

No. 07-1372

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IN THE  
**Supreme Court of the United States**

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

*v.*

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

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF HAWAII

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**REPLY BRIEF FOR PETITIONER**

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INTRODUCTION AND SUMMARY

1. With scarcely a nod to the merits, respondents ask this Court to dismiss certiorari for lack of federal jurisdiction. That position is as baseless now as when respondents unsuccessfully raised it in opposition to certiorari. Under the plain-statement rule of *Michigan v. Long*, 463 U.S. 1032 (1983), this Court has jurisdiction whenever “a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.” *Id.* at 1040-1041. Here there is no avoiding the essential federal-law character of this case. The Hawaii Supreme Court ruled that the federal Apology Resolution “dictate[d]” entry of the challenged

injunction (Pet. App. 85a) and that respondents' claims did not even arise until the Resolution was enacted (*id.* at 58a-59a, 62a-63a, 99a). And federal law, as embodied in the Newlands Resolution and the Admission Act, forecloses the inference that the Hawaii court sought to derive from the Apology Resolution: that Congress has recognized the potential legal validity of Native Hawaiian title to the ceded lands.

Rather than engage the merits of these federal issues, respondents contend that the Hawaii Supreme Court, which cited the Apology Resolution *77 times*, invoked it merely as a recitation of historical facts about the overthrow of the Hawaiian monarchy rather than as a source of legal rights and obligations. But the court's opinion speaks for itself, and it says the opposite.

The Hawaii Supreme Court held that the Apology Resolution compelled the issuance of an injunction because, among other things, the Resolution "clearly acknowledged the *illegality* of the overthrow," the illegitimacy of the Republic of Hawaii, and "the existence of the [N]ative Hawaiians' *unrelinquished claims* to the ceded lands." Pet. App. at 33a (emphasis added). These propositions are legal, not factual. And like respondents, the court treated them as an essential and previously unavailable basis for concluding that Native Hawaiian claims of title to the ceded lands, while ultimately non-justiciable, had assumed enough legal substance to warrant preservation of those lands from alienation. To the extent the Hawaii court also relied on state trust-law principles in reaching that conclusion, the court's reliance on those principles was plainly "interwoven with federal law," and certainly "the adequacy and independence of any possible state law

ground is not clear from the face of the opinion.” *Michigan v. Long*, 463 U.S. at 1040-1041.

2. On the merits, the state court’s reliance on the Apology Resolution is untenable as a matter of federal law. The Resolution does not support any claims of Native Hawaiian title to the ceded lands—and, indeed, *could* not support such claims without *sub silentio* repealing the Newlands Resolution and the Admission Act, both of which foreclose any such claims. There is no merit to respondents’ efforts to detach those prior enactments from the scope of the question presented. Among other considerations, this Court could not sensibly consider whether the Apology Resolution “changed the legal landscape and restructured the rights and obligations of the State” (Pet. App. 27a) without examining the prior federal enactments that defined—and still define—that very landscape.

Moreover, the legal consequences of those enactments on claims of Native Hawaiian title are simple for this Court to identify because they are undisputed. Respondents do not deny that, under the Supremacy Clause, the Newlands Resolution and Admission Act bar any judicial holding based on the premise that Native Hawaiians may have legal claims (whether justiciable or not) to the ceded lands. To salvage the opinion under review, therefore, respondents assert that the Hawaii Supreme Court did not “rel[y] solely on the existence of *legal* claims by Native Hawaiians to the ceded lands,” and that it relied in part on non-legal “moral and political claims.” Resp. Br. 37-38, 40. But this rationale cannot insulate the challenged injunction from the Supremacy Clause if—as the state court’s own opinion makes clear—the injunction also relies on a critical premise that the Apology Resolution conferred

new legitimacy on Native Hawaiian legal claims to the ceded lands.

Finally, despite artful wording, respondents do not (and could not) claim that the Hawaii Supreme Court abandoned its judicial role altogether and imposed its will on the state's political branches *solely* on the basis of its own non-legal intuitions about moral entitlement. A state court should be presumed not to have arrogated such unprecedented extrajudicial powers to itself in the absence of a plain statement to that effect. Here, the only plain statements in the opinion under review point in the opposite direction: The court ruled as it did because, in necessary part, it accepted respondents' long-pressed and erroneous argument that the Apology Resolution endorses key *legal* predicates to Native Hawaiian land claims.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION

In their merits brief, as in their brief in opposition to certiorari, respondents focus mostly on avoiding this Court's review on the merits. As before, they urge this Court not to review the Hawaii Supreme Court's analysis of the federal Apology Resolution because, they say, that court's judgment rested on adequate and independent state law grounds. That jurisdictional argument fares no better now than it did at the petition stage.

Under the plain-statement rule of *Michigan v. Long*, which respondents all but ignore, this Court presumes jurisdiction over a federal ground for a state-court judgment unless the state court "indicate[d] clearly and expressly" that the judgment was "alternatively based on bona fide separate, adequate, and inde-

pendent [state] grounds.” 463 U.S. at 1041. Any ambiguity is resolved in favor of this Court’s jurisdiction. As we have explained, the Hawaii Supreme Court is acutely aware of that rule and has not hesitated in past opinions to include such a plain statement in order to preclude further review by this Court. *See* Pet. Br. 21-22 n.11.

