

In The
Supreme Court of the United States

—◆—
STATE OF HAWAII, et al.,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, et al.,

Respondents.

—◆—
On Writ Of Certiorari To The
Supreme Court Of Hawaii

—◆—
**AMICI CURIAE BRIEF OF
GRASSROOT INSTITUTE OF HAWAII AND
SOUTHEASTERN LEGAL FOUNDATION, INC.
IN SUPPORT OF PETITIONERS**

—◆—
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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTERESTS OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT.....	4
1. The State Parties ask too little	4
2. The State’s Revelation; The Ceded Lands Trust has never generated annual net income. Therefore, distributions of trust revenues only to OHA for native Hawaiian beneficiaries, and none to or for the rest of the beneficiaries, were and are illegal	6
3. <i>Trustees of Dartmouth College v. Woodward</i>	8
4. In cases involving alleged racial discrimination, courts do not accept legislative allegations or conclusions, but rigorously scrutinize them	11
5. Victimhood claims unjustified. U.S. a success story for Hawaiians	14
6. Hawaii’s Economic System in 1778.....	16
7. In Hawaii, as everywhere, the good old days were not all that good	17
8. The United States in 1778.....	19
9. Hawaii’s search for security in an insecure world.....	20

TABLE OF CONTENTS – Continued

	Page
10. 1819, Kamehameha II abolishes the kapu system. 1820, first American missionaries arrive. Kaahumanu takes charge of Christianity, makes it the new path to <i>mana</i>	21
11. Hawaii sits astride principal Pacific trade routes. Embraces western institutions.....	21
12. Hawaii's economic system in 1890.....	22
13. 1893, Queen Liliuokalani secures passage of lottery, opium and distillery bills, announces new constitution. Business and political establishment revolts. Overthrow.....	24
14. Republic, then Annexation, then Statehood ..	25
15. Hawaiians wanted children to be taught English to open up wider opportunities.....	28
16. Hawaiians prosper with equality.....	29
17. Kamehameha Schools/Bishop Estate has corrupted the government of the State of Hawaii, pursues hereditary superiority, disassimilation.....	30
18. Racial tensions are simmering in Hawaii's melting pot.....	32
CONCLUSION.....	35

TABLE OF AUTHORITIES

Page

CASES

<i>Brown v. Bd. of Education</i> , 347 U.S. 483 (1954)	14
<i>Day v. Apoliona</i> , 496 F.3d 1027 (9th Cir. 2007)	5
<i>Day v. Apoliona</i> , No. CV05-00649 SOM-BMK, U.S. District Court, Hawaii, June 4, 2008	6
<i>Doe v. Kamehameha Schools</i> , 16 F.3d 1025 (9th Cir. 2005)	29
<i>Railway Express v. New York</i> , 336 U.S. 106 (1949)	11
<i>Rice v. Cayetano</i> , 528 U.S. 495 (2000)	5, 12
<i>State v. Zimring</i> , 58 Hawaii 106, 566 P.2d 725 (1977)	6
<i>Trustees of Dartmouth College v. Woodward</i> , 17 U.S. 518 (1819)	4, 8, 10, 35
<i>U.S. v. Morrison</i> , 529 U.S. 598 (2000)	12

CONSTITUTIONS

United States Constitution, Article I	8
Hawaii Constitution, Article XII	4, 12, 13, 35

STATUTES AND LEGISLATIVE MATERIALS

The Admission Act, March 18, 1959, 73 Stat. 4, Section 4 (compact requiring State to adopt and carry out Hawaiian Homes Commission Act.)	12, 13, 14
---	------------

TABLE OF AUTHORITIES – Continued

	Page
Act 57, sec. 30, 1896 Laws of the Republic of Hawai'i.....	28
Apology Resolution, Pub. L. 103-150, 107 Stat. 1510 (1993).....	12, 13
CONGRESSIONAL RECORD Vol. 139, S14477, S1482 (Oct. 27, 1993).....	14
Hawaiian Homes Commission Act, 42 Stat. 108 (1921) (“HHCA”).....	5
HRS §10-13.3.....	4, 35
HRS §708-830(6)(a).....	7
HRS §708-874.....	7
Organic Act, 31 Stat. 141, April 30, 1900.....	13, 27
S.L.H. 1903 at 377.....	27
Senate Report 886 of January 27, 1954.....	27
Sen. Rep. No. 103-126 (1993).....	13
Supreme Court Rule 37(1).....	3
Treaty of Annexation, ratified September 9, 1897 Senate, Republic of Hawaii. http://tinyurl.com/yofozz	15, 26

OTHER AUTHORITIES

American Community Survey for California, 2005, U.S. Census Bureau.....	29
Answers.com available at http://www.answers.com/topic/Hawaiian-language	28

TABLE OF AUTHORITIES – Continued

	Page
Bradley, <i>The American Frontier in Hawaii: The Pioneers 1789-1843</i> , Stanford University Press (1942).....	22
Carrington, <i>Testamentary Incorrectness: A Review</i> , 54 <i>Buffalo Law Review</i> 693, Dec. 2006	15, 34
Chinen, <i>The Great Mahele, Hawaii's Land Division of 1848</i> , University of Hawaii Press, 1948 at 31	23
Conklin, <i>Hawaiian Apartheid Racial Separatism and Ethnic Nationalism in the Aloha State</i> , E-BookTime, 2007, http://tinyurl.com/2f7p86 , Chapter 1 Introduction – The Gathering Storm	32
Council for Native Hawaiian Advancement list of members, including KSBE and its Alumni Associations of Northern and Southern California, http://www.hawaiiancouncil.org/members.html	32
Fein, <i>Hawaii Divided Against Itself Cannot Stand</i> , June 1, 2005, http://tinyurl.com/7d6xq	3
Hitch, <i>Islands in Transition, The Past, Present And Future of Hawaii's Economy</i> , First Hawaiian Bank, 1992	16, 20, 23
Honolulu Star-Bulletin Special Series Edition at http://starbulletin.com/specials/bishopo.html	31
Kame'eleihiwa, <i>Native Lands and Foreign Desires</i> , Bishop Museum Press 1992 at 154-157	21

