QUESTION PRESENTED

Whether the Hawaii Supreme Court acted within its authority in relying upon Hawaii's laws and Constitution, as well as principles of trust law and the 1993 federal Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, to impose an injunction on the sale or transfer of the lands conveyed in trust to the State of Hawaii until the ongoing reconciliation process between the state and federal governments and native Hawaiians is completed?

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IN THE

Supreme Court of the United States

No. 07-1372

STATE OF HAWAII, *et al.*,
Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Hawaii

BRIEF OF RESPONDENTS IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

In addition to the two federal statutes mentioned in the Petition,

Hawaii Legislative Act 340 (1993), "An Act Relating to the Island of Kaho`olawe," is reprinted at Appendix A.

Hawaii Legislative Act 354 (1993), "An Act Relating to Hawaiian Sovereignty," is reprinted at Appendix B.

Hawaii Legislative Act 359 (1993), "An Act Relating to Hawaiian Sovereignty," is reprinted at Appendix C.

Hawaii Legislative Act 329 (1997), "An Act Relating to the Public Land Trust," is reprinted at Appendix D.

STATEMENT

The unanimous decision of the Hawaii Supreme Court in this case mentioned seven different sources of law: four Acts of the Hawaii legislature, two Acts of the United States Congress, and the carefully-crafted body of state trust law as applied to Hawaii's Public Lands Trust. Petitioners' claim before this Court is limited to the assertion that the decision below misread one of the two federal acts, the 1993 Apology Resolution, a Resolution that was enacted after three of the four Hawaii laws at issue in the case and that duplicated those very laws. *See* Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993) (the "Apology Resolution").[1]

The 1993 Hawaii statutes that form the essence of the Hawaii Supreme Court's decision in this case were a long-overdue reaction to the overthrow of the Kingdom of Hawaii exactly one hundred years earlier, in 1893. In 1898, when Hawaii was annexed, the Republic of Hawaii "ceded all former Crown, government, and public lands to the United States." *Rice v. Cayetano*, 528 U.S. 495, 505 (2000) (*citing* the Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750 (1898) (hereafter cited as Annexation

[1] The Petition does not assert a violation of the 1959 federal Admission Act, Pub.L.No. 86-3, 73 Stat. 4.

Resolution)). However, the United States treated these lands as separate from other public lands, requiring their revenues "to be 'used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.'" *Id.* (quoting from the Annexation Resolution). In 1899, the U.S. Attorney General opined that the Annexation Resolution had placed these lands (about 1.8 million acres) in a "special trust" for the benefit of Hawaii's people. Hawaii–Public Lands, 22 U.S. Op. Atty. Gen. 574, 1899 WL 577 (1899).

Subsequently, in the 1959 Hawaii Admission Act, Pub.L.No. 86-3, 73 Stat. 4 (the "Admission Act"), Congress stated five purposes for which the lands in the trust could used. One of these was "for the betterment of the conditions of native Hawaiians" *Id.*, Section 5(f). Congress also affirmed that it would be up to the State of Hawaii to determine how to manage these lands: "Such lands, proceeds and income shall be managed and disposed of for one or more of the foregoing purposes *in such manner as the constitution and laws of said State may provide*, and their use for any other object shall constitute a breach of trust." *Id.* (emphasis added.) In 1978, the people of Hawaii clarified the State's trust obligation to native Hawaiians during a Constitutional Convention, and the Office of Hawaiian Affairs (OHA) was created to manage proceeds derived from the lands held in trust and designated for the benefit of native Hawaiians. Pet.App. 6a-7a (*quoting from Office of Hawaiian Affairs v. State,* 110 Hawai`i 338, 340-41, 133 P.3d 767, 769-70 (2006)).[2]

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[2] The annual amount of revenue received by OHA each year is still under negotiation, but in 2006, the Hawaii Legislature

In the spring of 1993, the year marking the 100th anniversary of the overthrow of the Kingdom of Hawaii, the Hawaii State Legislature passed three related statutes:

- The first was Act 340 (1993), "An Act Relating to the Island of Kaho`olawe." It established the Kaho`olawe Island Reserve Commission, and stated that the island of Kaho`olawe (which had been used by the Navy for training purposes, and was in the process of being returned from the federal government to the State) "shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii." Hawaii Revised Statutes, sec. 6K-9; Appendix A.
- The second was Act 354 (1993), "An Act Relating to Hawaiian Sovereignty." It set forth the facts of the 1893 overthrow and 1898 annexation, and stated that the Hawaii State Legislature "has also acknowledged that the actions by the United States were illegal and immoral, and pledges its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians." Appendix B.
- The third was Act 359 (1993), "An Act Relating to Hawaiian Sovereignty." Its Findings section again provided the facts related to the 1893 overthrow and the 1898 annexation, empha-

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passed Act 178, setting the annual payment to OHA at $15.1 million.