The court chose not to do that here, and for good reason: the principles of federal law that it (erroneously) derived from the Apology Resolution formed an essential basis for its judgment. The court acknowledged this point throughout its opinion, as discussed in greater detail in our opening brief (at 21-23, 33). For example, it found that the Resolution not only supported issuance of the injunction, but in fact “*dictate[d]* that the ceded lands should be preserved.” Pet. App. 85a (emphasis added). And in excusing respondents’ failure to file suit years earlier, the court held that, but for the Apology Resolution, their claims would have lacked a legal basis: “[I]t was not until the Apology Resolution was signed into law ... that the plaintiffs’ claim regarding the State’s explicit fiduciary duty to preserve the corpus of the public lands trust arose,” and it was therefore “not until that time that the plaintiffs’ lawsuit could have been grounded upon such a basis.” *Id.* at 62a-63; *accord id.* at 58a-59a, 99a; *see also id.* at 41a (“we ... hold that the Apology Resolution and related state legislation ... give rise to the State’s fiduciary duty to preserve the corpus of the public lands trust”). In short, the Hawaii Supreme Court did include a plain statement about the jurisdictional basis for its judgment, but it is the opposite of the one needed to defeat the *Michigan v. Long* presumption.

Respondents nonetheless argue that, although the Apology Resolution may have been critical to the

judgment, the court relied on it “simply to support its factual determination that Native Hawaiians have unresolved claims to the ceded lands.” Resp. Br. 21. This argument is implausible because, at respondents’ urging, the Hawaii Supreme Court relied on the Apology Resolution for its *legal* conclusions and made them essential elements of its judgment. As that court itself confirmed (in a passage that respondents do not cite), “our holding is grounded in Hawai‘i and *federal law*” (Pet. App. 82a n.25 (emphasis added))—not, as respondents contend, in state law alone, informed only by congressionally recognized “facts.” And the Hawaii Supreme Court’s reliance on the Apology Resolution as a source of controlling law, rather than as a mere recitation of historical facts, becomes even clearer upon close examination of the court’s decisional logic.

For many years before the Apology Resolution was enacted, Native Hawaiian groups had of course asserted “claims” to the ceded lands.<sup>1</sup> Congress’s acknowledgment of that well-known fact could not logically have led the Hawaii Supreme Court to conclude, as it did, that the Apology Resolution “dictates” a ban on land sales and serves as a *sine qua non* of respondents’ trust-law claims. Instead, the court accepted respondents’ argument that the Apology Resolution

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<sup>1</sup> See, e.g., *Akaka Bill: Native Hawaiians, Legal Realities and Politics as Usual*, 24 U. Haw. L. Rev. 693, 703 (2002) (stating that, between 1959 and 1978, “[n]ative political groups ... brought land claims based on aboriginal rights”); *Native Hawaiian Rights Handbook* 40 (Mackenzie ed., 1991) (“Ultimately, Native Hawaiians seek return of Government and Crown Lands from both the state and federal governments.”); *id.* at 91 (citing 1988 resolution from a Native Hawaiian Rights Conference calling for return of all ceded lands to Native Hawaiians).

“changed the *legal* landscape and restructured the *rights and obligations* of the State” (Pet. App. 27a (emphasis added)), on the grounds that it—

expressly recognized, *inter alia*, that: (1) the overthrow of the Kingdom of Hawai‘i was *illegal*; (2) the taking of crown, government, and public lands of the Kingdom was *without consent* or compensation; and (3) “the indigenous Hawaiian people *never directly relinquished* their claims ... over their national lands to the United States.”

*Id.* at 21a (emphasis added) (quoting Apology Resolution); *see id.* at 33a (Resolution “clearly acknowledg[ed] the illegality of the overthrow”); *id.* at 85a (“a plain reading of the Apology Resolution” recognizes “unrelinquished claims over the ceded lands, which were taken without consent or compensation”); *id.* at 88a (“the ceded lands were illegally taken from the [N]ative Hawaiian monarchy”).

These propositions are legal, not factual. They concern whether the displacement of the Kingdom with the Republic of Hawaii was lawful; whether the Republic could legitimately speak for “the indigenous Hawaiian people”; and whether the Republic could thus grant “consent” on behalf of Native Hawaiians to the “relinquish[ment]” of governmental and crown lands to the United States in 1898. In resolving those issues, the Hawaii Supreme Court construed the Apology Resolution to establish, as a matter of federal law, that the overthrow was illegal; that (contrary to Congress’s judgment in 1898) the Republic could not consent on behalf of Native Hawaiians to the cession of these lands to the United States; and that the claims of Native Hawaiians were then and are now “unrelinquished.”

