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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION

STATUTES AND LEGISLATIVE MATERIAL

MISCELLANEOUS

INTRODUCTION

As the court below explicitly held, Hawaii has adopted voting restrictions that contain "a racial classification on their face." Pet. App. 11a. Those restrictions prevent petitioner and many other citizens of Hawaii from voting for state officials in certain statewide elections, solely because they have the wrong ancestors and the wrong blood in their veins.

This Court has repeatedly emphasized that government's use of racial classifications is uniquely harmful, and that the injury from such classifications radiates outward into society, creating further problems of stigma, resentment and racial politics. The use of race is absolutely forbidden under the Fifteenth Amendment; and under the Fourteenth Amendment, the Court has strictly reserved the permissible use of race to the rarest and most extreme of circumstances, precisely because race is such a destructive basis for government action. A state actor, even one motivated by an ostensibly benign intent, must demonstrate that a racial classification is necessary to serve a truly compelling governmental purpose, and the classification chosen must be tightly tied to that compelling purpose. Hawaii's racial voting restrictions embody the perils and pernicious consequences of racial classifications, and the "justifications" offered are irrational, attenuated and far removed from the facts that provide the purported rationalization for the discrimination. There is no close fit between the means chosen—racial segregation at the polls—and the various ends respondent identifies. Hawaii's laws thus plainly violate both the Fifteenth and the Fourteenth Amendments.

In an effort to avoid this inescapable conclusion, respondent attempts to redefine Hawaii's voting restriction as *not* racial but "political," because it benefits descendants of an "aboriginal" or "indigenous" race. But respondent's effort at repackaging cannot conceal the simple and unavoidable fact that the right to vote in

Hawaii is conditioned on genetics. There is no exception in the Constitution's text or this Court's jurisprudence for race discrimination based upon descent from an "indigenous" ancestor. Nor is respondent correct to suggest that a ruling in petitioner's favor would automatically invalidate scores of federal statutes. *E.g.*, Resp. Br. 14. Hawaii's racial voting laws are unique, and are the only laws at issue here.

I. HAWAII RESTRICTS VOTING ON RACIAL, NOT POLITICAL, GROUNDS

The central premise of respondent's argument—under both the Fifteenth and Fourteenth Amendments—is that Hawaii's voting restrictions are not racial but "political." Respondent asks this Court to rule that Congress's power to legislate with respect to "Indian Tribes" extends to all descendants of every "indigenous" race, even clusters of persons who share common ethnic ancestors but lack political or social separateness, internal governmental structures, or any of the other attributes of retained sovereignty. Respondent also contends that Congress has delegated to Hawaii the power to make these racial classifications.

Respondent is doubly wrong. The Constitution and this Court's decisions establish that the United States' special relationship with Indian Tribes is based on the quasi-sovereign political status of those Tribes, not on fashionable theories regarding "indigenous" races. Moreover, whatever the outer limits of Congress's power, Congress has not purported to give Hawaii the authority to enact the racial voting laws challenged here.

A. Hawaii's Voting Restriction Is Race-Based

Respondent's initial claim that the word "race" is "not found anywhere" in the OHA election laws is a sophism. Resp. Br. 1. Hawaii restricts the OHA electorate to "any descendant of the aboriginal *peoples* inhabiting the Hawaiian Islands which exercised sovereignty . . . in 1778." Haw. Rev. Stat. § 10-2 (emphasis added). The word "peoples" is, of course, synonymous with "races" in this context. *E.g.*, Resp. Br. 24 ("this Court ha[s] often referred to indigenous people . . . in terms of race"). But even if that were not sufficiently obvious, when Hawaii's legislature substituted the word "peoples" for "races," its intent to discriminate based on race remained explicit: "Your Committee wishes to stress that this change is non-substantive, and that '*peoples*' *does mean* '*races.*'" Conf. Comm. Rep. No. 77, in 1979 Sen. J., at 998 (emphasis added). It is undisputed, moreover, that the 1778 date on which the definition pivots was chosen to exclude "Westerners." Resp. Br. 40; *see also* Kamehameha Schools Br. 7 (1778 is significant as the year the first "*white* foreigner" landed in Hawaii) (emphasis added).

