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 OF AMICUS CURIAE COMMISSIONER OF PUBLIC LANDS FOR THE STATE OF NEW MEXICO IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

This brief is filed in support of the Petition for a Writ of Certiorari by Patrick H. Lyons, in his capacity as the Commissioner of Public Lands for the State of New Mexico (hereinafter, the "Commissioner"). The Commissioner serves as the State's constitutional trust officer charged to direct, control, care for and dispose of lands granted in trust by the United States to the State of New Mexico in the New Mexico Enabling Act (Act of Congress dated June 29, 1910, Pub. L. 61-219, Ch. 310, 36 Stat. 557).[2] The Commissioner holds in trust approximately 9 million acres of surface estate and approximately 13 million acres of mineral estate statewide. New Mexico, like Hawaii, is one of 26 states that, when admitted to the Union, received land from the federal public domain to manage for the purpose of generating the income needed to create and maintain essential state institutions.

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[1] This brief was not authored, in whole or in part, by counsel for any party, and no person or entity other than amicus and its counsel contributed monetarily to the preparation or submission of the brief. Counsel for Petitioners and counsel for Respondents consented by letter to the filing of the amicus curiae brief at least 10 days prior to the due date of the amicus curiae's intention to file this brief.

[2] The State of New Mexico, through its Attorney General, has joined with various other states in filing an amicus brief. The Commissioner is writing separately to provide an additional perspective from the point of view of a trust officer entrusted specifically with the responsibility to carry out the State's obligations under the New Mexico Enabling Act.

As set forth in the Enabling Act, these lands were granted by the federal government to the State in trust to support public schools, public institutions of higher learning, and various other public institutions. The amount contributed to the beneficiaries overall budgets varies from year to year, but is always significant. For example, in 2007 the income from state trust lands constituted 22% of the budget of New Mexico public schools, 10% of the budget of the New Mexico School for the Visually Impaired, and 25% of the budget of the New Mexico Military Institute.

A significant portion of state trust income is achieved through land sales and exchanges. Because of the importance of these resources in supporting vital public institutions throughout the State, the State has a strong interest in any decision that suggests that the state's ability to alienate trust lands for the benefit of the trust and its beneficiaries can be substantially restricted by Congressional action such as the Joint Resolution at issue in this case.

The Court previously has addressed issues pertaining to the New Mexico Enabling Act and the contemporaneously adopted Arizona Enabling Act. *See Ervien v. United States*, 251 U.S. 41 (1919); *Lassen v. Arizona Hwy. Dept.*, 385 U.S. 458 (1967). Because the express trust created under the Hawaii Admission Act was based on principles established in the New Mexico and Arizona Enabling Acts, the Commissioner is well situated to provide background and analysis regarding the federal law issues raised by the Hawaii Supreme Court's unprecedented

injunction barring state alienation of lands held in a similar federal law trust.

SUMMARY OF ARGUMENT

The decision of the Hawaii Supreme Court imposes an unprecedented restriction on the alienation of lands granted by the federal government to provide support for schools and other public benefits. The court found authority for that restriction in the Apology Resolution (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)), passed by Congress 34 years after the federal government granted the lands to the state in trust and established the terms of the trust. In granting federal lands to the State of Hawaii in trust upon its admission into the Union, Congress followed a practice that had evolved from the earliest days of the Union to allow new states to be admitted on an equal footing with existing states. Under this well-established practice, the lands were granted to newly admitted states pursuant to a solemn compact under which the states agreed not to tax federal lands in the state and, in exchange, acquired lands which could be used to support vital public institutions. Because the granted lands cease to be federal property and no federal power is reserved to substantially restrict the states' ability to alienate the granted lands for the benefit of the trust and its beneficiaries,

the Apology cannot have the effect that the Hawaii Supreme Court gave it.

Although Congress clearly could have retained the power to restrict alienation of the granted land, it did not do so; the only federal authority reserved was enforcement of the terms of the trust. If the federal government could alter its grant in the manner determined by the Hawaii court, fundamental principles of federalism would be violated. And, fundamental trust principles would be altered if the federal government, as settlor, could establish a trust, make an irrevocable grant to the trust, and then seek to take back all or a part of the trust corpus. Only if the Hawaii Supreme Court had first determined that the trustee's discretion regarding disposition of trust assets was arbitrary and capricious, and thus a violation of the terms of the trust, could it have enjoined the trust as it did. No such determination was made by the Court. For these reasons this Court should grant the Petition of the State of Hawaii.

ARGUMENT

I. CONGRESS DID NOT INTEND THE APOLOGY TO INCLUDE RESTITUTION.

The Hawaii Supreme Court was improperly persuaded that language in the Apology warranted an injunction against the alienation of trust land. The Joint Resolution, however, is not remedial legislation. T.C. Memo. 2000-11, 2000 WL 15087 (U.S.TaxCt.).

