of the [limited government] board be white males." Such a result, and any reasoning leading to it, this Court concluded, would be "obviously untenable." *Id.* Yet that is precisely the type of "obviously untenable" requirement that Hawaii has imposed here.

In any event, even if *Salyer*'s narrow land-use exception were somehow deemed applicable to an explicit racial classification, OHA could not qualify as a "special limited purpose" governmental body. First, *Salyer* requires that the activities of the governmental body "disproportionately affect" the limited class of citizens granted the right to vote for its officials. This "disproportionate effect" prong requires, at a minimum, that the costs of those activities be borne disproportionately by those granted the right to vote. Thus, critical to the result in *Salyer* was the fact that "there is no way that the economic burdens of district operations can fall on residents *qua* residents" (410 U.S. at 729), and the Court distinguished and expressed disapproval of lopsided voting schemes in which "those persons excluded from voting . . . contributed both directly through local taxes and indirectly through increased rents." *Id.* at 727.

The *Salyer* exception, therefore, cannot be applied to OHA, a state agency that expends substantial funds drawn from taxes paid by *all* citizens of Hawaii without regard to race. *See, e.g.*, 1997 Haw. Sess. L., Act 240 (appropriating millions of dollars of general tax proceeds to OHA for fiscal years 1997-1999). Moreover, because OHA elections select state officials to manage and spend both legislative appropriations and public lands proceeds, it is axiomatic that all Hawaiian citizens, regardless of race, have a legitimate interest in the proper management of those funds. That is particularly true here, where the majority of OHA funds are subject to a "public trust." Admission Act, § 5(f). By definition, the entire "public" has an interest in how "public trust" proceeds are administered by state officials, regardless of who actually receives the expenditures.[7] In addition, *all* Hawaiian citizens are affected by how those funds are administered. Therefore, *all* voters in the State have a constitutional right to vote in any election that selects officials to administer those funds. *See Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626-33 (1969) (childless citizens who do not pay taxes are nevertheless interested in matters affecting public education, and cannot be denied the right to vote in school board elections).

In addition, OHA's broad mandate and extensive services make it a far cry from the simple water storage district this Court addressed in *Salyer*. The record shows that OHA is a "semi-autonomous" branch of state government that exercises sweeping discretion over large amounts of public funds and "can set the policies for the office separate from those established within the parameters of state government." J.A. 21-22. For this reason, OHA has proclaimed itself "an agency, a trust, and a government all rolled into one." *Id.* at 19.

Indeed, OHA's "broad purpose" encompasses a "lengthy" catalog of "programs and services," including student scholarships, business loans, housing assistance,

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[7] Ironically, the legislature of Hawaii itself recognized this fact in enacting the OHA laws: "[t]he requirement that the ultimate accountability for the [§ 5(f)] trust must be to *all the people of the State*—albeit that the beneficiaries of a portion of that trust res may consist of only one segment or category from among all of the varied peoples of Hawaii—is obvious by the language imposing the trust." Conf. Comm. Rep. No. 77, in 1979 Sen. J., at 998 (emphasis added).

health programs, and cultural activities for racial "Hawaiians." J.A. 29. OHA incorporates, among other things, an education division that "help[s] establish an educational system which empowers Hawaiians" and "develop[s] model educational programs" for Hawaiian students; a health and human services division that "support[s] the development of and/or expansion of services that promote the health and well being of OHA beneficiaries"; and an economic development division that "increase[s] economic self-sufficiency within the Hawaiian community and . . . provide[s] better economic opportunities" to Hawaiians. L. 10 at 2-3. Nothing in *Salyer* or its progeny suggests that the exception created by that case applies to such an important and comprehensive organ of state government.

C. Hawaii's Voting Restriction Is Not A Political Classification

Despite acknowledging that Hawaii's election laws "contain a racial classification on their face" and are "clearly racial," the Ninth Circuit ultimately treated this race restriction as if it were a race-neutral political classification. Pet. App. 11a-16a. Similarly, respondent repeatedly characterizes the racial restriction on voting as merely a "political" classification aimed at promoting the goal of self-governance by granting a race-exclusive franchise to "those people (and their descendants) who were subjects of a formerly independent sovereign nation." Opp. 24. These political "sovereignty" arguments are flatly incompatible with the constitutional text and are historically inaccurate.

The State's definitions of "native Hawaiian" and "Hawaiian" contain racial classifications on their face. In the case of "native Hawaiian," the relevant statute defines this group *expressly* in racial terms: "descendant[s] of not less than one-half part of the *races* inhabiting the Hawaiian Islands previous to 1778." Haw. Rev. Stat. § 10-2 (emphasis added). The State's definition of "Hawaiian" substitutes the word "peoples"

for "races" (Haw. Rev. Stat. §§ 10-2, 13D-3), but the terms are equally race-based. In fact, the Hawaiian legislature made clear that the change was purely for aesthetic purposes and that the term "peoples" should be interpreted strictly on racial grounds. Conf. Comm. Rep. No. 77, in 1979 Sen. J., at 998 ("The definitions of 'native Hawaiian' and 'Hawaiian' are changed to substitute 'peoples' for 'races.' *Your Committee wishes to stress that this change is non-substantive, and that 'peoples' does mean 'races.'*") (emphasis added).

In creating OHA and limiting the right to elect the OHA board to racial "Hawaiians," Hawaii's legislature specifically listed as one of its primary purposes "the protection and preservation of the Hawaiian *race*." Comm. of the Whole Rep. No. 13, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978: Journal and Documents, at 1018 (1980) (emphasis added); *see also* J.A. 52. It further declared that the OHA laws constitute "imaginative affirmative action programs" designed to "better" the "long neglected" Hawaiian race and "to aid their establishment of ethnic identity." Conf. Comm. Rep. No. 77, in 1979 Sen. J., at 998; Stand. Comm. Rep. No. 784, in 1979 Sen. J., at 1351. Similarly, the records from the debates on the OHA legislation refer repeatedly to all non-"Hawaiian" races as "foreigners" and even "foreign invaders." J.A. 58-59.