The unavoidable fact is that Hawaii's OHA election system determines eligibility to vote on the basis of ancestry or ethnic consanguinity, *i.e.*, race.[1]

B. Respondent's Theory Of "Indian Tribes" Is Irreconcilable With The Constitution And With This Court's Precedents

Respondent concedes that the United States "never formally recognized or dealt with Hawaiians as 'Indian tribes,'" and "never entered into treaties with indigenous Hawaiians." Resp. Br. 6. Nonetheless, respondent combines unconnected dictionary definitions of the terms "Indian" and "Tribe" to create an unprecedented

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[1] The Justice Department has analyzed language substantively *identical* to that in Hawaii's statute, and concluded that it constitutes an "*express racial classification.*" S.L. 1 at 1 (Letter from Thomas M. Boyd, Acting Assistant Attorney Gen., to Hon. Augustus F. Hawkins, Chairman, House Education and Labor Comm. (Mar. 31, 1988) (emphasis added)). The documents cited "S.L." are lodged with the Clerk as a Supplemental Lodging.

and wildly expansive definition of "Indian Tribes" as any class of persons descended, however remotely, from an "indigenous" race. *Id.* 28-29. *But see United States v. Sandoval*, 231 U.S. 28 (1913); *Montoya v. United States*, 180 U.S. 261 (1901).[2] The resulting spurious "tribe" of racial Hawaiians is diffuse, lacks internal governing structures or institutions, has no separate political identity, is inconsistent with Hawaiian history and culture, and is defined solely on the basis of an ancestral relationship linked to the date a particular "white" British naval officer first arrived in the Islands. According to respondent, Congress—and by implicit delegation, Hawaii—has virtually unreviewable authority to single out such an "indigenous" racial group for special treatment, in perpetuity, free from the constraints on government action imposed by the Fifteenth and Fourteenth Amendments. This asserted power would be far greater than Congress's power to legislate with respect to any other racial group, and is wholly unsupported by the Constitution and contrary to this Court's precedents.

1. Congress's power to legislate with respect to Indian Tribes is not as sweeping or as infinitely elastic as

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2 Respondent meticulously uses the word "peoples" in order to avoid the word "race." But as noted above, in this context the two terms both connote ancestry and mean precisely the same thing. As this Court has explained, "[d]istinctions between citizens solely because of their *ancestry* are by their very nature odious to a free people .... For that reason . . . classification . . . based on *race* alone has often been held to be a denial of equal protection." *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943) (emphases added); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223-24 (1995); Opp. 20 (emphasizing "native blood").

When this Court struck down Virginia's miscegenation laws, it rejected classifications based on ancestry, including a provision that made exceptions in order "'to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas . . . .'" *Loving v. Virginia*, 388 U.S. 1, 5 n.4 (1967).

respondent's theory demands. That power stems from two provisions of the Constitution: the Indian Commerce Clause of Article I, Section 8, which empowers Congress to regulate commerce "with Indian Tribes," and the Treaty Clause of Article II, Section 2. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).[3]

Respondent distorts the meaning of "Indian Tribes" by divorcing the phrase from the surrounding text. The Constitution states that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes"—in each clause, the reference is to sovereign entities. U.S. Const. art. I, § 8. This Court has looked to those related clauses in interpreting the Indian Commerce Clause, precisely to avoid atextual interpretations such as respondent's. *Cherokee Nation v. Georgia*, 30 U.S. 1, 19 (1831). Respondent's reading also renders "Tribes" superfluous, because it adds nothing that simply adding an "s" to "Indian" would not also accomplish.[4]

The Treaty Clause confirms that any "special relationship" is limited to quasi-sovereign Indian Tribes. As Chief Justice Marshall stated for the Court in *Worcester v. Georgia*, 31 U.S. 515 (1832), the Constitution "has

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3 Quoting *United States v. Kagama*, 118 U.S. 375, 384-85 (1886), the Solicitor General implies that Congress's authority stems from the "weakness" of Indian Tribes, rather than the Constitution's text. U.S. Br. 13. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973), however, this Court rejected *Kagama*'s reasoning as the product of "confusion," and emphasized that "the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."

