

No. 07-1372

IN THE
Supreme Court of the United States

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

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

On Writ of Certiorari to the Supreme Court of Hawaii

**BRIEF OF CURRENT AND FORMER HAWAII
STATE OFFICIALS AS *AMICI CURIAE* IN
SUPPORT OF RESPONDENTS**

SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY
SUPREME COURT
PRACTICUM
357 East Chicago Ave.
Chicago, IL 60611
(312) 503-0063

VIRGINIA A. SEITZ*
ISAAC ADAMS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

January 29, 2009 * Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. HAWAII'S PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.	8
II. THE HAWAII SUPREME COURT'S DECISION RESTED ON INDEPENDENT AND ADEQUATE STATE GROUNDS	16
III. THERE IS NO OTHER BASIS FOR THIS COURT TO ASSERT JURISDICTION OVER OHA'S STATE-LAW CLAIM.....	22
CONCLUSION	28

TABLE OF AUTHORITIES

CASES	Page
<i>Badger v. Hoidale</i> , 88 F.2d 208 (8th Cir. 1937)	10
<i>Bush v. Gore</i> , 531 U.S. 98 (2000)	11
<i>California v. Freeman</i> , 488 U.S. 1311 (1989)	7, 10
<i>City of Chicago v. Int'l Coll. of Surgeons</i> , 522 U.S. 156 (1997)	15, 16
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	16
<i>Colorado v. Connelly</i> , 474 U.S. 1050 (1986)	24
<i>Colorado v. Nunez</i> , 465 U.S. 324 (1984)	7
<i>In re Corestates Trust Fee Litig.</i> , 39 F.3d 61 (3d Cir. 1994)	10
<i>Equitable Life Assurance Soc'y v. Brown</i> , 187 U.S. 308 (1902)	5, 8, 11
<i>Florida v. Meyers</i> , 466 U.S. 380	6, 22, 23, 24
<i>GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.</i> , 445 U.S. 375 (1980)	6, 25
<i>Gully v. First Nat'l Bank</i> , 299 U.S. 109 (1936)	12
<i>Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing</i> , 545 U.S. 308, 313 (2005)	12
<i>Hawaii v. Office of Hawaiian Affairs</i> , No. 07-1372 (U.S. Oct. 1, 2008)	14
<i>Irvine v. California</i> , 347 U.S. 128 (1954)	26
<i>James v. Arizona</i> , 469 U.S. 990 (1984)	24
<i>Kansas v. Marsh</i> , 548 U.S. 163 (2006)	24
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999)	27
<i>Merrell Dow Pharm. Inc. v. Thompson</i> , 478 U.S. 804 (1986)	12

TABLE OF AUTHORITIES—continued

	Page
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983)	5, 16, 19
<i>Moore v. Chesapeake & Ohio Ry. Co.</i> , 291 U.S. 205 (1934)	13
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985) ..	24
<i>Office of Hawaiian Affairs v. Housing & Cmtys. Dev. Corp. of Haw.</i> , 177 P.3d 884 (Haw. 2008)	<i>passim</i>
<i>Pa. Dep’t of Corr. v. Yeskey</i> , 524 U.S. 206 (1998)	27
<i>Palmer Oil Corp. v. Amerada Petroleum</i> , 343 U.S. 390 (1952)	8
<i>Patton v. Yount</i> , 467 U.S. 1025 (1984)	24
<i>Pennsylvania v. Bruder</i> , 488 U.S. 9 (1988) ..	24
<i>Sochor v. Florida</i> , 504 U.S. 527 (1992)	20
<i>Steel Co. v. Citizens for Better Env’t</i> , 523 U.S. 83 (1998)	25
<i>Taylor v. Freeland & Kronz</i> , 503 U.S. 638 (1992)	7, 25
<i>United States v. Benchimol</i> , 471 U.S. 453 (1985)	24
<i>United States v. Johns</i> , 469 U.S. 478 (1985) ..	24
<i>United States v. Sharpe</i> , 470 U.S. 675 (1985)	24
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977)	7
<i>Youakim v. Miller</i> , 425 U.S. 231 (1976)	27