> sizing that the activities taken by U.S. diplomatic and military representatives to support the overthrow of the Kingdom occurred "without the consent of the native Hawaiian people or the lawful Government of Hawaii in violation of treaties between the two nations and of international law," and characterizing these acts as "illegal." Act 359, sec. 1 (6-7), Appendix C. The Act went on to observe that the 1898 annexation of Hawaii was "without the consent of or compensation to the indigenous people of Hawaii or their sovereign government," and that as a result of the annexation, "the indigenous people of Hawaii were denied the mechanism for expression of their inherent sovereignty through self-government and self-determination, their lands, and their ocean resources." *Id.*, sec. 1(9). The Act declared its main purpose to be to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing," *id.*, sec. 2, and outlined a process designed to promote that goal.

Only after the State of Hawaii enacted these three statutes into law did the United States Congress, in November 1993, pass "a Joint Resolution recounting the events [relating to the overthrow] in some detail and offering an apology to the native Hawaiian people." *Rice,* 528 U.S. at 505 (*citing* Apology Resolution). The Apology Resolution's findings directly mirrored those of the three statutes that Hawaii had just recently passed.[3] In light of these

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[3] Specifically, the Apology Resolution recognized that due to "the illegal overthrow of the Kingdom of Hawaii," Hawaiian lands were taken from the Kingdom and the native Hawaiian people

findings, Congress "express[ed] its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." 107 Stat. at 1513.

Following the above spate of state and federal legislation, four years later the Hawaii Legislature enacted Act 329 (1997), "An Act Relating to the Public Land Trust," which was designed to clarify the proper management of the lands in the Trust. *See* Appendix D. The Act stated that "the events of history relating to Hawaii and Native Hawaiians, including those set forth in [the federal Apology Resolution] continue to contribute today to a deep sense of injustice among many Native Hawaiians and others." *Id.* It explained that "the people of Hawaii, through amendments to their state constitution, the acts of the legislature, and other means, have moved substantially toward [a] reconciliation." *Id.* In addition, the Act identified its "overriding purpose" as "to continue this momentum, through further executive and legislative action in conjunction with

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"without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government," 107 Stat. at 1512; that the overthrow "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people" and deprived Native Hawaiians of their rights to "self-determination," *id.* at 1513; that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States," *id.* at 1512; and that "the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions," *id.* at 1512-1513.

the people of Hawaii, toward a comprehensive, just, and lasting resolution." *Id.* Importantly, the Act also stated that Congress' Apology Resolution provided a correct recounting of "the events of history relating to Hawaii and Native Hawaiians." *Id.*

The fact findings set forth in these four Hawaii statutes—the three from 1993, preceding the Apology Resolution, and the fourth postdating it in 1997—were repeatedly and directly relied upon by the Hawaii Supreme Court in the opinion upon which certiorari is sought. Pet.App. at 35a-39a, 86a-87a. Although at one point the Hawaii Supreme Court characterized Respondents as relying "largely" upon the Apology Resolution, Respondents referred repeatedly to these state grounds below, and, of course, the Hawaii Supreme Court explicitly relied on these sources of State law at every turn. The Opening Brief filed by the Office of Hawaiian Affairs in the Hawaii court referred, for instance, to Act 340 (1993) (codified as Hawaii Revised Statutes, sec. 6K-9) at pages 35-36 and 38; to Act 359 (1993) at pages 2, 4, 11, 15, 26, 34, 35, and 38; and to Act 329 (1997) at pages 2-3, 11, 15, 22, 26, 35, and 38-39 (and both Acts 359 (1993) and 329 (1997) were attached to the Opening Brief as appendices). The first sentence in the Individual Plaintiffs' Opening Brief to the Hawaii Supreme Court stated: "The central issue in this case is whether, in light of the admissions in Act 354 (1993), Act 359 (1993) and the Apology Resolution (collectively referred to as the "1993 Legislation"), the State would breach fiduciary duties if it sold ceded lands before the Hawaiians' claim to ownership of the ceded lands is resolved." Thereafter, "1993 Legislation" was cited 30 times in Individual Plaintiffs' Opening and Reply Briefs. Both Act 354 (1993) and Act 359 (1993) were included in the appendices of the

Opening Brief filed by the Individual Plaintiffs. In combination with Hawaii judicial precedent and Hawaii trust law, the Hawaii statutes provided an explicit, independent state-law basis for the court to enjoin the State of Hawaii from selling the lands held by the State in the Public Land Trust until the claims of native Hawaiians are addressed and the ongoing reconciliation process is completed.

Basic common law principles of Hawaii trust law provided the Hawaii court with the authority to protect the trust corpus, and the factual findings of the Hawaii statutes (like those of the federal Apology Resolution, which mirrored them) reaffirmed the need to ensure that the corpus remains when a settlement is reached as to these claims.