TABLE OF AUTHORITIES – Continued

	Page
King and Roth, <i>Broken Trust: Greed, Mismanagement & Political Manipulation at America's Largest Charitable Trust</i> , University of Hawaii Press 2006	30, 31
Kirch, <i>On the Road of the Winds</i> at 247, Univ. of California Press, 2000.....	16
Krischel, <i>Hawaiians do better without entitlements</i> Honolulu Advertiser, January 9, 2007, http://tinyurl.com/ytryoz	30
Kuykendall, <i>The Hawaiian Kingdom</i> , 5th Ed., Vol. 1 at 8, University of Hawaii Press 1938.....	17, 29
Kuykendall, <i>The Hawaiian Kingdom</i> , Vol. 3 at 586, 594, University of Hawaii Press 1967.....	24, 25
Madison: <i>Remonstrance against Religious Assessments</i> (1785), Writings of James Madison 183 (Hunt ed. 1901).....	34
Malo, <i>Hawaiian Antiquities</i> , Bishop Museum Press, 1959, Translated from the Hawaiian 1898 2d Ed	17, 18, 19
Morgan Report, U.S. Senate, February 26, 1894, Morganreport.org	24, 26
Restatement (Third) of Trusts §64 (2003)	4, 10
Russ, <i>The Hawaiian Revolution (1893-94)</i> , at 66, 67, Susquehanna University Press (1959).....	24, 25
Russ, <i>The Hawaiian Republic (1894-98)</i> , at 47, Susquehanna University Press (1959).....	26
SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION, §20.03 (5th ed. 1993).....	13

TABLE OF AUTHORITIES – Continued

	Page
Sowell, <i>Affirmative Action Around the World, an Empirical Study</i> , Yale University Press (2004).....	34
Sullivan, <i>Race to Racism? Ascribe it to Tribe</i> , 3/21/2003, http://www.hawaiireporter.com/story.aspx?ab166d66-d042-4561-9276-b6577961accd	3
Zimmerman, <i>Corruption within Bishop Estate Reached the Highest Levels of Government, But Major Records Still Under Seal</i> , Hawaii Reporter 7/10/2006, http://tinyurl.com/pwsgg	31
Zimmerman, <i>What Does Broken Trust Book Say about Ed Case and Dan Akaka?</i> Hawaii Reporter 8/23/06, http://tinyurl.com/3x9fho	31

**AMICI CURIAE BRIEF IN
SUPPORT OF PETITIONERS**

**(EXCEPT THAT THEY ASK TOO LITTLE
AND DO NOT ADDRESS THE REAL ISSUE)**

INTERESTS OF AMICI CURIAE¹

Grassroot Institute of Hawaii (“GRIH”) is a non-profit, free-market public policy institute advocating liberty, responsible and open government, and the rights of the individual. It is an affiliate of State Policy Network and more than 80 similar state think tanks and institutes across America and Europe. Through research papers, policy briefings, commentaries and conferences, GRIH seeks to educate and inform Hawaii’s policymakers, news media and the general public on the important issues of our time.

This case deals with the gravest threat to the State of Hawaii in its history. GRIH believes the January 31, 2008 decision of the Hawaii Supreme Court, the 1993 Apology Resolution on which it is based, and the Akaka bill which it would enable, have brought the State of Hawaii to the brink of self-destruction. On March 7, 2008 GRIH advised the

¹ Blanket consents of the parties to the filing of *amicus curiae* briefs are on file with the Office of the Clerk of this Court. The Petitioners’ consent was filed November 6, and the Respondents’ December 1, 2008.

No counsel for a party authored this brief in whole or in part and no person or entity, other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Honorable Linda Lingle of its concerns and asked her as Governor to take appropriate action on behalf of all the people of Hawaii. GRIH's concerns were that the State Attorney General had not contested the misstatements of history in the Apology resolution; and did not raise the constitutional and trust law defenses to the Office of Hawaiian Affairs' ("OHA's") claims.²

Southeastern Legal Foundation, Inc. ("SLF"), founded in 1976, is a national public interest law firm and policy center that advocates constitutional individual liberties, free enterprise and private property rights in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court of the United States. SLF shares the grave concerns of GRIH and its call for action by this Court.

Hawaii is justly admired as an integrated, racially blended society. It has been called a model for the rest of the country, perhaps for the world. But some people in Hawaii find no comfort in integration and equality. For over two decades, a counter-current promoting special privileges for persons of Hawaiian ancestry has gradually developed and, to some extent become the accepted norm among those in Hawaii with a vested interest in continuing such racial

² The correspondence is posted at <http://www.aloha4all.org/news.aspx>.

distinctions between citizens. This case is just a glimpse of the internal forces working to destroy the ideals of aloha and equal opportunity for every individual whatever his or her ancestry, embraced by the founding fathers of both the Kingdom of Hawaii (Kamehameha I, II and III) and the United States of America.³

These *Amici* support the Petitioners-Defendants-Appellants HCDCH and its director and board members; the State of Hawaii; and the Honorable Linda Lingle, Governor of the State of Hawaii (collectively “State Parties”) except that State Parties ask too little and do not address the real issue.

Pursuant to Supreme Court Rule 37(1) these *Amici* bring to the attention of the Court the following “relevant matters not already brought to its attention by the parties.”



SUMMARY OF ARGUMENT

The Apology resolution and its “whereas” clauses are incorrect, of no probative value, and have no legal force or effect whatsoever.

³ See for example two *Grassroot Institute of Hawaii* research papers:

Race to Racism? Ascribe it to Tribe by Paul M. Sullivan, Esq. 3/21/2003, <http://www.hawaiireporter.com/story.aspx?ab166d66-d042-4561-9276-b6577961accd>; *Hawaii Divided Against Itself Cannot Stand* by Bruce Fein, Esq. June 1, 2005, <http://tinyurl.com/7d6xq>.

Under *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819) and Restatement (Third) of Trusts §64 (2003) neither the State of Hawaii nor the United States have authority to modify the terms of the Ceded Lands Trust. Hawaii Constitution, Article XII §§4, 5 and 6 and HRS §10-13.3 and all other state laws purporting to give Hawaiians or Native Hawaiians any right, title or interest in the Ceded Lands Trust not given equally to other beneficiaries are unconstitutional and void.

OHA and its use of ceded lands funds or property solely for race-based purposes is unconstitutional.



ARGUMENT

1. The State Parties ask too little.

While commendably seeking review and reversal of the January 31, 2008 decision of the Hawaii Supreme Court, the State Parties ask only if Congress's "symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land" unless and until the State has made a deal with native Hawaiians.