CONSTITUTION AND STATUTES

Haw. Const. art. XII, § 4	9
Pub. L. No. 103-150, 107 Stat. 1510 (1993).	4
28 U.S.C. § 1257	8
28 U.S.C. § 1331 (2009)	12
1997 Haw. Sess. Laws Act 329	17
1993 Haw. Sess. Laws Act 359	17

TABLE OF AUTHORITIES—continued

	Page
1993 Haw Sess. Laws Act 354	17
1993 Haw. Sess. Laws Act 340	17
 RULE	
Sup. Ct. R. 14(a)	25
 OTHER AUTHORITY	
Melody K. MacKenzie, <i>The Ceded Lands Trust, in Native Hawaiian Rights Handbook</i> 26 (Melody K. MacKenzie ed., Native Hawaii Legal Corporation 1991) ..	3

INTEREST OF THE *AMICI CURIAE*¹

This appeal arises from a decision of the Hawaii Supreme Court, holding that the State of Hawaii's sale or transfer of certain lands it holds in trust constitutes a breach of trust and issuing an injunction forbidding the State from selling or transferring these lands until such time as the ongoing reconciliation process among the state and federal governments and native Hawaiians is completed. One critical, preliminary issue in this case is whether this Court has jurisdiction over the petition filed by the State of Hawaii *et al.* ("Hawaii" or "the State"). Specifically, respondents, the Office of Hawaiian Affairs *et al.* ("OHA"), contend that the petition does not present a substantial federal question and that the judgment of the Hawaii Supreme Court rests on an independent and adequate state ground. See Resp'ts' Br. at 32-34. They assert that the decision below makes clear that Hawaii state law independently supports the court's findings and conclusions and is adequate to support the issuance of the injunction. See *id.* As such, OHA argues that this Court lack jurisdiction over this case. See *id.*

Amici are current and retired officials of all three branches of the Hawaii state government and include a retired Chief Justice of the Hawaii Supreme Court, a former Governor, and the President of the Hawaii State Senate.

¹ No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from the *amici curiae* made any monetary contribution for the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

Amicus William S. Richardson was the first native Hawaiian Chief Justice of the Hawaii Supreme Court, holding that position from 1968 until 1982. He was also the founder of Hawaii's first and only law school which now bears his name. While on the bench, Chief Justice Richardson participated in a series of decisions that were responsible for the integration of the principles of Anglo-American and indigenous Hawaiian law. In addition, Chief Justice Richardson has experience in the executive branch of the Hawaii state government, serving as Lieutenant Governor from 1962 until 1966.

Amicus John D. Waihee was the fourth Governor of the State of Hawaii, holding that position from 1986 to 1994; he was the first native Hawaiian to hold the office. Governor Waihee was in office during the centennial anniversary of the overthrow of Queen Lili'uokalani and signed into law myriad state statutes regarding native Hawaiian rights, including many of the state statutes at issue. Before his election, Governor Waihee was Lieutenant Governor and a member of the Hawaii State House of Representatives. He also was a delegate to the 1978 Hawaii State Constitutional Convention and was instrumental in the creation of the Office of Hawaiian Affairs and in defining the public lands trust.

Amicus Colleen Hanabusa has represented the people of the Twenty-First Senatorial District, a district on the Wai'anae Coast comprised of a high percentage of native Hawaiians, since 1998.² Senator Hanabusa was elected Senate President in 2007 and previously served as the Chair of the Judiciary and

² Senator Hanabusa's views do not necessarily reflect those of the Hawaii State Senate. No State Senate funds were used in the preparation or submission of this brief.

Hawaiian Affairs Committee. In addition, she served on the Task Force on Native Hawaiian Issues State Working Group, one of five working groups convened to advise the Hawaii Congressional Delegation on the drafting of federal legislation to clarify the relationship between native Hawaiians and the federal government. Before her election to the State Senate, Senator Hanabusa practiced law for 30 years and served as a delegate to the Hawaii State Judicial Conference.

Based on their years of experience in state government and unique insight into the Hawaii legal system and Hawaii state law, *Amici* are exceptionally qualified to analyze the decision of the Hawaii Supreme Court and to provide an assessment of the independence of the Hawaii state law bases for the issuance of the injunction.

