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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 NATIVE HAWAIIANS, SAMUEL L. KEALOHA, JR., VIRGIL EMMITT DAY, JR., PATRICK KAHAWAIOLAA, JOSIAH L. HOOHULI, AND MEL HOOMANAWANUI, AS AMICI CURIAE SUPPORTING RESPONDENTS

WALTER R. SCHOETTLE
Counsel of record
P. O. Box 596
Honolulu, Hawaii
96809

EMMETT E. LEE LOY
P. O. 15336
Honolulu, Hawaii
96830

QUESTION PRESENTED

Whether the resolution adopted by Congress to acknowledge the United States' role in the 1893 overthrow of the Kingdom of Hawaii strips the State of Hawaii of its present-day authority to sell, exchange, or transfer 1.2 million acres of land held in a federally created land trust unless and until the State reaches a political settlement with native Hawaiians about the status of that land.

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Price v. Akaka, 3 F.3d 1220 (9th Cir. 1993) . . . 23

Price v. Akaka, 928 F.2d 824 (9th Cir. 1990) . . 22

Price v. State of Hawaii, 764 F.2d 623 (9th Cir. 1985) 22

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Cannelora, Louis, "The Origin of Hawaii Land Titles and the Rights of Native Tenants," Security Title Corp., Honolulu, Hawaii (1974) 27-29

Chinen, Jon Jitsuzo, "Original Land Titles in Hawaii", Library of Congress No. 51-17314 (1961) 26

Chinen, Jon Jitsuzo, "The Great Mahele", University of Hawaii Press, (1957) 28

Final Report on the Public Land Trust, Legislative Auditor of the State of Hawaii, Rep. No. 86-17, December 1986 20

Fuchs, Lawrence H., *Hawaii Pono: A Social History*, Harcourt, Brace & World, Inc., New York (1961) 29

Management and Financial Audit of the Department of Hawaiian Home Lands, Auditor of the State of Hawaii, Rep. No. 93-22, December 1993 21

Progress Report on the Implementation of Recommendations of the Federal-State Task Force, Office of the Inspector General, Audit Report, Rep. No. 92-I-641, March, 1992 21

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Wright, Theon, *The Disenchanted Isles*, The Dial Press, New York (1972) 26

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I. INTEREST OF AMICI

Amici,[1] SAMUEL L. KEALOHA, JR., VIRGIL EMMITT DAY, JR., PATRICK KAHAWAIOLAA, JOSIAH L. HOOHULI, AND MEL HOOMANAWANUI, are all native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, Pub.L. 67-34, 42 Stat. 108 (1921) ("HHCA"). Amici support Respondent OHA's contention that the injunction granted by the Hawaii Supreme Court is properly grounded in state law and not prohibited by federal law. Amici are all Plaintiffs in *Day v. Apoliona,* Docket No. 08-16704 (9th Cir. 2008), now pending before the Ninth Circuit Court of Appeals, seeking to prevent OHA from spending the income and proceeds from trust established by § 5(f) of the Hawaii Admission Act, Pub.L. 86-3, 73 Stat. 4 (1959) on non-beneficiaries, and to instead use such monies to fund implementation of the HHCA. Additionally, three of the Amici were intervenor-applicants in *Barrett v. Cayetano*, 314 F.3d 1091 (9th Cir. 2002), and *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003), seeking to protect native Hawaiian interests from diminishment by OHA and abolishment by Plaintiffs therein. Also,

[1] No person other than amici and their counsel has participated in any way in the writing of this brief or contributed to fund its preparation and submission.

four of the Amici were Plaintiffs in *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), seeking equal protection of the law as a preventive measure from attack by persons wanting to abolish the HHCA and §5(f) trust.

Samuel L. Kealoha, Jr., 60, is a U.S. Army Vietnam-Era veteran who served in Vietnam, 1st Cav. 2-5. He is a Hawaiian homestead applicant, who has been on the waiting list since 1977. The reason the State has failed to deliver his homestead is the State "lost" his application. Mr. Kealoha's interest is his concern that the parties here, both the State and its OHA, are not speaking on behalf of native Hawaiian beneficiaries. "They are talking over us. The scheme of undermining the native Hawaiians' interest in § 5(f) and it being subject to corruption has gone on too long. The State came up with this charade of OHA, and the U.S. has not brought suit against the State for breach of trust under § 5(f). The United States should know the difference between Congress' definition of native Hawaiian of 1920, (that the state solemnly accepted in 1959,) versus the State's made-up definition of 'Hawaiian' in 1978, when it manufactured the OHA scheme created to undermine growing native Hawaiian interests in § 5(f)." Mr. Kealoha is also a former OHA trustee, and can provide this Court a unique vantage from a native Hawaiian who, as

Trustee, was too often out-voted by "Hawaiian" trustees (hostile to native Hawaiians), who sought to benefit themselves and this diluted class of "Hawaiians," including their friends, relatives and others who are not native Hawaiian, with lucrative contracts. Mr. Kealoha witnessed the State's OHA agency misspend § 5(f) proceeds that could have been used to fund the HHCA.

