No. 07-1372

IN THE
Supreme Court of the United States

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

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

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF HAWAII

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

In the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. The question here is whether this symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—29 percent of the total land area of the State and almost all the land owned by the State—unless and until it reaches a political settlement with Native Hawaiians about the status of that land.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Hawaii were:

Office of Hawaiian Affairs; Rowena Akana; Haunani Apoliona; Dante Carpenter; Donald Cataluna; Linda Dela Cruz; Colette Machado; Boyd P. Mossman; Oswald Stender; and John Waihe'e, IV, in their official capacities as members of the Board of Trustees of the Office of Hawaiian Affairs;[*] Pia Thomas Aluli; Jonathan Kamakawiwo'ole Osorio; Charles Ka'ai'ai; and Keoki Maka Kamaka Ki'ili (Plaintiffs-Appellees); and

Housing and Community Development Corporation of Hawaii (HCDCH); Robert J. Hall, in his capacity as Acting Executive Director of HCDCH; Charles Sted, Chair; Stephanie Aveiro; Francis L. Jung; Charles King; Lillian B. Koller; Betty Lou Larson; Theodore E. Liu; Travis Thompson; Taiaopo Tuimaleialiifano, Members of the Board of Directors of HCDCH;[**] State of Hawaii; and Linda Lingle, in her capacity as Governor of the State of Hawaii (Defendants-Appellants).

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[*] Walter Meheula Heen has replaced Dante Carpenter, and Robert K. Lindsey, Jr. has replaced Linda Dela Cruz.

[**] Robert J. Hall, Charles Sted, Stephanie Aveiro, Lillian B. Koller, Travis Thompson, and Taiaopo Tuimaleialiifano no longer serve on the Board of Directors of HCDCH, and Charles King now serves as Chair. David A. Lawrence, Georgina Kawamura, Linda Smith, Ralph M. Mesick, and Allan Los Banos, Jr. now serve as Directors.

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OPINION BELOW

The decision of the Supreme Court of Hawaii is published at 177 P.3d 884 (Haw. 2008) and is reprinted in the appendix to the petition ("Pet. App.") at 1a-100a.

JURISDICTION

The Hawaii Supreme Court issued its decision on January 31, 2008. This Court has jurisdiction under 28 U.S.C. § 1257. The topic of jurisdiction is addressed in Part I of the Argument below.

STATUTORY PROVISIONS INVOLVED

The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the

Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) ("Apology Resolution"), is reprinted at Pet. App. 103a-111a.

The Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, is reprinted at Pet. App. 113a-132a.

The Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Res. No. 55-55, 30 Stat. 750 (1898) ("Newlands Resolution"), is reprinted in the Appendix to this brief ("App.") at 1a-3a.

The Act to Provide a Government for the Territory of Hawaii, Ch. 339, 31 Stat. 141 (1900) ("Organic Act"), is reprinted in relevant part at App. 4a-5a.

The Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921), is reprinted in relevant part at App. 6a.

The Act to Amend Section 73(1) of the Hawaiian Organic Act, Pub. L. No. 82-483, 66 Stat. 515 (1952), is reprinted in relevant part at App. 7a.

STATEMENT

In 1993, Congress marked the 100th anniversary of the overthrow of the Hawaiian monarchy by enacting the Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510, which expresses the federal government's regret for the role of federal officials in the overthrow. In this case, the Supreme Court of Hawaii held that this symbolic Resolution tacitly but materially impairs the State's sovereign authority over nearly all State-owned lands. The court found that the Resolution both placed a "cloud on the title" to these lands and recognized Native Hawaiian land claims that Congress had extinguished when it annexed Hawaii to the United States in 1898. On that basis, the Court concluded that "the

Apology Resolution dictates that [these] lands should be preserved" against any transfer by the State until the federal and state governments have reached some undefined "reconciliation" with "the native Hawaiian people" who now assert title as a group. Pet. App. 85a.

Nothing in the Apology Resolution remotely supports that outcome; indeed, the Resolution does not purport to address either Hawaii's sovereign powers or its title to state lands. In addition, the federal law annexing Hawaii to the United States in 1898 as well as subsequent federal legislation foreclose the Hawaii Supreme Court's premise that Native Hawaiians may have valid land claims that an injunction against land sales is needed to preserve. In issuing this injunction, the Hawaii Supreme Court both misconstrued the Apology Resolution and disregarded the annexation law's conclusive determination that the United States obtained absolute fee title and ownership to these lands. The result is an affront to state sovereignty, committed in the name of federal law but actually in gross disregard of federal law.

1. History of the Ceded Lands

In 1893, with the involvement of certain United States officials, the Hawaiian monarchy under Queen Lili'uokalani was overthrown, and the Republic of Hawaii was declared in its place. *See generally Rice* v. *Cayetano*, 528 U.S. 495, 499-506 (2000). In 1898, Congress enacted, and President McKinley signed, the Newlands Resolution, which annexed Hawaii to the United States. App. 1a-3a.[1] The Newlands Resolution

[1] A "joint resolution" passed by the Senate and House of Representatives and signed by the President has the same legal status as an ordinary statute. *See* U.S. Const. art. I, § 7; *United States ex*

recognized the Republic of Hawaii and recited that the Republic had both relinquished sovereignty to the United States and "cede[d] and transfer[red] to the United States the absolute fee and ownership" of approximately 1.8 million acres of former crown and government lands, now known as the "ceded lands." App. 1a. The Resolution affirmed that all such "property and rights" to these lands "are vested in the United States of America." *Id.*

For several decades thereafter, Hawaii remained a federal territory, and Congress delegated to the territorial government broad powers over these ceded and thus federal lands. *See* Part II.B, *infra*. In March 1959, Congress enacted the Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (Pet. App. 113a-132a), which specified the terms on which Hawaii would enter the Union after its citizens voted for statehood in a plebiscite. Two months later, on June 27, the people of Hawaii voted by a margin of 17 to 1 in favor of statehood. Harold S. Roberts, *Preface* to *Proceedings of the Constitutional Convention of Hawaii*, 1950, at xi (1960). Hawaii became the 50th State shortly thereafter.

Under the Admission Act, the United States transferred to the new State full title to most of the ceded lands (keeping some 350,000 acres) and directed the State to hold these lands in public trust. Pet. App. 115a-117a. Section 5 of the Act provides that these

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rel. Levey v. *Stockslager*, 129 U.S. 470, 475 (1889); *see also Bowsher* v. *Synar*, 478 U.S. 714, 756 (1986) (Stevens, J., concurring in the judgment). Both the Newlands Resolution and the Apology Resolution fall into this category.

lands, which now total 1.2 million acres,[2] "together with the proceeds from the *sale or other disposition* of [these] lands and the income therefrom, shall be held by [the] State as a public trust" to promote one or more of five purposes:

> [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.

Pet. App. 116a-117a (emphasis added). Section 5(b) of the Admission Act provides that this grant of title to Hawaii was made "in lieu of any and all grants provided for new States by provisions of law other than [the Admission Act], and such grants shall not extend to the State of Hawaii." *Id.* at 115a.

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[2] The land area of the State of Hawaii totals about 6,422.6 square miles, *see* Hawaii State Databook, tbls. 5.07, 5.08, *available at* http://hawaii.gov/dbedt/info/economic/databook/db2006/section05.pdf (last modified Jan. 15, 2008), which equals about 4,110,464 acres. Thus, the approximately 1.2 million acres of ceded land at issue here constitute about 29 percent of the total land area of the State and nearly all of the approximately 1.3 million total acres of land owned by the State. *See* State of Hawaii GIS Program, Map No. 20080411-04-DK (Apr. 11, 2008), *available at* http://hawaii.gov/dbedt/gis/maps/state_lands_non-dhhl_statewide. These figures exclude the separate 200,000 acres that Congress set aside in the Hawaiian Homes Commission Act (Act of July 9, 1921, ch. 42, 42 Stat. 108), which "created a program of loans and long-term leases for the benefit of native Hawaiians." *Rice*, 528 U.S. at 507-509.

Just as the Admission Act anticipates that the State will earn "proceeds from the sale" of ceded lands, Pet. App. 116a, Hawaii state law likewise authorizes the State not just to hold the land and (for example) collect leasehold revenues from it, but also to sell it outright to private parties. *E.g.*, Haw. Rev. Stat. § 171-45 (the State may "dispose of public land for personal residence purposes … by sale in fee simple"); *see also* Haw. Rev. Stat. §§ 171-13, 171-41, 171-42. Indeed, *without* the power to sell the ceded lands in fee simple, the State could not promote the third of the five purposes of the Admission Act: "the development of farm and home ownership on as widespread a basis as possible." Hawaii law further provides that "[a]ll funds derived *from the sale* … or other disposition" of the ceded lands "or acquired in exchange for [those] lands" shall "be held as a public trust" for the purposes specified in the Admission Act. Haw. Rev. Stat. § 171-18 (originally adopted in 1962 Haw. Sess. L. Act 32) (emphasis added).[3] In short, federal and state law both authorize the State to sell ceded lands to private purchasers so long as it holds the proceeds in trust for the citizens of Hawaii in accordance with Section 5(f) of the Admission Act.

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[3] *See also* Haw. Const. art. XI, § 10 ("The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible."); Haw. Const. art. XII, § 4 (ceded lands "shall be held by the State as a public trust for native Hawaiians and the general public"); *id.* § 6 (OHA board shall "manage and administer the *proceeds from the sale or other disposition*" of lands, "including all income and *proceeds from that pro rata portion* of the trust referred to in section 4 of this article for native Hawaiians") (emphasis added).