4 Respondent's out-of-context dictionary survey is misleading and incomplete. *See, e.g.*, Bouvier, *A Law Dictionary* 492 (1839) (defining "Indian Tribe" as "a body of the aboriginal Indian race . . . exercising the powers of government and sovereignty" and "a distinct political society, capable of self-government").

adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties." *Id.* at 559; *see also Cherokee Nation*, 30 U.S. at 11. Respondent's theory would lead to the absurd result that the federal government could "make Treaties" with any group of two or more descendants of an "indigenous" race, regardless of whether that group retains any sovereignty or internal governmental structure, and such "Treaties" would be the "supreme Law of the Land." U.S. Const. art. VI.[5]

2. Respondent's attempt to transform an amorphous group of individuals defined by race into an "Indian Tribe" is also inconsistent with this Court's decisions.

Mancari held that "only . . . '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; *see also Worcester*, 31 U.S. at 556, 559; *Cherokee Nation*, 30 U.S. at 15. The *Mancari* Court, in fact, was careful to explain that "[t]he preference, as applied, is granted to Indians *not as a discrete racial group*, but, rather, *as members of quasi-sovereign tribal entities*." 417 U.S. at 554 (emphases added).

The classification at issue in *Mancari* was "political" because it defined its beneficiaries based on a political criterion: membership in a distinct quasi-sovereign polity. 417 U.S. at 554. The political quality of the classification both preexisted and was independent of special treatment by Congress. Respondent cannot claim a similar political organization for distant relatives of persons living in Hawaii in 1778, and expressly disclaims that notion. *E.g.*, Opp. 18 ("The tribal concept simply has no place in the context of Hawaiian history."); Pet. Br. 40-43. The so-called "political" event on which respondent relies, European discovery, would apply to all descendants of Indians and other "indigenous" groups, regardless of political identity, and thus is inconsistent with the Constitution and *Mancari*. Respondent's argument is also inconsistent with the Justice Department's own interpretation of *Mancari*.[6]

Respondent also makes the extraordinary claim that equal treatment for all citizens of Hawaii imposes "second-class status" on racial Hawaiians. Resp. Br. 3, 27, 38. To the contrary, equality under the law and equal access to the ballot box are among this nation's

5 Respondent's novel contention that classifications based on "indigenous" races are "political" rather than "racial" also is irreconcilable with the consistent view of the Executive Branch that Indians are a "race" for purposes of the Fifteenth and Fourteenth Amendments. *See, e.g.*, S.L. 2 at 2 (Memorandum for the United States as Amicus Curiae, *Allen v. Merrell*, No. 56-534 (U.S. 1956)); S.L. 3 at 7 (Complaint, *United States v. Day County* (D.S.D. May 10, 1999)).

6 The official letters cited by the Solicitor General (U.S. Br. 26-27 n.7) establish that the government's litigating position in this case contradicts the Administration's recent views. *E.g.*, U.S. Lodging, Letter from Andrew Fois, Assistant Attorney Gen., to Hon. Nancy Kassebaum, Chairwoman, Senate Comm. on Labor and Human Resources at 3 (Jan. 11, 1996) (adopting "government-to-government" interpretation of *Mancari* and concluding that "the United States has not granted Native Hawaiian organizations a status similar to that of Indian tribes" and therefore "any grants or contracts awarded under the [proposed] bills to Native Hawaiian organizations or their members probably would have to meet the *Adarand* standards, rather than those of *Morton v. Mancari*"); U.S. Lodging, Letter from L. Anthony Sutin, Acting Assistant Attorney Gen., to Hon. Ben Nighthorse Campbell, Chairman, Senate Comm. on Indian Affairs at 2 (July 16, 1998) ("Native Hawaiians have not been accorded the same status or treatment as Federally recognized Indian tribes in the continental United States."); *see also* S.L. 4 at 5 (Janet Reno, *Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes* (Aug. 13, 1999)).

greatest promises. Under respondent's distorted rhetoric, this Court relegated non-tribal Indians (and all non-Indians) to "second-class status" in *Mancari*. Certainly no Member of the Court saw it that way.

Respondent next relies on three other cases to claim that the "special relationship" with federally recognized Indian Tribes applies to all descendants of "indigenous" races, regardless of their internal political organization or retained sovereignty: *United States v. Sandoval*, 231 U.S. 28 (1913), *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), and *United States v. John*, 437 U.S. 634 (1978). Resp. Br. 32-34. These cases refute, rather than support, respondent's analysis.