Virgil Emmitt Day, Jr., 65, is a U.S. Army Vietnam-Era veteran, who applied for a Hawaiian homestead in 1984, yet did not receive his lease until 1999, because the State claimed they had no money for infrastructure. Now a lessee, yet holding an unimproved lot with no paved road and no running water, at Kahiki Nui, island of Maui. Mr. Day is a member of Ka Ohana o Kahiki Nui, a homestead beneficiary organization seeking settlement of Kahiki Nui. Ka Ohana o Kahiki Nui applied to OHA for a grant for water tanks, but OHA refused to expend any § 5(f) money to assist the beneficiaries.

Patrick Kahawaiolaa, 63, is a U.S. Navy Vietnam-Era veteran who, as a native Hawaiian, was born and raised on the Keaukaha Hawaiian homestead, serving in various capacities, the latest as President of the Keaukaha Hawaiian Homestead Association for approximately the last six (6) years. Keaukaha, on the Big Island of Hawaii, opened in

1924, the second Hawaiian homestead, following Kalamaula, on the island of Molokai. Mr. Kahawaiolaa has been a party in a number of suits against the State of Hawaii, its Department of Hawaiian Home Lands (DHHL) and OHA. His main interest is full implementation of the HHCA, rehabilitation and self-determination of native Hawaiians, use of § 5(f) monies to benefit native Hawaiians and to settle the homelands. Mr. Kahawaiolaa also has been a party in opposing HHCA § 221 violations, dealing with burdensome water costs sought to be charged to homesteaders by the state's counties, in clear violation of the HHCA. Mr. Kahawaiolaa lost his homestead over this fight. Mr. Kahawaiolaa also opposed removal of Hawaiian home lands from the inventory of lands available to native Hawaiian settlement, as the State of Hawaii continues, to this day, to lease such lands to persons, parties and entities not contemplated by the HHCA. The State does so under pretext it has no money, while funneling millions to OHA that, in turn, does not expend such §5(f) monies on beneficiaries of the HHCA to settle their lands.

Josiah L. Hoohuli, 70, is a U.S.M.C. Veteran. A pure blood native Hawaiian, and homestead lessee, he was raised on his mother's homestead, who received her lease in 1930. Born in 1938, Mr. Hoohuli has lived his entire life on the Hawaiian

homestead, except for two years in California while in the service, but served two years in the USMC in Hawaii, when he resided upon his homestead. Mr. Hoohuli, opposed the State of Hawaii creating OHA in 1978, giving OHA § 5(f) monies, while OHA does not help fund the HHCA. Mr. Hoohuli believes native Hawaiian beneficiaries should be in charge of their own money so that it can be used for native Hawaiian economic independence, self-sufficiency and rehabilitation upon the homelands. Mr. Hoohuli is a founding member of Ho'ala Kanawai, Inc, that was formed in about 1975, and is significant because it was an educational agency charged to educate native Hawaiians about § 5(f) of the Admission Act, and also be the entity for native Hawaiians.

Mel Hoomanawanui, 68, is retired from the Honolulu Fire Department, and a homesteader of Lai o Pua Hawaiian homestead, Kona, island of Hawaii. Mr. Hoomanawanui joined Ho'ala Kanawai, Inc., in 1978. Mr. Hoomanawanui has always been an advocate for bona-fide native Hawaiians. He vehemently opposes the State funneling § 5(f) monies to its agency, OHA, and OHA misusing, misspending and cheating native Hawaiians out of monies that should be used to fund the HHCA, or otherwise rehabilitate native Hawaiians.

All five of these Amici hold to the position that, since Congress used identical language in both the HHCA, and § 5(f), the rule of statutory construction of *in pari materia* applies. Both Acts of Congress are to be read together through a lens to glean Congressional intent that unmistakably calls for § 5(f) proceeds designated for native Hawaiians be used for the "rehabilitation" of native Hawaiians.

"Rehabilitation" is the very purpose of the HHCA. *See In Re Aiona*, 60 Haw. 487, 591 P.2d 607 (1979); *Ahuna v. Department of Hawaiian Home Lands,* 64 Haw. 327, 640 P.2d 1161 (1982). The term "rehabilitation" means "self-determination," similar to that applied to various American Indian nations, tribes, bands, clans, rancherias, domestic dependant communities and Alaskan native villages under the Indian Reorganization Act of 1934, 25 U.S.C., § 461 et seq.

The fundamental difference that separates these native Hawaiian Amici from the position taken by the State's OHA, is that the Amici hold the United States is not the cause of mass dispossession of commoner native Hawaiian tenants in 1893. Instead, it was the Kingdom of Hawaii in the Mahele of 1848, forty-five years *before* the overthrow, which was responsible for causing untold suffering and destitution among the common

native Hawaiian tenants.

OHA's argument, restated previously in the Apology Resolution, and now in the proposed Akaka bill pending in Congress, is that the overthrow of the Kingdom in 1893, is the root of all evil befallen native Hawaiians. But that is an incomplete account of the actions by the Kingdom and the Mahele of 1848. OHA perhaps unwittingly conceals and obscures that it was the Kingdom that dispossessed the native Hawaiian commoner tenants; driving them off their ancestral lands and into the urban core to live in slum, shanty-town, tenement housing conditions. Left abandoned, in squalor, destitute and in abject poverty by the Kingdom, it was in such dismal condition that Congress found this discrete group of native Hawaiians in 1920, when Congress enacted the HHCA.