As these legislative materials reveal with disturbing clarity, the classifications of "Hawaiian" and "native Hawaiian" are suffused with condescending and paternalistic racism. Whatever else may be said about preserving or promoting racial identities, it plainly is *not* a permissible subject of state action. *Cf. Loving v. Virginia*, 388 U.S. 1, 7 (1967) (rejecting Virginia's purported interests in "preserv[ing] the racial integrity of its citizens," preventing "a mongrel breed of citizens," and "the obliteration of racial pride") (citation omitted). That is particularly true where, as here, the mechanism

for achieving these offensive racial goals includes erecting racial barriers to the ballot box.[8]

That Hawaii's racial classifications make 1778 the only relevant date for determining class membership belies the State's claim that "sovereignty," as opposed to race, is their hallmark. Opp. 24. The government of the Kingdom of Hawaii did not lose its sovereign power until 1893, *a full 115 years after* the defining date for membership in the racial class. Indeed, the Kingdom of Hawaii *did not even exist* in 1778; the conquests of Kamehameha I did not result in a unified Kingdom of Hawaii until 1810. Thus, the year 1778 has no special relevance to claims of "native Hawaiian" sovereignty.

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[8] As was the case with Virginia's unconstitutional miscegenation laws—the centerpiece of which was entitled "An Act to Preserve Racial Integrity"—Hawaii's purported goal of "protect[ing]" and "preserv[ing]" racial identity is limited to only one race. *See Loving*, 388 U.S. at 11 & n.11 (fact that miscegenation laws punished only interracial marriages involving "white persons" demonstrated illegitimate purpose of preserving power of one race over others). In addition, as Virginia did with applicants for marriage certificates, Hawaii requires potential voters to attest to their racial identity and maintains records regarding the race of its citizens for use by state officials in administering the State's program of racial "preservation." *Compare id.* at 6-7 (Virginia officials maintained "certificates of 'racial composition'" and issued marriage certificates only after they were "satisfied that the applicants' statements as to their race are correct") (citation omitted), *with* L. 2, 3 (voter registration forms requiring attestation of "Hawaiian" racial identity), *and* L. 5 at 1 (*Native Hawaiian Data Book 1998*, Appendix) (State health survey "examines the ethnic background of the parents of each individual and bases its racial designation on the racial composition of his/her parents," rather than relying on self-identification method used by U.S. Census); *see also* L. 1 at 1, 2, 6, 9-27 ("Hawaiian Ancestry Enrollment Form" used by OHA to track individuals' "Percentage of Hawaiian Blood," maintain racial "registry," and enroll "card-carrying Hawaiian[s]" to receive "special group benefits").

In fact, the only possible relevance of 1778 is that it marks the last days of what might be characterized as the era of relative "racial purity" in the Hawaiian Islands. The Kingdom of Hawaii was itself established in no small part due to the aid given to Kamehameha by dozens of "westerners" whom Kamehameha rewarded by making them high-ranking chiefs and advisors in his government. Ralph S. Kuykendall, *The Hawaiian Kingdom 1778-1854: Foundation and Transformation* 25-29 (1938). Thus, in contrast to the State of Hawaii's race-based voting scheme, the Kingdom of Hawaii was not "racially pure" even at its inception.[9]

When the Kingdom of Hawaii ended in 1893—the only relevant date if "sovereignty" concerns were really driving the State's voting restriction—the inhabitants of the Hawaiian Islands who were descended from the pre-1778 inhabitants constituted less than half of the population. Schmitt, *supra*, at 74 (estimating 1890 population

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[9] Indeed, it was not "racially pure" even before 1778. As the Hawaii legislature's conference committee on the 1979 OHA laws stated,

> [T]here were cross-migrations of people between Hawaii and the South Pacific island groups previous to 1778, so that persons of those island groups may conceivably have a basis to claim having 'descended from races inhabiting the Hawaiian Islands previous to 1778.' In that connection, it is also conceivable that persons descended from any race which may have been shipwrecked on Hawaii before 1778 could similarly claim that distinction.

Stand. Comm. Rep. No. 784, in 1979 Sen. J., at 1353. In order to solve these "cross-migration" and "shipwrecked sailor" problems and ensure racial purity under OHA, the legislature revised the definition of "Hawaiian" by limiting it to "'descendants of the aboriginal races of people *which exercised sovereignty* and subsisted in the Hawaiian Islands in 1778 *and which races continued to reside there*.'" *Id.* at 1353-55 (emphasis added); Haw. Rev. Stat. § 10-2.

was 45.2 percent full- and partial-blooded "Hawaiian" and 54.9 percent "Non-Hawaiian" or "foreign"); *Hawaiian Annual 1897* at 11, 13 (Thos. G. Thrum ed., 1897) (listing the total population of the Hawaiian Islands in 1890 as 89,990, with full- and partial-blooded "Hawaiians" accounting for only 40,622); *see also* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 550 (1996). In this regard, the 1778 date is analogous to the grandfather clause struck down in *Guinn*. *See* 238 U.S. at 365 (finding no "peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless [avoiding] the Fifteenth Amendment was in view").

Moreover, with the notable exception of most Asian immigrants, many of the residents of the Kingdom of Hawaii who lacked what respondent calls "native blood" (Opp. 20) were full citizens of the Kingdom, and even more enjoyed substantial political rights (including the right to vote) as subjects and denizens. From the time of Kamehameha I and the establishment of the Kingdom of Hawaii, "foreigners," and in particular Americans and Europeans, held positions of considerable authority in the government (*see* Kuykendall, *supra*, at 25-29) and beginning in the 1840s a formal procedure was established by which they could, and did, become fully naturalized citizens of the Kingdom by taking an "oath of allegiance." *See, e.g.*, The First Laws of the Hawaiian Islands, ch. X (IX) (1842), *reprinted in The Fundamental Law of Hawaii* 48 (Lorrin A. Thurston ed., 1904). "A considerable number of . . . foreigners became naturalized." Kuykendall, *supra*, at 240, 230-38. And in 1887, the franchise was extended to "[e]very male resident of the Hawaiian Islands, of Hawaiian, American or

European birth or descent." Constitution of 1887, art. 59, *reprinted in Fundamental Law* at 189.[10]

Thus, the Kingdom of Hawaii was consciously multiracial. To the extent the OHA voting scheme promotes "sovereignty," therefore, it does so only for a *subset* of "those people (and their descendants) who were subjects of a formerly independent sovereign nation" (Opp. 24), *a subset defined exclusively along racial lines*. Indeed, as the record below reflects, *petitioner himself* is a descendant of subjects of the Kingdom of Hawaii. Pet. App. 6a, 20a. The fact that he nonetheless is excluded from voting belies any attempt to clothe Hawaii's racial gerrymander in the race-neutral garb of "sovereignty."