One of the recipients of the monies derived from the ceded lands is respondent Office of Hawaiian Affairs ("OHA").[4] In 1978, a state constitutional convention established OHA to receive and manage a portion of that income, including "the proceeds from the sale or other disposition of the [public trust] lands," for the benefit of native Hawaiians—the second of the five purposes identified in the Admission Act. Haw. Const. art. XII, §§ 4-6; *see also* Haw. Rev. Stat. ch. 10. Since then, OHA has received a substantial portion of the monies derived from the ceded lands. 1980 Haw. Sess. L. Act 273, at 525, *abrogated by* 1990 Haw. Sess. L. Act 304, § 3, at 948, Haw. Rev. Stat. § 10-2 (substituting the word "revenue" for "funds"); *see also Office of Hawaiian Affairs* v. *State*, 31 P.3d 901 (Haw. 2001). As of June 30, 2007, these monies, including earnings, totaled $458,315,573. *See* Office of Hawaiian Affairs, *Financial Statements and report of Independent Certified Public Accountants* 12 (June 30, 2007), *available at* http://www.oha.org/pdf/FY_2007_OHA_Audited_Financial_Statements.pdf.

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[4] As used in state law, the noun "Hawaiian" refers not to all inhabitants of Hawaii, but to the subset who can trace some ancestry to the Islands' pre-1778 inhabitants, and "native Hawaiian" is defined more narrowly to encompass only "descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778." *Rice*, 528 U.S. at 499. As discussed below, the federal Apology Resolution uses the term "Native Hawaiian" to encompass the broader class of people denoted by the term "Hawaiian" under state law. Because the distinction between that class and its subclass is not essential to the issues presented here, and because the Resolution is central to this case, this brief uses the term "Native Hawaiian" in the broader sense used in the Resolution.

2. The Apology Resolution

In 1993, Congress enacted the Apology Resolution and summarized its purpose as follows:

> [I]t is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians[.]

Pet. App. 109a.

The Resolution sets forth a list of historical findings, followed by three sections of operative text. Section 1, titled "Acknowledgment and Apology," recites that Congress:

> (1) … acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;
>
> (2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;
>
> (3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;

> (4) expresses 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; and
>
> (5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.

Pet. App. 110a.

Section 2 of the Apology Resolution defines the term "Native Hawaiian" to include "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." Section 3 then states:

> Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.

Pet. App. 111a. No provision of the Apology Resolution impairs or even addresses Hawaii's sovereign right to control or alienate any of the lands it owns.

3. This Litigation

a. This case began in 1994, shortly after President Clinton signed the Apology Resolution into law. The dispute began over a parcel of land in West Maui referred to as the "Leiali'i parcel." Since 1987, the State's affordable housing authority, the Housing Finance and

Development Corporation (HFDC),[5] had been working to develop the Leiali'i parcel, in part for sale to residential purchasers, because it was located in an area with a "critical shortage" of affordable housing. Pet. App. 18a. Home ownership is one of the five explicit purposes for which ceded land (or proceeds from the sale of such land) may be used pursuant to Section 5 of the Admission Act. *See* p. 5, *supra*.

In 1989, HFDC filed a petition with the Land Use Commission to reclassify the parcel from agricultural to urban use. Pet. App. 20a. The Commission granted the petition, with respondent OHA's approval, in 1990. *Id.* As the Land Use Commission observed, the "proposed project on the Property is intended to carry out the State of Hawaii's overall goal of increasing housing opportunities in West Maui for persons and families of all income levels. … The Property can accommodate up to 4,800 residential units. The residential units will be comprised of single family dwellings and lots, multifamily townhouse units and vacant lots." Trial Exhibit "OO" at 9-10.

For the next four years, OHA and HFDC tried to agree on the compensation due to OHA when the State transferred the land to HFDC. Pet. App. 20a-21a. In 1992, the Hawaii legislature established that OHA

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[5] In 1997, the Hawaii legislature merged HFDC with the public housing agency to form the Housing and Community Development Corporation of Hawaii (HCDCH), which is the captioned party in this case. 1997 Haw. Sess. L. Act 350, § 1, at 1010-1011; Haw. Rev. Stat. ch. 201G (2001). HFDC was spun off as a separate agency again in 2006. *See* 2006 Haw. Sess. L. Act 180, § 2, at 709; 2007 Haw. Sess. L. Act 249, § 2, at 777-806 (codified at Haw. Rev. Stat. chs. 201H, 356D).

would receive 20 percent of the fair market value of the land to be transferred. 1992 Haw. Sess. L. Act 318, at 1016. The parties, however, disputed the parcel's fair market value. While this negotiation continued, HFDC spent $31 million developing the parcel, including building roads, hooking up utilities, and grading the lots. Pet. App. 22a.

After the Apology Resolution was enacted in 1993, OHA demanded, for the first time, that HFDC attach a disclaimer to the Leiali'i transfer stating that the conveyance would not waive or diminish Native Hawaiian claims to ownership of the land. Pet. App. 21a. HFDC rejected this proposed disclaimer on the ground that it would have "rendered title insurance unavailable" for the land and thus would have undermined the interests of would-be homeowners. *Id.*[6] On November 4, 1994, HFDC purchased the land from the State for consideration of $1.00 and transmitted a check to OHA for $5,573,604.40, which was 20 percent of the fair market value OHA had previously said it would consider accepting. *Id.* OHA refused the check.

b. Respondent OHA filed this suit on November 4, 1994, and the individual plaintiffs (also respondents here) filed a separate suit on November 9, 1994. The cases were consolidated shortly thereafter.

In their First Amended Complaint, filed in 1995, respondents claimed that the State's proposed land dispositions would violate the trust obligations in the fed-

[6] Subsequent events have confirmed the validity of this concern. "After institution of this lawsuit in November 1994, … title insurance companies refused to insure title to the lands at Le[i]ali'i. Therefore, the development of Le[i]ali'i has been on hold because of th[e] lawsuit." Pet. App. 208a (footnote omitted).

eral Admission Act as well as various provisions of state law. *See* J.A. 34a-40a. Respondents' position soon evolved to focus heavily on the Apology Resolution as the main basis for their breach-of-trust claims.

In particular, respondents argued that the Apology Resolution "changed the legal landscape" (Pet. App. 27a) by casting doubt on whether, in the Admission Act, Congress had passed valid title to the State. Respondents contended that "the State's title is only as good as the title the United States had at the time of admission," and that "[a]s of 1993, the United States has admitted that this land was illegally obtained." Private Pls.' Opp. to Summ. J. 11, Cir. Ct. Record on Appeal (ROA), Volume (V.) 5, at 11 (Apr. 29, 1998). Respondents thus claimed that, although Section 5(f) of the Admission Act includes all Hawaii citizens as potential beneficiaries of ceded lands revenues, the Apology Resolution "serve[s] as notice … that the [Native] Hawaiian beneficiaries may have a claim to the ceded lands that the non-[Native] Hawaiian beneficiaries do not enjoy and that such claim is likely to result in title to at least some of the ceded lands being vested in a sovereign [Native] Hawaiian entity." Private Pls.' Proposed Findings of Fact and Conclusions of Law 48, ROA V. 12, at 50 (Nov. 5, 2001). To preserve the lands for that purpose, respondents requested (i) an injunction prohibiting the State from selling any ceded lands and (ii) an injunction barring the sale of the Leiali'i parcel specifically.

After a bench trial in November and December 2001, the trial court ruled for the State on grounds of waiver, collateral estoppel, sovereign immunity, ripeness, and the political question doctrine. *See* Pet. App. 133a-279a. It also held that the State had the authority to transfer the ceded lands, concluding (among other

things) that in "adopting the Apology Resolution … Congress did not create a 'claim' to any ceded lands." *Id.* at 258a. On February 3, 2003, the trial court certified its judgment as final pursuant to Hawaii Rule of Civil Procedure 54(b).

c. Respondents appealed to the Hawaii Supreme Court. Like their trial court arguments, respondents' claims on appeal were "based largely on the Apology Resolution." Pet. App. 27a. Respondent OHA argued, for example, that—

- "[t]he *crucial event* affecting OHA's legal position on the sale of the Ceded Lands was the passage of the Apology Resolution in November 1993" (J.A. 134a) (OHA Haw. S. Ct. Reply Br.) (emphasis added);
- by enacting the Apology Resolution "Congress … *caused the change in the legal regime* that governs these lands" (*id.* at 113a) (emphasis added); and
- the Apology Resolution "*transform[ed] the legal landscape* and alter[ed] the relationship of the parties" (*id.* at 116a) (emphasis added).[7]

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[7] *See also* OHA Hawaii S. Ct. Opening Br. 3 ("OHA's lawyers and other lawyers advised OHA's Trustees that Congress's explicit recognition of Native Hawaiian claims placed a cloud on any title of any Ceded Lands transferred by the State into private hands."); *id.* at 45 ("OHA's position regarding the protection of these Native Hawaiian financial interests and cultural rights in the Ceded Lands changed after November 1993 with the passage by Congress of the Apology Resolution."); *id.* at 46 (OHA's position "matured … after the Congress explicitly recognized the illegal action and uncompensated takings that occurred in the 1890s."); J.A. 104a ("This Congressional recognition of illegality, and its accompanying call for a 'reconciliation' through a process now un-

In effect, respondents argued once more that the Apology Resolution disavows Congress's prior decisions (i) to recognize the Republic of Hawaii and accept its cession to the United States of absolute title to the these lands (the Newlands Resolution) and (ii) to convey that title to the new State of Hawaii upon its statehood (the Admission Act). Respondent OHA elaborated that "[o]nce Congress identified the cloud on the title to these lands resulting from the illegalities surrounding their transfer to the United States, it became inevitable that a hold should be put on these lands until the legal issues can be sorted out properly." J.A. 126a. In particular, OHA submitted that this "hold" was necessary "so that a subsequent transfer can take place" from the State to "the rightful owners" (*i.e.*, Native Hawaiians). *Id.* at 116a. And OHA further contended that the State would violate its trust obligations to Native Hawaiians if it "transfer[red] property whose ownership has been put into question by federal enactments"—specifically, by the Apology Resolution. *Id.* at 118a-119a.[8]

d. On January 31, 2008, nearly twenty years after HFDC first filed its petition to reclassify the Leiali'i

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derway, has changed the legal landscape and restructured the rights and obligations of the State.") (footnote omitted).