Sandoval held that the Pueblo Indians were a federally recognized Indian Tribe. 231 U.S. at 46-47. Although different from more nomadic Tribes, "[t]he people of the pueblos," the Court emphasized, are "Indians in race, customs, *and domestic government*," and have "[a]lways liv[ed] in separate and isolated communities." *Id.* at 39 (emphasis added). The Court was clear that Congress's power over Indian Tribes does "*not* mea[n] . . . that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." *Id.* at 46 (emphasis added).

Weeks involved a congressional plan to distribute an Indian Claims Commission judgment to the descendants of the Delaware Indian Tribe for a century-old treaty violation. Congress expressly *limited* the beneficiaries to those descendants who were affiliated with then-existing, federally recognized Indian Tribes. 430 U.S. at 78-82. The Court rejected equal protection claims by descendants who lacked tribal affiliation, reasoning that distinctions between tribal and non-tribal Indians were consistent with the scope of Congress's power to deal with federally recognized Indian *Tribes*, and that the Indians seeking to overturn the plan had "severed their relations with the tribe . . . to become United States citizens." *Id.* at 85-86; *see also Eastern Band of Cherokee Indians v. United States*, 117 U.S. 288, 309 (1886) (denying benefits to individual Indians who "dissolved their connection with their nation" and "have had no separate political organization since").

Respondent characterizes *Weeks* as upholding Congress's grant of benefits to a group of Indians who were "'not a recognized tribal entity, but * * * simply individual Indians with no vested rights in any tribal property.'" Resp. Br. 33 (citations omitted). But when the Court described the group as not being "a recognized tribal entity," it was referring to the group of non-tribal Indians properly *excluded* from the beneficiary class. 430 U.S. at 85. Respondent has *Weeks* exactly backward.

Both respondent and the United States also mistakenly rely on *John* for the proposition that neither internal tribal government nor federal recognition is a prerequisite to Congress's authority to recognize a "special relationship" with the descendants of an "indigenous" race. *John* involved a group of Choctaw Indians that, pursuant to an 1830 treaty with the United States, elected to remain in Mississippi rather than relocate with their Tribe to a new reservation outside the State. Although the United States did not at first regard these Mississippi Choctaws as a Tribe, Congress eventually granted them official tribal recognition. 437 U.S. at 644-46. The 1830 treaty, moreover, specifically provided that any tribal members who elected to remain in Mississippi were not to "'lose the privilege of a Choctaw citizen.'" *Id.* at 641 (citation omitted). Racial Hawaiians, by contrast, were never part of a Tribe, retained no citizenship in the Kingdom of Hawaii either at the time Hawaii was annexed by the United States or at the time it attained statehood, and hold no such right today. Pet. Br. 2-5.[7]

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[7] As in *John*, many of the cases relied upon by respondent and his amici turn on treaty or statutory rights granted to members of

Similar errors infect respondent's and the United States' reliance on *United States v. Antelope*, 430 U.S. 641 (1977). Both characterize *Antelope* as holding that federal regulation of Indian affairs, regardless of tribal affiliation, "'is not based upon impermissible [racial] classifications.'" U.S. Br. 15 (citation omitted, brackets in original); Resp. Br. 24-25. But these isolated quotations are misleading. *Antelope* declared that congressional power over Indian affairs "is rooted in the unique status of Indians as 'a separate people' with their own political institutions." 430 U.S. at 646. Federal law was applicable to the respondents, "*not* . . . because they are of the Indian race *but because they are enrolled members of the Coeur d'Alene Tribe.*" *Id.* (emphases added). As respondent and the United States appear to concede, the Hawaiians selected to be eligible to vote for OHA trustees are neither "'a separate people' with their own political institutions" nor "enrolled members" of a federally recognized Indian Tribe. *Antelope* therefore refutes respondent's theory.