Where Congress intends an Apology such as this one to include Restitution, it clearly states that Restitution is intended. *See* Radiation Exposure Compensation Act of 1990, Pub. L. No. 101-426, 104 Stat. 920. In enacting the Radiation Exposure Compensation Act, the federal government apologized to individuals exposed to the Government's atmospheric nuclear tests which exposed individuals to radiation. The law gave restitution for improper acts by the federal government. As in the Hawaii case, Congress made a formal apology. *Id.* at § 2(c) ("Apology. – The Congress apologizes on behalf of the Nation to the individuals described in subsection (a) and their families for the hardships they have endured."). Congress also provided specifically for restitution. *Id.* at § 2(b) ("It is the purpose of this Act to establish a procedure to make partial restitution to the individuals described in subsection (a) for the burdens they have borne for the Nation as a whole."). Congress went on to set forth a plan for restitution. The Apology at issue here is drafted as merely an apology. Given its lengthy nature people may wish that restitution was intended. However, even if restitution was intended it could not legally be accomplished by using state trust lands which the Federal Government has given to the State.

II. THE TRUST LANDS WERE GRANTED PURSUANT TO A BILATERAL COMPACT, WHICH CANNOT BE CHANGED UNILATERALLY.

Between 1803 and 1962, the United States granted a total of some 330,000,000 acres to the States for all purposes. Of these, some 78,000,000 acres were given in support of common schools. The Public Lands, Senate Committee on Interior and Insular Affairs, 88th Cong., 1st Sess., 60 (Comm. Print 1963). The federal government made the grants to the states in "a solemn bilateral compact" between the federal government and each of the states with "[t]itle to the sections vested in the State." *See Andrus, infra* at 523. And, it is black letter law that a bilateral agreement cannot be changed unilaterally. If the federal government had intended its Apology to impact the disposition of grant lands, this would have been a unilateral disposition.

As the grantor, the federal government does not have the power to enjoin the state from alienating state trust lands once title has passed to the state. *Andrus*, 446 U.S. 500, 506-507. In *Andrus*, this Court determined that the federal government had the power to dispose of grant lands prior to a survey, and thus prior to title passing to a State. In this case surveys were complete, the Federal Government's grant was complete, and title passed long before the Apology. At the time of the Apology the federal government clearly did not have the power to dispose of grant land. Congress would certainly have

understood that and could not have intended more than an Apology.

Moreover, under the equal footing doctrine, all states are admitted to the Union with the same attributes of sovereignty as the original 13 States. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). This doctrine prevents the Federal Government from impairing the fundamental attributes of state sovereignty when it admits new States into the Union. *Id.*

III. THE APOLOGY RESOLUTION COULD NOT RESTRICT ALIENATION OF HAWAII'S TRUST LANDS BECAUSE CONGRESS HAS NO PROPERTY CLAUSE POWER TO IMPOSE RESTRICTIONS BEYOND THOSE CONTAINED IN THE ADMISSION ACT.

Congress does not have the authority to restrict the State of Hawaii's alienation of lands granted to Hawaii in trust at statehood; to do so would be contrary to the terms of the Admission Act trust. Because the granted lands are no longer federal property subject to Congressional regulation under the Property Clause of U.S. Const., art. VI, § 3, and Congress has no other authority under which it can restrict alienation of the granted lands, the court's decision is incorrect as a matter of federal law.

The history surrounding federal land grants to states reaches back to the Land Ordinance of 1785[3] and the Northwest Ordinance of 1787.[4] *See Andrus v. Utah*, 446 U.S. 500, 522-525 (1980) (Powell, J., dissenting); *Papasan v. Allain*, 478 U.S. 265, 268-70 (1986). When the first 13 States formed the Union, each State had sovereign authority over the lands within its borders. These lands provided a tax base for the support of education and other governmental functions. However, when settlers sought to carve the State of Ohio from the Northwest Territory in 1802, the federal government owned much of the land within the boundaries of the proposed State, which land was immune from taxation. In order to place Ohio on an equal footing with the original States, Congress enacted a compromise, which set a pattern followed in the admission of virtually every other State. As consideration for each new State's pledge not to tax federal lands, Congress granted the State a fixed proportion of the lands within its borders for the support of public education. *See generally* Paul Wallace Gates, *History of Public Land Law Development*

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[3] The Land Ordinance of 1785 "reserved the lot No. 16, of every township, for the maintenance of public schools within the said township. . . ." 1 Laws of the United States 565 (1815).

[4] Article III of the Northwest Ordinance of 1787 declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52. Article IV provided that legislatures established in the region could not "tax . . . the property of the United States" or interfere with the Federal Government's disposal of the public lands. *Id.*

(1968). Over time, the grants included additional lands to support other public institutions. These agreements were solemn bilateral compacts between each State and the Federal Government. *Andrus*, 446 U.S. at 523.