SUMMARY OF ARGUMENT

1. This Court is without jurisdiction over Hawaii's appeal because the Hawaii Supreme Court's judgment does not present a substantial federal question. The Hawaii Supreme Court considered OHA's claim, brought under the Hawaii Constitution, that the State's sale of ceded lands³ violated the exacting fiduciary standards that state constitutional

³ The term "ceded lands" refers to the approximately 1.75 million acres of land that were government and crown lands of the Hawaiian kingdom and held for the benefit of all the Hawaiian people. *See Melody K. MacKenzie, The Ceded Lands Trust, in Native Hawaiian Rights Handbook* 26 (Melody K. MacKenzie ed., Native Hawaii Legal Corporation 1991). The government and crown lands were eventually ceded to the U.S. government, upon annexation in 1898. When Hawaii became a state, the lands were transferred to the State. *See id.* Today, they are held in trust by the State. *See id.* at 30-32.

and common law impose upon it, as trustee of the public lands trust. The court found that the State land sales at issue would violate established state-law standards regarding the State's fiduciary obligations to the beneficiaries of the public lands trust.

In deciding this state-law claim, the Hawaii Supreme Court cited 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) [hereinafter *Apology Resolution*]. But the court relied on the *Apology Resolution* for a limited purpose—to support its factual finding that native Hawaiians have unrelinquished claims to the ceded lands. See *Office of Hawaiian Affairs v. Housing & Cnty. Dev. Corp. of Haw.*, 177 P.3d 884, 901-03, 922 (Haw. 2008) [hereinafter *OHA*]. In making this finding, the court did not hold that the *Apology Resolution* itself provided OHA with any substantive rights or claims (including claims to the ceded lands) or imposed any burdens, liabilities, or obligations on the State. Instead, the court concluded that the factual findings contained in the *Apology Resolution* recognize that native Hawaiians have unrelinquished claims over the ceded lands and contemplate native Hawaiians' future reconciliation with the state and federal governments as to those claims. See *id.* at 902, 905, 923. The court also concluded that state laws recognize the same facts and support the same conclusions. See *id.* at 903-04, 923.

Any limited federal question presented by the Hawaii Supreme Court's reliance on the *Apology Resolution*, as well as state law, in making its factual findings, is insufficient to provide this Court with jurisdiction under 28 U.S.C. § 1257. That provision

authorizes this Court to review only state court judgments that present *substantial* federal questions. A state court's citation, *inter alia*, to a federal statute in stating facts relevant to its decision of a claim that indisputably arises under state law does not create a substantial federal question. Any federal "question" presented is wholly ancillary to the state-law cause of action, not necessary to its resolution, and "merely formal." *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308, 311 (1902). Accordingly, it is insufficient to confer jurisdiction under section 1257.

2. This Court also lacks jurisdiction over the instant case because the Hawaii Supreme Court's opinion expressly sets forth a state-law ground for decision that is independent from the *Apology Resolution* and adequate to support the judgment. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983). The Hawaii court concluded that state law covers the same ground as the *Apology Resolution*, in so far as it too acknowledges that native Hawaiians have unrelinquished claims to the ceded lands and contemplates that the state and federal governments will seek reconciliation with native Hawaiians with regard to those claims. The Hawaii court made clear, in several passages in its decision, that its construction of state law independently supported its ruling on OHA's breach of trust claims and that state law mandated issuance of the injunction. The state court opinion thus "plain[ly] state[s]" an independent and adequate state ground for the judgment. See *id.* at 1042.

3. Finally, the State makes two arguments that this Court should exercise jurisdiction notwithstanding the independent and adequate state grounds for the Hawaii court's decision.

First, the State contends that, despite the state-law ground for the decision, there is an Article III case or controversy over the federal question because this Court’s interpretation of the *Apology Resolution* might affect the political machinations in the Hawaii State Legislature. This argument is based on a footnote in *Florida v. Meyers*, 466 U.S. 380, 381 n.* (1984) (per curiam). There, this Court suggested that it might address a federal question, even where there exists an independent and adequate state ground for a state court decision, when this Court’s “resolution of [the federal] issue will affect the proceedings below regardless of how the [state court] rules on remand.” *Id.* This Court has not taken up this suggestion since 1984, and in all events, the case at issue does not fall within its parameters. This Court’s interpretation of the *Apology Resolution* will not affect the lower court’s resolution of the state-law claim before it and thus will not “affect . . . how the [state court] rules on remand.” *Id.* (first alteration in original). Moreover, a case does not present an Article III case or controversy if the sole consequence of its resolution is some speculative impact on the Hawaii state political process. See *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 382 (1980) (Article III case or controversy is justiciable only if it is capable of “resolution through the judicial process.” (quoting *Flast v. Cohen*, 392 U.S. 83 (1968))).