Amici strongly oppose any effort by those that seek to reestablish the miserable failure that was the Hawaiian Monarchy. A review of this "Monarchy," reveals that it was not a native Hawaiian concept. Instead, it was imported from Europe, lasted a brief 83 years, and was the instrument that led to common native Hawaiian tenants being dispossessed. That, and the greed of the participating chiefs and konohiki in the Mahele, is the real cause of the suffering endured by

common native Hawaiian tenant heirs today. Amici also point out that many of the Great War Chiefs who backed Kamehameha I during the wars of conquest, refused to participate in the Mahele, for they saw what it would do to the people. They were also dispossessed and stripped of their lands along with the chiefs defeated in the Kamehameha wars, as well as disinherited chiefs—all were left without lands, and became homeless wanderers in their homeland, just as destitute as the commoners, sharing in this sad destiny and condition Congress sought to remedy under the HHCA and § 5(f).

These conditions linger to this very day, and it was the intent of Congress to treat such conditions under the HHCA and § 5(f), since 1921.

This you will not hear from the State or its agency, OHA. This you hear from the native Hawaiian Amici respectfully submitting this brief for your consideration.

II. SUMMARY OF ARGUMENT

There is nothing in federal law that would preclude the Hawaii Supreme Court from enjoining Petitioners from transferring ceded lands until the unresolved claims of native Hawaiians have been resolved through the reconciliation process contemplated by the Apology Resolution or the

comparable resolution adopted by the state legislature; PROVIDED, HOWEVER, that the reconciliation process is conducted with a native Hawaiian entity composed of native Hawaiian beneficiaries of the HHCA and Admission Act.

The classification of native Hawaiians as beneficiaries of the HHCA and § 5(f) trust is not a racial classification at all. Instead, it is a criterion which Congress has the sole power to use to reach the people with the closest degree of kinship to those who were unjustly and wrongly deprived of their one-third undivided interest in the 1.4 million acres of land conveyed by the United States to the state of Hawaii in the Admission Act.

But, if the definition of native Hawaiian in the HHCA is found to be a racial classification, it is a discrete group. The provisions are narrowly defined, as the United States points out in their amicus brief, and the HHCA itself is narrowly tailored, to vindicate a compelling governmental interest: treatment of heirs of native Hawaiian tenants dispossessed of their ancestral lands by the Kingdom of Hawaii in the Mahele of 1848. The United States, coming into title, possession and control of such undelivered lands, acted to treat such native Hawaiians under the HHCA and § 5(f).

III. ARGUMENT

A. *Issues raised by Petitioner and amici are not within the scope of the question presented.*

The main issue of interest to Amici is the continued validity of the HHCA and the § 5(f) trust. Nevertheless, Amici support and join Respondents' arguments 1) that there were adequate grounds under state and federal law to support an injunction granted by the Hawaii Supreme Court; 2) that many of the issues raised by Petitioners, the United States and other amici are not within the scope of the question presented and are, therefore, not properly before the court; and, 3) that even if those issues are properly before the court they are without merit. However, as native Hawaiian beneficiaries of the § 5(f) trust, Amici herein have a different perspective than Respondents which they hope this court will consider.

B. *There were adequate grounds under state and federal law to support an injunction granted by the Hawaii Supreme Court*

1. Native Hawaiians may not be native Hawaiians.

The HHCA set aside approximately 200,000 acres of land in Hawaii designated as "available

lands" for 99-year leasehold homesteads for "native Hawaiians." HHCA, § 201(a)(7) defines "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Section 5(f) of the Admission Act requires that all land conveyed to the state of Hawaii by the United States in § 5(b) *and § 5(e)*, be held in trust by the state, in part, "for the betterment of the conditions of native Hawaiians, *as defined in the Hawaiian Homes Commission Act, 1920, as amended*." [emphasis added]. Section 4 of the Admission Act requires that the HHCA be made a part of the constitution of the state "[a]s a compact with the United States relating to the management and disposition of the Hawaiian home lands."

Section 213(i) of the HHCA, as amended, provides:

> Native Hawaiian rehabilitation fund. Pursuant to Article XII, Section 1, of the State Constitution, thirty per cent of the state receipts, derived from lands previously cultivated as sugarcane lands under any other provision of law and from water licenses, shall

> be deposited into this fund. The department[2] shall use this money solely for the rehabilitation of *native Hawaiians* which shall include, but not be limited to, the educational, economic, political, social, and cultural processes by which the general welfare and conditions of habilitation fund. Pursuant to Article XII, Section 1, of the *native Hawaiians* are thereby improved and perpetuated.

[emphasis added] .