These propositions of federal law are also essential components of the court’s judgment. Respondents stressed below that the Apology Resolution was critical to this case because it “identified the cloud on the title to these lands resulting from the illegalities surrounding their transfer to the United States” and indeed “provide[d] substantial support for the conclusion that Native Hawaiians ... have ‘complete and perfect title’ to the ceded lands.” J.A. 127a-128a. Respondents likewise treated the Apology Resolution as a core component of their breach-of-trust claim. They reasoned that the State cannot meet its trust obligations if it “transfer[s] property whose *ownership has been put into question by federal enactments.*” J.A. 119a (emphasis added).<sup>2</sup>

Only because it agreed with respondents on these points did the Hawaii Supreme Court conclude that “the State’s explicit fiduciary duty to preserve the corpus of the public lands trust” did not arise “until the Apology Resolution was signed into law on November 23, 1993.” Pet. App. 62a-63. In other words, the court

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<sup>2</sup> Although respondents contend (Br. 22-23) that their 1995 complaint referred only in passing to the Apology Resolution, the complaint in fact argued that, despite Congress’s “acknowledg[ment] ... of the illegal overthrow,” the State “has been illegally alienating ceded lands which came from the Kingdom of Hawaii and the [Native] Hawaiian people ... without regard for the claims of [Native] Hawaiians to those lands.” J.A. 32a (internal quotation marks omitted); *see also* J.A. 36a. As explained in our opening brief (at 12), respondents’ later advocacy emphasized the Apology Resolution far more than the complaint did. Although respondents assert that their claims never “evolve[d]” in favor of heavier reliance on the Apology Resolution (Br. 23), their own briefs—reprinted in the Joint Appendix (at 98a-148a) and quoted in the text here—belie that assertion.

concluded that Congress’s declaration of illegality gave rise, for the first time, to respondents’ breach-of-trust claim. Respondents argue at length that the State’s trust obligations toward the ceded lands (which run to all the people of Hawaii, and not just Native Hawaiians) arise from state law, even though respondents elsewhere concede that the “ceded-lands trust was established by federal law—and is therefore ... a ‘federal trust.’” Resp. Br. 47.<sup>3</sup> But no matter how the trust is characterized, the essential point is that respondents argued below—and the Hawaii Supreme Court held—that the legal determinations in the Apology Resolution are integral to their breach-of-trust claim. Having persuaded the court to adopt that conclusion on these federal legal grounds, respondents can hardly be heard now to disavow those same federal grounds as an essential basis for the challenged injunction.<sup>4</sup>

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<sup>3</sup> See also *OHA v. State*, 133 P.3d, 767, 784 (Haw. 2006) (Hawaii constitution imposes duty “to hold ceded lands in accordance with the § 5(f) trust provisions”); *Pele Defense Fund v. Paty*, 837 P.2d 1247, 1264 (Haw. 1992).

<sup>4</sup> The Hawaii Congressional Delegation *amici* correctly note that the Hawaii Supreme Court “relied upon” (Br. 15) the Apology Resolution in deciding this case, and that point confirms this Court’s jurisdiction. It is incorrect, however, to say that the Apology Resolution was “not simply an apology” (*id.* at 12) (internal quotation marks omitted). See, e.g., 139 Cong. Rec. 26,392, 26,428 (1993) (statement of Sen. Inouye) (responding to question from Sen. Gorton about whether passage of Resolution would give Native Hawaiians “rights or privileges or reparations or land or money communally that are unavailable to other citizens of Hawaii”: “[T]his is a simple resolution of apology .... It is a simple apology.”); S. Rep. No. 103-126, at 35 (1993) (Resolution “will not result in any changes in existing law”); see also Pet. Br. 27-30; U.S. Amicus Br. 23-28.

Again, under the *Michigan v. Long* presumption, this Court has jurisdiction whenever “a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.” 463 U.S. at 1040-1041 (emphasis added). What is “clear from the face of the opinion” here is that any state law ground is not independent of the federal law grounds.<sup>5</sup> But if there were any question on that point, it would be resolved in favor of this Court’s jurisdiction. Respondents nowhere address that familiar rule of practice, let alone explain how it could accommodate their request to dismiss certiorari for lack of jurisdiction.

Finally, respondents suggest (Br. 33) that if “there is any ambiguity as to whether the decision below rested on state law or federal law,” the “appropriate course would be to vacate the Hawaii Supreme Court’s judgment and remand the case for further proceedings[.]” The State agrees that vacatur is appropriate, but only after this Court resolves the federal law issues raised by the state court’s judgment. Again, that is the standard course whenever “the adequacy and independence of any possible state law ground is not clear.” *Michigan v. Long*, 463 U.S. at 1040-1041; *see id.* at 1039-1040 (ruling that mere “[v]acation and continuance

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<sup>5</sup> In addition, the asserted state law grounds are not even “adequate” to sustain the judgment under review because they are irreconcilable with federal law, as discussed in Section II below. *See also* Pet. Br. 24-25; *see generally* *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917) (state law ground cannot be “adequate” for these purposes if it is “so certainly unfounded that it properly may be regarded as essentially arbitrary”).