Accordingly, both the text and reasoning of the Hawaii Supreme Court's opinion provide independent and adequate—indeed, crucial and central—state grounds supporting the Hawaii court's holding and its remedy.

ARGUMENT

In requesting that this Court grant certiorari, petitioners attempt to manufacture a federal question and interest where none exists, and ignore the obvious existence of adequate and independent grounds for the Hawaii Supreme Court's decision. Congress and the Hawaii legislature have found as a matter of fact, and even petitioners do not and cannot dispute, that the claims of native Hawaiians resulting from the illegal overthrow of their ancestors' government have never been resolved or relinquished.

Based on these undisputed facts, the Hawaii Supreme Court ensured that assets from the state's

Public Land Trust—one of the stated purposes of which is the "betterment of the conditions of native Hawaiians"—will remain available for such a resolution. Now, petitioners seek to shoehorn Congress's laudable decision to join the Hawaii legislature in recognizing well-settled historical realities into a basis for inviting this Court to meddle in what are quintessentially state-level affairs. That they seek to do so in a case where there is not even a hint of a conflict among the lower courts, and one in which the decision below is correct, only underscores the inappropriateness of this Court's review.

I. THIS COURT'S REVIEW IS UNWARRANTED BECAUSE THE HAWAII SUPREME COURT'S DECISION RESTED FIRMLY UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

There is no split among the lower courts on the issue presented in this case, and Petitioners do not even attempt to suggest one. Instead, they suggest that the legal issue is so important that this Court must interrupt the ongoing dispute resolution process in the State of Hawaii to intervene, preempt that process, and decide that issue itself. Even assuming Petitioners were right about this (and they are not), this Court's review is not warranted and would yield at best an advisory opinion. This is so because the Hawaii Supreme Court's decision was clearly based on adequate and independent state grounds—grounds drawn from Hawaii's Constitution, statutes, and case law, most prominently its common law of trusts. Moreover, no issues involved in the Apology Resolution or the state materials examined in the opinion below have relevance outside Hawaii.

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). *See also* Eugene Gressman et al., *Supreme Court Practice* 208 (9th ed. 2007) (describing the rationale behind the doctrine). As Justice Scalia has explained, "[a]pplication of the 'independent and adequate state ground' doctrine . . . is based upon equitable considerations of federalism and comity." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). All that is required for the doctrine to apply to preclude review is that "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate adequate, and independent grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). That is the case here.

Had there never been a federal Apology Resolution, the Hawaii court could and would have reached the very same result and imposed the same remedy, upon the very same fact findings.[4] Not only do the four Hawaii statutes together make a set of factual findings that perfectly parallel those of the federal statute, but one of them actually formally *incorporates* the federal statute's factual findings—explicitly confirming that the Apology Resolution provides a correct recounting of "the events of history

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[4] Notably, Petitioners do not even argue otherwise. They instead offer an argument about state *political* processes. This assertion is examined *infra* p. 17.

relating to Hawaii and Native Hawaiians." Act 329, Sec. 1, Appendix D.

The Hawaii court, faced with facts suggesting that the State was finally prepared to acknowledge and satisfy its obligations to native Hawaiians, was within its power to ensure the trust would have the resources to meet them. That power did not derive from the Apology Resolution, and the Hawaii Supreme Court never once said that it did. Instead, the Hawaii Supreme Court merely noted that the Apology Resolution supported, as did the Hawaii statutes, the court's reasonable belief that the trust assets would need to be called upon in the near future and should be available; making them unavailable, the court logically concluded, would be a breach of fiduciary duty on the part of the trustee. The court cited "related state legislation," referring to the four Hawaii statutes, for every holding in its opinion. The Hawaii Supreme Court did discuss the Apology Resolution in some detail, but immediately followed this discussion with the statement that "[t]he above interpretation is also supported by related state legislation enacted at around or subsequent to the adoption of the Apology Resolution—specifically Acts 354, 359, 329, and 340." Pet.App. at 35a.

Thus, even if the Court were to grant certiorari and rule in favor of the State of Hawaii, on remand the Hawaii Supreme Court would simply reach the very same result (this time without citation of the Apology Resolution) and impose the very same remedy, once again—a dead giveaway that the application of the "adequate and independent state grounds" doctrine is required here. *See California v. Freeman*, 488 U.S. 1311, 1314 (1989) (O'Connor, J.) (dismissing certiorari as improvidently granted) ("Were we to review

the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the [California] court would still reverse [the defendant's] conviction on state statutory grounds. This is precisely the result the doctrine of adequate and independent state grounds seeks to avoid.") (citation omitted); *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Even if the Idaho and federal statutes contained identical language . . . the interpretation of the Idaho statute by the Idaho Supreme Court would be binding on federal courts.").