By presenting only that question, the State Parties would reduce this case to nothing more than a turf war, an intra-government squabble over which State politicians, the Governor and other executive branch officials or the OHA Trustees, both courting the Native Hawaiian voting bloc and the well-financed

interests that serve it, are in charge of doling out the benefits of, and divvying up, the ceded lands.

Reversing the Hawaii court's judgment simply because the Apology resolution does not actually "dictate" issuance of an injunction, would provide only fleeting, if any, relief. The Hawaii Legislature could enact even more race-based legislation such as a veto-proof moratorium on land transfers; or it could approve an agreement similar to the \$200M "settlement"/giveaway proposed by the Governor and OHA in January of this year. www.oha.org/kawaiola/2008/2. Even if such legislation would be ultimately invalidated, it is uncertain whether, by then, it would be possible to put Hawaii back together.

The State Parties' myopic view of the question presented ignores that the State of Hawaii holds the 1.2 million acres as Trustee of the federally-created Ceded Lands Trust for all the people of Hawaii.⁴ It

⁴ Justice Breyer's concurring opinion with whom Justice Souter joined in *Rice v. Cayetano*, 528 U.S. 495, 525 (2000), "But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii." *Day v. Apoliona*, 496 F.3d 1027, 1034, n.9 (9th Cir. 2007) ("Justice Breyer noted that, unlike a trust for an Indian tribe, the lands ceded in the Admission Act are to benefit "*all* the people of Hawaii," not simply Native Hawaiians.") (The 1.2 million acres consists of the 1.4 million acres returned to Hawaii upon statehood under Admission Act §5(b), less the about 200,000 acres Congress had set aside in 1921 as "available lands" under the Hawaiian Homes Commission Act. See also, Admission Act §5(g). It is this same 1.2 million acres which is the corpus of the Ceded Lands Trust

(Continued on following page)

would have this Court turn a blind eye to ongoing violations by State Parties and OHA Trustees of basic trust law and Equal Protection principles applicable to the federally created Ceded Lands Trust.

By not challenging the Hawaii Supreme Court's acceptance of the tendentious "whereas" clauses of the Apology resolution as historical truth, the State would have this Court implicitly condone the re-writing of Hawaii's history.

2. The State's Revelation: The Ceded Lands Trust has never generated annual net income. Therefore, distributions of trust revenues only to OHA for native Hawaiian beneficiaries, and none to or for the rest of the beneficiaries, were and are illegal.

On June 4, 2008 in *Day v. Apoliona*,⁵ the State, apparently for the first time in history, publicly accounted for, at least in part, and acknowledged that the Ceded Lands Trust costs the State many times

burdened by the injunction ordered by the Hawaii Supreme Court.)

"The federal government has always recognized the people of Hawaii as the equitable owners of all public lands; and while Hawaii was a territory, the federal government held such lands in 'special trust' for the benefit of the people of Hawaii." *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977).

⁵ *Day v. Apoliona*, No. CV05-00649 SOM-BMK, U.S. District Court, Hawaii, June 4, 2008. The State's June 4, 2008 motion for summary judgment, memo in support Docket # 142 and separate concise statement Docket # 143 are accessible through PACER.

more annually than the 1.2 million acres bring in. The State also acknowledged that this has been so for every year since Statehood; and that the State had never previously made that argument to the District Court or to the Ninth Circuit.

This “bombshell” revelation by the State means that since 1959 the Ceded Lands Trust has never generated any annual net income from which distributions could lawfully be made to any Ceded Lands Trust beneficiaries. As the State argued vigorously and correctly to the Hawaii Supreme Court in a related case in 1999, beneficiaries of the Ceded Lands Trust are entitled to, and only to, net income after trust expenses.⁶

Thus, the hundreds of millions of Ceded Lands Trust revenues the State has distributed to OHA exclusively for native Hawaiian beneficiaries over the last three decades have illegally diverted trust funds equitably owned by all the people of Hawaii. Such conduct would appear to meet the definitions of HRS §708-874 (Misapplication of entrusted property, a misdemeanor), or Theft, HRS §708-830(6)(a) (Failure to make required disposition of funds, a felony).

Since the State itself presented these facts as undisputable, documented them with the declaration

⁶ The State’s June 4, 2008 revelation is covered in depth in Wendell Marumoto’s Opening Brief at 29-45 filed 10/30/2008 in the Ninth Circuit No. 08-1668, available on PACER and at http://www.aloha4all.org/documents/81030_WM_OpeningBrief.pdf.

of the State's highest financial officer, and with official data, and forcefully and correctly spelled out the law that beneficiaries of the Ceded Lands Trust are entitled only to net income, it would be entirely appropriate for this Court, if it reverses the Hawaii Court, to direct that such distributions must cease.

3. *Trustees of Dartmouth College v. Woodward.*

In 1819, Chief Justice John Marshall held that the charter granted by the British Crown to the trustees of Dartmouth College, in New Hampshire, in the year 1769, was a contract within the meaning of that clause of the Constitution of the United States (Art. I, §10), which declares, that no state shall make any law impairing the obligation of contracts.

The state of Vermont was a principal donor to Dartmouth College. The lands given lie in that state and are of "great value." The State of New Hampshire also donated lands of "great value." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 574 (1819).

After the trustees had operated the college beneficially for nearly 50 years and after the revolution, the New Hampshire legislature, controlled by Republican supporters of Thomas Jefferson, passed a bill revising the charter of Dartmouth College, adding new trustees and a board of overseers. The trustees refused to accept the changes and filed suit to invalidate them.

C.J. Marshall held that the royal charter had “every ingredient of a complete and legitimate contract.” He ruled that the trustees were “one immortal being” whose powers continued forever and could not be abridged by legislative acts.

Hawaii’s Ceded Lands Trust, for “educational and other public purposes” was also endowed with public lands and also founded with every ingredient of a complete and legitimate contract. On June 16, 1897 the Republic of Hawaii, by its proposed Treaty of Annexation, offered to cede to the United States its public lands (about 1.8 million acres formerly called the Crown lands and Government lands of the Kingdom of Hawaii) with the requirement that all revenue from or proceeds of the lands, except those used for civil, military or naval purposes of the United States or assigned for the use of local government, “shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.” Another condition of the Republic’s offer was that “The public debt of the Republic of Hawaii” was to be “assumed by the government of the United States, but the liability of the United States in this regard shall in no case exceed \$4,000,000.”