Second, the State maintains that this Court has jurisdiction, despite an independent and adequate state ground for the decision below, because the Hawaii court’s construction of state law conflicts with federal law. This potential basis for jurisdiction is waived because it was neither pressed nor passed upon below; nor is it fairly embraced in the question presented in the petition for a writ of certiorari. See

Taylor v. Freeland & Kronz, 503 U.S. 638, 645-46 (1992).

ARGUMENT

The State asks this Court to address and overturn a judgment of the Hawaii Supreme Court on a state-law claim that rests on an interpretation of the Hawaii Constitution and state common law. The State asserts that this Court has jurisdiction to do so because the state court cited and relied upon factual findings contained in a federal statute, among other authorities, in resolving OHA's state-law claim for injunctive relief. The lower court's reliance on a federal statute as one among several independent sources of factual findings relevant to the state-law claim it resolved is insufficient to confer jurisdiction on this Court.

The federal question presented by this case is insubstantial and ancillary, and the Hawaii court rested its decision upon an interpretation of state law that is independent from federal law and adequate to support the judgment. “[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts.” *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). This Court, accordingly, does not have jurisdiction over this case. See *California v. Freeman*, 488 U.S. 1311, 1314 (1989) (dismissing certiorari as improvidently granted where state court decision rested on a foundation of state law); *Colorado v. Nunez*, 465 U.S. 324 (1984) (per curiam) (dismissing certiorari “as improvidently granted, it appearing that the judgment of the court below rested on independent and adequate state grounds”).

I. HAWAII'S PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The State invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). That section provides in relevant part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under . . . statutes of . . . the United States." This Court has interpreted section 1257 to vest it with jurisdiction to review a state-court judgment only where that judgment presents a "*substantial federal question*[]." *Palmer Oil Corp. v. Amerada Petroleum*, 343 U.S. 390, 391 (1952) (per curiam) (emphasis added). "There must be a real substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, Federal question is essential to the jurisdiction of this court.'" *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308, 311 (1902) (quoting *New Orleans Waterworks Co. v. Louisiana*, 185 U.S. 336, 345 (1902)). To the extent this case presents any federal question, it does not present a substantial one. The Hawaii court's citation of and reliance on the *Apology Resolution* as one of several sources of the factual background against which it rendered a decision on a state-law claim is insufficient to confer jurisdiction under section 1257.

As the opinion plainly reveals, the judgment being reviewed was founded upon state substantive law—to wit, an interpretation of the Hawaii Constitution and state common law. OHA's claim against the State brings a private cause of action under article XII, section 4 of the Hawaii Constitution.⁴ It alleges that

⁴ Article XII, § 4 provides in whole:

the State's sale of ceded lands generally, and of the Leiali'i parcel particularly, would constitute a breach of the State's fiduciary obligations as trustee of the public lands trust established in that same provision of the state constitution. See J.A. 32a-34a.

The Hawaii court expressly concluded that OHA's claim for injunctive relief under the state constitution was proper. The court recognized that the individual native Hawaiian plaintiffs were "beneficiaries of the ceded lands trust" and therefore that they had the "right to bring suit under the Hawai'i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust." *OHA*, 177 P.3d at 904 (quoting *Pele Defense Fund v. Paty*, 837 P.2d 1247, 1262 (Haw. 1992)). The court also found that OHA was a proper plaintiff and could bring suit under article XII, section 4 because it was "representing the interests of the native Hawaiian beneficiaries to the ceded lands trust." *Id.* at 905.