A. This Case Concerns State Trust Law, and Only Tangentially Involves the Factfindings of the Apology Resolution.

The Hawaii court's crucial conclusion, which caused it to impose its remedy of freezing the trust assets, is grounded primarily in Hawaii's trust law. Hawaii law establishes that native Hawaiians are beneficiaries of the Public Land Trust, and that the Respondents, the Office of Hawaiian Affairs (OHA), "can be said to be representing the interests of the native Hawaiian beneficiaries to the ceded lands trust." Pet.App. at 41a. It is the "well-settled" law of Hawaii that native Hawaiians have "a right to bring suit under the Hawai`i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust"; "that the State, as trustee 'must adhere to high fiduciary duties normally owed by a trustee to its beneficiaries"; that "[i]ts conduct . . . should therefore be judged by the most exacting fiduciary standards"; and that therefore the Hawaii Supreme Court "will strictly scrutinize the actions of the government." Pet.App. at 39a-40a (quotations and citations omitted). In so doing, the Court measures

the State's trust duties by "the same strict standards applicable to private trustees." *Pele Defense Fund*, 73 Haw. 578, 605 n.18, 837 P.2d 1247, 1264 n.18 (citation omitted).

Applying those fiduciary standards, the Hawaii court concluded that "we believe that Plaintiffs, as a matter of law, have succeeded on the merits of their claim inasmuch as any future transfer of ceded lands by the State would be a breach of the State's fiduciary duty to preserve the trust res." Pet. App. at 84a-85a. Based on well-substantiated fact-findings at both the state and federal level, and the stance of Hawaii's governor, all concurring that a settlement with native Hawaiians of still-live claims was desirable and should occur, the Hawaii court chose to impose a remedy that would allow that settlement to ultimately be paid out.

Given this classic state-law trusts analysis, informed by perfectly-concurring statutory findings at both the state and federal level, it would require some straining to view this case as even raising a federal question, let alone a question that warrants this Court's review.[5]

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[5] Indeed, the Hawaii court rested its conclusion that an injunction should issue on the findings of the trial court regarding the importance of land (`aina) to native Hawaiians, which were based on testimony presented in trial by Dean David H. Getches of the University of Colorado School of Law and the Hawaiian expert on chants and hula, Olive Kanahele. Pet.App. at 89a-94a. After reviewing this testimony, the court concluded:

> We firmly believe that, given the "crucial importance [of the `aina or land to] the [n]ative Hawaiian people and their culture, their religion, their economic self-sufficiency, and their sense of personal and community well-being," any further diminishment of the ceded lands (the `aina) from

B. The Concurring Fact Findings of the State Statutes and Federal Apology Resolution Each Provided Independent, Parallel Support for the Court's Trust Remedy.

This case is, at its core, about Hawaii trust law. Yet to the extent that it does touch on statutes—to accept their factual findings—it exhibits a parallel reliance upon both Hawaii and federal statutes. That parallel reasoning provides another strong reason for this Court to find independent and adequate state grounds for the Court's ruling.

Throughout its opinion, every time the Hawaii court discusses the Apology Resolution, it also—and more heavily—relies on the four parallel Hawaii statutes discussed above, referred to both by number and as "related state legislation." *See, e.g.*, Pet.App. at 27a, 35a, 41a; *see also* 82a n. 25 ("[O]ur holding is grounded in Hawaii and federal law"), 98a. These state statutes are fully independent of the federal Apology Resolution; indeed, three of them preceded it. Accordingly, in reaching the conclusion that it was appropriate to issue an injunction, the Hawaii Court referred to the 1993 Apology Resolution, but also stated that, *"[m]ore importantly,"* "the state legislature itself" had set the stage for such an injunction in the four key Hawaii statutes. Pet.App.

> the public lands trust will negatively impact the contemplated reconciliation/settlement efforts between native Hawaiians and the State.

Id. at 94a (*quoting from* the trial court's findings). The Hawaii court's decision was thus based on findings reached after a several-week trial and numerous witnesses, and the federal Apology Resolution played only a tangential supporting role in its ultimate decision.

at 86a (emphasis added). The Court added that "[t]he governor, herself" had also made a "commitment" to reaching a settlement, which would be facilitated by the injunction, *id.* at 87a; summarized factual conclusions that were recognized by "Congress, *the Hawaii state legislature*, the parties, and the trial court"; and noted that "Congress, *the [state] legislature*, and the governor have all expressed their desire to reach such a settlement." *Id.* at 88a (emphases added).[6]

If there were any doubt that the Hawaii state law grounds provided an adequate and independent basis for the Hawaii court's actions, it would be resolved by the court's clear statement about Act 329:

> [W]e need look *no further* than the legislative pronouncement contained in Act 329, declaring that a "lasting reconciliation [is] desired by all people of Hawai`i," 1997 Haw. Sess. L. Act. 329