[8] The private plaintiffs made similar arguments. *See* Private Pls.' Haw. S. Ct. Opening Br. 22 ("Given the admission in the Apology Resolution that the overthrow was 'illegal,' it is important to analyze what a trustee is to do when he or she learns that the trust *res* may have been illegally obtained."); *id.* at 32 ("[T]he Apology Resolution is law. It … manifests the settlor's intent, it describes changed circumstances and it includes admissions that [Native] Hawaiians have an unrelinquished claim to the ceded lands.") (footnote omitted).

parcel, the Hawaii Supreme Court issued its decision. Pet. App. 1a-100a.[9] The court articulated the primary question on appeal as "whether, in light of the Apology Resolution, [the] court should issue an injunction to require the State, as trustee, to preserve the corpus of the ceded lands in the public lands trust until such time as the claims of the [Native] Hawaiian people to the ceded lands are resolved." *Id.* at 79a; *see id.* at 8a n.7 ("[U]ltimately, [N]ative Hawaiians seek return of [the ceded lands] from both the state and federal governments.") (internal brackets and quotation marks omitted). The court answered that question in the affirmative.

The court first construed the text of the Apology Resolution to recognize the "unrelinquished claims" that Native Hawaiians have asserted in the lands at issue. Pet. App. 32a. From this, the court inferred that the Apology Resolution subjects the State to a new and specific fiduciary duty to preserve the lands until some unspecified future date. The court found support for this interpretation in Congress's statement that it intended "to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." *Id.* (quoting 107 Stat. at 1513) (emphasis omitted). On these grounds, the court enjoined the State from transferring any of the ceded lands, including the Leiali'i parcel, "pending a reconciliation between the United States and the [N]ative Hawaiian

[9] As noted in our letter to the Clerk of July 14, 2008, the reprint of the court's opinion contains a format error: the block-quoted text on the top of page 6a of the petition appendix should actually appear as the second paragraph in footnote 5 at the bottom of the previous page.

people" and "until the claims of the [N]ative Hawaiians to the ceded lands have been resolved." *Id.* at 85a, 100a. It did not set out a standard for determining what type or extent of "reconciliation" would be sufficient to warrant lifting the injunction. It held only that "injunctive relief is proper pending final resolution of [N]ative Hawaiian claims through the political process." *Id.* at 98a.

The Hawaii Supreme Court stressed that its decision rested primarily on its construction of the federal Apology Resolution. *See* Pet. App. 26a ("At the heart of the plaintiffs' claims … is the Apology Resolution."); *id.* at 79a ("The primary question … is whether, in light of the Apology Resolution, this court should issue an injunction.") (emphasis omitted); *id.* at 85a ("[T]he language of the Apology Resolution itself supports the issuance of an injunction."); *id.* ("[T]he Apology Resolution dictates that the ceded lands should be preserved."). Indeed, at three separate points in its opinion, the court emphasized that respondents' cause of action arose from the Apology Resolution and could not have been brought until that Resolution was enacted. *See id.* at 58a-59a, 62a-63a, 99a; *see also* Part I, *infra* (discussing these passages).

The court invoked several state law provisions as well—most of them enacted before the Apology Resolution supposedly gave rise to plaintiffs' claims—but only as ancillary support for its judgment. *See* Pet. App. 35a-39a. None of these provisions purports to curb the State's general authority to dispose of the ceded lands.[10] Instead, these provisions relate to this

[10] *See* Respondents' Br. in Opp. to Cert. ("Opp.") App. 1a-27a (reprinting these statutes). The only one of these state law provi-

case only in the attenuated sense that they criticize the overthrow of the Hawaiian monarchy, voice general support for Native Hawaiians, and recite the undisputed fact that "[m]any native Hawaiians *believe*" that they have a legal claim either to the ceded lands or to "monetary reparations." *Id.* at 35a-38a (quoting 1993 Haw. Sess. L. Act 354, § 1) (some emphasis omitted); *see also* 1997 Haw. Sess. L. Act 329, § 1 (resolving questions about OHA's funding and endorsing "momentum" toward reconciliation with native Hawaiians); 1993 Haw. Sess. L. Act 359 (reciting various historical findings, "acknowledg[ing] and recogniz[ing] the unique status [of] the native Hawaiian people," calling for a convention of native Hawaiians on self-government issues, setting up an advisory commission and various task forces, and appropriating funds for that purpose).

SUMMARY OF ARGUMENT

1. Although respondents contended otherwise in opposing certiorari, this Court clearly has jurisdiction to review the Hawaii Supreme Court's decision. First, under *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court has jurisdiction whenever a state court decision appears to rest primarily on federal law, or to be interwoven with federal law, and it contains no "plain statement" that it rests on adequate and independent

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sions that even arguably requires the State to hold *any* lands for a future "native Hawaiian entity" is 1993 Haw. Sess. L. Act 340, which is narrowly limited to land on a former military target range: Kahoʻolawe island. *See* Pet. App. 38a-39a. That land, which the United States conveyed 35 years *after* the Admission Act, constitutes only 2 percent of the land owned by the State, whereas the lands at issue in this case constitute nearly *all* State-owned lands. *See* note 2, *supra*.

state law grounds. That is the case here. The Hawaii Supreme Court held that the Apology Resolution "dictates" the injunction under review here (Pet. App. 85a) and, indeed, stressed repeatedly that respondents' claims arise from the Resolution and could not have been raised before its enactment in 1993.

In any event, the Hawaii Supreme Court's injunction rests on a legal premise foreclosed by federal law: namely, that Native Hawaiian claims to the ceded lands may have survived Hawaii's annexation to the United States and that the lands should thus be preserved pending resolution of that title dispute. This premise contradicts multiple congressional enactments from the Newlands Resolution to the Admission Act, and any state court decision resting on that premise violates the Supremacy Clause. Although respondents may disagree on the merits, this Court plainly has jurisdiction to address that federal law dispute.

2. On the merits, the Apology Resolution is a straightforward statement of regret. It does not affect the legal status of the ceded lands, much less "cloud[]" the State's title or "change[] the legal landscape and restructure[] the rights and obligations of the State" (Pet. App. 26a-27a). For example, although the Resolution recites that Native Hawaiians "never directly relinquished their claims … over their national lands," Pet. App. 15a, it does not repeal Congress's 1898 decision to extinguish such claims; it simply apologizes for the role of certain U.S. officials in the overthrow of the Hawaiian monarchy. The text of the Apology Resolution is quite clear on this point, as is the legislative history, which confirms that the Resolution "will not result in any changes in existing law." S. Rep. No. 103-126, at 35 (1993).

The Hawaii Supreme Court's ruling is untenable not only because it misreads the Apology Resolution, but also because, in violation of the Supremacy Clause, its rationale contradicts preexisting congressional enactments, whose legal effect the Apology Resolution left intact. The court enjoined any sales of the ceded lands on the theory that title might actually belong not to the State, but to "the Native Hawaiian people." But that legal theory runs headlong into the Newlands Resolution, which vests absolute and unreviewable title in the United States; the Organic Act of 1900, which confirms the extinguishment of any Native Hawaiian or other claims to the ceded lands; and the Admission Act of 1959, which transfers to the State the same absolute title previously held by the United States. This body of federal law forecloses any competing claims to the ceded lands, such as those respondents present here. It similarly bars any judicial remedy that, like this injunction, is premised on the possible validity of such competing claims.

Respondents have suggested that, even if the Apology Resolution did not *repeal* these prior federal enactments, its recitation of certain historical facts permits them now to challenge the enactments' underlying validity as a matter of international or constitutional law. There is no merit to such arguments. As this Court has long recognized, Congress has absolute and judicially unreviewable authority to extinguish, with or without just compensation, communal claims to public lands brought on behalf of an entire native group. At the same time, Native Hawaiians have a clear *moral* basis for asking the political branches to grant them recompense, and both Congress and the State have responded by implementing programs for their specific benefit. But Native Hawaiians have no

legal claim to the ceded lands that federal law permits any court to recognize.

Finally, construing the Apology Resolution to "cloud" the title to the ceded lands, as the Hawaii Supreme Court did, would raise profound concerns about the Resolution's own constitutionality. Under basic principles of federalism, Congress may not grant lands to a State upon admitting it to the Union and thereafter impair the State's title to those lands or force the State to use them to implement a previously unannounced federal objective. That, however, is exactly what the Hawaii Supreme Court construed the Apology Resolution to do. Even if that construction were plausible in the first place, which it is not, it should be rejected under the doctrine of constitutional avoidance.

ARGUMENT

The decision under review violates federal law in two related respects. First, it erroneously concludes that the Apology Resolution impairs the State's prerogative to dispose of its own lands in the manner it deems best for its citizens as a whole. The Apology Resolution does no such thing. Second, the decision under review rests on a premise—*i.e.*, Native Hawaiians have legal claims to the ceded lands—that directly contradicts the Newlands Resolution and subsequent federal enactments. Nothing in the Apology Resolution repeals the preclusive effect of those prior enactments on claims of Native Hawaiian title.

Because respondents' opposition to certiorari focused almost exclusively on a challenge to this Court's jurisdiction, however, we briefly address that issue before proceeding to the merits.

I. THIS COURT HAS JURISDICTION

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." *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983); *see also Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 150, 152 (1984) ("If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law."). In opposing certiorari, respondents claimed (Opp. 11) that the decision below was primarily based not on the Apology Resolution, but on preexisting state trust law and four state enactments, even though none of those enactments even purports to curb the State's authority to dispose of the ceded lands. *See* pp. 16-17 and note 10, *supra*. That argument is wrong in two main respects.