Turning to the merits of OHA's claims, the Hawaii Supreme Court considered whether, under the circumstances, the sale of ceded lands would violate the State's obligations under article XII, section 4 to "adhere to high fiduciary duties normally owed by a trustee to its beneficiaries." *Id.* at 904 (quoting *Ahuna v. Dep't of Hawaiian Home Lands*, 640 P.2d 1161, 1168 (Haw. 1982) (Richardson, C.J.)). In

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

Haw. Const. art. XII, § 4.

particular, the court looked to the State's "three specific trust duties" as trustee under state law:

- (1) "the obligation . . . to administer the trust solely in the interest of the beneficiary"; (2) the obligation that the trustee "deal impartially when there is more than one beneficiary"; and (3) the "obligation to use reasonable skill and care to make trust property productive[.]"

Id. at 905 (quoting *Ahuna*, 640 P.2d at 1169-70).

The court agreed with OHA that, in light of the native Hawaiians' unrelinquished claims over the ceded lands, the State's sale of these lands would violate the "exacting fiduciary standards" to which the State was held under state law—specifically, the State's "obligation to use reasonable skill and care' in managing the public lands trust." *Id.* (quoting *Ahuna*, 640 P.2d at 1169).

The Hawaii court's decision, accordingly, rested entirely on a foundation of state substantive law. OHA's cause of action arises under state law—article XII, section 4 of the Hawaii Constitution—and the Hawaii Supreme Court rendered a judgment on the merits of OHA's claims based on its definitive interpretation of state trust law. "One is hard pressed to imagine an area of law more traditionally a province of state law, than the law of trust," *In re Corestates Trust Fee Litig.*, 39 F.3d 61, 69 (3d Cir. 1994), except perhaps, as is the case here, when the law of trust is embedded in a provision of the state constitution. See *Freeman*, 488 U.S. at 1313 ("Interpretations of state law by a State's highest court are, of course, binding upon this Court."); *Badger v. Hoidale*, 88 F.2d 208, 211 (8th Cir. 1937) ("[T]he interpretation and construction of the

Constitution of a state is peculiarly within the province of the highest court of the state”).

“[C]omity and respect for federalism compel [this Court] to defer to the decisions of state courts on issues of state law” because “the decisions of state courts are definitive pronouncements of the will of the States as sovereigns.” *Bush v. Gore*, 531 U.S. 98, 112 (2000) (per curiam) (Rehnquist, J., concurring). This Court should decline the State’s request to review the Hawaii Supreme Court’s interpretation of state constitutional and common law.

The State claims, however, that this case presents a substantial federal question for resolution by this Court because the Hawaii Supreme Court examined the *Apology Resolution* as part of the factual context for its determination of the content of the State’s fiduciary duties under state law. The lower court’s discussion of the *Apology Resolution* gives rise at best to a “formal” federal issue that is insufficiently substantial to vest this Court with jurisdiction under section 1257. The *Apology Resolution* is only one of the sources that the lower court cited in concluding that the native Hawaiian people have unresolved and unreleased claims to the ceded lands and that a process of reconciliation among the federal and state governments and native Hawaiian people is ongoing. See *OHA*, 177 P. 3d at 900-05, 922-23. The state-law sources for these conclusions are independently sufficient. See *infra* Part II.

This Court’s jurisprudence addressing when a federal question is “substantial” within the meaning of section 1257 is sparse, with *Equitable Life Assurance Society*, *supra* p. 5, providing the only extended discussion. *Amici* submit, however, that this Court should look for guidance to its

interpretation of 28 U.S.C. § 1331,⁵ which grants district courts jurisdiction over civil actions presenting substantial federal questions. In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, this Court concluded that a federal issue is presented only if it “really and substantially involve[es] a dispute or controversy respecting the validity, construction or effect of [federal] law.” 545 U.S. 308, 313 (2005) (internal quotation marks omitted) (alteration in original); see *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 814 (1986) (“[A] suit does not so arise [under federal law] unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of . . . a law, upon the determination of which the result depends.”) (quoting *Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912)). The Court has cautioned that

countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible.

Gully v. First Nat'l Bank, 299 U.S. 109, 118 (1936). Thus, where a federal statute simply “touche[s] on” a legal claim “at a single point,” and otherwise, the “right of the plaintiff to recover [is] left to be determined by the law of the state,” the federal

⁵ Section 1331, which is captioned, “Federal Question,” provides in whole: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2009).

question presented generally is not substantial and the federal courts lack jurisdiction. See *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 216-17 (1934). That is the situation here.