Finally, the patently racial nature of the voting restriction at issue here is further confirmed by respondent's arguments in this Court. Respondent's brief in opposition made no effort to challenge the Ninth Circuit's conclusion that the challenged voting restriction is facially racial. Moreover, respondent defends the OHA restriction on the repugnant racial ground that States can appropriately use one racial subgroup of citizens as a "prox[y]" for another, so long as they share some of the same racial "blood." Opp. 20, 25. And respondent boldly contends that race-based state action is justified to protect pure "native blood" from dilution. *Id.* 6, 20 & n.10. These undisguised rationalizations of discrimination on the basis of race foreclose any claim that the laws at issue here are race-neutral in purpose or effect.[11]

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[10] In a partial foreshadowing of current Hawaii law, the Constitution of 1887 disenfranchised all citizens of other racial backgrounds (most of whom were Asian), even those who were naturalized citizens of the Kingdom. Ralph S. Kuykendall, *The Hawaiian Kingdom 1874-1893: The Kalakaua Dynasty* 406-07 & n.* (1967).

[11] Respondent's attempts to justify the State's race-based voting laws are disturbingly reminiscent of the "Blood Protection"

II. HAWAII'S RACIAL VOTING SCHEME VIOLATES THE FOURTEENTH AMENDMENT

Hawaii's racial voting restriction also violates the Equal Protection Clause of the Fourteenth Amendment. That Clause requires strict judicial scrutiny of all state-sponsored racial classifications, and invalidates those that are not narrowly tailored to achieve a compelling state interest. *Hunt v. Cromartie*, No. 98-85, slip op. at 4 (U.S. May 17, 1999); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 496-97 (1989). Such classifications are "immediately" and "inherently" suspect (*Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citation omitted)), because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Where, as here, race discrimination is apparent on the face of the statute, "[n]o inquiry into legislative purpose is necessary." *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

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and "Citizenship" laws adopted as part of the infamous Nuremberg Laws. Just as OHA's voting restriction requires definitions of "native Hawaiian" and "Hawaiian" according to blood quantum and the race of one's ancestors, the Nuremberg laws restricted the right to vote of persons with "Jewish blood," and contained detailed definitions of "Jew" and "mixed Jewish blood." *See* 1 *The Holocaust: Legalizing the Holocaust, The Early Phase, 1933-1939* at 23, 24, 31-32 (John Mendelsohn & Donald S. Detwiler eds., 1982); *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) (quoting Nuremburg laws); *cf. Loving*, 388 U.S. at 5 n.4 (Virginia miscegenation laws defined "white persons" as persons who have "no trace whatever of any blood other than Caucasian," and "colored persons" as "[e]very person in whom there is ascertainable any Negro blood"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) ("Other examples are available. *See* Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985)."). These notions—that individuals should be judged by their "Hawaiian blood," "Jewish blood," "Negro blood," and the like—are the inevitable consequences of respondent's approach, and are entirely alien to our Constitution. "*Indeed, the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals.*" *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting) (emphasis added).

Despite an abundance of compelling precedents, the court of appeals found strict scrutiny inapplicable, and instead applied the deferential "rational basis" test on the erroneous assumptions that OHA's racially defined electorate can be treated as if it were a federally recognized Indian Tribe, and that elections for the powerful, taxpayer-funded OHA board can be treated like elections for tribal officials. The court also went on to hold in the alternative that Hawaii's race-based OHA election laws withstand strict scrutiny. But Hawaii's racial classification lacks a compelling justification and narrow tailoring, both of which are necessary to save this exercise in segregation at the ballot box from invalidation under the Fourteenth Amendment.

A. Hawaii's Racially Segregated Voting Scheme Is Not Narrowly Tailored To Achieve A Compelling State Interest

"[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227. Such classifications must be invalidated unless the government meets its heavy burden of proving that "they are narrowly tailored measures that further compelling governmental interests." *Id.* at 224, 227; *Croson*, 488 U.S. at 493-94. Hawaii's racial election laws fail both elements of the strict scrutiny test.

"'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.'" *Shaw v. Reno*, 509 U.S. at 643-44 (citation omitted). "[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and the spirit of the Constitution's guarantee of equal protection." *Adarand*, 515 U.S. at 229-30. Thus, a government may impose racial classifications only as a "last resort." *Croson*, 488 U.S. at 519 (Kennedy, J.). An interest is "compelling" only when it rests on a "strong basis in evidence" that government action favoring one race over another is both "necessary" and "legitimate." *Croson*, 488 U.S. at 493, 500; *Adarand*, 515 U.S. at 226, 228, 236. Similarly, a classification is "narrowly tailored" only when a government has no other choice—when it legitimately has attempted or considered alternative means and determined that they do not or cannot succeed (*Croson*, 488 U.S. at 507, citing *Fullilove*, 488 U.S. at 463-67; *id.* at 511 (Powell, J.))—and only when the chosen classification also minimizes any encroachment on the constitutional rights of other citizens (*Croson*, 488 U.S. at 510-11) and maintains "'the most exact connection between justification and classification.'" *Adarand*, 515 U.S. at 236 (quoting *Fullilove*, 488 U.S. at 537 (Stevens, J., dissenting)).

1. There is no compelling state interest that justifies Hawaii's race discrimination in elections for the OHA board. The *only* interest that this Court has found sufficiently compelling to justify race-based laws is the need to remedy present discrimination or the present effects of past discrimination. *Adarand*, 515 U.S. at 222; *Croson*, 488 U.S. at 493, 500; *see also Fullilove*, 448 U.S. at 539 (Stevens, J., dissenting) ("[I]f there is no duty to measure the recovery by the wrong . . . our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members."). Nothing in the record demonstrates—nor has respondent even alleged—the existence of any past or present discrimination against racial "Hawaiians." Indeed, the only evidence of discrimination on this record is Hawaii's 21-year history of discrimination against Asian, white, black, Hispanic, and other citizens of Hawaii who lack the requisite "native blood." The absence of any evidence of discrimination against racial "Hawaiians" in which the State was a participant is sufficient in itself to show that Hawaii's racial voting scheme cannot survive strict scrutiny. *Croson*, 488 U.S. at 491-92, 505-06. Indeed, the notion that Hawaii could decide in 1978 to favor a class of individuals simply because they had some blood relationship, however slight, with inhabitants of the Islands two hundred years earlier, and at the same time disfavor every other Hawaiian citizen who lacks the preferred racial makeup, is wholly irreconcilable with this Court's Fourteenth Amendment cases.