First, the Hawaii Supreme Court did not even suggest that its decision rested on adequate and independent state law grounds, let alone make the "plain statement" to that effect needed to defeat the *Michigan* v. *Long* presumption of jurisdiction. 463 U.S. at 1040.[11]

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[11] The Hawaii Supreme Court is familiar with the *Michigan* v. *Long* presumption and has often shielded its decisions from this Court's review by explicitly relying on state law rather than federal law. *See, e.g.*, *State* v. *Heapy*, 151 P.3d 764, 772 n.7 (Haw. 2007) (plurality opinion) (citing *Michigan* v. *Long* and specifying that "[t]he analysis in this opinion is grounded in … the Hawai'i Constitution"); *State* v. *Lessary*, 865 P.2d 150, 154 (Haw. 1994) ("When the United States Supreme Court's interpretation of a

To the contrary, at three separate points in its opinion, the court emphasized that "it was not until the Apology Resolution was signed into law on November 23, 1993 that the plaintiffs' claim regarding the State's explicit fiduciary duty to preserve the corpus of the public lands trust arose. As such, it was *not until that time that the plaintiffs' lawsuit could have been grounded upon such a basis*." Pet. App. 62a-63a (emphasis added); *accord id.* at 58a-59a, 99a. As respondents have acknowledged, the Apology Resolution "was enacted *after* three of the four Hawaii laws at issue in the case." Opp. 2 (emphasis added). If the Hawaii Supreme Court had deemed these state law grounds independent of the Apology Resolution and adequate to support the judgment, it would not have concluded that respondents' cause of action did not even "ar[i]se" until the later-enacted Apology Resolution was signed.[12]

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provision present in both the United States and Hawai'i Constitutions does not adequately preserve the rights and interests sought to be protected, we will not hesitate to recognize the appropriate protections as a matter of state constitutional law."); *State* v. *Bonnell*, 856 P.2d 1265, 1272 & n.1 (Haw. 1993) ("[b]ecause we resolve the present appeal on state constitutional grounds, we need not (and do not) decide whether a federal constitutional violation has occurred"; "as 'the ultimate judicial tribunal in this state,' this court has final, unreviewable authority to interpret and enforce the Hawaii Constitution"). That practice provides further confirmation that the court's decision here does *not* rest on adequate and independent state law grounds.

[12] The one state statute enacted after the Apology Resolution, 1997 Haw. Sess. L. Act 329, did not purport to limit the State's disposition of the ceded lands; it merely clarified OHA's share of ceded-land revenues and endorsed continued "momentum" toward reconciliation with Native Hawaiians, while noting the political "controversy" surrounding disposition of the ceded lands and other matters. *Id.* § 1. The Hawaii Supreme Court did

If further proof were needed on this point, the Hawaii Supreme Court amply supplied it. The court began by observing that "[a]t the *heart of plaintiffs' claims* … is the Apology Resolution," that "plaintiffs' current claim for injunctive relief is … *based largely upon the Apology Resolution*," and that this claim presupposes that the Resolution "*changed the legal landscape* and restructured the rights and obligations of the State." Pet. App. 26a-27a (emphasis added; internal quotation marks omitted). Then, in holding for respondents, the court agreed that "[t]he *primary question* before this court on appeal is whether, *in light of the Apology Resolution*, this court should issue an injunction" against sale of the trust lands, and it concluded that "*the Apology Resolution dictates* that the ceded lands should be preserved pending a reconciliation between the United States and the native Hawaiian people." *Id.* at 79a, 85a (emphasis added, alteration in original omitted).

This conclusion of the Hawaii Supreme Court—that federal law "dictates" the injunction under review—not only confirms this Court's jurisdiction, but underscores why this Court's intervention is critical. By relying on federal law, the Hawaii Supreme Court effectively in-

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not suggest that Act 329 had any special significance among the other state law provisions. To the contrary, it repeatedly lumped them all together in the phrase "the Apology Resolution and ... *related state legislation*." *E.g.*, Pet. App. 41a (emphasis added). Indeed, any specific reliance on Act 329 as a basis for judicial intervention would have been most anomalous, given that this statute admonished the state courts that "the issues currently under litigation" should "be addressed within and remain under the control of the executive and legislative branches of state government as essentially political questions." 1997 Haw. Sess. L. Act 329, § 1.

sulated its decision from state-level political checks because, under the Supremacy Clause, its federal law holding would presumably trump any state law response. This Court should review and reverse that holding to free the state-level political process from the distorting influence of an "erroneous view of what [federal law] requires." *Arizona* v. *Evans*, 514 U.S. 1, 8 (1995).[13]

Second, this Court has jurisdiction not only because the decision under review relies primarily (and unjustifiably) on the Apology Resolution, but also because it affirmatively conflicts with the Newlands Resolution and related federal enactments in violation of the Supremacy Clause. As discussed in Part II.B below, the Hawaii Supreme Court enjoined any sale of the ceded lands because it found that the Apology Resolution had clouded the State's title to those lands by recognizing claims of competing Native Hawaiian title. But as a matter of federal law, the Newlands Resolution vested absolute title to the ceded lands in the United States (which Congress later transferred to the State) and thereby foreclosed any claim of preexisting or compet-

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[13] *See generally* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485, 1510 (1987) (where "a state court [has] intentionally muddled the state and federal questions in order to prevent [the] state's democratic branches from recognizing their power to alter the result," Supreme Court "[d]eference to the state court on that basis parodies true deference to the state"); Ruth Bader Ginsburg, *Book Review*, 92 Harv. L. Rev. 340, 343-344 (1978) (arguing that state courts should not be permitted to escape review by the Supreme Court when they "curb[] state officials" by relying on "federal law determination[s] that could not be overturned by [the State's] legislature or electorate" and are thus "virtually beyond the reach of democratic politics").

ing Native Hawaiian title. Thus, even if the Hawaii Supreme Court *had* relied primarily on state law for the "cloud on the title" rationale underlying this injunction, its decision still would have *contradicted federal law* unless the Apology Resolution somehow repealed the Newlands Resolution, which it did not do. In all events, any dispute on that point is plainly within this Court's jurisdiction to decide. *See Three Affiliated Tribes*, 467 U.S. at 152 (Supreme Court has jurisdiction to hear claims that state court has "construed state law broadly in the belief that federal law poses no barrier to the exercise of state authority").[14]

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[14] For reasons discussed more fully in our petition-stage reply brief (at 6-8), this Court would have jurisdiction even if the decision below *did* rest on adequate and independent state law grounds and even if those state law grounds were consistent with federal law. Unlike the parties in a typical *Michigan* v. *Long* case, these parties have antagonistic interests in the resolution of the federal-law issue quite apart from how any state law issues are resolved. If affirmed, the state court's interpretation of the Apology Resolution would, as discussed, obstruct state-level efforts to restore the State's land-transfer authority. Petitioners thus have a concrete interest in securing removal of this federal-law obstacle to state-level political checks. Respondents have a strong competing interest in *sustaining* the Hawaii Supreme Court's conclusion that "the [federal] Apology Resolution … dictates" the result below (Pet. App. 85a), no matter how state law is amended. That continuing adversity of interest precludes any concern that this Court could issue an "advisory opinion" by resolving the federal issues presented. *See Florida* v. *Meyers*, 466 U.S. 380, 381-382 n.* (1984) (final paragraph) ("even if [there was] an independent state ground for reversal [of a conviction], we would still be empowered to review" the federal issue because "there is no possibility that our opinion will be merely advisory," given its potential to affect subsequent proceedings).

II. FEDERAL LAW PRESERVES THE STATE'S SOVEREIGN AUTHORITY TO DISPOSE OF THE CEDED LANDS IN ACCORDANCE WITH THE ADMISSION ACT

For decades after Hawaii was admitted to the Union, the State had undisputed authority to dispose of the ceded lands as it deemed appropriate so long as it satisfied its "public trust" obligations, which run to *all* the citizens of Hawaii, not just to Native Hawaiians. *See* Admission Act, § 5(f); *Rice*, 528 U.S. at 525 (Breyer, J. concurring) ("[T]he Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii.") (emphasis in original). Both the federal Admission Act and state law contemplate that, as is common in such arrangements, the State will discharge its trust obligations by selling some of the ceded lands and using the proceeds to benefit its citizens.[15] For example, both the Act and the state constitution direct the State to use these lands to promote private "farm and home *ownership* on as widespread a basis as possible." Pet. App. 116a (Admission Act; emphasis added); *accord* Haw. Const. art. XI, § 10 (same language); *see Big Island Small Ranchers Ass'n* v. *State*, 588 P.2d 430, 435 (Haw. 1978) (this language "refers expressly to farm and home [o]wnership and not leaseholds"). And both the Admission Act and state law direct the State to use income from, and the "proceeds from the *sale*" of, the ceded lands to fund any of five broad categories of public programs. Pet. App. 116a (emphasis added); *accord* Haw. Rev. Stat. § 171-18. As noted, many of those

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[15] *See generally Alabama* v. *Schmidt*, 232 U.S. 168, 174 (1914) ("[E]ven in honor [the trust] would not be broken by a sale and substitution of a fund … a course, we believe, that has not been uncommon among the states."); *see, e.g.*, *Lassen* v. *Arizona*, 385 U.S. 458, 466-467 (1967).

revenues are used to fund programs for native Hawaiians, including the operations of respondent OHA.[16]

This dispute arose when the State tried to sell a small portion of the ceded lands for residential purposes, including affordable housing for needy individuals, and thereby promote "home ownership on as widespread a basis as possible." The Hawaii Supreme Court has indefinitely enjoined that and all similar state initiatives on the ground that the Apology Resolution has "clouded" the State's title to the ceded lands by recognizing competing claims based on pre-annexation Native Hawaiian title. That rationale both misconstrues the Apology Resolution itself, as discussed in Part II.A below, and contradicts the Newlands Resolution and subsequent federal enactments, as discussed in Part II.B. And as discussed in Part II.C, if there were any doubt on these points, it should be resolved in the State's favor in order to avoid the severe constitutional concerns that would arise if Congress were deemed to have impaired Hawaii's title to these lands after the State's admission to the Union.