The State seeks to paint the limited and ancillary federal issue related to this case as substantial, but its characterization of the Hawaii Supreme Court's decision does not survive a natural reading of the opinion. The Hawaii Supreme Court made clear that the *Apology Resolution* was not the source of OHA's private cause of action. See *OHA*, 177 P.3d at 904. Instead, OHA pursued and the court recognized a cause of action under the state constitution. *Id.* (Plaintiffs brought "suit under the Hawai'i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust." *Id.* (internal quotation marks omitted)). And the court did not hold that the *Apology Resolution* prevented the State from selling the ceded lands or created native Hawaiians' claims over the ceded lands or imposed fiduciary obligations on the State. See, e.g., *id.* at 902 ("We agree with the OHA plaintiffs that the 'Apology Resolution by itself does not require the State to turn over the [ceded] lands to the [n]ative Hawaiian people[.]'" (alterations in original));⁶ *id.*

⁶ The State repeatedly contends that the Hawaii Supreme Court held that the *Apology Resolution* "clouded" the State's title to the ceded lands. See, e.g., Pet'r's Br. at 2, 20, 24, 25, 27, 33, 38, 47, 48. In so doing, they mischaracterize the Hawaii court's decision. Although OHA may have argued below that the *Apology Resolution* clouded the State's title to the ceded lands in so far as native Hawaiians have some type of claim over the ceded lands, the Hawaii Supreme Court ruled in OHA's favor on a different ground—that the State's sale of the ceded lands would violate its fiduciary duty "to use reasonable skill and care' in managing the public lands trust" in light of native Hawaiian's unrelinquished claims over those lands. *OHA*, 177

(noting that the *Apology Resolution* merely acknowledges that native Hawaiians have unrelinquished claims over the ceded lands); *id.* at 904-05 (describing State's trust obligation under the Hawaii Constitution and related state statutes).

Indeed, the question presented by this case is *not* the question set forth in the petition because the Hawaii Supreme Court did not hold—or even intimate—that the *Apology 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.

Pet. for Cert. at i; see *Hawaii v. Office of Hawaiian Affairs*, No. 07-1372 (U.S. Oct. 1, 2008) (granting certiorari). The lower court's decision about the nature and extent of the State's obligations vis-à-vis the ceded lands were based upon a construction of the Hawaii Constitution and state common law defining the State's fiduciary duties as trustee of the public lands trust. See *OHA*, 177 P.3d at 904-05, 923. The Hawaii Supreme Court did not hold that the *Apology Resolution* was the source of any substantive claims, rights, liabilities, or obligations.

In reality, the Hawaii Supreme Court did not rely on the *Apology Resolution* in its legal analysis. Instead, it relied on the *Apology Resolution* as one of a number of authorities, including state statutes, that

P.3d at 905. The only reference to clouded title in the Hawaii court's opinion is in characterizing the parties' arguments, *see id.* at 899, 912, 914, 919, not in analyzing the merits of OHA's claims or the issuance of the injunction.

supported its factual finding that native Hawaiians have unsettled claims over the ceded lands. In this context, the question whether the *Apology Resolution* supports this factual finding, although federal in nature, cannot be described as substantial. The Hawaii high court stated that the *Apology Resolution* “*acknowledges only* that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims.” *Id.* at 902 (emphasis added). The court looked solely to the *Apology Resolution*’s factual findings—*i.e.*, the whereas clauses—in particular, to Congress’s acknowledgement that the United States had taken the “crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the [n]ative Hawaiian people of Hawaii or their sovereign government,” who “never directly relinquished their claims to their inherent sovereignty . . . over their national lands to the United States.” *Id.* at 901 (quoting the *Apology Resolution*) (first alteration in original). And the Hawaii court concluded that the *Apology Resolution* recognized the factual basis for native Hawaiians’ claims over the ceded lands. *Id.* at 901-02, 922. The Hawaii court’s reliance on the *Apology Resolution* went no further, and it relied on several other sources for this same proposition. See, *e.g.*, *id.* at 903-04 (citing 1997 Haw. Sess. Laws Act 329; 1993 Haw. Sess. Laws Act 359; 1993 Haw. Sess. Laws Act 354; 1993 Haw. Sess. Laws Act 340).