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[6] In its brief to the Hawaii Supreme Court in this case, the State of Hawaii did not challenge any of the factual findings in the Apology Resolution or the relevant state statutes, arguing only that "the Apology Resolution and other legislative enactments do not provide judicially manageable standards for this case" and therefore that it was inappropriate for Hawaii's courts to issue an injunction because of the political question doctrine. *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii (HCDCH)*, State Defendants Appellees Answering Brief 49 (filed with the Hawaii Supreme Court, Oct. 13, 2003). The State's Brief below did quote from Act 329 (1997), *id.* at 50-51, but it failed to mention Acts 340 (1993), Act 354 (1993), and Act 359 (1993) at all, even though the opening briefs filed by the Office of Hawaiian Affairs and the Individual Plaintiffs below both addressed these statutes in some detail.

> § 1 at 956, to conclude that the public interest supports granting an injunction.

Pet. App. at 94a (emphasis added). In sum, there is copious evidence in the Hawaii court's opinion of the clear, express statement of reliance on state grounds that this Court requires.[7]

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[7] In its detailed analysis of the wide range of procedural issues presented by this action, the Hawaii Supreme Court relied almost exclusively on its own prior decisions, such as *Office of Hawaiian Affairs v. State*, 110 Hawai`i 338, 133 P.3d 767 (2006); *Office of Hawaiian Affairs v. State*, 96 Hawai`i 388, 31 P.3d 901 (2001); *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992); and *Ahuna v. Dept. of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982), which in turn relied on the statutes and Constitution of the State of Hawaii—and not upon the Apology Resolution.

The only section of the opinion that examined federal decisions in any detail is Section III.D.1 (Pet.App. at 63a-69a) on Sovereign Immunity, where the Court examines *Idaho v. Couer d'Alene Tribe*, 521 U.S. 261 (1997), and *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999). The Hawaii Court was interpreting Hawaii state law governing sovereign immunity and contrasting it with federal law. For example, in Footnote 21, Pet.Br. at 66a, the Court explained that it was relying upon its previous decision in *Pele Defense Fund, supra*, which had adapted the federal rule from *Ex Parte Young*, 209 U.S. 123 (1908), and where the Hawaii Court stated explicitly that it was interpreting and applying "the law in this state." And in Footnote 18, Pet. App. 50a-51a, the Court stated that in the previous cases of *Bush v. Watson*, 81 Hawai`i 474, 482 n.9, 918 P.2d 1130, 1138 n.9 (1996) and *Kaho`ohanohano v. State*, 114 Hawai`i 302, 162 P.3d 696 (2007), it had "decline[d] to adopt the federal courts' narrow view that a claim for relief based on past illegal action is necessarily 'retrospective[],'" thus leaving no doubt that it was interpreting and applying *state* law rather than federal law.

The Petition, however, claims that the decision below interferes with state political processes. The theory is evidently that by mentioning the federal Apology Resolution, the Hawaii Supreme Court's opinion would forever prevent Hawaii's political bodies from reexamining the five sources of State Law (four legislative Acts and Hawaii Trust Law). No support whatsoever is provided for the proposition. And its embrace, in this case or any other, would spell the end of the adequate and independent state grounds doctrine.

This Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). Every time a state Supreme Court mentions both federal and state sources of law, there is some hypothetical impact on state politics. But this Court has never considered that a basis for granting certiorari, and for good reason. The Court, merely to decide whether to hear the case, is placed in the unenviable position of trying to estimate what effect, if any, the decision has on state politics. And should it decide to hear the case, the fact that this Court has agreed to do so may itself alter the dynamics within the state's political landscape in all sorts of unforeseen ways. Once this Court renders a decision, moreover, the anticipated state political movement may never even materialize, rendering any decision by this Court advisory. Considerations of ripeness, limits on advisory jurisdiction, federalism, and simple prudence together thus all militate against this Court's taking into account the potential impact upon state political processes in its certiorari analysis. The proper path is to hear a case only after the independent state grounds have been removed, either by an intervening state court decision or subsequent state legislation.

Finally, if certiorari were granted, it would only result in a dismissal for lack of Article III standing, because the injury petitioners seek to remedy is not redressable by this Court. Article III standing requires, *inter alia*, that that a plaintiff show redressability, defined as a "'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *McConnell v. Federal Election Com'n*, 540 U.S. 93, 225 (2003) (citations omitted). In *McConnell*, this Court held that one set of plaintiffs—known as the "Paul plaintiffs"—could not fulfill this basic Article III requirement because even if the Court were to grant the relief sought, "it would not remedy the Paul plaintiffs' alleged injury because both the limitations imposed by FECA and the exemption for news media would remain unchanged." *Id.* at 229 (citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 32, 105-110 (1998)). Similarly here, even if this Court reversed the Hawaii Supreme Court's opinion to the extent that it relied upon the Apology Resolution, the rest of the holdings would remain unchanged; the order temporarily barring transfers of public lands subject to the trust would continue; and plaintiffs' claimed injury would remain unredressed.