for clarification,” without resolution of the federal legal questions, would be “unsatisfactory because of the delay and decrease in efficiency of judicial administration”); *Coleman v. Thompson*, 501 U.S. 722, 732-733 (1991) (describing pre-*Long* remand approach as “burdensome” and “unnecessary”); *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (similar); *cf. Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984) (per curiam) (cited at Resp. Br. 33) (summarily remanding where it appears that the state court issued no significant opinion accompanying its order).<sup>6</sup>

## II. THE HAWAII SUPREME COURT’S JUDGMENT CONFLICTS WITH FEDERAL LAW

The Hawaii Supreme Court was wrong to rely on federal law as a basis for the challenged injunction, be-

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<sup>6</sup> Respondents claim that the effect of the challenged injunction could be eliminated “by an act of the Hawaii Legislature that definitively resolves [Native Hawaiian] claims.” Br. 28. This is inaccurate in several respects. First, the Hawaii Supreme Court retains full authority to decide for itself when and if those claims have been “definitively resolve[d],” and its views on that subject may not coincide with those of the Legislature. *See* Pet. App. 98a, 100a; *see also* Resp. Br. 7 (quoting earlier Hawaii Supreme Court decision ordering legislature to demonstrate concern for Native Hawaiians). Also, because the court viewed reconciliation as a joint federal and state project *see, e.g.*, Pet. App. at 32a, it is by no means clear that the court would view unilateral state legislative action as a “definitive resolution” of anything. Most important, despite respondents’ contrary suggestion (Br. 28), the injunction hamstring the state-level political process for the foreseeable future by forbidding the political branches to decide, for example, that they will permit sales of specific parcels of ceded lands for purposes specifically sanctioned in the Admission Act (as they did with the Leiali’i parcel) before any full and final resolution of the multi-year “reconciliation process.”

cause federal law in fact forecloses the injunction. Respondents' efforts to defend the court's analysis on the merits are untenable, as are the waiver theories they invoke to avoid this Court's review.

**A. The Judgment Should Be Reversed Because The Apology Resolution Does Not Repeal The Preexisting Federal Bar On Native Hawaiian Claims To The Ceded Lands**

Respondents' brief is a case study in perverse characterizations. As discussed, they first try to avoid this Court's jurisdiction altogether by implausibly re-characterizing as "factual" the core legal propositions the Hawaii Supreme Court derived from the Apology Resolution. In this section, we address respondents' related and equally quixotic claim that the principles underlying the Hawaii Supreme Court's decision were "moral" and "political" and not "purely legal." As discussed below, that characterization cannot serve its intended purpose: insulating the court's logic from the preemptive force of federal law. To illustrate why respondents must resort to that improbable argument, however, we first review the Supremacy Clause defense they wish to avoid meeting on its legal merits. *See* Pet. Br. 31-46.

As noted, the Hawaii Supreme Court accepted respondents' position that, under the Apology Resolution, the overthrow of the Kingdom was illegal, the Republic's cession of these lands was therefore illegitimate, and the title the United States transferred to the State in the Admission Act was "clouded" as a result.<sup>7</sup> *See*

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<sup>7</sup> The concept of "clouded title" suffused respondents' state court advocacy, and the Hawaii Supreme Court recited that phrase repeatedly in describing respondents' successful legal ra-

pp. 7-8, *supra*. Respondents stopped short of asking the Court to rule definitively that the Native Hawaiian community owns the ceded lands outright because existing state precedent deemed that ultimate question nonjusticiable. J.A. 128a. That ultimate question, respondents conceded, would have to be resolved out of court, as part of the “reconciliation process.”

Respondents argued, however, that the court should nonetheless enter an injunction because the Apology Resolution “provide[s] substantial support for the conclusion that Native Hawaiians ... have complete and perfect title to the ceded lands.” J.A. 128a (internal quotation marks omitted).<sup>8</sup> In other words, respon-

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tionale for injunctive relief. *See, e.g.*, Pet. App. 22a, 26a, 58a; *see generally* Pet. Br. 31-33 & nn.17-18. Despite respondents’ perplexing argument to the contrary (Resp. Br. 39-40), the court adopted, rather than rejected, that rationale: namely, the notion that the Apology Resolution delegitimized the cession of these lands by the Republic of Hawaii and thereby conferred new legitimacy on Native Hawaiian claims to these same lands. Just as respondents argued that the Resolution “changed the legal landscape” by “cloud[ing]” the “title to the ceded lands” (Pet. App. 26a-27a), so too did the Hawaii Supreme Court hold that the Resolution “dictate[d]” entry of the challenged injunction by “recogniz[ing] that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation.” *Id.* at 85a; *see also id.* at 32a-34a, 41a, 58a, 69a, 75a, 79a, 98a-99a.

<sup>8</sup> Indeed, even as late as in their brief in opposition to certiorari, respondents contended that “[j]ust as in this case, the Pueblo Indians [in *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919)] 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*.’” Opp. 23 n.9 (emphasis added) (describing similarities between this case and *Lane*, in which the Pueblos also claimed “complete and perfect title” (249 U.S. at 113)); *see also id.* at 13 (describing claims

dents asked for an injunction on the ground that their underlying legal theory—based on the property law concept of “complete and perfect title”—had potential merit. They elaborated: “Just as a person who knowingly possesses stolen goods is not free to alienate those goods, but must try to return them to their rightful owner, the State is no longer free to transfer or sell the Ceded Lands.” J.A. 136a. The court granted the requested injunction.