A year later, on July 7, 1898, by the Newlands Resolution, the United States accepted the offer, expressly including the conditions that it hold the lands in trust and that it assume the debts accumulated by the Kingdom and Republic up to \$4 million.

As this Court said, “Where there is a charter, vesting proper powers of government in trustees or governors, they are visitors; and there is no control in anybody else; except only that the courts of equity or of law will interfere so far as to preserve the revenues, and prevent the perversion of the funds, and to keep the visitors within their prescribed bounds.” *Id.*, 17 U.S. 565.

That basic legal principle of trust law enforcing contractual obligations undertaken by the sovereign, announced 189 years ago, is now found in Restatement (Third) of Trusts §64 (2003) current through August 2008,

§64. Termination Or Modification By Trustee, Beneficiary, Or Third Party

(A) Except as provided in §§65 and 68, the trustee or beneficiaries of a trust have only such power to terminate the trust or to change its terms as is granted by the terms of the trust.

(B) The terms of a trust may grant a third party a power with respect to termination or modification of the trust; such a third-party power is presumed to be held in a fiduciary capacity.

Since the Ceded Lands Trust gives no trustee, beneficiary or third party any right to modify or change the terms of the Ceded Lands Trust, as a matter of law, neither the State of Hawaii, nor the Hawaii Supreme Court, nor Congress, whether by the

Apology resolution or any other law, has the power to impair the obligations to all the people of Hawaii undertaken by the United States in 1898 in the Annexation Act, and assumed by the State of Hawaii in 1959.

Again, if this Court reverses the Hawaii Court, it would be appropriate to apply this straightforward rule of trust law and direct that the unauthorized alterations favoring selected beneficiaries are void and must cease.

4. In cases involving alleged racial discrimination, courts do not accept legislative allegations or conclusions, but rigorously scrutinize them.

What deference, if any, a court should accord legislative findings is not a question of “judicial notice” in the sense covered by the Federal Rules of Evidence but a question of constitutional law. For purely economic legislation judged by the minimal scrutiny of the rational basis test, the courts are deferential to legislative findings unless they are plainly false or irrational. See, e.g., *Railway Express v. New York*, 336 U.S. 106 (1949). But when the issue is whether the statute uses a suspect classification, such as race, or infringes a fundamental right, the courts do not defer to legislative findings but rigorously scrutinize them. This is true even if the government denies in the statute itself that it is discriminating based on a suspect classification or

infringing a fundamental right. Otherwise a legislature could utterly frustrate protection of constitutional rights by adding tendentious findings of “fact” to immunize its laws from independent judicial review. “Under our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace.” *U.S. v. Morrison*, 529 U.S. 598, 615 (2000).

This Court in *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000) has determined that the definitions of “Hawaiian” and “native Hawaiian” are racial classifications. These are the classes that the State constitutional and statutory laws at issue in this case are intended to benefit. Consequently, the “most rigid scrutiny” applies to any attempt to justify use of these classifications, whether by alleged fact-finding or otherwise.

The legislative statements that the Hawaii Supreme Court cites to establish the facts on which its injunction rests (the 1993 Apology Resolution, Pub. L. 103-150, 107 Stat. 1510 (1993)) suffer from an additional defect: they are not part of the statute on which this suit is based, the 1959 Admission Act, or Article XII of the Hawaii Constitution and the State OHA Statutes implementing it, and so are irrelevant to this case.

Legislative statements in a preamble may help a court interpret the operative clauses of a particular statute by clarifying the legislative intent relating to

the statute to which the preamble is attached, but they do not legislate facts or confer rights. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION, §20.03 (5th ed. 1993). A preamble does not clarify the intent of a legislature that enacted a different statute decades earlier. Congress enacted the Admission Act in 1959. The Ceded Lands Trust is the subject of this suit. That trust originated in 1898 with annexation, was reiterated in the Organic Act in 1900 and continued by the Admission Act in 1959. Congress was of course not relying in 1898 or 1900 or 1959 on the “whereas” clauses found in the 1993 “Apology Resolution.” Nor was the State in 1978 when it adopted Art. XII of the Hawaii Constitution or in the Statutes implementing it before 1993.

The Hawaii Supreme Court relies chiefly on the “whereas” clauses to the so-called “Apology Resolution.” Because that resolution has no legally operative provisions and is not the subject of this lawsuit, these “whereas” clauses do not determine the intent or effect of the statute on which Plaintiffs rely.

Congress intended no change in the status quo by passing the Apology Resolution. The resolution expressly does not resolve any claims. 107 Stat. 1510 §3. The Senate Committee Report informed Congress that the resolution would have no regulatory impact and “will not result in any change to existing law.” S. Rep. 103-126. There were no fact-finding hearings or floor debate about the accuracy of the factual claims. It can hardly be compared to the social science research

used in *Brown v. Bd. of Education*, 347 U.S. 483, 494, n.11 or a “Brandeis brief.”

The resolution’s sponsor, Senator Daniel K. Inouye, assured the Senate that it is only “a simple resolution of apology.” He emphasized this point to reassure his colleagues that the resolution would have no effect on any controversial questions:

As to the matter of the status of Native Hawaiians, as my colleague from Washington knows, from the time of statehood we have been in this debate. Are Native Hawaiians Native Americans? This resolution has nothing to do with that. This resolution does not touch upon the Hawaiian homelands. I can assure my colleague of that. It is a simple apology.

CONGRESSIONAL RECORD Vol. 139 at S14477, S14482 (Oct. 27, 1993). Thus, the Resolution has no bearing on the status of Native Hawaiians or the 1959 Admission Act or this case.

5. Victimhood claims unjustified. U.S. a success story for Hawaiians.

The civil rights movement of the 1960’s (which triggered the “Hawaiian Renaissance”) also had a negative spin as peoples everywhere became increasingly sensitive to racial differences not only as sources of inequity and injustice but as opportunities for individual self-aggrandizement. Claims to compensation

for group injustices began to be advanced around the globe by ethnic leaders.