Respondent's voting restriction based on ancestry thus depends upon a vast, unprecedented, unjustifiable and potentially quite dangerous expansion of *Mancari*. Tens of millions of Americans have arguably "indigenous" roots—Indian, Tejano, Californio, and so on. *E.g.*, CCBA Br. 19-25; 60 Fed. Reg. 44674, 44679 (1995) (8.7 million Americans already self-identify as

federally recognized Indian Tribes. *See, e.g., Taylor v. Brown*, 147 U.S. 640 (1893) (land allotments); *Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943) (same); *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (hunting and fishing rights); *Chippewa Indians v. United States*, 307 U.S. 1 (1939) (land trust proceeds). These cases do not support respondent's theory, because "the United States never entered into treaties with indigenous Hawaiians" or recognized them as a "Indian Tribes." Resp. Br. 6.

having at least one "American Indian" ancestor). Respondent would have this Court approve essentially unconstrained power to discriminate in favor of—or against—any part of that population.[8] Respondent's approach thus contains "no logical stopping point," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986), and "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (opinion of O'Connor, J.). Indeed, petitioner's amici provided several examples of States with "indigenous" inhabitants who, under respondent's view, would also be subject to the "special relationship." CCBA Br. 19-25; *see also* CEO Br. 21-24; Pet. Br. 18, 35. Respondent does not even attempt to address those examples.

3. Finally, even *if* respondent's theory could be harmonized with the Constitution's text and this Court's jurisprudence, it fails for additional reasons. There has been no "express" delegation to Hawaii to make the racial classification at issue here. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 486 n.30, 501 (1979). No Act of Congress—not the Admission Act, not the "Apology Bill," nothing—even remotely authorizes Hawaii to discriminate on the basis of race in voting; nor could Congress constitutionally authorize such a restriction. Pet. Br. 41 n.16.

This case does not require the Court to redefine the dimensions of the federal government's relationship with Indian Tribes. Nor does it remotely warrant the Court's abandonment of its role in reviewing States' race-based

[8] *Antelope* makes clear that the "special relationship" can justify special burdens on members of Indian Tribes. 430 U.S. at 646; *see also Duro v. Reina*, 495 U.S. 676, 692 (1990) (recognizing "the Federal Government's broad authority to legislate with respect to *enrolled* Indians as a class, *whether to impose burdens or benefits*") (emphases added).

classifications, including those involving "indigenous" peoples. *Croson*, 488 U.S. at 506. If the Fifteenth and Fourteenth Amendments mean anything, they mean that the right to vote in elections for public officials may not be denied to American citizens based upon ancestry.

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

The Fifteenth Amendment prohibits racial restrictions on the right to vote. The argument that Hawaii's voting restriction is not racial has been rebutted above. Respondent's remaining arguments would require this Court to fashion new and entirely unwarranted racial loopholes in the Fifteenth Amendment.

First, respondent contrives an argument that the racial content of the OHA election laws is a coincidence based on "time and place—not race." Resp. Br. 38. Oklahoma's racially-restrictive "Grandfather Clause" was defended on the basis of a similar "time and place" argument. This Court rejected that subterfuge in *Guinn v. United States*, 238 U.S. 347, 349-52, 358-65 (1915).

Respondent claims that racial Hawaiians, defined by reference to 1778 when a racially "pure" group supposedly inhabited the islands, deserve preferential treatment because they lost national sovereignty and public lands when the Kingdom of Hawaii fell. Resp. Br. 38-40. But there was no Kingdom of Hawaii in 1778, and the Kingdom that was formed in 1810 fell in 1893, not 1778. In 1893 the citizenry was racially diverse and had a shared interest in sovereignty and public lands. Pet. Br. 2-3, 24-27. Thus, respondent makes an untenable rhetorical connection between two dates in history, one to justify the preference (1893—the loss of sovereignty) and one to justify the racial restriction (1778—the arrival of "white foreigner[s]," Kamehameha Schools Br. 7). Respondent's bewildering "time and place" theory amounts to nothing more than a 221-year multi-generational residency requirement (*cf. Dunn v. Blumstein*, 405 U.S. 330

(1972); *Saenz v. Roe*, 119 S. Ct. 1518 (1999)), and would even provide a rationalization for limiting the electorate to "any descendant of the peoples who inhabited Great Britain prior to 1776."[9]