The court of appeals identified two non-remedial interests that it viewed as sufficiently compelling to justify Hawaii's racial classification in voting: (1) the responsibility to honor the "trust" created by Section 5(f) of the Admission Act, and (2) the "perceived value" that a board "'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.'" Pet. App. 17a. Neither of these open-ended and generalized interests is sufficient to justify Hawaii's use of a racial classification under this Court's equal protection jurisprudence.

This Court has never held that a legislatively declared "trust" relationship suffices to justify racial discrimination in voting, and neither respondent nor the Ninth Circuit has identified any persuasive rationale for creating such a novel and potentially far-reaching exception to the dictates of the Equal Protection Clause. Particularly in this case, where the "trust" beneficiaries are themselves defined by race, *a fortiori* government

does not have a "compelling interest" in using race-based voting restrictions in order to extend a classification that is itself constitutionally suspect. *Cf. Croson*, 488 U.S. at 496 ("The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was 'discrimination for its own sake,' forbidden by the Constitution.") (O'Connor, J.) (citation omitted).

Nothing in the Admission Act or any other federal law provides a compelling basis for denying Hawaiian citizens the right to vote on account of race. To the contrary, the Admission Act does not even compel race-conscious administration of the ceded public lands. Instead, it spells out five possible uses for the public lands, without providing that *any* portion of those lands or the proceeds thereof must be set aside exclusively for the benefit of racial "Hawaiians." Admission Act, § 5(f) ("Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes . . . ."). Indeed, when these lands were annexed by the United States in 1898 they were committed to use for the benefit of all inhabitants of Hawaii, regardless of race, and from its admission to the Union in 1959 until 1978, the State administered these public lands proceeds in a race-neutral manner, allocating them principally to public education. *See* p. 2-5, *supra*. Respondent now takes the position that the State of Hawaii has a compelling interest in engaging in blatant racial discrimination today—and indefinitely into the future—in order to make up for even-handed treatment of all Hawaiian citizens, regardless of race, in the past. This is a bizarre and wrongheaded interpretation of the Equal Protection Clause.

Nor do the state laws creating OHA and purporting to define the "trust" create a compelling interest in race discrimination at the polls. Those laws mandate allocation and administration of general tax appropriations and 20 percent of public lands proceeds on the basis of race

(Haw. Const. art. XII, §§ 4-6; Haw. Rev. Stat. ch. 10), but they do not by their mere existence create an independent demand that must be "honor[ed]" (Pet. App. 17a) by racially discriminatory elections for the OHA board. *See Miller*, 515 U.S. at 921-23. Rather, each governmental racial classification requires its own compelling rationale. *Id.* at 922; *Shaw v. Hunt*, 517 U.S. 899, 911-12 (1996). The State therefore has no compelling need for a racially discriminatory voting regime to maintain its administration of the "trust," and it has offered no other constitutionally sufficient justification.

Moreover, in light of this Court's conclusion in *Anderson v. Martin*, 375 U.S. 399 (1964), that race is irrelevant to the election of government officials, Hawaii does not and cannot have a legitimate, let alone compelling, interest in turning citizens away from the polls on the basis of race. In *Anderson*, this Court rejected on equal protection grounds a State's claim that requiring political candidates to specify their race for use on the ballot was "reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates." Hawaii's requirement that voters attest to the racial "composition" of their "blood" as a condition of voting in an election is an even deeper affront to the Fourteenth Amendment. To paraphrase *Anderson*, there is "no relevance in the State's pointing up the race of the [voter] as bearing upon his qualifications [as an elector]. Indeed, this factor in itself 'underscores the purely racial character and purpose' of the statute." 375 U.S. at 403 (citation omitted). That is because, as this Court declared so forcefully in the landmark poll-tax case *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966), *"race, creed or color[] is not germane to one's ability to participate intelligently in the electoral process*." (Emphasis added).

The second purported "compelling" interest identified below—the "perceived value that a board 'chosen from among those who are interested parties would be

the best way to insure proper management and adherence to the needed fiduciary principles'" (Pet. App. 17a)—is insufficient as well. The proposition that only members of a particular race are well situated to make government decisions affecting the expenditure of public funds on their behalf finds no support in this Court's jurisprudence and is irreconcilable with the basic premise of the Equal Protection Clause, which is that all citizens, *regardless* of race, have equal rights before the law and must be accorded an equal opportunity to participate in government decisionmaking. Indeed, the Ninth Circuit's recognition of this purportedly "compelling" interest effectively reinvigorates the patently offensive notion, previously rejected by this Court, that it is legitimate for States to categorize voters based on racial stereotypes. "It reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes." *Shaw v. Reno*, 509 U.S. at 647. And as this Court has emphasized, "[t]he community is harmed by the State's participation in the perpetuation of invidious group stereotypes." *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994).

Indeed, even if voters of other races would bring different points of view to OHA elections than those purportedly shared by racial "Hawaiians" (an assumption that is an invidious stereotype itself, without any support in the record), this Court has held that "'[d]ifferences of opinion' may not be the basis for excluding any group or person from the franchise." *Dunn v. Blumstein*, 405 U.S. 330, 355 (1972) (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 705 (1969)). In short, any effort by Hawaii to construct an electorate "with a common interest in all matters pertaining to . . . government is impermissible" under the Equal Protection Clause. *Dunn*, 405 U.S. at 355 (punctuation omitted); *accord Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the

franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

Equally importantly for purposes of this Court's equal protection analysis, such "generalized assertion[s]" of interests "provide[] no guidance for . . . determin[ing] the precise scope of the [purported] injury," and therefore provide "no logical stopping point" for an unfocused use of race in government decisions. *Croson*, 488 U.S. at 498 (citation and internal quotation marks omitted). Hawaii's racial voting restriction has been in effect now for 21 years, and nothing in the law, the lower court's opinion, or respondent's position before this Court suggests that this program of race discrimination is conceived as anything other than improperly "timeless in [its] ability to affect the future." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (Powell, J.). Hawaii's proffered justifications are therefore insufficient to support the State's racial classification.