But correcting for past injustices is a special problem for racial groups, such as Hawaiians, not justified in claiming to be victims. The foul deeds committed against their ancestors since 1778, as before, were almost all committed by other Hawaiians. Nevertheless, despite the demerits of their claims of racial injustice, Hawaiians with increasing frequency put themselves forward in the public arena as champions of a victimized race whose status and civil rights had been denied, and who might therefore claim compensatory entitlements. This led to “Hawaiianizing” the trustees of Bishop Estate and turned the estate to a policy of disassimilation contrary to the Princess’s goal of integration. *Id.*⁷

America’s acceptance in 1898 of the Republic of Hawaii’s offered Treaty of Annexation⁸ was the logical culmination of the friendly and mutually beneficial trading relationship between the two countries. The United States is Hawaii’s closest large neighbor, even more so after 1850 when California became a state. The irresistible mutual attraction between the people

⁷ Condensation of text from *Testamentary Incorrectness: A Review* by Paul D. Carrington, Vol. 54 Buffalo Law Review 693, 705-706, Dec. 2006.

⁸ September 9, 1897 the Senate, Republic of Hawaii ratified the proposed Treaty of Annexation. <http://tinyurl.com/yofozz>. This was accepted by the U.S. by the Annexation Act, 30 Stat. 750 1898.

of Hawaii and the people of America, Europe and Asia, is a fact of history.

6. Hawaii's Economic System in 1778.

After 500 years of isolation, the Hawaiian islands were “discovered” in 1778 by British explorer, Captain James Cook. What Cook found was the most hierarchical of the Polynesian chiefdoms.⁹ Each of the major Hawaiian islands was separately ruled by a paramount chief or *ali'i nui*. The ruling classes generally did not engage in economically productive work, except for the managerial skills of the *konohiki*, lesser chiefs who served as property managers. Chiefs, from the head of the smallest *ahupua'a* (land district) to the *ali'i nui*, basically lived off the labor of the *maka'ainana* (commoners or tillers of the soil), as did their courtiers, warriors, priests, administrators, policemen, servants and hangers-on. Estimates vary as to the size of the tax burden that commoners bore to support this upper structure, ranging from more than half to about two-thirds of the fruit of the commoners' labor.¹⁰ In these social formations, “high rank holds the rule and possesses the land title: commoners are subject and landless.”¹¹

⁹ Kirch, *On the Road of the Winds* at 247, Univ. of California Press, 2000.

¹⁰ Hitch, *Islands in Transition, The Past, Present and Future of Hawaii's Economy* at 15, First Hawaiian Bank, 1992.

¹¹ Kirch, *On the Road of the Winds*, *supra* at 249.

7. In Hawaii, as everywhere, the good old days were not all that good.

Interwoven with the religion of Hawaii (and of all Polynesia) and with governmental and social organization, was the *kapu* system. This was the feature of the Hawaiian culture which made the deepest impression upon most of the early foreign visitors, who saw only the outer manifestations of the system and who, in their descriptions emphasize its bizarre restrictions and cruel sanctions.¹²

The condition of the common people was that of subjection to the chiefs, compelled to do their heavy tasks, burdened and oppressed, some even to death. The life of the people was one of patient endurance, of yielding to the chiefs to purchase their favor. The plain man (*kanaka*) must not complain.¹³

If the people were slack in doing the chief's work they were expelled from their lands, or even put to death. For such reasons as this and because of the oppressive exactions made upon them, the people held the chiefs in great dread and looked upon them as gods.¹⁴

¹² Kuykendall, *The Hawaiian Kingdom*, 5th Ed., Vol. 1 at 8, University of Hawaii Press, 1938.

¹³ Malo, *Hawaiian Antiquities*, Bishop Museum, Translated from the Hawaiian 1898 2d Ed. at 60-61, #63.

¹⁴ Malo at 61, #64.

The following practices were considered *hewa* by the landlord, that one should give himself up to the fascinations of sport and squander his property in *puhenehene*, sliding the stick (*pahe'e*), bowling the *ulumaiika*, racing with the canoe, on the surfboard or on the *holua* sled, that one should build a large house, have a woman of great beauty for his wife, sport a fine *tapa*, or gird one's self with a fine *malo*. All of these things were regarded as showing pride, and were considered valid reasons for depriving a man of his lands, because such practices were tantamount to secreting wealth.¹⁵

The Hawaiians had no money, nor anything that stood as an accepted representative of value to take its place. In the barter carried on between them and the ships in the early days of intercourse with the foreigner, the value of the pig was reckoned by the Hawaiian in proportion to his length, so much for the pigling of the length of the forearm, so much hoop-iron for the three-foot porker, and so much for the full-grown, fathom long (*anana*) hog (New Zealand, *whanganga*).

The one barrier that stood in the way of the invention and adoption of some tangible representative of value was the selfish and exclusive policy of the chiefs, which allowed the poor *kanaka* to possess

¹⁵ *Id.* at 74, #13.

nothing he might call his own, not even his *malo* or his wife.¹⁶

One thing which the priest urged upon the king was to kill off the ungodly people, those who broke tabu and ate with the women or who cohabited with a woman while she was confined to her infirmary, and the women who intruded themselves into the *heiau*.¹⁷

Another thing he urged was that the woman who beat *tapa* on a tabu day, or who went canoeing on a tabu day should be put to death; also that the man who secretly left the service at the temple to go home and lie with his wife should be put to death; that the men and women who did these things, whether from the backwoods (*kua'aina*) or near the court, should be put to death.¹⁸

8. The United States in 1778.

In 1778, the United States consisted of the 13 former British colonies on the Atlantic seaboard of America. They were engaged in the Revolutionary war triggered, among other grievances, by the British monarchy's oppressive taxation. The economy of the new United States soon intertwined with Hawaii's as merchant ships carrying furs from Alaska and the

¹⁶ Malo at 80, Notes on Chapter 22.

¹⁷ *Id.* at 188 #9.

¹⁸ *Id.* at 188 #10.

Pacific Northwest to China began taking on sandalwood from Hawaii, as well as provisions. Then, as the ships carrying off the sandalwood of Hawaii disappeared, a new kind of vessel began arriving at the ports of the kingdom, the New Englanders hunting whales to light the lamps of America.¹⁹

9. Hawaii's search for security in an insecure world.

Kamehameha I (who would later unite the islands and become their first king) had seen Cook's British men of war in 1778, La Perouse's two French naval vessels that visited in 1786 and Vancouver's warships in 1792, 1793 and 1794. It was obvious to Kamehameha that the continued independence of his little kingdom hinged on having one of these powers as a protector. In 1794 he agreed with Vancouver to a "solemn cession" of the Island of Hawaii (which was all he controlled at the time) to Great Britain, which would own the island but not interfere in domestic affairs. The British crown never took official cognizance of this agreement but until his death in 1819, Kamehameha felt that he had a solid defensive alliance with Great Britain.²⁰

¹⁹ Hitch, *Islands in Transition*, *supra* at 40, 41.