Article XII, Section 1 of the Constitution of the State of Hawaii adopted in 1978 accepts this compact created by § 4 of the Admission Act and provides further that thirty percent of the income from former sugarcane lands and water licenses be paid to DHHL to be used for the rehabilitation of *native Hawaiians*. A similar provision was

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[2] "Department" refers to the Department of Hawaiian Home Lands, not the Office of Hawaiian Affairs. HHCA, § 202. OHA and DHHL are separate and distinct agencies, although OHA did recently make a loan to DHHL in the amount of $3 million. This was the first time in 30 years that OHA used any of the $456 million of § 5(f) trust funds it has administered for the purpose of helping to implement the HHCA. Had the entire $456 million been used for that purpose, many beneficiaries on the DHHL waiting lists could have received their homestead awards. Amici would like to think that this loan was made in response to their efforts in bringing the issue before the courts in *Day v. Apoliona, supra.*

contained in the original unamended version of the HHCA. HHCA, § 213. So, although the language of § 213 has been amended over the years, the sugarcane lands referred to therein are any state lands that have been leased for sugar cane since 1921.

Article XII, Section 4 of the Constitution of the state of Hawaii purports to create a trust upon the land conveyed to the state by § 5(b) of the Admission Act, excluding the Hawaiian home lands, for the benefit of "native Hawaiians and the general public." While the home lands are covered in Article XII, Section 1, there is no provision in the state constitution for the disposition of income and proceeds from the § 5(e) lands.

Article XII, Section 5 creates the Office of Hawaiian Affairs, and Article XII, Section 6 gives OHA power:

> to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, 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].

The state constitution does not define "pro rata portion" or "Hawaiians." A proposed Article XII, Section 7, defining the terms "native Hawaiian" and "Hawaiian" was not ratified by the voters and did not become part of the 1978 state constitution. *Kahalekai v. Doi*, 60 Haw. 324, 342, 590 P.2d 543 (1979). Therefore, the only definition of "native Hawaiian" in the state constitution is the one found in HHCA, §201(7).

Nevertheless, the state legislature defined the terms "Hawaiian" and "Native Hawaiian" in H.R.S. §10-2, as follows:

> "Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.
>
> "Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778

and which peoples thereafter continued to reside in Hawaii.

Thus, there are three separate statutory definitions of the descendants of the original inhabitants of the Hawaiian Islands: the state definition of "Hawaiian"; the state definition of "Native Hawaiian" ; and the HHCA definition of "native Hawaiian." Amici believe these distinctions are crucial to the resolution of this case. In this brief, the term, "native Hawaiian" always refers to the HHCA definition of "not less than one-half part" blood quantum and the term "Hawaiian" always refers to descendants of the original inhabitants without regard to blood quantum, i.e. those with one drop of Hawaiian blood, or one ancestor in five hundred or one-sixty fourth part blood quantum. Of course, the term Hawaiians also includes the subset of native Hawaiians.

Adding to the confusion, parties, courts and legislative bodies often fail to recognize these distinctions. For example, the Apology Resolution, which is at the heart of this litigation, uses the term "Native Hawaiian" without defining the term, but probably meaning Hawaiians.

The Akaka Bill, S. 310, 110th Cong. (2007), cited by Respondents, defines and uses the term "Native Hawaiian" without regard to blood quantum. *Id.*,

§3(10). Therefore, the term "Native Hawaiians" in the Akaka Bill really means "Hawaiians." In so defining "Native Hawaiian", the Akaka Bill makes several false statements in its supporting findings. The bill falsely states:

> pursuant to the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), the United States set aside approximately 203,500 acres of land to address the conditions of Native Hawaiians in the Federal territory that later became the State of Hawaii;

Id., § 2(5)

> by setting aside 203,500 acres of land for Native Hawaiian homesteads and farms, the Hawaiian Homes Commission Act assists the members of the Native Hawaiian community in maintaining distinct native settlements throughout the State of Hawaii;

Id., § 2(6)

> in 1959, as part of the compact with the United States admitting Hawaii into the Union, Congress established a public trust (commonly known as the 'ceded lands trust'), for 5 purposes, 1 of which is the betterment of the conditions of Native Hawaiians;

Id., § 8A

> the United States has recognized and reaffirmed the special political and legal relationship with the Native Hawaiian people through the enactment of the Act entitled, 'An Act to provide for the admission of the State of Hawaii into the Union', approved March 18, 1959 (Public Law 86-3; 73 Stat. 4), by—
>
> (A) ceding to the State of Hawaii title to the public lands formerly held by the United States, and mandating that those lands be held as a public trust for 5 purposes, 1 of which is for the betterment of the conditions of Native Hawaiians;

Id., § 21

These statements are true only with respect to native Hawaiians. Congress did not set aside land in the HHCA or create a the § 5(f) trust for the betterment of the conditions of Hawaiians who are not also native Hawaiians.

The Hawaii Supreme Court in its opinion below magnifies this confusion even further. Throughout its opinion, the Hawaii Supreme Court uses the term native Hawaiian with a lower case 'n' without definition. *Office of Hawaiian Affairs v. HCDCH*, 117 Haw. 174, 177 P.3d 884 (2008). The Court goes so far as to replace the upper case 'N' as used in the Apology Resolution with a lower case 'n.' In the

statement of Historical Background, the court begins by reciting that, on admission to the union, the state acquired title to lands from the United States, in trust, in part, for the betterment of the conditions of native Hawaiians, as defined by the HHCA. *Id.* 117 Haw. at 181. The court goes on to discuss how the 1978 constitutional amendments clarified the state's obligation to native Hawaiian beneficiaries of the 5(f) trust. *Id.*, 182. Use of the term "native Hawaiian" with a lower case 'n' is consistent with the HHCA definition.