2. OHA's racial voting law is not narrowly tailored to achieve the interests at which it is purportedly directed. The court of appeals' holding that Hawaii's race-based scheme "is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles'" (Pet. App. 17a) conflicts sharply with this Court's holding in *Croson* that racial classifications cannot be deemed to be narrowly tailored unless, at a minimum, the government has previously "carefully examined and rejected race-neutral alternatives" to attain the same end. *Croson*, 488 U.S. at 507. The court below did not identify "any consideration of the use of race-neutral means" by the State (488 U.S. at 507), nor did it make any effort to explain why such means would have been unavailing. Ensuring "proper management" and "adherence to . . . fiduciary principles" are goals that OHA shares with innumerable state agencies and other organizations whose leadership is selected by race-

neutral means, and virtually any trust of any sort, making the court's failure to examine these alternatives a particularly glaring departure from the approach mandated by this Court.

In fact, the State has several readily available race-neutral alternatives. For example, "[i]n matters of . . . breach of fiduciary duty, [OHA] board members shall be subject to suit" brought by any beneficiary of the public trust. Haw. Rev. Stat. § 10-16(c). The court below cited this law, but apparently failed to appreciate that it rendered unnecessary any recourse to supposed "racial solidarity" between OHA board members and racially defined "Hawaiians" as a guarantee of proper OHA administration. Most surprising is the lower court's failure to acknowledge that the courts, including the Ninth Circuit, have recognized alternative race-neutral means to ensure proper use of public lands proceeds. *See, e.g.*, *Price v. Akaka*, 928 F.2d 824, 826-28 (9th Cir. 1990) (recognizing 42 U.S.C. § 1983 claim against OHA); *Pele Defense Fund v. Paty*, 837 P.2d 1247, 1256-58 (Haw. 1992) (recognizing claims against OHA under Section 1983 and Hawaii's constitution).

Furthermore, the OHA voting scheme is not narrowly tailored because it does not even achieve the purportedly "compelling" goal identified by the court below: ensuring that "the beneficiaries [are] the same as the voters." Pet. App. 17a-18a. As it stands, the OHA election law is both overinclusive and underinclusive on its own terms.

The OHA scheme is overinclusive because the majority of OHA-qualified voters—racial "Hawaiians" who fail to satisfy the 50 percent blood quantum required to be "native"—are not in fact beneficiaries of the public lands proceeds, which are dedicated by state law exclusively to the benefit of the more racially pure "native Hawaiians," and which constitute the vast majority of OHA's funds. Haw. Rev. Stat. § 10-13.5. Thus, racial "Hawaiians"—the majority of OHA electors—are not among those whom the lower court classified as

"interested parties" worthy of the vote, at least with respect to the bulk of OHA's funds. Pet. App. 17a.[12] As in *Croson*, this racial classification is significantly overbroad in view of its stated goal, and it therefore fails the narrow tailoring requirement. *See* 488 U.S. at 506.

This overinclusiveness is reflected in the clashing interests, and overt conflicts, between the small group of 50 percent blood quantum "native Hawaiians" and the remaining "Hawaiians" who make up the majority of OHA's constituency. OHA has been sued repeatedly by "native Hawaiians" who claim that OHA improperly gives public-land revenues to other "Hawaiians" who dominate OHA elections.[13] Thus, far from being narrowly tailored to advance the interests of a class of beneficiaries defined in racial terms, Hawaii's race-based voting scheme undermines the economic interests of one racial subgroup of "beneficiaries" in favor of another, larger racial subgroup.

Hawaii's scheme is simultaneously *underinclusive*. By making race the primary factor defining the electorate for officials administering a "*public* trust" (Admis-

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[12] In the last five years for which audited figures are available, proceeds from the public lands (which benefit only 50-percent blood quantum "native Hawaiians") have exceeded OHA's legislative appropriations (which may be spent to benefit all racial "Hawaiians") by a ratio of more than seven to one. L. 8 at 54, 56; L. 9 at 10; L. 10 at 10, 11, 13 (OHA Financial Statements, 1993-1997).

[13] *See, e.g.*, *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990) (suit by native Hawaiians claiming OHA board members were spending public land proceeds for purposes other than the benefit of "native Hawaiians"); *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153 (D. Haw. 1986) (upholding statutory definition of "Hawaiians" against claim by "native Hawaiians" that statute improperly expanded class of beneficiaries by distributing benefits without regard to blood quantum).

sion Act, § 5 (emphasis added)), the OHA laws silence all other members of the *public* with a legitimate interest in the administration of *public* lands proceeds, improperly distorting the electoral incentives for OHA board members.[14] There is no constitutional basis under the Fourteenth Amendment to invoke race to cut other members of the public off from their interest in the proper administration of the proceeds of the public lands.

The court of appeals notably did not hold that the OHA election scheme was narrowly tailored to Hawaii's other purportedly compelling interest, "honor[ing] the trust" (Pet. App. 17a), and instead merely remarked that the State's race-based voter restriction "responds to" that interest. *Id.* In any event, the "*public* trust" established in Section 5(f) of the Admission Act does not require the State to consider race at all in administering the public funds at issue here. Similarly, the state laws establishing OHA and setting aside 20 percent of the public lands proceeds for "native Hawaiians" do not depend on the voting restriction challenged here for their own effectiveness. *See* pp. 32-33, *supra*. And Hawaii's race-neutral distribution of the proceeds of the public lands from 1959 to 1978 shows that the State is capable of "honor[ing] the trust" without recourse to race discrimination.

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[14] The OHA racial voting scheme excludes many Hawaiian citizens who are affected by the public money that flows through OHA. For example, all citizens benefited or burdened directly or indirectly by the educational resources channeled to racial "Hawaiians" are entitled to a role in selecting the elected government officials who control distribution of those resources (*Kramer*, 395 U.S. at 626-32), and more generally, all citizens who have an interest in seeing that their state tax dollars channeled through OHA are put to good use—*i.e.*, *all* citizens—are entitled to a voice in the selection of the elected officials who run those programs. *Kramer*, 395 U.S. at 632; *see also Salyer*, 410 U.S. at 729.