²⁰ Hitch, *Islands in Transition* at 32.

10. 1819, Kamehameha II abolishes the *kapu* system. 1820, First American missionaries arrive. Kaahumanu takes charge of Christianity, makes it the new path to *mana*.

In 1819, shortly after the death of Kamehameha the Great, his son Liholiho, the new King Kamehameha II, broke the *kapu*, dismantled the *heiau* and burned the wooden idols. Into this religious vacuum, the first American missionaries arrived the next year, 1820, and soon Kaahumanu took charge of Christianity, made it the new *kapu*, displacing *Lono* and *Ku* as the path to *mana*.²¹

11. Hawaii sits astride principal Pacific trade routes. Embraces western institutions.

By 1830 the United States had replaced Great Britain as the accepted friend and most likely protector of the little kingdom. The expansion of American interests into this region was a by-product of the trans-Pacific trade in furs and sandalwood. Manufactured goods destined for California and Oregon were distributed from Honolulu and exports from those territories were sent to Honolulu for transshipments to Europe or to the United States. The trade which linked Honolulu, Monterey, and the mouth of the Columbia in an economic interdependence was carried almost exclusively in American vessels and was

²¹ *Native Lands and Foreign Desires*, Kama'eleihiwa 154-157.

controlled by American merchants, many of whom resided either in Honolulu or in California.²²

As Stanford University Professor Harold Bradley concluded,²³ in reference to the time period 1789-1843, this development of a Polynesian kingdom with Western institutions was, in part, the result of the location of the Hawaiian Islands astride the principal trade routes of the northern and central Pacific. It had been possible only because of the ready amiability with which the Hawaiian chiefs and commoners had welcomed all classes of foreigners to the Islands. The principal forces in the creation of the new Hawaiian kingdom, however, had been the few score of American traders and missionaries who had made the Islands their home and whose energy in the introduction of the political, religious, and economic ideals of their native land had established an American frontier in Hawaii.

12. Hawaii's economic system in 1890.

Between the death of Kamehameha I in 1819 and the death of King Kalakaua in January 1891, the *ali'i nui* themselves had abolished the *kapu* system; adopted a Bill of Rights laying the legal basis for a free-enterprise economy, under which the people of Hawaii were set free to work and otherwise manage

²² Bradley, *The American Frontier in Hawaii* at 392-394.

²³ *Id.* at 465-466.

their affairs as they wanted and to accumulate personal property and pass it along to their heirs; provided Hawaiians with a written form of their previously oral language and established widespread public schools and an exemplary level of literacy among all classes; adopted an American-style constitution giving commoners an institutional voice in the government and guaranteed a regime of law for business transactions and property holding; Kamehameha III and 245 chiefs had agreed among themselves how much land should go to the crown and how much to the chiefs and in 1850 the legislature had ordered grant of fee-simple titles to native tenants for their *kuleanas*, the parcels of land cultivated by them. By the end of the *mahele*, or land division, in 1855, less than 30,000 acres were awarded to the native tenants. However, these tracts of land consisted chiefly of taro lands and were considered the more valuable lands in the Islands.²⁴ The *kuleana* grants put land into the hands of about two out of every three Hawaiian families, said to be “a record of fee simple ownership among natives unique in the early 19th century.”²⁵

²⁴ Chinen, *The Great Mahele, Hawaii's Land Division of 1848*, University of Hawaii Press, 1848 at 31.

²⁵ Hitch, *Islands in Transition*, *supra* at 30.

13. 1893, Queen Liliuokalani secures passage of lottery, opium and distillery bills, announces new constitution. Business and political establishment revolts. Overthrow.

On Saturday January 14, 1893, Queen Liliuokalani violated her oath taken just two years earlier to uphold the existing constitution. She announced her intention to promulgate a new constitution giving herself more absolute power.²⁶ Shortly before that day, she had secured passage of a lottery law and one legalizing importation of opium and another for a distillery. For much of the kingdom's business and political establishment, this was the last straw. They revolted. On Sunday January 15th notices were posted for mass meetings of the opposing sides for the following Monday. Uncertainty prevailed. On Monday January 16th, Captain Wiltse on the U.S.S. Boston, just back from a training voyage, found an interregnum, uncertainty about who, if anyone was in charge. (Put into <http://morganreport.org> search window the word "interregnum.") He sent 162 sailors and marines ashore, to protect American lives and property. The marines went to the U.S. legation at Nuuanu and School Streets and the consulate at Merchant Street. The sailors marched down King Street, dipped their

²⁶ Russ, *The Hawaiian Revolution (1893-94)* at 66, 67, Susquehanna University Press; 3 Kuykendall, *The Hawaiian Kingdom* at 586, summarizes proposed changes which would "give the queen more power and influence over the government than had been possessed by Kalakaua at the beginning of his reign." Also, morganreport.org, Emerson testimony at 536-537.

colors respectfully to the Queen as they passed Iolani Palace and continued on to King and Alapai Streets. They were quartered that night at Arion Hall out of sight from the Palace and separated from it by the Music Hall on King Street.²⁷ The troops did not cooperate with the revolutionists' committee of safety and the committee had no more knowledge than did the Queen's Government where the troops were going nor what they were going to do.²⁸ On Tuesday January 17th, the committee occupied the government building, Aliiolani Hale, read a proclamation deposing the Queen, abrogating the monarchy and establishing a provisional government until the terms of annexation were negotiated with the United States.²⁹ After learning the provisional government was in possession of the government building, U.S. Minister Stevens recognized the provisional government as the *de facto* government of Hawaii. The Queen then surrendered under protest.³⁰

14. Republic, then Annexation, then Statehood.

Sanford B. Dole, President of the new Provisional Government, promptly sent a delegation to Washington seeking annexation, but the new President, Grover Cleveland, opposed annexation and tried to restore

²⁷ Russ, *supra* at 82; Kuykendall, *supra* at 595.