A. The Hawaii Supreme Court's Interpretation Of The Apology Resolution Conflicts With The Resolution's Express Terms

The Apology Resolution acknowledges the wrongs Native Hawaiians suffered as a result of the 1893 overthrow and recognizes a federal commitment to recon-

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[16] At the certiorari stage, the Pacific Legal Foundation, relying on *Rice* v. *Cayetano*, 528 U.S. 495 (2000), filed an amicus brief challenging the constitutionality of any governmental program directed to Native Hawaiians. As we noted in our petition-stage reply brief (at 9-10 n.4), that issue is not before this Court because it was neither raised in nor decided by the state courts in this case.

ciliation. But the 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 for any of the purposes identified in the Admission Act. The Hawaii Supreme Court thus had no basis for invoking this federal provision to abrogate the State's core sovereign authority over its own lands.

Interpretation of the Apology Resolution begins with its text. *See, e.g.*, *Nebraska Dep't of Revenue* v. *Loewenstein*, 513 U.S. 123, 128 (1994); *Ann Arbor R.R. Co.* v. *United States*, 281 U.S. 658, 666 (1930) (interpreting a joint resolution under the standard rules of statutory construction). After a succession of "whereas" clauses that recount historical events, the Resolution contains seven operative paragraphs. The first five, which compose Section 1, list the elements of Congress's "acknowledgment and apology" to "Native Hawaiians." Then, in one paragraph apiece, Section 2 defines "Native Hawaiians," and Section 3 provides a savings clause for "settlement of claims" against the United States.

The Resolution serves two purposes: "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." Pet. App. 101a (emphasis added). The Resolution does not address the State's trust obligations, let alone restrict the State's preexisting and explicit authority both to transfer land out of the trust and to dispose of "the proceeds from the sale" of such land (Admission Act § 5(f) (Pet. App. 116a)) for any of the five purposes set forth in the Admission Act. Indeed, nothing in the Resolution alters *any* of the State's legal rights or obli-

gations in any respect. The Resolution does recite that Native Hawaiians "never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." Pet. App. 15a. But while the Resolution apologizes "for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States," it does not repeal (or apologize for) Congress's enactment of the Newlands Resolution, which (i) recognized the Republic of Hawaii as the government of Hawaii, (ii) ratified the "cession" of the lands in question by the Republic to the United States, and (iii) vested title to the lands in the United States. App. 1a.

The Section 3 disclaimer provides no support for respondents' position, despite the Hawaii Supreme Court's contrary suggestion (Pet. App. 33a-34a). Indeed, the disclaimer cuts against respondents' position. In its entirety, Section 3 states: "Nothing in [the Resolution] is intended to serve as a settlement of any claims against the United States." At most, this savings clause reassured anyone with any type of claim against the United States that he or she was no *worse off* after the Resolution was enacted than before. If Congress had intended to alter substantive rights in favor of such claimants, it would have done so explicitly in the text of the Resolution—as it has done in other "apology" enactments. *See, e.g.*, Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. § 1989 Appx.) (acknowledging and apologizing "for the evacuation, relocation and internment" of Japanese citizens during World War II and providing $20,000 in restitution to each eligible individual).

In short, by construing this Resolution to curtail the State's sovereign authority over its lands, the Hawaii Supreme Court violated every court's duty when construing federal law to "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

Finally, the legislative history and subsequent judicial interpretation confirm that the Apology Resolution leaves substantive rights unaltered. For example, the Senate Report accompanying the Resolution states emphatically that this enactment "will not result in any changes in existing law." *See* S. Rep. No. 103-126, at 35 (1993); *see also* 139 Cong. Rec. S14477, S14482 (daily ed. Oct. 27, 1993) (remarks of Sen. Inouye) ("[T]his is a simple resolution of apology, to recognize the facts as they were 100 years ago."); 139 Cong. Rec. E2898, E2898 (daily ed. Nov. 15, 1993) (remarks of Sen. Richardson) (Apology Resolution "does not infer any new rights to native Hawaiians"). And until the Hawaii Supreme Court's decision here, each court that had addressed the question had agreed that the Apology Resolution is simply an apology—and not a source of substantive rights or obligations. *See Rice* v. *Cayetano*, 941 F. Supp. 1529, 1546 n.24 (D. Haw. 1996) ("[The Apology Resolution] did not create any substantive rights …. The Apology Bill creates no specific Native Hawaiian rights."), *rev'd on other grounds*, 528 U.S. 495 (2000); Pet. App. 175a (trial court decision) ("[B]y its terms, the 1993 Apology Resolution does not … itself create a claim, right or cause of action."); *see also Rice* v. *Cayetano*, 528 U.S. 495, 505 (2000) (referring to the Resolution simply as an acknowledgment and apology).

B. Federal Law Bars Any "Cloud On The Title" Theory As A Basis For Restricting Sales Of The Ceded Lands, Whether Under The Apology Resolution Or State Law

The Hawaii Supreme Court's ruling rests not only on a misreading of the Apology Resolution, but also on a legal rationale foreclosed by the Newlands Resolution: namely, that Native Hawaiians may have legal title to the ceded lands that an injunction is needed to protect (pending the "reconciliation process" or otherwise). In the Newlands Resolution, Congress extinguished any such title as a matter of federal law by accepting the Republic's cession of these lands and by vesting absolute title to (and ownership of) these lands in the United States. And, contrary to the Hawaii Supreme Court's conclusion, the Apology Resolution did not somehow revive or recognize any such title. The Newlands Resolution and similar federal enactments thus preclude any injunctive relief—whether based on federal or state law—that is designed, as the current injunction is, to preserve possible Native Hawaiian claims of legal title. As a matter of federal law, no such title exists, and any state law theory to the contrary violates the Supremacy Clause.

1. Federal Law, In The Form Of The Newlands Resolution And Subsequent Congressional Enactments, Bars Any Claim Of Native Hawaiian Title

Although respondents have conceded that "the acknowledgment of wrongdoing [in the Apology Resolution] may not by itself create any substantive rights," they have insisted that "it nonetheless transforms the legal landscape and alters the relationship of the parties." J.A. 116a (internal quotation marks omitted). In particular, they argued below that, "[o]nce Congress

identified the *cloud on the title* to these lands resulting from the illegalities surrounding their transfer to the United States, it became inevitable that a hold should be put on these lands until the legal issues can be sorted out properly." *Id.* at 126a (emphasis added). Respondents noted that the Hawaii Supreme Court had previously ruled that "the political branches," rather than that court itself, would ultimately bring this title dispute to a final resolution. *Id.* at 128a. But respondents urged the court to justify its own intervention in the meantime by finding that there is "substantial support for the conclusion that Native Hawaiians … have complete and perfect title to the Ceded Lands." *Id.*[17] On that basis, respondents asked the court to conclude that Hawaii, as trustee of the ceded lands, would violate its trust obligations if it "transfer[red] property whose *ownership has been put into question by federal enactments*." *Id.* at 118a-119a (emphasis added). Respondents concluded: "Just as a person who knowingly possesses stolen goods is not free to alienate those

[17] Respondents contend that, in fact, "the Native Hawaiian people were and remain the ultimate owners of the trust corpus." OHA Supp. S.J. Opp. 9, ROA V. 3, at 26 (Mar. 27, 1996); *accord* OHA Settlement Conf. Statement 3, ROA V. 7, at 114 (Nov. 18, 1998) ("the State of Hawaii does not have good, marketable title to the ceded lands," and any "sale or transfer would constitute an illegal conversion of lands because the [Native] Hawaiian people are the rightful owners of the ceded lands"); Private Pls.' Haw. S. Ct. Opening Br. 26 ("Although the State, as trustee, may have been granted the power to sell ceded lands, … the State has a duty not to exercise that power if such sale is illegal," and, "[i]f the United States illegally acquired the ceded lands, the State would violate [that duty] if it sold ceded lands."); *id.* at 30 (arguing that, until the Apology Resolution was enacted, "Congress probably was not prepared to admit that the overthrow [of the Hawaiian monarchy] was illegal").

goods, but must try to return them to their rightful owner, the State is no longer free to transfer or sell the Ceded Lands." *Id.* at 136a.

The Hawaii Supreme Court adopted this "cloud on the title" argument as the basis for issuing its injunction: "[W]e believe, based on a plain reading of the Apology Resolution, that Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation[.]" Pet. App. 85a. The court noted that, "[w]ithout an injunction, the ceded lands are at risk of being alienated." *Id.* And the court thus entered an injunction out of concern that "once the ceded lands are sold or transferred from the public lands trust, they will not be available to satisfy the unrelinquished claims of native Hawaiians" to relief from the State, *id.*, which could take the form of "monetary payment[s]," "transfer of lands," and "the creation of a sovereign [Native] Hawaiian nation," *id.* at 88a.[18]

This injunction violates federal law, and thus the Supremacy Clause, because the court's "unrelinquished claims" rationale conflicts with prior federal enactments confirming that Native Hawaiians have no claims to the ceded lands that are cognizable in any court.