Ultimately, the court below ordered that the defendants be enjoined "from selling or otherwise transferring . . . any ceded lands from the public lands trust until the claims of the *native Hawaiians* to the ceded lands has been resolved." *Office of Hawaiian Affairs v. HCDCH, supra,* 117 Haw. at 181 [emphasis added]. It is not clear what the court means by "native Hawaiians", but the lower case 'n' suggests blood quantum as in HHCA.

It is also not clear what was meant by "ceded lands", or "public lands trust." In 1898, the Republic of Hawaii "ceded" 1.8 million acres of land to the United States. In 1959, the United States "ceded" 1.4 million acres of land to the state of Hawaii. The 1.4 million acres "ceded" to Hawaii in 1959 includes the 200,000 acres set aside as available lands for

native Hawaiians in the HHCA. In 1978, the Hawaii State Constitution, Article XII, Section 4, purported to create a "public trust" comprising 1.2 million acres of ceded lands, not including the available lands for the benefit of native Hawaiians and the general public.

The parties seem to agree that they are talking about 1.2 million acres of land, but it is unclear exactly when or how the "public lands trust" they are talking about was created. If the trust, was created in 1898, then the corpus is 1.8 million acres and the uses and purposes are not clear. If the trust was created in 1959, then the corpus is 1.4 million acres and the uses and purposes are as set forth in § 5(f). If the trust was created in 1978, then the corpus is 1.2 million acres and the beneficiaries are native Hawaiians and the general public and the uses and purposes are unstated.

The only trust of which Amici are aware is the trust created by Congress in 1959 by § 5(f) of the Admission Act, which includes the HHCA. This is the only trust discussed in the opinion below as it is quoted at the outset. It is clear that native Hawaiians do in fact have an interest in the ceded lands conveyed to the state in 1959 under the provisions of the HHCA, Admission Act and state constitution quoted above. It is not clear that

Hawaiians, other than native Hawaiians, have an interest in those lands.

2. Native Hawaiians, as defined in the HHCA, do have unresolved claims to the ceded lands

The § 5(f) trust clearly established a beneficial interest in favor of native Hawaiian beneficiaries that is enforceable in the courts. *Day v. Apoliona,* 496 F.3d 1027, 1039 (9th Cir. 2007). This trust includes the HHCA and the federal-state compact obligating the state to fulfill the commitment to native Hawaiians in HHCA. *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 739 F.2d 1467 (9th Cir. 1984). This trust has a corpus of 1.4 million acres of ceded lands conveyed to the state pursuant to both sections § 5(b) and § 5(e) of the Admission Act.

The state of Hawaii has been less than faithful in performing its fiduciary duty to native Hawaiians under the HHCA and § 5(f) trust. *Final Report on the Public Land Trust*, Legislative Auditor of the State of Hawaii, Rep. No. 86-17, December 1986; *A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians*, Hawaii Advisory Committee to the U.S. Commission on Civil Rights,

December 1991; *Progress Report on the Implementation of Recommendations of the Federal-State Task Force*, Office of the Inspector General, Audit Report, Rep. No. 92-I-641, March, 1992; *Management and Financial Audit of the Department of Hawaiian Home Lands*, Auditor of the State of Hawaii, Rep. No. 93-22, December 1993; "Broken Promise: How Everyone Got Hawaiians' Homelands Except Hawaiians" *Wall Street Journal*, September 9, 1991, p. 1.

Indeed, even at this very moment DHHL is in serious breach of trust with respect to approximately one-quarter of the total available lands. On the slopes of Mauna Kea, DHHL has 50,000 acres of some of the best pasture land in the state. This land had been leased out to Parker Ranch from the time of statehood until 2003, under leases that required the lessee to control noxious weeds. Parker Ranch did not control the noxious weeds and left the land infested with gorse. By some estimates, as much as 25,000 acres of this land has been rendered totally unusable by the spread of gorse and the remaining 25,000 acres is in danger of being blighted and laid waste.

DHHL has taken no action against Parker Ranch for breach of the leases. Indeed, DHHL actually obtained the dismissal of a suit by a

neighboring rancher against DHHL and Parker Ranch for failure to control the gorse. The dismissal was recently overturned by the Hawaii Intermediate Court of Appeals in *Freddy Nobriga Enterprises, Inc. v. DHHL, et al.,* 118 Haw. 209, 186 P.3d 593 (App. 2008) and the case remanded to the Third Circuit Court of the State of Hawaii.

In recent years many thousands of acres of former sugarcane lands have been sold by the state for development. Based on all the other breaches of trust by the state, Amici believe that it may have failed to comply with the provision requiring the state to pay thirty percent of the proceeds of these sales to DHHL pursuant to HHCA § 213(i) and Article XII, § 1 of the state constitution. It is doubtful that the state even has a record of which lands have been leased for sugar cane at any time since enactment of the HHCA.