²⁸ 3 Kuykendall, *supra* at 594.

²⁹ Russ, *supra* at 86-90.

³⁰ Russ, *supra* at 95, 96.

the Queen. But he reversed himself upon receipt of the Morgan Report, <http://morganreport.org> of February 26, 1894 refusing requests from the queen for further aid in her restoration, and acknowledging both the Provisional Government and Republic of Hawaii as the legitimate successors to the Kingdom. Queen Victoria of Great Britain, a friend of the former Queen Liliuokalani, also recognized the Republic as the lawful government of Hawaii.³¹ Letters personally signed by emperors, kings, queens and presidents of at least twenty nations on four continents in eleven languages, recognized the Republic under President Sanford B. Dole as the rightful successor government of Hawaii.

In 1897, after President Cleveland had left office, the Republic of Hawaii again proposed a treaty of annexation. At first the Senate was unable to muster the two-thirds vote for ratification, but following the outbreak of the Spanish American War in 1898, the U.S. Congress passed a joint resolution accepting the Republic of Hawaii's proposed treaty of annexation.³² The vote was 42-21 in the Senate and 209-91 in the House.

³¹ Russ, *The Hawaiian Republic* at 47, recognition granted to the new Government by Queen Victoria Nov. 15, 1894. Photos of all the original documents are available at <http://tinyurl.com/4wtwdz>.

³² Newlands Resolution (Annexation Act) 30 Stat. 750, July 7, 1898.

The Organic Act in 1900³³ gave all citizens of the former Republic, including Native Hawaiians, full U.S. citizenship. The Territory of Hawaii's first Delegate to Congress, Native Hawaiian Robert Wilcox, was elected on the promise that "The first bill I shall introduce will be one to admit Hawaii to Statehood."³⁴ In 1903, the first Legislature of the Territory of Hawaii, with more than 70% of its members being Native Hawaiian, unanimously resolved to ask Congress to convene a constitutional convention to create a constitution for the proposed State of Hawaii.³⁵ In 1919 Hawaii's elected Territorial Delegate Prince Jonah Kuhio Kalakaua Kalaniana'ole (heir to the throne if the Kingdom had continued) introduced in Congress the first bill for Hawaii statehood. As of 1954, thirty-three bills for statehood for Hawaii had been introduced in Congress by Hawaii's Territorial delegates since 1919.³⁶

In the 1940 Hawaii Statehood plebiscite, two out of three Hawaii voters said "Yes for Statehood" but Congress was not yet ready. In 1959, the people of Hawaii finally achieved their long sought goal. Congress proposed, over 94% voted "Yes" and Hawaii became the 50th State of the Union. Results of Votes Cast, T.H. 1959, <http://tinyurl.com/2rbx79>.

³³ Organic Act, 31 Stat. 141, April 30, 1900.

³⁴ The evening Bulletin, July 12, 1901.

³⁵ S.L.H. 1903 at 377.

³⁶ Senate Report 886 of January 27, 1954.

15. Hawaiians wanted children to be taught English to open up wider opportunities.

Act 57, sec. 30 of the 1896 Laws of the Republic of Hawai'i, read as follows: "The English Language shall be the medium and basis of instruction in all public and private schools, provided that where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the Department, either by its rules, the curriculum of the school, or by direct order in any particular instance. Any schools that shall not conform to the provisions of this section shall not be recognized by the Department." See web site Answers.com available at <http://www.answers.com/topic/hawaiian-language> (last visited on 3/23/2007), which notes that "[t]his law established English as the main medium of instruction for the government-recognized schools, but it did not ban nor make illegal the Hawaiian language in other contexts. The law specifically provided for teaching languages 'in addition to the English language.' Hawaiian-language newspapers were published for over a hundred years, right through the period of the supposed ban. . . . The longest run was that of *Ka Nupepa Kuokoa*: about 66 years, from 1861 to 1927."

By 1850 a strong desire existed among many of the Hawaiians to have their children taught English in order to open to them wider avenues for advancement. In 1854 a law was enacted by the Kingdom legislature "for the encouragement and support of English schools for Hawaiian youth." "This was the

beginning of a movement which ended many years later with the complete abandonment of the Hawaiian language as a medium of instruction in the public schools of Hawaii.”³⁷

Princess Bernice Pauahi Bishop herself was fully in accord. Clause Thirteenth of her will requires her trustees to “provide first and chiefly a good education in the common English branches.” The Schools’ 1885 Prospectus observed: “The noble minded Hawaiian chiefess who endowed the Kamehameha Schools, put no limitations of race or condition on her general bequest. Instruction will be given only in English language, but the Schools will be opened to all nationalities.”³⁸

16. Hawaiians prosper with equality.

The 2005 American Community Survey (ACS) for California, recently released by the U.S. Census Bureau, confirms Native Hawaiians’ ability to prosper without special government programs. The estimated 65,000 Native Hawaiian residents of California, with no Office of Hawaiian Affairs or Hawaiian Homes or other such race-based entitlements, enjoyed higher median household (\$55,610) and family (\$62,019) incomes, relative to the total California population (\$53,629 and \$61,476 respectively) despite having

³⁷ Kuykendall, *The Hawaiian Kingdom*, Vol. 1 at 360-362.

³⁸ *Doe v. Kamehameha Schools*, 416 F.3d 1025, 1028 (9th Cir. 2005).

smaller median household and family sizes. “Hawaiians do better without entitlements” by Jere Krischel, Honolulu Advertiser, January 9, 2007, <http://tinyurl.com/ytryoz>.

17. Kamehameha Schools/Bishop Estate has corrupted the government of the State of Hawaii, pursues hereditary superiority, disassimilation.

A remarkable book published two years ago reported that the trustees of Kamehameha Schools/Bishop Estate (“KSBE”) have so corrupted the political process in the State of Hawaii that the legislative, executive and judiciary powers have been, and still seem to be, concentrated in the hands of those who facilitated “A World Record for Breaches of Trust” by trustees and others of high position, without surcharge or accountability. *Broken Trust: Greed, Mismanagement & Political Manipulation at America’s Largest Charitable Trust*, King and Roth, 2006.