Second, respondent asserts that the Fifteenth Amendment does not apply to all state-wide elections because of the "special purpose" election exception to the Fourteenth Amendment's one-person, one-vote rule. Resp. Br. 41-42 (citing *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973)). This theory hinges on a new and unsupported distinction between what respondent labels "traditional" public officials (whose elections are governed by the Fifteenth Amendment) and other state officials who are "not 'public officials' in any traditional sense" (whose elections are not covered by the Amendment). Resp. Br. 41. Indeed, respondent argues that the OHA election laws satisfy the Fifteenth Amendment, even if they are race-based, precisely because the underlying OHA laws are designed to exclude non-racial Hawaiians not only from

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9 Respondent also argues the OHA election laws are not racial because they exclude non-Hawaiian Polynesians who arrived in Hawaii too late. Resp. Br. 38-39. This is no less racially discriminatory than limiting suffrage to whites but excluding those born on the mainland. Under respondent's theory, Virginia could have salvaged its miscegenation laws by discriminating against most but not all African-Americans, or by making special provisions (as it did) for the descendants of Pocahontas and John Rolfe. *Cf. Loving*, 388 U.S. at 5 n.4; note 2, *supra*. Respondent's converse sky-is-falling argument, that invalidating Hawaii's voting laws would open all tribal elections to non-members (Resp. Br. 47 n.19), is equally flawed. OHA is an organ of *state* government subject to the Fifteenth and Fourteenth Amendments; this case has nothing whatever to do with who may vote in Indian tribal elections. *Cf. Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985).

the vote, but from any role in OHA whatever. *Id.* at 44-45.[10]

The sole authority respondent cites for this breathtaking exception to the Fifteenth Amendment is *Salyer*. But *Salyer* is not a race case, and its definition of public officials proves respondent's error. The Court in *Salyer* found that members of the board of a *county* water district elected in a "special purpose" election were public officials. 410 U.S. at 720, 724, 727-28. OHA board members, who head a *state* agency responsible for a host of government functions, including distributing funds appropriated from general tax revenues, are *a fortiori* public officials.[11] Respondent's theory thus fails under both *Salyer* and *Terry v. Adams*, 345 U.S. 461 (1953), because the Fifteenth Amendment "*bans* racial discrimination" in "*any* election in which public issues are decided or public officials selected." *Id.* at 467, 468 (emphases added). This Court has *never* approved a racially-defined "special purpose" election.[12]

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10 The United States does not support this portion of respondent's argument; indeed, the Justice Department recently argued that exclusion of Indian voters from a county sanitary district abridges the right of Indians to vote "on account of race" in violation of the Fifteenth and Fourteenth Amendments. S.L. 3 at 7.

11 The claim that OHA officials are not "public" conflicts with respondent's position that OHA exercises delegated congressional power and is responsible for administering the *State's* alleged trust responsibility (Resp. Br. 8-9), and also with OHA's characterization of its "broad" "public" functions. Pet. Br. 21-22; J.A. 19, 29.

12 Respondent's and OHA's claim that OHA is somehow free to spend state tax dollars in discriminatory ways because all Hawaiians are eligible to vote for the lawmakers who fund it (Resp. Br. 45; OHA Br. 25) would permit States to discriminate at will. The bodies that enacted the laws at issue in *Croson* and *Adarand* were also elected by the general public. That did not release them from constitutional constraints.

Finally, respondent argues that once Hawaii created the OHA board as "trustees" to serve racial Hawaiians (Haw. Rev. Stat. § 10-5(5)), it had a "duty" to limit the board's electorate to trust beneficiaries. Resp. Br. 34, 41. But the Fifteenth Amendment precludes any "duty" to discriminate on the basis of race in voting.

As the Hawaiian legislature acknowledged in enacting the OHA laws, the entire public has an interest in how "public trust" proceeds are administered by state officials, regardless of who receives the expenditures. Conf. Comm. Rep. No. 77, in 1979 Sen. J., at 998 ("ultimate accountability for the trust must be to *all the people of the State*") (emphasis added); Pet. Br. 20-21. Petitioner himself has grandchildren (seventh-generation Hawaiian citizens) who qualify as OHA beneficiaries, yet Hawaii denies him (a fifth-generation Hawaiian citizen) any vote on how OHA programs are run.