In *Steel Co.*, too, the Court dismissed for lack of standing where the injury complained of would not be redressed by the relief sought. After canvassing all the remedies sought in the complaint, the Court concluded that "[n]one of the specific items of relief sought, and none that we can envision as 'appropriate' under the general request" would serve to redress the plaintiffs' claimed injuries. *Id.* at 105-06. Here, the relief petitioners seek is to free the state trust corpus from the court's order, but that relief cannot be granted by this Court, for the ulti-

mate source of the power to restrain the trust assets comes from state law, of which the Hawaii Supreme Court is the ultimate interpreter.

II. THE UNIQUENESS OF HAWAII'S SITUATION REBUTS THE CLAIM OF THE AMICUS CURIAE STATES THAT THE HAWAII COURT'S DECISION CONFLICTS WITH OTHER RULINGS AND HAS BROADER IMPACT.

Amici Curiae State of Washington et al. claim that the Hawaii court's decision affects them because "every state admitted into the Union since 1802 has received grants of land owned, prior to statehood, by the federal government." *Amicus Curiae* Brief of State of Washington, et al., at 1 The argument starts out properly, recognizing that "[e]ach Admissions Act or Enabling Act has its own terms," *id.* But *amici* then move on to wrongly ignore the profoundly unusual circumstances of Hawaii's land trust—circumstances that render this Court's review of the decision below to be, at best, mere error-correction of a factbound Hawaii issue. Hawaii's situation is unique now, and it has been unique since annexation.

Hawaii was set apart from other land trust arrangements from the very beginning. *See, e.g., Andrus v. Utah*, 446 U.S. 500, 522 n. 4 (1980) (noting Hawaii as one of few exceptions to general pattern in which federal government gave lands to states in consideration, *inter alia*, for the promise not to tax federal lands). In Hawaii's 1898 Annexation Resolution, Hawaii received an individual exemption from existing federal laws dealing with public lands, so that Congress could enact "special laws for [the] management and disposition" of Hawaii's public

lands, and with the understanding that the revenues and proceeds from the public lands would be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

In an 1899 opinion, the United States Attorney General interpreted the language in the Annexation Resolution as subjecting public lands in Hawaii to "a special trust." 22 U.S. Op. Atty Gen. 574 (1899). The relationship between the State of Hawaii and the federal government is importantly informed by the unique terms of that trust. See *Papasan v. Allain*, 478 U.S. 265, 289-90 n.18 (1986) ("[T]he interest transferred to the State depends on the federal laws that transferred the interest. . . . [I]f the federal law created a trust with the State as trustee, the State is bound to comply with the terms of that trust.").

In the 1900 Organic Act, Congress provided that the ceded lands would remain in the "possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States[.]" Section 91 of the Organic Act of Hawaii, 31 Stat. 141, 159 (April 30, 1900). In 1977, the Hawaii Supreme Court interpreted the 1900 Organic Act to mean that "Congress provided that the United States would have no more than *naked title* to the public lands other than those set aside for federal uses and purposes." *State v. Zimring*, 58 Haw. 106, 124, 566 P.2d 725, 737 (1977) (emphasis added).

Hawaii's Admission Act, Pet.App. at 113a, is also unique and arose out of the State's distinctive history. As noted above, Section 5(f) sets out the five

purposes of the trust governing the ceded lands, and one of these is the "betterment of conditions of native Hawaiians." Pet.App. at 116a. Importantly, Section 5(f) leaves to the State Constitution and State law the manner and method by which the trust is to be implemented, providing that "[s]uch lands, proceeds and income shall be managed and disposed of for one or more of the foregoing purposes *in such manner as the constitution and laws of said State may provide* . . ." *Id.* (emphasis added). In other words, the Admission Act authorized Hawaii to develop its own system of law, tailored to its unique situation, to address the management of its own public lands issues. Hawaii did just that—through a Constitutional Convention, the creation of the Office of Hawaiian Affairs, and the development, through the Hawaii Supreme Court, of a line of judicial precedent relating to the Public Lands Trust. *See, e.g., Pele Defense Fund v. Paty, supra; Ahuna v. Dept. of Hawaiian Homelands, supra.* And, of course, as the decision below recognized, Hawaii courts have adopted a high fiduciary standard in cases dealing with the Public Lands Trust and the claims of native Hawaiians—a standard that may not necessarily exist elsewhere. See *supra* pp. 12-13 (discussing *Pele Defense Fund*, 73 Haw. at 605 n.18).[8]