The first and most important of these enactments was the Newlands Resolution of 1898, which annexed Hawaii to the United States. As discussed, that Reso-

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[18] *Accord* Pet. App. 26a (noting respondents' position that "the title to the ceded lands is clouded as a result of the Apology Resolution's recognition that the native Hawaiian people never relinquished their claims over their ancestral territory").

lution recognized the Republic of Hawaii; accepted the cession "and transfer to the United States [of] the absolute fee and ownership of all public, Government [and] Crown lands"; and declared that all "property and rights" in the ceded lands had become "vested in the United States of America." App. 1a; *see Fasi* v. *King (Land Commissioner)*, 41 Haw. 461, 466 (1956) ("[U]pon annexation, all public lands in Hawaii became the property of the United States."); *see also Territory of Hawaii* v. *Mankichi*, 190 U.S. 197, 214 (1903) (noting that one of the Resolution's "main objects" was to "accept the cession of the islands … made by the Republic of Hawaii"). Anticipating the trust obligations that Congress imposed six decades later in the Admission Act, the Newlands Resolution directed that "all revenue from or proceeds of" those lands, with certain exceptions, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." App. 1a-2a. That statutory directive concerning the *use* of these lands comported with—indeed, presupposed—complete and unqualified federal *ownership* of these lands.

Congress thereafter enacted multiple statutes confirming that the United States had assumed perfect title to the ceded lands and could use or dispose of them as it deemed appropriate.[19] For example, when it cre-

[19] Shortly after the Newlands Resolution was enacted, the Executive Branch similarly concluded that the United States had assumed "absolute fee and ownership" of the ceded lands, 22 Op. Att'y Gen. 574, 576 (1899), and that the vestigial Republic of Hawaii was "without any power whatever to convey" to any third parties "the legal or equitable title of the United States," 22 Op. Att'y Gen. 627, 632 (1899). *See also* Exec. Order of Sept. 11, 1899, *reprinted in* James D. Richardson, *A Compilation of the Messages*

ated a territorial government for Hawaii in the Organic Act of 1900, Congress reaffirmed that the ceded lands had been "transferred to the United States" under the Newlands Resolution, and it delegated rights of "possession, use, and control" of those lands to the government of "the Territory of Hawaii." Act to Provide a Government for the Territory of Hawaii, Ch. 339, § 91, 31 Stat. 141, 159 (1900) (App. 5a); *see generally Wilson* v. *Shaw*, 204 U.S. 24, 32 (1907) (when Congress enacts legislation "based on the title of the United States," including "one to provide a temporary government," that assertion of title "is conclusive upon the courts").

Specific provisions within the Organic Act confirm Congress's determination that the United States could hold or alienate the ceded lands. Those lands fall into two basic categories. The first are "crown" lands, which, under Kingdom of Hawaii law, the monarchy could use and occupy but not alienate.[20] The second are "government" lands, which consisted of the other public lands of the Kingdom. Section 99 of the Organic Act "hereby declared" that, before annexation, all such lands were "the property of the Hawaiian government, … free and clear from … all claim of any nature whatsoever"—and that those lands therefore became, after

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and Papers of the Presidents, 1789-1902, 369-370 (1900) (providing that any sale of land by the Republic of Hawaii after passage of the Newlands Resolution was null and void).

[20] *See generally Liliuokalani* v. *United States*, 45 Ct. Cl. 418, 428 (1910) ("The reservations made were to the Crown and not the King as an individual. The crown lands were the resourceful methods of income to sustain, in part at least, the dignity of the office to which they were inseparably attached. When the office ceased to exist they became as other lands of the Sovereignty and passed to the [United States] as part and parcel of the public domain.").

cession and annexation, federal lands "*subject to alienation*" by the United States. *Id.* § 99, 31 Stat. 141, 161 (emphasis added) (App. 5a); *see also* note 25, *infra*.

This provision supports two conclusions. First, Congress recognized that the ceded lands as a whole—including all "crown" lands, which would henceforth be treated like the "government" lands—should be deemed "free and clear from … all claim of any nature whatsoever," including the types of claims respondents raise here. Second, Congress found that "alienation" of such lands was entirely appropriate. Section 73 of the Organic Act also recognizes that the territorial government would alienate ceded lands for agricultural uses and directs it to use "[a]ll funds arising from the *sale* … of such lands … for the benefit of the inhabitants of the Territory of Hawaii," as anticipated under the Newlands Resolution. App. 4a (emphasis added).

Similar conclusions also follow from subsequent amendments to the Organic Act. In 1921, Congress defined the term "public lands" as it appears in the Act to mean "all lands in the Territory of Hawaii [previously] classed as government or crown lands," except (among other qualifications) "lands to which the United States has relinquished the absolute fee and ownership." Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, § 304, 42 Stat. 108, 116 (1921) (App. 6a). That proviso would have been nonsensical if the United States had never obtained "absolute fee and ownership" of the ceded lands to begin with. Congress drove this point home when, in 1952, it amended the Organic Act to authorize "*sales of Government lands*" even "for business uses" whenever the relevant territorial official deemed "such sale … to be in the interest of the development of the community or area in which said lands are located." Act to Amend Section 73(1) of the Hawaiian Organic

Act, Pub. L. No. 82-483, 66 Stat. 515, 515-516 (App. 7a) (emphasis added); *see* H.R. Rep. No. 82-1120, at 1 (1952) (explaining that "[t]he present law," which the amendment revises, "is restrictive in that it does not permit the sale of public lands for … uses which would tend to aid the economic conduct of modern business"). Like Section 99 of the Organic Act, this provision underscores Congress's determination that federal law not only permitted, but often affirmatively encouraged, "sales" of ceded lands to private parties.

The Admission Act, passed in 1959, reaffirmed these same conclusions. Congress there "grant[ed] to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property" within Hawaii, defined as "the lands and properties that were ceded to the United States by the Republic of Hawaii" under the Newlands Resolution. Admission Act § 5(b), (g) (Pet. App. 115a, 117a).[21] Because the United States' own title was perfect and unchallengeable, the Admission Act transferred perfect and unchallengeable title to the State, unencumbered by any competing legal claims brought by Native Hawaiians or anyone else.

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[21] The Admission Act made an exception for those ceded lands under the direct control of the federal government, such as military bases. Admission Act § 5(d) (Pet. App. 115a-116a). If the Apology Resolution placed a "cloud on the title" of the ceded lands owned by the State, it would presumably also place a "cloud on the title" of the ceded lands retained by the federal government—and, under the logic of the Hawaii Supreme Court's decision, would apparently bar the federal government from selling such lands until it reaches its own "political resolution" with Native Hawaiians. *See* Pet. App. 8a n.7 ("[U]ltimately, [N]ative Hawaiians seek return of [the ceded lands] from both the state and federal governments.") (internal quotation marks and brackets omitted).

Just as Congress had imposed various trust obligations on other States upon their admission to the Union, *see, e.g.*, *Lassen* v. *Arizona*, 385 U.S. 458, 460 & n.2 (1967), the Admission Act required the State to use the ceded lands, and the proceeds from their sale or other disposition, to promote one or more of the five trust objectives listed in Section 5(f). Again, in its description of those objectives, "the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii," not just Native Hawaiians. *Rice*, 528 U.S. at 525 (Breyer, J. concurring) (emphasis in original). And, as discussed, the Admission Act reaffirms that alienation of ceded lands comports with the State's trust obligations under Section 5(f) and is indeed necessary to fulfill one of Section 5(f)'s purposes. *See* p. 5, *supra*.

The only remaining question is whether, as the Hawaii Supreme Court believed, the Apology Resolution repealed all of these prior enactments *sub silentio*, recognized competing claims, and placed a "cloud" on Hawaii's title to the ceded lands. The Apology Resolution did no such thing. As discussed in Part II.A, it is a symbolic enactment that *apologizes* for the role of U.S. officials in the 1893 overthrow of the Hawaiian monarchy. The Resolution "does not result in *any* changes in existing law," S. Rep. No. 103-126, at 35 (1993) (emphasis added), let alone repeal Congress's 1898 assertion of perfect and unchallengeable title to the ceded lands and its 1959 transfer of that title to the State. *See generally Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 18-19 ("[A] general statement of 'findings' … is

too thin a reed to support the rights and obligations read into it by the court below.").[22]

Finally, legislation enacted *after* the Apology Resolution provides yet further confirmation of these same points. In 1994, just one year after the Apology Resolution, Congress enacted the Native Hawaiian Education Act, Pub. L. No. 103-382, § 9202, 108 Stat. 3518 (1994) (NHEA), which provides various educational benefits to Native Hawaiians. In this legislation, Congress expressly found:

> In 1898, [the Newlands Resolution] *ceded absolute title of all lands held by the Republic of Hawai'i, including the government and crown lands of the former Kingdom of Hawai'i, to the United States*, but mandated that revenue generated from these lands be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

20 U.S.C. § 7512(6) (emphasis added). If, in the Apology Resolution, Congress had meant to repeal the preclusive effect of the Newlands Resolution on claims of preexisting Native Hawaiian title to the ceded lands, it would not have made this finding one year later, reaffirming that Congress could and did take "absolute title" to those lands from the congressionally recognized Republic of Hawaii. Nor would Congress have used this same language (as it did) when it reenacted the

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[22] Indeed, as discussed in Part II.C below, Congress would lack constitutional authority to impair the State's title to this land after granting the State free and clear title upon its admission to the Union.

NHEA in 2002. *See* Pub. L. No. 107-110, § 7202, 115 Stat. 1425 (2002).

2. Congress's Foreclosure Of Native Hawaiian Land Claims Is Not Subject To Judicial Invalidation

Respondents have suggested that, even if the Apology Resolution did not by its terms *repeal* Congress's 1898 decision to eliminate any competing claims of title to the ceded lands, it nonetheless endorsed historical propositions that support a new legal challenge to that decision. For example, invoking the Apology Resolution's recitation of facts, respondents argue that the United States "illegally" overthrew "the Kingdom of Hawai'i … in violation of international law." J.A. 115a (internal quotation marks omitted); *see also* Private Pls.' Mem. in Opp. to State's Mot. to Dismiss 10, ROA V. 5, at 10 (April 29, 1998) ("[A]t trial, Plaintiffs will put on historical evidence to establish that the overthrow was illegal, the ceded lands were illegally obtained, and [Native] Hawaiians never relinquished their claims to ceded lands.").