Respondent's "trust" theory also fails for a host of reasons. First, it rests on a misunderstanding of trust law and *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). According to respondent, *Amax Coal* holds that "election [of trustees by] non-beneficiaries . . . could . . . create a conflict of interest on the part of trustees" (Resp. Br. 18), and trust doctrine precludes a non-racial OHA electorate because it would undermine "proper management and adherence to the needed fiduciary principles." *Id.* at 47-48 (citation omitted). To the contrary, *Amax Coal* affirmed the propriety of *employer-* and *union*-appointed trustees jointly administering a trust for *employees*. 453 U.S. at 330, 334. And trust law permits nearly anyone to administer a trust for anyone else. Restatement (Second) of Trusts §§ 89-108, 115. Thus, even assuming *Amax Coal* and trust law are relevant, they most certainly do not establish that either trustees or those who select them must be beneficiaries of the trust. Second, by respondent's own standards the OHA board currently suffers from an impermissible "conflict of interest" because it represents two groups of racially defined Hawaiians with

inevitably conflicting claims. Pet. Br. 36-38; Hou Hawaiians Br. 9-12. Third, OHA is not a "trust" in any formal sense. In fact, it is a state agency that distributes public property and public funds to racially defined groups of individuals. That does not make it a trust.

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

The OHA laws also violate the Fourteenth Amendment. Racial Hawaiians are not members of an Indian Tribe, which precludes rational basis review under *Mancari*. *See* Part I; Pet. Br. 39-45.[13] Accordingly, Hawaii's race restriction must satisfy strict scrutiny.[14] Respondent has never identified a "compelling interest" sufficient to support race discrimination at the polls, and cannot even begin to show that Hawaii's race-based voting is narrowly tailored to serve any such interest. Pet. Br. 28-45.

Respondent claims a compelling interest in addressing the "congressionally recognized wrongs that were inflicted upon these people by the United States." Resp.

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13 Respondent asserts that petitioner does not "seriously contend" that Hawaii's voting laws fail rational basis review. Resp. Br. 46. To the contrary, OHA's election laws are the embodiment of irrational racial stereotyping and discrimination. *E.g.*, Pet. Br. 33-35.

14 *See* S.L. 5 at 2 (Letter from Thomas M. Boyd, Assistant Attorney Gen., to Hon. Daniel K. Inouye, Chairman, Senate Select Comm. on Indian Affairs (Jan. 30, 1989) ("[P]references for Indians, however, that do not depend, even in part, upon membership in an Indian tribe, but rather depend solely upon being a person of the Indian racial group, are not justified under [*Mancari*], and accordingly must be examined under Supreme Court precedent governing the use of racial classifications.")); *see also* note 6, *supra*.

Significantly, the Solicitor General does *not* argue that the OHA election laws could meet strict scrutiny.

Br. 48 (citing "Apology Bill," 107 Stat. 1510 (1993)). The "Apology Bill," however, does not compel the United States, let alone Hawaii, to act on the basis of race. It is, as its sponsor explained, "a simple resolution of apology, to recognize the facts as they were 100 years ago." 139 Cong. Rec. S14477, 14482 (1993) (remarks of Sen. Inouye); *id.* ("Are Native Hawaiians Native Americans? *This resolution has nothing to do with that.* . . . It is a simple apology.") (emphasis added); *see also* S. Rep. No. 103-126, at 35 (1993) (bill "will not result in any changes in existing law").

Nor can respondent satisfy narrow tailoring. The State administered the funds now allocated to OHA in a race-neutral manner for two decades prior to creation of OHA in 1978. Pet. Br. 5, 32. Respondent nowhere explains why race classifications became necessary in 1978, two hundred years after the date on which they are predicated, eighty years after Hawaii became part of the United States and nineteen years after Hawaii became a State. Even if discrimination at the polls in favor of racial Hawaiians could be said to serve a compelling interest, Hawaii has also failed to narrowly tailor its voting restriction by ignoring the 50% blood quantum limitation referenced in the Admission Act. Pet. Br. 36-37.[15]

Respondent claims that "[n]either this Court nor any other has ever applied strict scrutiny" to "an indigenous people subject to a congressionally recognized trust relationship." Resp. Br. 47. Respondent is mistaken. This Court *has* applied strict scrutiny to racial preferences for Indians and Aleuts—groups which, according to respondent, are subject to such a relationship. *Croson*, 488 U.S. at 506; *Adarand*, 515 U.S. at 204-05. Thus, this Court already has decided that strict scrutiny

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15 Respondent errs in contending (Resp. Br. 37 n.14) that petitioner lacks standing to raise this fatal flaw in Hawaii's racial scheme. *See Heckler v. Mathews*, 465 U.S. 728, 737-40 (1984).

applies to preferences for "indigenous" races (as opposed to members of Indian Tribes).[16]

IV. HAWAII'S RACIAL LAWS ARE NOT PRESUMPTIVELY CONSTITUTIONAL

Respondent's defense of the Ninth Circuit's presumption of constitutionality for unchallenged racial laws fails to address this Court's precedents and misreads the chief case on which it is based. Resp. Br. 16-20.