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[8] Today, other states' situations are different from Hawaii's for other reasons as well, such as that they involve a different federal agency and different sets of native peoples. The Bureau of Indian Affairs (BIA) is "responsible for the administration and management of 66 million acres of land held in trust by the United States for American Indian, Indian tribes, and Alaska Natives." *See* http://www.doi.gov/bia/. By contrast, Hawaii still faces the major, valid, unresolved claims of a native people to public lands—claims that are themselves entangled

All of these aspects of the relevant law of Hawaii thoroughly rebut the claim of the *Amicus Curiae* States that this decision is somehow relevant to their own situations regarding their own public lands. They also provide a full explanation not only for why the decision below is unsuitable for this Court's review, but also for why the Hawaii Supreme Court's legal reasoning was correct. Whatever the limits might be on the United States Congress' ability to dictate future terms over land trusts already bestowed, the State of Hawaii—pursuant to terms of the federal Admission Act itself—has the ability to use its state Constitution and laws in its land-use decisions over such property.

There is nothing unusual at all about the Hawaii Supreme Court's decision in this case. Indeed, the findings of fact in the decision below were entirely in line with what the Hawaii court itself had found in prior cases, and the way in which it had interpreted Hawaii's Constitution. In 2001, the Hawaii court held that:

> [T]he State's obligation to native Hawaiians is firmly established in our constitution. . . . [I]t is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust. *See* Haw. Const. art. XVI, § 7 . . . [W]e trust that the legislature will re-examine the State's constitutional obligation to native Hawaiians and the purpose of HRS § 10-13.5 and enact

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with Hawaii's unique history and that fall outside of the BIA's jurisdiction.

> legislation that most effectively and responsibly meets those obligations.

Office of Hawaiian Affairs v. State, 96 Hawai`i 388, 401, 31 P.3d 901, 914 (2001); *see also Office of Hawaiian Affairs v. State*, 110 Hawai`i 338, 366, 133 P.3d 767, 795 (2006) (*quoting from* the 2001 decision). Finally, to the extent that the experience of other land disputes is instructive, it suggests that the decision below was correct.[9]

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[9] For example, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), is similar in many respects to the decision below, and the Hawaii Court viewed the *Lane* precedent as "instructive." Pet.App. at 97a. Pueblo Indians held title to some 460,000 acres in what is now southern Arizona when the United States acquired sovereignty over the surrounding territory from Mexico in 1853. The Indians brought suit to enjoin the United States from "offering, listing, or disposing" of their lands as public lands of the United States. *Id.* at 111.

Just as in this case, the Pueblo Indians were "not seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership." *Id.* at 113. The United States argued in *Lane* that the Indians were "wards of the United States . . . and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection." *Id.* This Court rejected this perspective, holding that even if it were true "it would not justify the defendants in treating the lands of these Indians--to which, according to the bill, they have a complete and perfect title--as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, *but an act of confiscation*." *Id.* (emphasis added).

This Court therefore directed the trial court to grant "an order restraining them [the Secretary of the Interior] from in any wise offering, listing, or disposing of any of the lands in question" until the claims of the Pueblo Indians could be addressed and resolved. *Id.* at 114. The Hawaii Supreme Court

III. THE PRACTICAL IMPACT OF THE DECISION WILL BE LIMITED.

According to Petitioners, "the practical impact of [the Hawaii court's] decision is enormous: it bars the state from prudently managing . . . 1.2 million acres of state-owned land[.]" Pet.Br. at 11. That claim, however, is completely inaccurate—as inaccurate as saying a landlord cannot prudently manage a rental house because she is temporarily forbidden to sell it. In fact, the Hawaii Supreme Court decision in this case found that "testimony was adduced at trial that the State has been following a self-imposed moratorium since 1994 on the sales of ceded lands. . ." Pet.App. at 87a; *see also id.* at 70a. "Such a self-imposed moratorium leads to an inference," the court concluded, "that the State is apparently able to comply with its duties as public lands trustee without having to alienate the ceded lands." *Id.* at 87a. As the court added, quoting from the trial court opinion, "[n]o evidence was presented . . . of any proposed sales of ceded lands other than at Leali`i." Pet.App. at 70a.[10]

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made a similar ruling in this case, protecting the corpus of the trust until the reconciliation process designed to address the unrelinquished claims of the Native Hawaiians can be completed.

[10] The cases cited for support by Petitioners are totally unrelated to the facts here. *Leo Sheep Co. v. United States,* 440 U.S. 668 (1979) (Pet. at 11), involved a grant of certiorari to a case from the United States Court of Appeals for the Tenth Circuit, *not* from a state supreme court, and involved a quintessential federal issue—whether an easement had been retained when the federal government issued land to a private party. *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974) (Pet. at 11), involved the interpretation by a state court of a provision of the U.S. Constitution, the Import-Export Clause,

In the interim, the lands will be managed as usual; they simply will not be transferred. The Order Granting Plaintiffs' Request for an Injunction, approved as to form by Hawaii Attorney General Mark J. Bennett, recognizes past practice and flexibility by allowing the State to "continue its practice of transferring remnants, and issuing licenses, permits, easements and leases concerning ceded lands." *See* June 4, 2008, trial court order, Appendix E.