The Apology Resolution could not support—let alone “dictate[.]” (Pet. App. 85a)—this train of legal reasoning unless it repeals at least two prior congressional enactments: (i) Congress’s 1898 decision in the Newlands Resolution to accept “the absolute fee and ownership” to these lands from the Republic of Hawaii and (ii) Congress’s 1959 decision in the Admission Act to transfer to the State “the United States’ title” to all lands “that were ceded to the United States by the Republic of Hawaii.”<sup>9</sup> Specifically, if the Apology Resolution does *not* repeal the Newlands Resolution and the Admission Act, those prior enactments undermine a critical step in the logic of the challenged injunction because, as a matter of federal law, they foreclose any claim “that Native Hawaiians ... have complete and perfect title to the ceded lands.” J.A. 128a (internal quotation marks omitted). And because, as discussed,

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as “still-live”), 21-22 n.8 (“major, valid, unresolved claims of a native people to public lands”).

<sup>9</sup> See Joint Resolution To Provide For Annexing The Hawaiian Islands To The United States, Res. No. 55-55, 30 Stat. 750 (1898) (“Newlands Resolution”) (Pet. Br. App. 1a-3a); Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (“Admission Act”) (Pet. App. 113a-132a).

that premise was essential to the injunction, the injunction must fall if the premise is false.

The question on the merits, therefore, boils down to whether the Apology Resolution did repeal these prior enactments—whether, in respondents’ words, it “changed the legal landscape” in ways that “restructured the rights and obligations of the State.” Pet. App. 26a-27a. It did not. “[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest.” *National Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) (internal quotation marks omitted). Here, the Apology Resolution reveals no “clear and manifest” intention to repeal Congress’s prior determinations that the United States obtained perfect and unchallengeable title to the ceded lands and that it successfully transferred that title to the State upon its statehood. Instead, the Apology Resolution should be read for what it is: a statement of regret with no substantive legal consequences.

Significantly, fifteen years after filing suit on the theory that “the State is not the true and legal owner of the ceded lands” (Trial Ct. Exh. 143), at 1, respondents no longer dispute that the Supremacy Clause bars that very contention as well as any competing claims of Native Hawaiian legal title. Instead, they claim that the Hawaii Supreme Court did not “rel[y] solely on the existence of *legal* claims by Native Hawaiians to the ceded lands,” and that it relied in part on non-legal “moral and political claims.” Resp. Br. 37-38, 40. And respondents contend that, if it had so chosen, the court could have avoided a Supremacy Clause problem by jettisoning any legal rationale and relying instead on such “moral” or “political” grounds.

This is a perplexing argument. As noted, respondents obtained this injunction on the theory that the Apology Resolution conferred new legitimacy on Native Hawaiian claims of legal entitlement to the ceded lands. They phrased those claims in property-law terms, asserting that Native Hawaiians have “complete and perfect title” to the lands (J.A. 128a) and analogizing the State to “a person who knowingly possesses stolen goods” and is therefore “not free to alienate those goods, but must try to return them to their rightful owner” (J.A. 136a).<sup>10</sup> These are straightforward legal concepts, not expressions of moral or political sentiment.

Respondents are careful not to contend that the Hawaii Supreme Court viewed these underlying claims of legal title as superfluous to its judgment. They argue that the Hawaii Supreme Court relied on moral and political considerations *in addition to* legal ones, and

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<sup>10</sup> See also Private Pls.’ [Written] Closing Arg. 28, ROA V. 19, at 200 (Dec. 17, 2001) (“The United States, in the Newlands Resolution, purported to obtain title to the ceded lands by cession from the Republic of Hawaii.... Thus, an important inquiry is whether the United States *received good title* to the ceded lands from the Republic of Hawaii.”) (emphasis added and omitted); *id.* at 48, ROA V. 19, at 220 (“*Lane* [v. *Pueblo of Santa Rosa*, *supra*] is instructive because Hawaiians and the Pueblo Indians of Santa Rosa, unlike most American Indian tribes, have a claim to *complete ownership of their lands*, not just possessory title[.]”) (emphasis added); OHA Supp. P.S.J. Opp. 21, ROA V. 3, at 38 (Mar. 27, 1996) (“the Apology Bill of 1993 contain[s] clear and plain language that Congress regards native Hawaiians as the ultimate owners to their ceded lands”); OHA Hawaii S. Ct. Opening Br. 26 (“The uncertainties regarding the *legitimacy of the transfer of land in the Newlands Resolution* have been cleared up by the explicit findings by the U.S. Congress in the 1993 Apology Resolution.”) (emphasis added).

they speculate that the Court *could* have dispensed with legal reasoning altogether had it so chosen. Resp. Br. 37-40. But respondents do not dispute that, quite apart from any non-legal considerations the court may have deemed relevant, the court's actual judgment relied in substantial part on a premise about the new legitimacy that the Apology Resolution supposedly bestowed on Native Hawaiian claims of legal title. Because that premise was both necessary to the judgment and wrong as a matter of federal law, the judgment cannot stand.