First, respondent ignores *Miller v. Johnson*, 515 U.S. 900 (1995), which rejects the blinkered approach to judicial review embraced by the Ninth Circuit. Pet. Br. 47-49. In *Miller*, this Court applied its "presumptive skepticism of all racial classifications" to unchallenged Justice Department rulings advanced as a defense to alleged voting rights violations. 515 U.S. at 922. The Court explained that "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.*

Second, respondent incorrectly asserts that "in the cases cited by petitioner the laws that this Court held were not entitled to a presumption of constitutionality had been *challenged*." Resp. Br. 19. To the contrary, the district court in *Miller* in fact had no jurisdiction to hear a challenge to the Justice Department rulings. 42 U.S.C. § 1973c. Similarly, in *Evans v. Newton*, 382 U.S. 296 (1966), and *Pennsylvania v. Board of Dirs. of City*

16 "If the Court [in *Croson*] had considered preferences for Native Americans to be subject to rational basis review (just like, say, preferences for optometrists, as in *Williamson v. Lee Optical* . . .), then presumably it would not have mentioned them in focusing on the absence of past discrimination." Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 568 n.142 (1996).

Trusts, 353 U.S. 230 (1957), the underlying racial preferences were private and thus unchallengeable. Pet. Br. 46-47. These cases demonstrate that even when courts lack *authority* to adjudicate the constitutionality of an underlying racial preference, that preference may not be used to justify challenged race-based state action.

Respondent relies almost entirely on *Rostker v. Goldberg*, 453 U.S. 57 (1981), to justify the Ninth Circuit's presumption of constitutionality for unchallenged racial laws. Resp. Br. 17. *Rostker* is an inappropriate case through which to justify willful judicial blindness on issues of race and voting rights because it involved neither of those topics. *Rostker* gave great deference to Congress's judgments on *both* the challenged all-male registration for the draft *and* the unchallenged underlying military policy against women in combat. 453 U.S. at 64-70. Furthermore, the standard of review in *Rostker* was much less demanding than that applicable here. Because of Congress's broad power over military affairs, *Rostker* applied a deferential version of the "important government interest" test. *Id.* at 69-70. Hawaii's racial voting laws, by contrast, must be judged against the Fifteenth Amendment's absolute ban on race discrimination at the polls, and are subject to the "most stringent scrutiny [reserved] for classifications based on race or national origin" under the Fourteenth Amendment. *United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996).

Petitioner has not asked this Court to invalidate the underlying racial classifications governing OHA's expenditures of funds; rather, he asks only that those racial classifications not be used as a pretext for denying him his right to vote. Respondent, not petitioner, injected those underlying classifications into this case by relying on them as an affirmative defense to petitioner's claims. Having forced the issue before the courts, respondent cannot insulate those underlying racial classifications from the skeptical treatment that all state-sponsored racial discrimination deservedly receives, nor use them to

shield Hawaii's racial voting restrictions. *See, e.g., Loving*, 388 U.S. at 11 (race classifications must be justified only by state objectives that are "independent" of race discrimination).

Respondent's suggestion that this Court must give complete deference to Hawaii's race-based preferences (Resp. Br. 19) ignores both the roots of the Civil War Amendments and this Court's consistent skepticism of race-based laws, "federal, state, or local." *Adarand*, 515 U.S. at 227. For example, in *Cooper v. Aaron*, 358 U.S. 1 (1958), this Court based its decision on unchallenged but plainly unconstitutional state racial laws, and held—in words directly applicable here—that the Fourteenth Amendment "can neither be nullified openly and directly by state ... officers, nor nullified indirectly by them through evasive schemes." *Id.* at 16, 17.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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September 3, 1999