No matter what the historical record might show, however, nothing in "international law" or any other body of jurisprudence permits any court to invalidate the Newlands Resolution's preclusive effect on any and all claims of preexisting or competing title. First, it is well established that, in cases of conflict, specific federal statutes trump preexisting treaties and principles of customary international law.[23] Thus, even if respon-

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[23] *See Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam) ("[A]n Act of Congress … is on a full parity with a treaty, and … when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty

dents were correct in contending that the Newlands Resolution's abrogation of any Native Hawaiian title conflicted with international law in 1898, that conflict would have no bearing on the Resolution's legal validity in U.S. courts.

Nor could respondents have any plausible basis for a judicial challenge to the Newlands Resolution under the Takings Clause or any other constitutional provision. For the purpose of assessing challenges to the Newlands Resolution, a Native Hawaiian polity could have stood in no stronger legal position than the sovereign Indian nations that were displaced or dispossessed by American expansion in the 19th century. As this Court has repeatedly held, "[t]he power of Congress" to extinguish "Indian title based on aboriginal possession … is supreme. The manner, method and time of such extinguishment raise political not justiciable issues." *United States* v. *Santa Fe Pacific R.R. Co.*, 314 U.S.

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null.") (first ellipsis in original) (quoting *Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)); *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("[I]f there be any conflict between the stipulations of [a] treaty and the requirements of the law, the latter must control."). Similarly, "Congress may enact laws superseding 'the law of nations' " and "is not bound by international law." *United States* v. *Yousef*, 327 F.3d 56, 109 n.44 (2d Cir. 2003) (quoting, *inter alia*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963)); *accord Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 734 (2004) (courts may "cautiously" consult principles of customary international law "[w]here there is no treaty, and no controlling executive or *legislative act* or judicial decision" on point) (emphasis added) (quoting in part *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *Tag* v. *Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959) ("There is no power in this Court to declare null and void a statute adopted by Congress … merely on the ground that such provision violates a principle of international law.") (citing, *inter alia*, *The Paquete Habana*).

339, 347 (1941); *accord Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 281 (1955); *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543, 587-588 (1823). Similarly, this Court has "long … held that the taking by the United States of 'unrecognized' or 'aboriginal' Indian title is not compensable under the Fifth Amendment." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 415 n.29 (1980) (quoting *Tee Hit-Ton*, 328 U.S. at 285).[24]

These principles apply with greatest force in the context presented here: *congressional* extinguishment of land claims now asserted on behalf of indigenous *groups*. Perhaps there might once have been a plausible basis for a just compensation claim against the *United States* if, counterfactually, (i) Executive Branch officials alone rather than Congress had asserted title for the United States; (ii) the land claims arose from a congressionally recognized property right; and (iii) the case involved claims of private title by individual owners rather than public title by Native Hawaiians as a group. All three of those factors are missing here. First, *Congress*, rather than errant federal officials acting alone, extinguished any pre-annexation title to the ceded lands. Second, the claims do not derive from any plausible assertion of federal statutory entitlement. Finally, respondents assert title to these lands in the aggregate on behalf of "the Native Hawaiian people" *as*

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[24] *See also Territory* v. *Kapiolani Estate, Ltd.*, 18 Haw. 640, 645-646 (1908) ("The validity of the declaration in the constitution of the Republic of Hawaii, under which the present title is derived, does not present a judicial question. Even assuming, but in no way admitting, that the constitutional declaration was confiscatory in its nature, this court has no authority to declare it to be invalid. The subsequent derivation of the title by the United States, as above stated, is clear.").

a whole; they do not assert just compensation claims on the basis of any individual's private title to specific parcels of land.[25]

Each of these three considerations individually suffices to distinguish this case from *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919), on which the Hawaii Supreme Court erroneously relied (Pet. App. 95a-98a). In *Lane*, this Court concluded that Executive Branch officials could not simply "confiscat[e]" land belonging to an incorporated town (the Pueblo) in southern Arizona if, as alleged, the town had "complete and perfect title" to the land and Congress preserved that title in the Gadsden Treaty. 249 U.S. at 113; *see also id.* at 112

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[25] *Compare Carino* v. *Insular Gov't of Philippine Islands*, 212 U.S. 449, 459-460 (1909) (invoking property rights guaranteed by federal statute to reject effort of government officials to occupy a 370-acre farm in the Philippines that, "as far back as testimony or memory goes … has been held by individuals under a claim of private ownership," such that "it will be presumed … never to have been public land"), *with Tee-Hit-Ton Indians*, 348 U.S. at 284-285 n.18 (upholding congressional abrogation of Native Alaskan land claims and distinguishing *Carino* on the ground, among others, that it involved claims of private title to a single farm rather than a "communal claim to a vast uncultivated area"). There could never have been a valid claim of private title to these lands in the first place, because the "ceded lands" to which the United States acquired "absolute fee and ownership" under the Newlands Resolution had been public "[g]overnment" and "[c]rown" lands. App. 1a; *see generally Liliuokalani*, 45 Ct. Cl. 418 (1910) (holding that Queen Lili'uokalani never owned personal fee simple title to "crown lands" under pre-1893 Hawaiian law; that Section 99 of the Organic Act divested any personal interest she might once have had (*see* pp. 35-36, *supra*); and that the statute of limitations barred any just compensation claim arising from that divestiture). In any event, the statute of limitations on just compensation claims relating to the Newlands Resolution expired more than 100 years ago. *See* 28 U.S.C. § 2501.

(noting that Congress had "provided that the inhabitants of any Indian pueblo having a grant or concession of lands from Spain or Mexico, such as is here claimed, should be … capable of suing or defending in respect of such lands").

This case is the reverse of *Lane* in all pertinent respects. In *Lane* the plaintiffs claimed that Executive Branch officials were wrongdoers in that they had defied the will of Congress, whereas here respondents claim that Congress itself was the wrongdoer in recognizing the Republic of Hawaii and enacting the Newlands Resolution. In *Lane*, this Court assumed that Congress had *preserved* claims of preexisting title, whereas here there is no question that Congress acted to *foreclose* such claims. Finally, the Pueblo in *Lane* was exercising its statutory right to sue as a "body corporate" (*id.*) in defense of its title to specific lands it occupied, whereas here respondents dispute title to 1.2 million acres of public lands on behalf of the "Native Hawaiian people" as a whole, wherever they may currently live, on the theory that Native Hawaiians "were and remain the ultimate owners of the trust corpus." OHA Supp. S.J. Opp. 9, ROA V. 3, at 26 (Mar. 27, 1996); *see also* Private Pls.' Proposed Findings of Fact and Conclusions of Law 48, ROA V. 12, at 50 (Nov. 5, 2001) (predicting that title to "at least some" of the lands will eventually be vested in a "sovereign [Native] Hawaiian entity.").

In short, this Court's precedent forecloses any *legal* theory that, like respondents', assumes that Congress acted wrongfully or "illegally" (J.A. 115a) when it took absolute title to the ceded lands for the United States, a measure that necessarily extinguished any competing Native Hawaiian claims to the same lands. Whether another nation "has just cause of complaint" for its past

treatment by Congress, and whether "our country was justified in its legislation, are not matters for judicial cognizance…. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will." *Whitney* v. *Robertson*, 124 U.S. 190, 194-195 (1888); *see* note 23, *supra*.

Similarly, while Native Hawaiians, like other wronged and displaced peoples, have strong *moral* claims on the political branches of government for recompense, the courts have no role to play in determining whether Congress should have made different or additional provision for Native Hawaiians to compensate them for their grave losses. If "[g]enerous provision has been willingly made to allow [indigenous peoples] to recover for wrongs" perpetrated by the United States, it has been "as a matter of grace, not because of legal liability." *Tee-Hit-Ton Indians*, 348 U.S. at 281-282. We do not argue here that congressional provision *has* been sufficiently generous. Our point is rather that such determinations have never been and are not now for the courts to make.

The political branches of Hawaii's state government have discretion, within broad limits imposed by federal law, to take native Hawaiian interests into account in fulfilling their trust responsibilities under Section 5(f) of the Admission Act. The State has indeed promoted such interests by, among other things, using proceeds from the ceded lands to subsidize the operations of respondent OHA, which reports that its assets traceable to the ceded lands reached almost half a billion dollars as of mid-2007. *See* p. 7, *supra*. And Hawaii's political branches could further decide, for example, that they will not alienate specified ceded lands if they conclude that those lands are properly preserved

for "the betterment of the conditions of native Hawaiians" rather than, for example, "the development of … home ownership on as widespread a basis as possible." Admission Act, § 5(f) (Pet. App. 116a). But neither the Apology Resolution nor any other source of law, state or federal, authorizes any court to tell Hawaii's political branches that they *may not* alienate those lands on the theory that Native Hawaiians may have enforceable legal rights to them. The Newlands Resolution and subsequent federal enactments confirm that no such rights exist, and the Supremacy Clause precludes any court decision based on a contrary premise.[26]

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[26] Even apart from this point, the Admission Act also imposes independent constraints on a state court's authority to restrict the State's use and disposition of the ceded lands in accordance with the Act's purposes. "[A]t least at the outer limits federal law must act as a barrier beyond which the State cannot go in its administration of the ceded lands pursuant to section 5(f)." *Price* v. *Hawaii*, 921 F.2d 950, 955 (9th Cir. 1990); *see generally Lassen* v. *Arizona*, 385 U.S. 458 (1967); *Branson School Dist.* v. *Romer*, 161 F.3d 619, 633-643 (10th Cir. 1998). For example, a state court could violate the Admission Act if it disregards "the constitution and laws" of Hawaii (Pet. App. 116a)—which *permit* sales of ceded lands (*see* p. 6, *supra*)—by categorically *prohibiting* such sales even when they are deemed necessary to promote the Act's trust objectives. Likewise, any such judicial bar on such sales would need to be analyzed in light of the "purposes of Congress" (*Lassen*, 385 U.S. at 467) in admitting Hawaii, "which ha[d] been an integral, 'incorporated' part of the United States for 60 years, into the Union as a full and equal sovereign state." S. Rep. No. 86-80, Rep. of the S. Comm. on Interior and Insular Affairs Regarding the Hawaii Admission Act, *reprinted in* 1959 U.S.C.C.A.N. 1346, at 1. These federal law constraints would bind the Hawaii state courts in any proceedings on remand from this Court, as would the independent Supremacy Clause constraint (discussed in the text) against any injunction based on Native Hawaiian land claims that have been

C. The Doctrine Of Constitutional Avoidance Requires Reversal

Finally, even if there *were* some basis for construing the Apology Resolution to place a "cloud on the title" to the ceded lands, any such construction would violate the rule of constitutional avoidance. It is a "cardinal principle" of statutory interpretation that, when Congress's intent is ambiguous, courts should construe statutes to avoid interpretations that would raise "grave and doubtful constitutional questions." *Harris* v. *United States*, 536 U.S. 545, 555 (2002). Here, even if Congress's intent were ambiguous, the Apology Resolution should be interpreted to leave the State's sovereign authority over its lands intact, because otherwise the Resolution would raise grave constitutional concerns.