Finally, there would be no merit to respondents' argument on this point even if they *did* contend that the judgment below rested on *purely* "moral" and "political" considerations rather than legal ones. As its name suggests, the Hawaii Supreme Court is a court, not a legislature. Like any court, it is presumed to act on the basis of legal findings, not raw "moral" or "political" instincts.<sup>11</sup> That presumption could be overcome

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<sup>11</sup> See, e.g., *State v. Mallan*, 950 P.2d 178, 192 (Haw. 1998) (plurality opinion) ("It is not within our role to usurp the responsibilities of the legislature.... Principles of due process and/or the police power should not be used as vehicles for importing a particular social philosophy into the Hawai'i Constitution."). Although respondents correctly note that "moral and political claims have served as the basis for Congress to grant lands" to aboriginal peoples (Br. 41), Congress is of course a political body, and the former Indian Claims Commission, which respondents also cite (Br. 40), was a politically constituted administrative agency. Finally, respondents' reliance on *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), is also bewildering. That case involved a claim for just compensation under the Takings Clause; one of the key issues was "whether the Court of Claims' inquiry in this case was guided by an appropriate *legal* standard"; and the Court "conclude[d] that it was." *Id.* at 416 (emphasis added).

only by the plainest of statements that the court abandoned this traditional limitation on its judicial role. There is no hint of any such statement here; the court acted as a court. Any contrary interpretation would convert a judgment that is merely wrong as a matter of federal law into one that would be quite literally lawless.<sup>12</sup>

### **B. Respondents' Waiver Arguments Are Baseless**

Alternatively, respondents urge the Court simply to ignore the legal effect of the pre-1993 federal enactments because, they say, that issue was improperly preserved in the state courts and falls outside the scope of the question presented. These waiver arguments are baseless.

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<sup>12</sup> As we have discussed, federal law not only precludes any remedy premised on the possible validity of Native Hawaiian title, but also constrains a state court's authority to impose a policy-based preference for one of the five Section 5(f) trust objectives at the expense of the others. *See* Pet. Br. 46 n.26 (citing, *inter alia*, *Lassen v. Arizona*, 385 U.S. 358 (1967)); *see also* U.S. Amicus Br. 20-23. For example, a state court could violate the Admission Act if, by subordinating all other Section 5(f) objectives to Native Hawaiian interests, it disregards "the constitution and laws" of the State (*see* Pet. App. 116a), which expressly *authorize* the sale ceded lands in pursuit of such objectives as "farm and home ownership on as widespread a basis as possible," Haw. Const. art. XI, § 10; *see* Pet. Br. 6 & n.3. Those additional federal law constraints, in addition to those discussed in the text, would bind the state courts in any proceedings on remand.

**1. The legal significance of the pre-1993 federal enactments was fully presented to the state courts**

Respondents contend that the State did not “argue before the Hawaii Supreme Court that, because the federal government had absolute title to the ceded lands pursuant to the Newlands Resolution (or similar federal statutes), an injunction would be improper.” Resp. Br. 36. That is flatly wrong. In fact, the State argued at length to the Hawaii Supreme Court exactly what it is arguing here: that longstanding federal law bars any Native Hawaiian claims of legal title to the ceded lands and that nothing in the Apology Resolution changes that conclusion.

For example, in response to respondents’ “cloud on the title” argument, the State explained to the Hawaii Supreme Court that the title the United States obtained in 1898 could not have been impaired because, as a matter of federal law, “Congress can take any and all ... aboriginal rights in land without compensation.” State’s Hawaii S. Ct. Br. 52 (citing, *inter alia*, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955)). Relying on the Newlands Resolution in particular, the State elaborated:

“By the ... the Newlands Resolution, of July 7, 1898, Congress accepted the cession by the Republic of Hawaii to the United States of all public lands belonging to the government of the Hawaiian Islands. Thus, upon annexation, all public lands in Hawaii became the property of the United States.” Whether or not Congress’s decisions were wise or proper is simply not (with all respect) a matter for inquiry by this Court.

*Id.* at 48 (indentation and internal citation omitted; quoting *Fasi v. King (Land Commissioner)*, 41 Haw. 461, 466 (1956)).<sup>13</sup> And in reply, respondent OHA acknowledged the State’s argument that “the political question doctrine prohibits the judiciary from issuing the injunction ... because Congress recognized the Republic of Hawai‘i as the rightful government of Hawaii in 1898”—*i.e.*, in the Newlands Resolution. J.A. 121a. Inexplicably, OHA now denies that the State made precisely that argument.