Even though individual native Hawaiian beneficiaries have the right to sue state officials for breach of the § 5(f) trust in federal courts, the courts so far, have not granted the beneficiaries any affirmative relief in such cases. *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985) (“Price I”); *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990); *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990); *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990) (“Akaka I”);

Price v. State of Hawaii, 939 F.2d 702 (9th Cir. 1991) ("Price II"); *Price v. Akaka*, 3 F.3d 1220 (9th Cir. 1993) ("Akaka II"); *Han v. U.S. Dept. Of Justice*, 45 F.3d 333 (9th Cir. 1995); and *The Hou Hawaiians v. Cayetano*, 183 F.3d 945 (9th Cir. 1999). During all of this time, the United States has taken no action to enforce the trust, as it is entitled to do under § 5(f). Indeed, the United States has even resisted efforts to compel it to take such action. *The Hou Hawaiians v. Cayetano, supra.* And, of course, the beneficiaries cannot sue the state itself in federal court by virtue of its Eleventh Amendment immunity.

Therefore, there are substantial unresolved claims for breach of trust that could be resolved by the reconciliation process contemplated in the Apology Resolution. The Hawaii Supreme Court could have ordered an injunction preventing the sale of § 5(f) ceded lands pending the political resolution of those claims by native Hawaiians.

The Admission Act does not preclude this. The admission Act provides that the income and proceeds from the ceded lands shall be used for "*one or more* of the foregoing purposes in such manner as the constitution and laws of said State may provide." The state has wide discretion in the use and management of the trust corpus and could,

consistent with the provision of § 5(f), use the entire income and proceeds of the § 5(f) trust for the "betterment of the conditions of native Hawaiians" "as the constitution and laws of the said State may provide."

Therefore, there is nothing in federal law that would preclude the Hawaii Supreme Court from enjoining Petitioners from transferring ceded lands until the unresolved claims of native Hawaiians have been resolved through the reconciliation process contemplated by the Apology Resolution or the comparable resolution adopted by the state legislature; PROVIDED, HOWEVER, that the reconciliation process is conducted with a native Hawaiian entity composed of native Hawaiian beneficiaries of the HHCA and Admission Act.

C. Remaining issues are beyond the scope of the question presented.

Since there was adequate grounds under state law for the injunction granted by the Hawaii Supreme Court which was not precluded by the Admission Act or other provision of federal law, all other issues raised by Petitioners and their supporting amici are moot. The Respondents' brief is quite adequate on this point and Amici have nothing further to add on this subject.

D. The designation of native Hawaiians as beneficiaries of HHCA and § 5(f) is not a racial classification.

The parties and the United States all agree that the validity of the HHCA and § 5(f) trust are not at issue in this case. Therefore, one might conclude that the equal protection challenges by other amici are likewise not before the court. However, the equal protection issue may be relevant to whether or not the United States and/or the state of Hawaii is able to engage in a reconciliation process with native Hawaiians at all.

Amici herein believe this is a serious question with respect to Hawaiians in light of Justice Breyer's comments in his concurring opinion in *Rice v. Cayetano*, 528 U.S. 495, 526-7 (2000). Justice Breyer, expressed his concern about an Indian analogy argument. He noted that all Indian tribes have a blood quantum requirement. He felt that the lack of a blood quantum in the state definition of "Hawaiian" was sufficient to reject the Indian analogy argument. Therefore, to the extent that the state engages in a reconciliation process with Hawaiians, it may be subject to an equal protection challenge under the reasoning in *Rice*. Indeed, the Akaka Bill may also be subject to such challenge so long as it does not contain a blood quantum. Amici

will leave this issue to other parties, however, because Amici are not concerned with the interests, if any, of Hawaiians. The definition of native Hawaiian in the HHCA includes a blood quantum and is, therefore, not subject to the issue raised by Justice Breyer.

To the extent that the equal protection does become an issue in this case, it does not apply to HHCA or §5(f) because classification of native Hawaiians as beneficiaries therein is not a racial classification at all. Instead, it is a criterion which Congress is empowered to use to reach the people with the closest degree of kinship to those who were unjustly and wrongly deprived of their one-third undivided interest in the 1.4 million acres of land conveyed by the United States to the state of Hawaii in the Admission Act.

In 1778, upon arrival of James Cook in the Sandwich Islands the native Hawaiian population exceeded 300,000. Wright, Theon, *The Disenchanted Isles*, The Dial Press, New York (1972) p. 68. It is generally accepted that there was then in existence a feudal type of land ownership system, in which all of the land was owned by the King and granted by him to his chiefs, known as *konohikis,* and, in turn, by them to lower level chieftans and eventually the tenant farmers. *See* Chinen, Jon Jitsuzo, "Original

Land Titles in Hawaii", Library of Congress No. 51-17314 (1961), p. 1; Cannelora, Louis, "The Origin of Hawaii Land Titles and the Rights of Native Tenants," Security Title Corp., Honolulu, Hawaii (1974), p. 1.

Even then it could not be considered a true feudal system, as native tenants were not serfs with no interest in the land. Instead, Hawaiian native tenants, as a group, had an undivided one-third interest in the total land mass of the Hawaiian Islands and surrounding waters. This was recognized in the first constitution of the Kingdom of Hawaii adopted in 1840. As provide therein:

> Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, *though it was not his own private property. It belonged to the chiefs and the people in commo*n, of whom Kamehameha I was the head, and had the management of landed property.