Sixty Minutes called it “The biggest story in Hawaii since Pearl Harbor; KSBE was characterized by *The New York Times* as “A feudal empire so vast that it could never be assembled in the modern world”; and by Howard M. McCue III, the Chairman of the Charitable Planning Committee for the American College of Trust and Estate Counsel, as the most significant legal dispute of our time . . . a tale of unbridled ambition, infectious greed, and high drama. . . . www.brokentrustbook.com.

Corruption within Bishop Estate Reached the Highest Levels of Government, But Major Records Still Under Seal, Six Prominent Community Leaders Share Their Part in the 'Broken Trust' Controversy, Call for Release of More Than 1 Million Pages of Documents Kept Secret by the Court By Malia Zimmerman, 7/10/2006, <http://tinyurl.com/pwsgg>.

KSBE put legislators on its payroll and used its alumni association as its proxy to lobby. Hawaii Reporter, *What Does Broken Trust Book Say About Ed Case and Dan Akaka?* <http://tinyurl.com/3x9fho>.

The Honolulu Star-Bulletin special Series Edition at <http://starbulletin.com/specials/bishop.html> provides links to stories illustrating KSBE's activist role in promoting segregation. See, for example, Aug. 4, 2005, "Rallies show school support." At one of the rallies organized by KSBE, one speaker, a tenured professor at U.H. Manoa, had this to say, "Some white men against us say they have been here seven generations. Big deal. We won't assimilate and we won't go away, so sooner or later, America will have to deal with us."

The trustees appear to continue to support the Akaka bill S.310/H.R.505 [110th Congress] (which would "recognize" Native Hawaiians as a privileged class; establish a process for them to create their own sovereign government and allow the state government, still dominated by KSBE, to negotiate with the new Native Hawaiian government, also certain to be dominated by KSBE, to negotiate for the breakup and

giveaway of much of the domain of the State of Hawaii).

KSBE openly flaunts its sweeping political clout behind the Akaka bill. KSBE and its Alumni Associations of Northern and Southern California are members of CNHA, Council for Native Hawaiian Advancement, <http://www.hawaiiancouncil.org/members.html>. The nativehawaiians.com website, lists the co-conspirators: CNHA, the Kamehameha Alumni Association, the prominent entities [many under KSBE's hegemony] who support the Akaka bill; and National Council of La Raza, the organization that seeks to "liberate" the SouthWest. <http://www.nativehawaiians.com/listsupport.html>.

18. Racial tensions are simmering in Hawaii's melting pot.

So said the headline on the first page of USA Today 3/7/07 describing the attack Feb. 19th in the parking lot of the Waikēle Mall on Oahu, when a Hawaiian family beat a young soldier and his wife unconscious while their three-year-old son sat in the back seat of their car. The attack, "unusual for its brutality," sparked impassioned public debate.

The USA Today article and related links may be found at <http://tinyurl.com/2jle2e>. See also The Gathering Storm, Chapter 1 of *Hawaiian Apartheid: Racial Separatism and Ethnic Nationalism in the Aloha State* by Kenneth R. Conklin, Ph.D., <http://tinyurl.com/2f7p8b>.

The brutality at Waikēle Mall is a flashing red light. Over 1 million American citizens in Hawaii are under siege by what can fairly be called an evil empire dedicated to Native Hawaiian Supremacy. That empire is dominated by KSBE, the nation's largest charitable trust, which has already conquered Hawaii's government and much of its business establishment. Even the United States supports this invidious discrimination by annually funding multiple Hawaiian entitlements; and by failing to disavow the Hawaiian homelands compact in the Admission Act which mandates that the State of Hawaii keep on discriminating on the basis of race.

Professor Carrington, referring to KSBE, puts it this way:

As the ambition to achieve disassimilation rose, the instinct of the state's citizens who lacked the appropriate ancestor was to humor those who did, seemingly in the hope that tolerance and modest support would enable all to remain amiable neighbors. Few if any citizens stepped forward to question efforts to assign White Guilt to the polychromatic people of the state when in 1993 Congress was asked to apologize for "the crime of 1893" and did so, with the possible implication that some further apology to a defiled group might be in order. . . . It discounted the possibility that its unwarranted apology might elevate the racist sentiment, as may have happened.

Testamentary Incorrectness: A Review by Paul D. Carrington, 54 Buffalo Law Review 693, Dec. 2006.

Thomas Sowell's *Affirmative Action Around the World* describes in chilling detail the consequences of "indigenous" movements in many countries strikingly similar to the events unfolding now in Hawaii. Sri Lanka, for example, is an island state that in 1948 was spoken of as an oasis of stability, peace and order. Within a decade, as a result of politicizing intergroup differences and instituting preferential policies, there were race riots, and ultimately civil war and horrible atrocities.

In 1785 James Madison said "it is proper to take alarm at the first experiment on our liberties . . . The freemen of America did not wait till usurped power had strengthened itself by exercise and entangled the question in precedents."³⁹

Taking alarm and opposing this empire are the *amici* and other citizens who seek to reinstate in Hawaii the idea that in the eyes of government there is only one race here, it is American.



³⁹ James Madison: *Remonstrance against Religious Assessments*, 2 Writings of James Madison 183 (Hunt ed. 1901).

CONCLUSION

These *Amici* recommend that the Court declare:

A. The Apology resolution and the “whereas” clauses in it are of no probative value, and have no legal force or effect whatsoever;

B. Under *Trustees of Dartmouth College v. Woodward* and Restatement (Third) of Trusts §64 neither the State of Hawaii nor the United States have authority to modify the terms of the Ceded Lands Trust. Hawaii Constitution, Article XII §§4, 5 and 6 and HRS §10-13.3 and all other State laws purporting to give Hawaiians or native Hawaiians any right title or interest in the Ceded Lands Trust not given equally to other beneficiaries are unconstitutional and void; and

C. All funds or properties in OHA’s hands derived from the Ceded Lands Trust, and all earnings or increase of those funds or properties, must be used for all the people of Hawaii, not just for Hawaiians or native Hawaiians; and

D. The Judgment of the Hawaii Supreme Court should be reversed and remanded directing it:

1. to enjoin any further distributions from the Ceded Lands Trust to OHA; and
2. to enjoin OHA from any further expenditures of Ceded Lands Trust funds, and any earnings or increase in those funds; and

3. to make such other orders as are necessary or appropriate to restore control of all such funds or other property in OHA's hands derived from the Ceded Lands Trust to the appropriate officer of the executive branch of the State of Hawaii.

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