Although the initial grants to states did not specifically proscribe the disposition of the lands, the need for clear Congressional authorization to sell, in order to raise adequate funds, resulted in special legislation that granted this authority to new states. Thereafter, Congress began to specifically restrict the manner of sales in order to assure that a fair price be obtained. There is thus no question that Congress' purpose in supporting education has consistently been expressed as the intention that the lands be alienable (sold) as a means of providing the necessary funds. *See* Jon A. Souder & Sally Fairfax, *State Trust Lands* (1996) at 30-31.

In the Hawaii Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, admitting Hawaii as a state, the United States granted to the State of Hawaii, with certain specified exceptions, "title to all the public lands and other property . . . within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union." *Id.* at § 5(b). Section 5(b) states that this grant "shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii." *Id.* Section 5(f) provides that the granted lands, together with the proceeds from

the sale or disposition of any such lands and the income therefrom, "shall be held by said State as a public trust" for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Section 5(f) further provides that use of the lands and proceeds "for any other object shall constitute a breach of trust for which suit may be brought by the United States[.]"

In imposing a federally-enforceable trust on the granted lands and the proceeds and income derived from the lands, Congress followed a practice that had developed over time to ensure that the grants were properly administered. *See Lassen*, 385 U.S. at 460-461; *Papasan*, 478 U.S. at 289 n. 18. Authority for the grants and the imposition of the trust came from the Admissions Clause of U.S. Const., art. IV, § 3 and the Property Clause, art. VI, § 3. *See generally Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 635-36 (10th Cir. 1998) (discussing Admissions Clause and Property Clause authority for statehood land grants and trust restrictions). However, while the federal government retained authority to enforce the terms of the trust, where one was imposed, it did not retain a continuing ownership interest in the lands, and thus did not retain continuing Property Clause power to further regulate the disposition of the lands.

Under general trust principles, once a trust is created, the trust terms cannot be altered except by the exercise of a reserved power to do so. *See* 2 *Restatement (Third) of Trusts* § 63; Bogert, *Trusts & Trustees*, § 42 (2d ed. 1965). This principle applies to charitable trusts. *See* 2 *Restatement (Second) of Trusts* § 367 (1959) at 245 ("If a charitable trust has been validly created, the settler cannot revoke or modify it unless he has by the terms of the trust reserved the power to do so."). Here, Congress expressly created a trust when granting the lands to the State of Hawaii, and, in doing so, Congress clearly anticipated the application of general trust principles, including the principle barring modification of the trust except through the exercise of powers reserved at the time that the trust was created.

In *Coyle v. Secretary of State of Oklahoma*, 221 U.S. 559 (1911), the Court held that the Oklahoma legislature could properly enact a legislative act permitting the relocation of the state capital from Guthrie to Oklahoma City, contrary to a provision of the Oklahoma Enabling Act, because such action was within a state's sovereign power after it was admitted to the Union. As the *Coyle* court said, "The [Admissions Clause] power, is to admit 'new States into this Union.' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Id.* at 567. Thus, in the absence of some Constitutional authority delegated to Congress, Congress had no

authority to impose further restrictions on the granted lands other than those imposed by the Hawaii Admission Act.

In finding that the Apology Resolution prohibits alienation of the granted lands, the Hawaii Supreme Court assumed that Congress had authority to do so. Because that assumption is not warranted this Court should reverse the decision of the Hawaii Supreme Court.

IV. THE HAWAII SUPREME COURT'S DECISION SHOULD BE REVERSED BECAUSE THE COURT INCORRECTLY DETERMINED THAT THE APOLOGY IMPACTED HAWAII'S SOVEREIGN AUTHORITY TO ALIENATE STATE LAND.

Because Congress did not reserve the power to modify the terms of the trust to further restrict the state's ability to alienate the trust lands, Congress did not, and does not have, the authority to do so. While the power to dispose of any kind of property belonging to the United States is vested in Congress. *Alabama v. Texas*, 347 U.S. 272 (1954); U.S. Const. art. IV, § 3, cl. 2; 43 U.S.C.A. § 1301 et seq. once that property has been disposed of without reservation, Congress no longer has the power to place restrictions on the property through a Congressional Act such as the Apology. If Congress wants to restrict the alienation of trust property it can do so through other means including eminent domain. And, if

Congress had intended to modify the trust with the Apology it would have done so clearly and specifically.

Congress is well aware that states have relied for decades on the authority to alienate trust lands in determining the policies and procedures governing these lands. Reliance on the rule of law is a fundamental principle essential to the proper management of state trust lands and to the proper functioning of our legal system.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Hawaii Supreme Court.

Respectfully submitted,

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