State v. Zimring, 58 Haw. 106, 111 (1977) quoting Fundamental Law of Hawaii (1904) at 3 quoting The Constitution of 1840.

This shows that the King held title merely as trustee for the use and benefit of the beneficiaries—the chiefs, *konohikis* and common

people.

On December 10, 1845, the Board of Commissioners to Quiet Titles, commonly known as the Land Commission was established to adjudicate and settle disputes over titles of real property. Cannelora, *supra*, p. 7. It was recognized in the Principals of the Land Commission as well as the Privy Counsel that the ownership of the land at that time was held in equal one-third undivided interests by the King, the *konohiki* landlords and the tenants living on the land. Cannelora, *supra*, pp. 10, 12. *See also Thurston v. Bishop*, 7 Haw. 421, 430 (1888). These principles are fully set out in Revised Laws of Hawaii, 1925, v. II, pp 2120-2152.

The Land Commission analyzed in detail the land system existing at the time in the Islands. It then declared that "there are but three classes of person having vested rights in the land, 1st, the government, 2nd, the landlord (the chiefs and konohiki), and 3rd, the tenant." Chinen, Jon Jitsuzo, "The Great Mahele", University of Hawaii Press, (1957), p. 9.

The problem was that the Land Commission had no means to divide these interests, so that fee simple ownership of land could not be obtained unless all of these parties joined in the deed. In order to solve this problem the King and *konohikis*

divided their lands between themselves in what is known as The Great Mahele. This was actually a series of divisions between the King and 245 *konohikis* made between January 27, 1848 and March 7, 1848, which allowed the *konohiki* to take his or her claim to the Land Commission and obtain title to the land *subject to the rights of the native tenants*. Cannelora, *supra*, p. 13.

Native tenants were not able to obtain title to their interests until 1850, when legislation was enacted allowing them to present *kuleana* claims to the Land Commission. Cannelora, *supra*, 17-19. But the law did not favor the granting of such claims. First, native tenants were less well educated and less informed than the *konohiki* class and may not have been aware of their right to obtain title or the means to perfect it. Second, native tenants were given only a 4 and one-half year period within which to file their claims, after which the claims were forever barred. *Id*. p. 19. The *konohiki,* on the other hand, were given up to 49 years to file claims. *Id*. Third, native tenants were required to incur considerable expense of a survey of their claim, while *konohiki* were not. *Id*. As a result, only approximately 28,000 acres of land—far less than the one-third interest that had previously been recognized—was awarded to native tenants under this provision. Fuchs, Lawrence H., *Hawaii Pono: A*

Social History, Harcourt, Brace & World, Inc., New York (1961) p. 257.

Thus, this provision purportedly to allow native tenants to obtain fee simple title to their land actually operated to extinguish the claims of the vast majority of native tenants who failed to go through the process of surveying and registering *kuleana* claims. Title to the land to which they would have been entitled remained with the Kingdom of Hawaii. This land was eventually transferred to the United States by the Newlands Resolution and thence to the state of Hawaii by the Admission Act.

As a result, by 1920, native Hawaiians were "a landless people in the country of their forefathers." Sen Doc. No. 151, 75th Cong., 3d Sess, Serial Set 10247 (Jan. 5, 1939), pp. 81-83. At the same time, an undivided, undelivered one-third interest in the 1.8 million acres of government land was impressed with the outstanding equitable property interests of native tenants who did not receive their lands under the *kuleana* law.

Therefore, it was entirely appropriate for Congress to set aside 200,000 acres of this land in order to redress this grave injustice and rehabilitate the native Hawaiian people. Congress enacted the HHCA and sections 4 and 5 of the Admission Act as

compensation to the descendants for the loss their ancestors had suffered in the Mahele. The benefits conferred thereby upon native Hawaiians do not involve a racial classification. This can be seen simply by changing the date and/or place contained in the definition.

The definition of "native Hawaiian" in the HHCA was crafted in a way to compensate the heirs of those people who had lost their land when a Western legal system was imposed upon them. The definition does not include Tahitians or Samoans or other people of the Polynesian races because they were not inhabitants of the Hawaiian Islands and did not unjustly lose their interest in the land.

Nor is the classification of "not less than one-half part" a racial classification because it excludes descendants of less than one-half part. This is a criterion determining the degree of kinship to those who lost their interests. It is no different than ordinary laws of intestate descent and distribution that establish degrees of kinship necessary in order to inherit property of a deceased ancestor.

E. The native Hawaiians are the victims of racial discrimination not the beneficiaries of it.

Turning to the Indian analogy, Amici do not care

to waste this Court's time hiking over "difficult terrain" to arrive at the destination finding native Hawaiians are, in fact, members of a domestic dependant community. Like the Pueblos in *United States v. Sandoval*, 231 U.S. 28 (1913) native Hawaiians are not Indian.