The State further explained to the Hawaii Supreme Court that, when Congress enacted the Admission Act in 1959, it “exercised [its] plenary power [over aboriginal lands] by transferring the Ceded Lands to the State along with the power to sell.” State’s Hawaii S. Ct. Br. 55; *see also id.* at 56 (explaining that “[t]he power of Congress’” to “[e]xtinguish[] ... Indian title based on aboriginal possession’” is “‘supreme’”) (quoting *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941)). The State thus observed that, at bottom, respondents’ breach-of-trust arguments “attack[] the United State[s]’ acquisition of the Ceded Lands” as well as “the Admission Act” and prior federal legislation. *Id.* at 63. Such an attack, the State added, was not just implausible on the merits, but procedurally inappropriate, because respondents had never made “the United States ... a party to any such action.” *Id.*

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<sup>13</sup> The State likewise argued that controlling precedent “foreclose[s] judicial inquiry into the State’s title to the Ceded Lands” and that even if the Republic’s disposition of the lands could be considered “‘confiscatory in nature, [a] court has no authority to declare it to be invalid,’” because “[t]he subsequent derivation of the title by the United States is clear.” *Id.* at 41 (quoting *Territory v. Kapiolani Est.*, 18 Haw. 640, 645-646 (1908)).

The State thus argued that even though “the question of whether the Admission Act empowers the State to sell Ceded Lands is properly before the Court,” the question of “[w]hether the Admission Act was wise or proper is not.” State’s Hawaii S. Ct. Br. 48. And it explained that any state law basis for opposing State’s authority to sell ceded lands would “conflict[] with the undoubted power to sell under the Admission Act and raises issues as to whether the compact is being changed without consent of Congress.” *Id.* at 25-26 (internal quotation marks omitted). In reply, respondents acknowledged this Supremacy Clause argument but opposed it on the (implausible) ground that the Apology Resolution had implicitly repealed the prior federal legislation: “The State’s argument ... that the ‘compact’ in the Admission Act ‘is being changed without consent of Congress’ is bizarre, because it was Congress itself that enacted the Apology Resolution and thus caused the change in the legal regime that governs these lands.” J.A. 114a.<sup>14</sup>

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<sup>14</sup> The State made the same points throughout this litigation. *See, e.g.*, Defs.’ Mot. for P.S.J. 13-14, ROA V. 1, at 87-88 (Dec. 15, 1995) (“Without dispute, the Newlands Resolution, the Organic Act, and the Admission Act ... reflect that public trust lands ... are subject to the management and disposition of the Hawaii government.”); Defs.’ Supp. Mot. for S.J. 10, ROA V. 3, at 336 (Mar. 19, 1996) (“[The Apology Resolution] does not ... expressly or by implication purport to reverse Annexation or repeal any part of the Admission Act[.]”); Defs.’ Mot. in Limine 5 n.3, ROA V. 10, at 204 n.3 (Aug. 9, 1999) (“The 9th Circuit has already rejected the argument that the agreements made in 1898 [the Newlands Resolution] and 1900 [the Organic Act] were invalid because they were made by ‘illegal revolutionaries.’”); Defs.’ Trial Mem. 39, ROA V. 16, at 44 (Nov. 7, 2001) (“Old treaties between the United States and the Kingdom of Hawai’i, all have been abrogated by Act of Congress in the Newlands Resolution. There can be no question of Congress’s

In short, the State made the same Supremacy Clause argument in the state courts that it is making here, and it relied explicitly on the Newlands Resolution and the Admission Act. *See also* U.S. Amicus Br. 32 (“In the state courts, the State raised a federal defense to respondents’ demand for an injunction.”). The Hawaii Supreme Court acknowledged that argument (*e.g.*, Pet. App. 82a & n.26) but then ignored it. As the Solicitor General explains, “[t]he only conceivable basis for the state supreme court’s failure to address that meritorious federal defense was the state court’s belief that *another* federal law, the Apology Resolution, eliminated that defense. Because that premise was wrong, federal law precludes respondents from showing success on the merits and obtaining an injunction.” U.S. Amicus Br. 32.

**2. The legal significance of the pre-1993 federal enactments is fairly included within the question presented**

Respondents also try to evade meaningful review by arguing that issues concerning the legal effects of the Admission Act and the Newlands Resolution fall outside the question presented in the certiorari petition. That, too, is incorrect.

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right to do so.”); Defs.’ Mot. to Dismiss 2, ROA V. 4, at 164 (Mar. 12, 1998) (“When the Republic of Hawaii was annexed to the United States pursuant to the Newlands Resolution ... , these lands became federal lands. *Hawaii v. Mankichi*, 190 U.S. 197, 209-11 (1903)”). Indeed, both parties introduced the Newlands Resolution itself as trial exhibits, Plaintiffs’ Ex. 17 & Defendants’ Ex. QQQQQ, and the private plaintiffs actually posed the question to the trial court as to whether “the Newlands Resolution ... extinguished the Hawaiians’ claim.” Private Pls.’ [Written] Closing Arg. 30, ROA V. 19, at 202 (Dec. 17, 2001).