B. The "Special Relationship" Recognized In *Morton v. Mancari* Does Not Apply Here

The court of appeals relied on *Morton v. Mancari*, 417 U.S. 535 (1974), to rationalize its decision to ignore the required strict scrutiny standard. But *Mancari* compels precisely the opposite conclusion.

1. In *Mancari*, this Court held that a "special relationship" exists between the United States and federally recognized Indian Tribes by virtue of the Indian Commerce and Treaty Clauses of the Constitution. 417 U.S. at 551-52. Accordingly, the Court concluded that a hiring preference for tribal members employed by the Bureau of Indian Affairs (BIA) was a political rather than a racial preference and was subject only to rational basis review (*id.* at 553-54 & n.24), rather than the strict scrutiny normally applied to race-based laws. Significantly, however, that holding was expressly predicated on the fact that the challenged preference involved a *tribal*, rather than a *racial*, classification (*id.*)—a factor that respondent concedes cannot be satisfied here. Opp. 18.[15]

Racial "Hawaiians" are not a federally recognized Indian Tribe, and therefore do not fall within the reach of *Mancari*. Because this Court traces authority for the "special relationship" to the Indian Commerce and Treaty Clauses of the Constitution—which are limited

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[15] Strict scrutiny applies with equal rigor to *all* distinctions based on race, including those that single out "Indians" based on race. For example, in *Adarand* this Court refused to enforce a federal program benefiting "'Black Americans, Hispanic Americans, *Native Americans*, Asian Pacific Americans, and other minorities'" in the absence of a governmental showing of a compelling interest in discrimination and a narrowly tailored solution. 515 U.S. at 205 (emphasis added; citation omitted). Similarly, in *Croson* the Court invalidated a municipal program benefiting "'Blacks, Spanish-speaking, Orientals, *Indians*, Eskimos, or Aleuts'" for the same reason. 488 U.S. at 478 (emphasis added; citation omitted).

by their own terms to "Indian Tribes" and separate sovereign entities capable of entering into "Treaties" with the United States (U.S. Const. art. I, § 8, art. II, § 2)—"only . . . members of 'federally recognized' tribes" enjoy a "special relationship" with the federal government, while "'racial' group[s] consisting of 'Indians'" do not. *Mancari*, 417 U.S. at 553 n.24; *id.* at 551-52; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). As the court below candidly acknowledged, "Hawaiians" "aren't organized in tribes and there isn't an Hawaiian Commerce Clause in the Constitution." Pet. App. 14a; *see also Price v. Hawaii*, 764 F.2d 623, 626-28 (9th Cir. 1985) (racial "Hawaiians" are not a federally recognized Indian Tribe). Indeed, respondent has conceded that "[t]he tribal concept simply has no place in the context of Hawaiian history." Opp. 18; *see also id.* ("*all* Hawaiians and native Hawaiians, without regard to any tribal classification" are beneficiaries of Hawaii's race-based regime, including the exclusive right to vote in elections for the OHA board) (emphasis in original). This conceded lack of tribal status precludes any attempt to fit Hawaii's "Hawaiian blood" racial classifications within *Mancari*.

Subsequent cases confirm that the existence of a formally recognized tribal government—"possessing 'the power of regulating their internal and social relations'"—is the defining characteristic of this "special relationship." *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (citations omitted); *see also Fisher v. District Court*, 424 U.S. 382, 390-91 (1976); *United States v. Antelope*, 430 U.S. 641, 645-46 (1977); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979). Notably, neither respondent nor the Ninth Circuit has identified any governing body that regulates the "internal and social relations" of racial "Hawaiians." Indeed, given that racial "Hawaiians" lack any tribal government, references to "internal relations" in this context are nonsensical.[16]

Thus, as legal opinions of the Executive Branch have long recognized, "if the special treatment of Indians cannot be grounded in their unique status as political entities . . . , to treat Indians other than as ordinary citizens would constitute impermissible discrimination." 6 Op. Off. Legal Counsel 298, 308 (1982). After this Court's decision in *Adarand*, for example, the Office of Legal Counsel advised the President that the federal government's "special relationship" with Indians remained limited to "Native Americans *as members of federally recognized Indian tribes*." 19 Op. Off. Legal Counsel, 1995 WL 835775 (June 28, 1995) (emphases added); *id.* (in *Mancari*, the "Court reasoned that a *tribal classification* is 'political rather than racial in nature,' because it is "granted to Indians not as a discrete racial

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[16] The court of appeals' reliance on Hawaii's role in creating a "special relationship" between racial "Hawaiians" and the State is precluded by *Yakima Nation*, which held that the *Mancari* "special relationship" does not apply to the States. 439 U.S. at 500-01 ("'[T]he unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians . . . . *States do not enjoy this same unique relationship with Indians*.") (quoting *Mancari*, 417 U.S. at 551-52) (emphasis added). Because Congress has not granted Hawaii "explicit authority" to act on its behalf in this arena (*see* 439 U.S. at 501), the State cannot rely on the constitutional basis of federal-tribal relations to justify its race discrimination at the polls. In any event, "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation" (*Saenz v. Roe*, No. 98-97, slip op. at 18 (U.S. May 17, 1999)), and therefore any purported grant of authority to Hawaii to prefer racial "Hawaiians" could not validate Hawaii's discrimination in OHA elections.

group, but, rather, as members of quasi-sovereign tribal entities") (emphasis added).

In contrast, Hawaii's definition of "Hawaiians" is entirely racial, and encompasses every resident with even a drop of "Hawaiian blood," without any requirement of tribal membership. Hawaii's election laws thus limit the right to vote based on the race of the voters, not their political identity, and accordingly those laws cannot be reconciled with *Mancari* and its progeny.[17]

That racial "Hawaiians" are not a federally recognized Indian Tribe is further confirmed by the federal government's treatment of Hawaiian citizens. For example, both Alaska and Hawaii became United States possessions in the second half of the nineteenth century and States in 1959. The 1867 treaty by which Russia ceded Alaska to the United States expressly provided that all inhabitants of the Alaskan territory would be granted U.S. citizenship, "*with the exception of uncivilized native tribes*." Treaty with Russia art. III, 15 Stat. 539 (1867) (emphasis added). That treaty further provided that "[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." *Id.* Like other tribal Indians, Alaskan Natives were not granted U.S. citizenship until 1924. *See* Act of June 2, 1924, Pub. L. No. 175, ch. 233, 43 Stat. 253.