As explained above, the court's decision merely preserves the status quo, following the State of Hawaii's own self-imposed moratorium—a moratorium that has been in effect for fourteen years already. The Hawaii Supreme Court also found that the process of resolving native Hawaiian claims is underway and will be resolved in a finite time frame. The Hawaii Supreme Court in its opinion found: "For the present purposes, this court need not speculate as to what a future settlement might entail—i.e., whether such settlement would involve monetary payment, transfer of land, ceded or otherwise, a combination of money and land, or the creation of a sovereign Hawaiian nation; it is enough that Congress, the legislature, and the governor have all expressed their desire to reach such a settlement." Pet.App. at 88a. If that political desire changes, a motion by the State to the court to modify its injunction could be filed. The court's injunction was designed to ensure that an appropriate reconciliation could be developed by the political branches: "[I]njunctive relief granted by this court would allow

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and thus logically called for review by this Court. The opinion below, by contrast, is an interpretation of state laws (and a similar federal law) related to the unique lands of Hawaii by Hawaii's state supreme court.

Congress and/or the state legislature a reasonable opportunity to craft and enforce . . . relevant laws consistent with the congressional and legislative calls for reconciliation and settlement of native Hawaiian claims." Pet. App. at 76a (quotation and citation omitted).

In this case, the decision below merely imposed an injunction on the disposal of lands until the dispute settlement process concluded. Because any aggrieved party could attempt to raise the same issues being litigated here after the litigation has concluded, it would be advisable, even if the issues presented were certworthy, to wait until they are suitably ripe and factually developed for this Court's adjudication. See, *e.g., Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923).

Of course, if this Court wanted to examine the proper construction of the Federal Apology Resolution, it will have ample opportunity to do so. This Court had such an opportunity eight years ago in *Rice v. Cayetano*, 528 U.S. 495, 505 (2000). See also *Rice v. Cayetano*, Brief for the United States as *Amicus Curiae*, 1999 WL 569475, at *3-*6. In addition, the Courts of Appeal have recently twice had occasion to interpret the Apology Resolution. In *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. en banc 2006), the Ninth Circuit interpreted the Apology Resolution as follows: "Congress officially apologized to the Hawaiian people and expressed its commitment to 'provide a proper foundation for reconciliation between the United States and the Native Hawaiian people,'" *id.* at 831; and "Congress admitted that the United States was responsible, in part, for the overthrow of the Hawaiian monarchy." *Id.* at 845. In

a concurrence, Judge William Fletcher observed that the Apology Resolution confirmed the "special trust relationship" between the United States and native Hawaiians. *Id.* at 850. The Ninth Circuit also drew upon the Apology Resolution for its factual findings in *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1281-82 (9th Cir. 2004). In sum, based on recent history, this Court is very likely to have other opportunities to construe the Apology Resolution in the near future.

Additional developments of the issues that surround native Hawaiians and the Apology Resolution are transpiring right now and this Court's review is therefore not warranted at this time.[11] The course of action of allowing the case to percolate is particularly appropriate since no conflict exists among the lower courts on the questions addressed, and because the question on which certiorari is sought is one unique to Hawaii and this case does not present a proper vehicle to decide it in any event.

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[11] Federal law toward native Hawaiians may very well change as well in the next few months, rendering any judicial decision about the Apology Resolution potentially irrelevant. In footnote 7 of the opinion below, the Hawaii Supreme Court summarized the Native Hawaiian Reorganization Act, commonly called the "Akaka Bill," which would further promote the reconciliation process, and noted that it "was passed by the House of Representatives on October 24, 2007," and is "still pending before the United States Congress." Pet. App. 8a.

CONCLUSION

For the reasons presented above, the petition for certiorari should be denied.

Respectfully submitted,

WILLIAM MEHEULA
WINER MEHEULA & DEVENS LLP
Ocean View Center
707 Richards Street, PH1
Honolulu, Hawaii 96813
(808) 528-5003

HAYDEN ALULI
707 Alakea Street,
Suite 213
Honolulu, Hawaii 96813

Attorneys for Individual Plaintiffs

SHERRY P. BRODER
Counsel of Record
JON M. VAN DYKE
841 Bishop Street, Suite 800
Honolulu, Hawaii 96813
(808) 531-1411

NEAL KUMAR KATYAL
600 New Jersey Avenue, NW
Washington, DC 20001

MELODY K. MACKENZIE
579 Kaneapu Place
Kailua, Hawaii 96734

Attorneys for Office of Hawaiian Affairs