The petition for certiorari asks this Court to rule on whether the Apology Resolution “strips Hawaii of its sovereign authority to sell, exchange, or transfer” the ceded lands “until it reaches a political settlement with native Hawaiians about the status of that land.” Pet. i.<sup>15</sup> By its terms, that question encompasses whether, as respondents argue, the Apology Resolution “changed the legal landscape and restructured the rights and obligations of the State.” Pet. App. 27a. Again, the Apology Resolution could have had that effect only if it repealed Congress’s prior decisions to take “absolute fee and ownership of” the ceded lands in 1898 (Newlands Resolution (Pet. Br. App. 1a)) and to “grant[] to the State of Hawaii” that same perfect and unchallengeable title in 1959 (Admission Act § 5 (b))

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<sup>15</sup> See also Pet. 2 (“[n]othing in the Apology Resolution remotely supports” injunction against land sales pending a “political settlement with native Hawaiians who assert aboriginal rights to that land”); *id.* at 11 (decision under review wrongly “holds that Congress dramatically but silently abrogated key land rights ... that Hawaii explicitly received when it was admitted to the Union in 1959”); *id.* at 12 (Apology Resolution “does not mandate, justify, or even contemplate the imposition of new limits on Hawaii’s sovereign authority to sell, exchange, or transfer its lands”); *id.* at 13 (Apology Resolution does not “restrict the State’s preexisting and explicit authority to transfer land out of the trust ... in accordance with any of the five purposes set forth in the Admission Act”); *id.* at 15 (state court’s analysis of Apology Resolution “raise[s] grave federalism concerns” by “abrogat[ing] the State’s sovereign power—explicitly granted by Congress ... —to manage and sell or exchange its own public lands within the broad limits set forth in the Admission Act”); *id.* at 16 (same). The Apology Resolution itself underscores the obvious interrelationship among these various enactments by discussing the content, background, and consequences of the Newlands Resolution. Pet. App. 107a-108a (quoting Resolution and noting that it “vested title to the [ceded] lands in the United States”).

(Pet. App. 115a)). Thus, this Court cannot logically consider the proper role of the Apology Resolution in this dispute without examining the preexisting “legal landscape” that it supposedly transformed—that is, without addressing the effects the Newlands Resolution and Admission Act had on claims of Native Hawaiian title to the ceded lands. A considered analysis of those provisions is thus “a ‘predicate to an intelligent resolution’ of the question presented, and therefore ‘fairly included therein.’” *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (quoting *Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980), and S. Ct. Rule 14.1(a)).<sup>16</sup>

Several additional factors reinforce the same conclusion. First, consideration of the pre-1993 enactments could not subject this Court to any incremental burden in its review of this case, both because those enactments are essential for background in any event and because their meaning is not even disputed. Second, although, if we could file the petition again, we would foreclose respondents’ procedural objection by including a fuller exposition of the pre-1993 enactments, the State gained no conceivable advantage by keeping the petition as concise as it was. If anything, fuller presentation of the pre-1993 enactments and their complete extinction of aboriginal title would only have underscored the need for this Court’s interven-

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<sup>16</sup> See also *Ballard v. C.I.R.*, 544 U.S. 40, 47 n.2 (2005) (“[Q]uestions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented.”) (quoting Stern et al., *Supreme Court Practice* 414 (8th ed. 2002)). Of course, the rule of practice concerning issues “fairly included” within the question presented, S. Ct. Rule 14.1(a), is prudential in any event, not jurisdictional.

tion. There is thus no basis for respondents' inflammatory accusation that the State has "engag[ed] in a classic bait and switch." Resp. Br. 18. Third, respondents likewise identify no respect in which they could possibly have been prejudiced by the fuller exposition of these issues in the State's opening merits brief than in its certiorari petition.

Finally, having granted certiorari, this Court has strong prudential reasons to address the preclusive effects of these pre-1993 enactments on any claim of Native Hawaiian title to the ceded lands. In opposing certiorari, respondents argued that, if this Court reverses the state court's determination that the Apology Resolution "dictates" the challenged injunction (Pet. App. 85a), "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," under state law. Opp. 11.<sup>17</sup> This Court should prevent these pre-announced plans from trivializing its jurisdiction. In holding that the Apology Resolution does not "dictate" an injunction to preserve claims of Native Hawaiian title, the Court should make clear that the Resolution does not repeal

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<sup>17</sup> The state law grounds respondents unsuccessfully invoked in opposing certiorari are neither "independent" of the federal law grounds (for the reasons discussed in Section I above) nor even "adequate," because they contradict the Newlands Resolution, the Admission Act, and other pre-1993 enactments. *See* note 5, *supra*. Respondents' invocation of those state law grounds thus opened the door to arguments about the preclusive consequences of these federal enactments for claims of aboriginal title. That issue would therefore be properly before the Court for that reason alone even if it otherwise fell outside the scope of the question presented in the petition (which it does not).

the Newlands Resolution, the Admission Act, or similar pre-1993 enactments; that those enactments foreclose such title claims; and that, as a result, those enactments also foreclose any judicial remedy that, like this one, rests on the potential validity of such claims.

**CONCLUSION**

The judgment of the Hawaii Supreme Court should be vacated and the case remanded with instructions to dissolve the injunction against the sale, transfer, or exchange of the ceded lands.

Respectfully submitted.

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