However, Amici have maintained that they are ethnically distinct from American Indians, they are nevertheless Native Americans who are *victims* racial discrimination by being excluded from the benefits of the Indian Reorganization Act. This issue was raised and wrongly decided by the Ninth Circuit in *Kahawaiolaa v. Norton*, *supra*. The Indian Reorganization Act provides certain benefits to Indian tribes recognized by the Secretary of the Department of the Interior. Yet under DOI regulations, native groups from Hawaii are prohibited from applying for federal recognition. 25 C.F.R. § 83.1. This is the same geographical classification that this Court found was a racial classification in *Rice.*

But the Ninth Circuit found that the exclusion of native Hawaiians from the benefits of the IRA was not a racial classification and therefore applied the rational basis standard of review rather than strict scrutiny. *Kahawaiolaa v. Nortion, supra*, 386 F.3d at 1278. The Ninth Circuit concluded it was rational

to exclude native Hawaiians from the provisions of the IRA because Congress had provided special benefits to native Hawaiians in the HHCA and Admission Act. The court concluded that:

> It is rational for Congress to provide different sets of entitlements — one governing native Hawaiians and another governing members of American Indian tribes. It would also be rational for Congress to decide that native Hawaiians should be prohibited from applying for federal recognition. Otherwise, as members of a newly recognized Indian tribe or tribes, native Hawaiians would be entitled to the special rights and privileges granted to native Hawaiians *and* to those accorded to American Indians.

Id., at 1282-3 [emphasis in original].

How ironic would it be to deny native Hawaiians the rights and benefits of the IRA because they are not a racial classification and because Congress has provided the HHCA and § 5(f) trust for them and then to invalidate HHCA and the § 5(f) trust because native Hawaiian is a racial classification?

As a practical matter, it would be much more reasonable for the United States and state of Hawaii to engage in a reconciliation process with native Hawaiian groups established by themselves and recognized under the same criteria as Indian

tribes rather than an artificial group including hundreds of thousands of non-beneficiaries. The state would obviously rather negotiate with non-beneficiaries than the actual beneficiaries themselves, otherwise they would have included a blood quantum in the Akaka Bill.

F. Even if the HHCA definition of "native Hawaiian" is a racial classification it survives an equal protection challenge under the strict scrutiny standard.

If the definition of "native Hawaiian" as defined in the HHCA is found to be a racial classification, Amici suggest that it is nevertheless permissible and would survive the test of strict scrutiny, because that term is a narrow and limited definition carefully crafted to reach a discrete group of beneficiaries, under a Congressional plan to treat the conditions of such discrete group from the catastrophic effects suffered by members of this group and the harmful effects following their dispossession from their ancestral lands since the time of the Mahele of 1848.

It is not simply the United States on a good will mission to benevolently bestow some sort of favor on native Hawaiians simply because they are native Hawaiian. Instead, it is a fact that the United States came into title, possession and control of

lands of the former Kingdom, and which lands were impressed with the undistributed, equitable, outstanding, property rights of the native Hawaiian tenants.

But, that is still not the compelling governmental interest. It is a fact that the native Hawaiian tenant population plummeted under the Kingdom, which condition was made even worse by the callous failure of the Kingdom to deliver to the native Hawaiian tenants their previously acknowledged and recognized one-third, undivided interest in the lands of the Kingdom.

When the number of native Hawaiians had plummeted from about 300,000, in 1778, to only 40,000, in 1920, and Congress became aware of the condition of native Hawaiians teetering on the verge of extinction, and Congress found, following extensive hearings, the cause of such dismal conditions of the commoner native Hawaiian tenants then barely surviving in abject poverty in the urban centers of Hawaii, it was in 1920, that the United States Congress was so moved to enact the HHCA to treat these native Hawaiians.

Landlessness, destitution and poverty: that is the legacy left by the Kingdom of Hawaii, to the native Hawaiian tenants.

It was the United States Congress that determined long ago in 1920, the connection between the dismal condition of the native Hawaiian tenants and their loss of their land. It was the United States Congress that went about to repair such condition by setting aside a portion of the land the United States held, for the exclusive benefit and the purpose of rehabilitating the common native Hawaiian tenants and their heirs under the HHCA.

It was the United States Congress that reasoned that rehabilitating the common native Hawaiian tenants upon a portion of their formerly undistributed lands (that should have been distributed in the Mahele of 1848,) would allow the native Hawaiians to strive to pick themselves up through hard work, on their lands, and thereby rehabilitate themselves with the opportunity under the HHCA.

The HHCA was intended to provide the native Hawaiians their lands, and § 5(f) was supposed to provide these identical beneficiaries the funding to achieve and vindicate this yet unfulfilled compelling governmental interest. It has been the state of Hawaii that has failed to fulfill this promise.

Therefore, even if “native Hawaiian” is a racial

classification, it, and the HHCA, and the provisions for native Hawaiians in 5(f), are constitutionally valid and will withstand close examination under strict scrutiny.

IV. CONCLUSION

The judgment of the Hawaii Supreme Court enjoining Petitioners “from selling or otherwise transferring . . . any ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands has been resolved” should be affirmed, provided that the term “native Hawaiians” is defined as provided in the Hawaiian Homes Commission Act, 1920.

Respectfully submitted,

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WALTER R. SCHOETTLE
Counsel of record
P. O. Box 596
Honolulu, Hawaii
96809

EMMETT E. LEE LOY
P. O. 15336
Honolulu, Hawaii
96830