In contrast, the Organic Act of 1900, which made Hawaii a formal Territory, granted full and immediate United States citizenship to "all persons who were citizens of the Republic of Hawaii" in 1898, including racial "Hawaiians." 31 Stat. 141, § 4. Racial "Hawaiians," in fact, not only enjoyed citizenship and the right to vote, but were the dominant political group in Hawaii for several decades after annexation, and were well represented in all forms of public office. *See, e.g.,* Lawrence H. Fuchs, *Hawaii Pono: A Social History* 161 (1961) (racial "Hawaiians" enjoyed "a clear majority of voters through the 1922 election, and more than any other group until 1938"); Andrew W. Lind, *Hawaii's People* 93 (1955).[18]

In sum, racial "Hawaiians" came into the federal union *as citizens*, not as members of a separate, quasi-sovereign Indian Tribe. Not surprisingly, neither "Hawaiians" nor "native Hawaiians" have ever been recognized as an Indian Tribe, and respondent disdains that very notion. Opp. 18.

The only way respondent can defend Hawaii's racial voting restriction is by entirely divorcing *Mancari*'s "special relationship" from its constitutional underpinnings. Respondent contends that it "is simply wrong to suggest that *Morton* turned on the unique Indian Commerce and Treaty Clauses of the Constitution," and that "[a]ny careful reading of *Morton* makes clear that the key to *Morton* was the historical special relationship and the self-governance factors, which apply equally well to Hawaiian history and the voter restriction." Opp. 18-19 (citation omitted).

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17 Indeed, if *Mancari* could be read in the manner adopted by the court below, it would be irreconcilable with this Court's equal protection jurisprudence, particularly *Adarand*, 515 U.S. 200, and would have to be overruled. *See Williams v. Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997) (questioning whether *Mancari* survives *Adarand*), *cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 118 S. Ct. 1795 (1998).

18 Indeed, it was in large part the declining political power of racial "Hawaiians" compared with other groups, primarily Asians, that led to the enactment of the HHCA. *See* H.R. Rep. No. 66-839, at 2 (1920) (quoting voter registration statistics and lamenting that racial "Hawaiians" were "fast becoming a minority element among the races of the Islands, with the probable result that in the future political control will pass into other hands. According to the latest estimates not only the Japanese and Portuguese, but also the Chinese, now outnumber the full-blooded Hawaiians.").

Respondent thus would read out of the Indian Commerce and Treaty Clauses, as well as this Court's settled jurisprudence, any requirement of tribal status. In its place, he would impose an amorphous and free-ranging "historical relationship" or "former sovereign" clause. There are no such clauses in the Constitution, and respondent's argument implicitly concedes that nothing in the Constitution *as actually written*, and in particular neither the Indian Commerce Clause nor the Treaty Clause, authorizes Hawaii's racial classification based on "Hawaiian blood." Such a counter-textual interpretation of the "special relationship" would wreak havoc on this Court's established jurisprudence under the Fourteenth and Fifteenth Amendments. And it would permit similar special treatment for descendants of "native" Texans, Californians, or other groups who could claim to trace their ancestors to some past "sovereign."

2. Finally, even if *Mancari* had some application to state laws granting preferences to racial "Hawaiians," it would not support respondent's argument. Neither *Mancari* nor any other decision relying on the "special relationship" between the national government and federally recognized Indian Tribes involved the fundamental right to vote in *statewide elections* for *state* officials. That distinction is important, for as this Court explained in *Reynolds v. Sims*, 377 U.S. 533 (1964), "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights," and therefore "*any* alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562 (emphasis added); *see also Kramer*, 395 U.S. at 627. Unlike the hiring preference at issue in *Mancari*, "statutes distributing the franchise constitute the foundation of our representative society," and for that reason, "[*a*]*ny* unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Id.* at 626 (emphasis added). Thus, *Mancari* cannot shield Hawaii's racially

discriminatory voting laws from strict judicial scrutiny—a scrutiny that, as shown above, is fatal to this naked racial classification.

III. HAWAII'S RACE-BASED VOTING LAWS ARE NOT IMMUNIZED FROM CHALLENGE BY THE MERE EXISTENCE OF OTHER RACIALLY DISCRIMINATORY LAWS

The Ninth Circuit concluded that because this case challenges only Hawaii's racial voting restriction, the State's other race-based laws must conclusively be presumed to be constitutional. "[W]e *must* accept the [race-based] trusts and their administrative structure as we find them, and assume that both are lawful." Pet. App. 9a (emphasis added). The court then reasoned that if the racial classifications in the underlying laws are presumed lawful, the OHA election laws containing the same classifications "must" also be constitutional. *Id.* at 9a-10a. Such tortured logic cannot shield Hawaii's blatantly racial voting laws from meaningful judicial review. The presumption adopted below is both irrelevant to the issues presented in this case and flatly inconsistent with this Court's Fourteenth and Fifteenth Amendment jurisprudence.

The Ninth Circuit's absolute presumption of constitutionality for unchallenged laws has no bearing on the constitutionality of the OHA voting restriction. The Fifteenth Amendment, which brooks no exceptions to its ban on race discrimination at the ballot box (*see* Part I.A), prohibits Hawaii's race-based voting laws, whether or not Hawaii's other racial classifications are constitutional. Nor can Hawaii's purported interests in excluding some races from OHA elections survive Fourteenth Amendment strict scrutiny, even if the laws creating the "racial classification that underlies the trusts and OHA" (Pet. App. 9a) are assumed to be constitutional. *See* Part II.A. Neither the "trust" nor the goal of "bettering" the conditions of native Hawaiians justifies race discrimina-

tion against all other citizens of Hawaii in OHA elections. In fact, this Court has rejected the use of such racial stereotypes as akin to "political apartheid" (*Shaw v. Reno*, 509 U.S. at 647), as well as government efforts to control electoral outcomes by limiting citizen participation. *Dunn*, 405 U.S. at 355. Thus, even if it were lawful, the absolute presumption adopted below would be irrelevant to this case.