In 1959, Congress invited Hawaii to join the Union on the premise that the new State would receive the federal government's absolute title to the ceded lands and, along with that title, discretion to make use of the lands as it deemed best, so long as it promoted one or more of the five objectives set forth in Section 5(f) of the Admission Act. Congress underscored the centrality of this land grant to the new State's sovereign identity by providing that the lands were offered "in lieu of any and all grants provided for [other] new States." Admission Act § 5(b) (Pet. App. 115a). The people of Hawaii embraced this specific arrangement when they voted overwhelmingly for statehood later in 1959. Indeed, the Admission Act made statehood contingent on a majority vote in favor of a ballot proposition that

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foreclosed by the Newlands Resolution and later federal enactments.

"[a]ll provisions of the [Admission Act] … prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people." *Id.* § 7(b) (Pet. App. 118a-119a).

Under the Hawaii Supreme Court's view of the Apology Resolution, Congress took from the State in 1993 what it gave in 1959—it placed a cloud on the title to property that it had previously conveyed free and clear of all claims, and it "dictate[d]" (Pet. App. 85a) that the State relinquish its core prerogative to realize the value of that property through sale. Congress has no authority to "dictate" any such thing.

First, the Constitution bars Congress from trying to rescind property rights that a State previously assumed upon its admission to the Union. In particular, as this Court has explained, Congress may not "grant lands to a State on certain specific conditions and then later, after the conditions had been met and the lands vested, succeed in upsetting settled expectations through a belated effort to render those conditions more onerous." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 632 (1989); *accord Idaho* v. *United States*, 533 U.S. 262, 280 n.9 (2001) ("Congress cannot, after statehood, reserve or convey submerged lands that 'ha[ve] already been bestowed' upon a State.") (quoting *Shively* v. *Bowlby*, 152 U.S. 1, 26-28 (1894) (alteration in original)); *id.* at 284 (Rehnquist, C.J., dissenting) (same). Enforcement of that constitutional principle is particularly critical here, where the hypothetically rescinded property rights encompass not just (for example) an isolated riverbed, but virtually *all* public land within the State and nearly a third of the State's total land mass. *See generally Coyle* v. *Smith*, 221 U.S. 559, 579 (1911) (striking down federal legislation dictating location of

state capital as violation of state's "jurisdictional sovereignty").

Indeed, far lesser intrusions on state property, while not Tenth Amendment violations in themselves, would trigger the federal government's Fifth Amendment obligation to provide just compensation to the State. *See Block* v. *North Dakota*, 461 U.S. 273, 291 (1983); *United States* v. *Carmack*, 329 U.S. 230, 241 (1946); *see also Isaak* v. *Trumbull Sav. & Loan Co.*, 169 F.3d 390, 397 (6th Cir. 1999) ("Property is not merely the ownership and possession of land …. It also embraces the unrestricted right to use, enjoy and dispose of lands…. Anything [that] destroys any of these elements of property, to that extent destroys the property itself."). Nothing in the Apology Resolution suggests that Congress wished to make the federal Treasury potentially liable to Hawaii for impairing its title to these lands, and the Resolution should be construed to avoid the risk of such liability. *See Bell Atl. Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 2004).

Finally, if the Hawaii Supreme Court's interpretation were correct, the Apology Resolution would violate federalism principles in another respect as well. As noted, the court found that the Resolution "dictate[d]" an indefinite moratorium on the sale of ceded lands in order to promote a "reconciliation" process between the State and Native Hawaiian groups. Pet. App. 85a. Although the State has long engaged in productive dialogue with Native Hawaiian groups, Congress has no constitutional authority to force it to do so. Any such federal compulsion would flout the Tenth Amendment ban on federal actions that "compel the States to implement … federal regulatory programs." *Printz* v. *United States*, 521 U.S. 898, 925 (1997); *accord New York* v. *United States*, 505 U.S. 144, 188 (1992).

Courts must "assume Congress does not exercise lightly" its limited powers to legislate in areas traditionally reserved to the States. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, no federal law should be construed to intrude in such areas unless, at a minimum, Congress includes a "clear and manifest" statement that it intends to interfere with traditional state prerogatives. *Id.* at 461 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Apology Resolution contains no such "clear and manifest" statement. Indeed, it contains no hint that Congress wished to diminish the State's authority over the ceded lands in any respect at all. The Hawaii Supreme Court's injunction rests on a contrary premise and thus violates federal law.

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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APPENDIX

APPENDIX

Joint Resolution To Provide For Annexing The Hawaiian Islands To The United States, Res. No. 55-55, 30 Stat. 750 (1898) ("Newlands Resolution")

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds from the same, except as regards such part thereof as may

be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the Unites States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs law and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of

the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided said Government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

SEC. 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

SEC. 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect.

Approved, July 7, 1989

Act To Provide A Government For The Territory Of Hawaii, Ch. 339, 31 Stat. 141 (1900) ("Organic Act") (Excerpts)

* * * * *

SEC. 73. That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide. That, subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii between the seventh day of July, eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed. In said laws "land patent" shall be substituted for "royal patent;" "commission of public lands" for "minister of interior," "agent of public lands," and "commissioners of public lands," or their equivalents; and the words "that I am a citizen of the United States," or "that I have declared my intention to become a citizen of the United States, as required by law," for the words "that I am a citizen by birth (or naturalization) of the Republic of Hawaii," or "that I have received a certificate of special right of citizenship from the Republic of Hawaii." And no lease of agricultural land shall be granted, sold, or renewed by the government of the Territory of Hawaii for a longer period than five years until Congress shall otherwise direct. All funds arising from the sale or lease or other disposal of such lands shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent

with the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight: *Provided*, There shall be excepted from the provisions of this section all lands heretofore set apart, or reserved, by Executive order, or orders, by the President of the United States.

* * * * *

SEC. 91. That the public property ceded and tranferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and 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 by the direction of the President or of the governor of Hawaii. And all moneys in the Hawaiian treasury, and all the revenues and other property acquired by the Republic of Hawaii since said cession shall be and remain the property of the Territory of Hawaii.

* * * * *

SEC. 99. That the portion of the public domain heretofore known as Crown land is hereby declared to have been, on the twelfth day of August, eighteen hundred and ninety-eight, and prior thereto, the property of the Hawaiian government, and to be free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof. It shall be subject to alienation and other uses as may be provided by law.

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Hawaiian Homes Commission Act, 1920,
Pub. L. No. 67-34, 42 Stat. 108 (1921)
(Excerpt)

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SEC. 304. The first, second, and third paragraphs of section 73 of the Hawaiian Organic Act are hereby amended to read as follows:

"SEC. 73. (a) That when used in this section—

"(1) The term 'commissioner' means the commissioner of public lands of the Territory of Hawaii;

"(2) The term 'land board' means the board of public lands, as provided in subdivision (1) of this section;

"(3) The term 'public lands' includes all lands in the Territory of Hawaii classed as government or crown lands previous to August 15, 1895, or acquired by the government upon or subsequent to such date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; except (1) lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, (2) lands set apart or reserved by Executive order by the President, (3) lands set aside or withdrawn by the governor under the provisions of subdivision (g) of this section, (4) sites of public buildings, lands used for roads, streets, landings, nurseries, parks, tracts reserved for forest growth or conservation of water supply, or other public purposes, and (5) lands to which the United States has relinquished the absolute fee and ownership, unless subsequently placed under the control of the commissioner and given the status of public lands in accordance with the provisions of this Act, the Hawaiian Homes Commission Act, 1920, or the Revised Laws of Hawaii of 1915[.]"

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Pub. L. No. 82-483, 66 Stat. 515 (1952)
(Excerpt)

AN ACT

To amend section 73 (1) of the Hawaiian Organic Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 73 (1) of the Hawaiian Organic Act is hereby amended by amending the first proviso of the second sentence thereof to read as follows: "*Provided, however*, That the commissioner shall, with the approval of said board, sell to any citizen of the United States, or to any person who has legally declared his intention to become a citizen, for residence purposes lots and tracts, not exceeding three acres in area; and that sales of Government lands or any interest therein may be made upon the approval of said board for business uses or other undertakings or uses, except those which are primarily agricultural in character, whenever such sale is deemed to be in the interest of the development of the community or area in which said lands are located, and all such sales shall be limited to the amount actually necessary for the economical conduct of such business use or other undertaking or use[.]"

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