The Ninth Circuit's approach also is irreconcilable with this Court's case law, which makes clear that race-based laws are "presumptively unconstitutional" (*Bush v. Vera*, 517 U.S. 952, 976 (1996); *Shaw v. Reno*, 509 U.S. at 642-43), and that "the general presumption of constitutionality afforded state statutes . . . [is] not applicable" to "statutes which deny some residents the right to vote." *Kramer*, 395 U.S. at 627-28. Unless this Court is willing to abandon its justifiable skepticism of racial classifications and abridgments of the right to vote, the Ninth Circuit's presumption of constitutionality cannot be allowed to justify Hawaii's racially restrictive voting laws.

Even where a particular form of racial classification is *permitted* by the Constitution (*e.g.*, in the case of purely private discrimination, *Georgia v. McCollum*, 505 U.S. 42, 50 (1992)), this Court has held that States may not rely on that constitutionally permissible discrimination to engage in further state-sponsored race-conscious action. Thus, in *Pennsylvania v. Board of Dirs. of City Trusts*, 353 U.S. 230 (1957), this Court held that a state agency violated the Fourteenth Amendment when it enforced the racially discriminatory terms of a private will. *Id.* at 231. Similarly, in *Evans v. Newton*, 382 U.S. 296, 301-02 (1966), the Court prohibited the city of Macon, Georgia, from honoring a racially discriminatory provision of a will that established a "whites only" public park. The Fourteenth Amendment, the Court declared, "bars a city from acting as a trustee under a private will that serves the racial segregation cause." *Id.* at 298.

A fortiori, States may not rely on their own racial classifications to justify other, plainly impermissible race-conscious laws.

In fact, this Court recently rejected a State's attempt to defend its race-based action by claiming it was necessitated by a prior governmental racial classification. *Miller v. Johnson*, 515 U.S. at 921-23. In *Miller*, Georgia defended its race-conscious redistricting plan on the ground that the U.S. Department of Justice had mandated that the State create as many majority-minority congressional districts as possible. 515 U.S. at 906-07, 921. The Court rejected that defense: "We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Id.* at 922. Rather, the Court explained, "[w]hen a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. . . . [W]e insist on a strong basis in evidence of the harm being remedied." *Id.* Nor was the Court willing to forego its "presumptive skepticism of all racial classifications" when weighing the underlying Justice Department rulings on which Georgia relied for its defense. *Id.* Rather, the Court held, "the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id.*[19]

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[19] The *Adarand* case followed a similar course. Plaintiff Adarand Constructors challenged only the program that affected it, rather than the entire regime containing the constitutionally suspect terms that this Court eventually reviewed. On appeal, the government argued that Adarand lacked standing to challenge the constitutionality of the regime because it "had not charged in its complaint that section 502 was unconstitutional." *Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537, 1543 (10th Cir. 1994). The court

Miller is illustrative of this Court's long-standing insistence that racial classifications must be presumed to be unconstitutional unless and until the State meets its constitutional burden of demonstrating affirmatively that each such classification is narrowly tailored to achieve a compelling government interest. In this case, the State chose to place at issue its creation of the OHA "trusts," asserting that the existence of those racial set-asides provides a compelling justification for the racial voting restriction challenged by petitioner. Before such a defense could be given any weight, however, the State was obligated to demonstrate that the presumptively unconstitutional racial classifications on which it predicates its defense (*i.e.*, the laws creating the alleged "trust" relationship) were themselves constitutionally permissible.

The Ninth Circuit improperly failed to require any such showing. Instead, the court uncritically accepted as conclusively valid and legitimate the State's proffered race-based justifications, announcing that the State had a compelling interest in enacting its race-based voting restriction simply because the restriction extended the racial classifications embodied in the state statutes creating and funding OHA. Pet. App. 9a, 17a-18a. There could be no sharper, or more improper, rejection of *Miller* and a host of other equal protection decisions of this Court. The Ninth Circuit's holding that a State's proffered justification for race-conscious action must be

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of appeals rejected the government's argument, explaining that it was "satisfied that Adarand is entitled to attack the constitutional validity of the legislation authorizing the very program which was challenged in its complaint." *Id.* The government abandoned that argument in this Court, which proceeded to the merits, thereby implicitly approving the lower court's judgment on the standing issue. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

conclusively presumed to be valid and legitimate, even if it is itself based on a presumptively unconstitutional racial classification, is clearly wrong.[20] As this Court explained in *Miller*, the courts may not simply abandon the difficult judicial function of constitutional review: "to insulate racial districting from constitutional review . . . would be surrendering . . . our role in enforcing the constitutional limits on race-based official action. We may not do so." 515 U.S. at 922.

There is no law or policy permitting courts to transform judicial review from the required assessment of the constitutionality of laws into a game, where legislatures are rewarded for violating citizens' rights when they do so in multifarious ways. The mere fact that petitioner did not independently challenge each and every one of Hawaii's racially discriminatory laws does not render any of those laws presumptively constitutional, nor does it provide the State with an automatic exemption from strict scrutiny when it chooses to put those laws at issue by proffering them as an affirmative defense in support of another racially discriminatory law. The Ninth Circuit's contrary reasoning would compel courts to uphold an unconstitutional racial classification whenever a related but antecedent racial classification was unchallenged, in direct violation of this Court's consistent refusal to extend any presumption of constitutionality to race-based government action. The Ninth Circuit's reasoning amounts to an evasion of its constitutional responsibility, and must be rejected.

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[20] The malleability and impropriety of such willful judicial blindness is revealed by the court of appeals' one-sided application of its unorthodox presumption After insisting that it was compelled to ignore the relationship between the underlying laws and the Constitution (Pet. App. 9a), the court proceeded to dedicate the bulk of its opinion to, and base its judgment for respondent on, a detailed analysis of the relationship between those same underlying laws and the OHA racial election restrictions. *Id.* at 10a-18a.

CONCLUSION

The Ninth Circuit's approaches to voting rights and equal protection invite all manner of laws that would increase the racial balkanization of America. Hawaii's racial voting scheme is inconsistent with more than a century of painful lessons taught by the Civil War and by this Court's carefully wrought interpretation of the constitutional amendments that followed it. If our Nation's struggles with race discrimination have taught one lesson, it is that when we distort our Constitution in the service of one race we do the gravest injustice to our Nation, and to the people. The judgment of the court of appeals should be reversed.

Respectfully submitted.

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May 27, 1999