Where, as here, a state court holds that only a state-law claim is made and makes clear that no element of that claim depends solely or significantly on federal law, review of that decision does not present for this Court a *substantial* federal question. See *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S.

156, 164 (1997) (A “federal question exists when *a right or immunity created by the Constitution or law of the United States* is an element, and an essential one, of the plaintiff’s cause of action.” (quoting *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 112 (1936) (emphasis added) (internal citation and alterations omitted))). This Court, accordingly, should dismiss the case for lack of jurisdiction.

II. THE HAWAII SUPREME COURT’S DECISION RESTED ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

In the alternative, this Court lacks jurisdiction because the Hawaii Supreme Court rested its decision upon independent and adequate state-law grounds. “This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). If this Court’s resolution of the federal question presented in a case will not change the outcome because the state court’s judgment rests on state substantive law, this Court lacks jurisdiction to review the federal questions involved. See *id.* (citing *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)).

In this case, the Hawaii Supreme Court’s opinion made clear that its judgment rested on a parallel interpretation of state law that was both independent of the *Apology Resolution* and adequate to support its judgment. See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (This Court lacks jurisdiction where independence and adequacy of state law ground is “clear from the face of the opinion.”). As explained above, the Hawaii court merely looked to the *Apology Resolution*’s factual findings to support its conclusions that native Hawaiians have

unrelinquished claims over the ceded lands and that the federal and state governments contemplate reconciliation with native Hawaiians as to those claims. Critically, however, the Hawaii court also relied on four state statutes that it found *independently* supported these factual findings and conclusions.

Specifically, in addressing the merits of OHA's breach of trust claim, the Hawaii Supreme Court held that "[t]he above interpretation"—that native Hawaiians have unrelinquished claims over the ceded lands and that the government contemplates future reconciliation with native Hawaiians with regard to those claims—"is also supported by related state legislation enacted at around or subsequent to the adoption of the Apology Resolution—specifically, Acts 354, 359, 329, and 340."⁷ *OHA*, 177 P.3d at 903-04 (emphasis added). The court expended nearly 900 words discussing the relevance of Hawaii Session Laws Acts 354, 359, 329, and 340 to this interpretation, without citation to federal law. Following this extensive discussion, the Hawaii court concluded that both "the Apology Resolution and the aforementioned related state legislation clearly contemplate that native Hawaiians (1) 'never directly relinquished their claims to . . . their national lands to the United States,' and (2) 'are determined to preserve, develop and transmit to future generations their ancestral territory.'" *Id.* at 905 (emphasis added) (alterations in original).

⁷ See 1997 Haw. Sess. Laws Act 329 pages 956-60; 1993 Haw Sess. Laws Act 359 pages 1009-13; 1993 Haw Sess. Laws Act 354 pages 999-1000; 1993 Haw. Sess. Laws Act 340, pages 803-06.

Later in the opinion, the Hawaii Supreme Court reaffirmed the independence and adequacy of the state law grounds for its judgment in discussing whether OHA had prevailed on the merits, one prong of the standard for the issuance of a permanent injunction under Hawaii state law. After discussing the *Apology Resolution*, the court stated: “*More importantly, the state legislature itself* has announced that future reconciliation between the State and native Hawaiians will occur” and again spent considerable time—approximately 500 words—identifying language from relevant state statutes that supported this conclusion. *Id.* at 923 (emphasis added). In the end, the Hawaii court characterized its holding on the merits of OHA’s breach of trust claim as follows:

In sum, *all of the aforementioned pronouncements* [including the *Apology Resolution* and Hawaii Sessions Laws Acts 359 and 329] indicate that the issue of native Hawaiian title to the ceded lands will be addressed through the political process. In this case, Congress, the *Hawai‘i state legislature*, the parties, and the trial court *all* recognize (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future reconciliation between the state and the native Hawaiian people is contemplated, and, (4) once any ceded lands are alienated from the public lands trust, they will be gone forever. . . . [T]he *aforementioned pronouncements* as they relate and impact the plaintiffs’ claim for injunctive relief *clearly support the plaintiffs’ position* that the State has a fiduciary duty as trustee to protect the ceded

lands pending a resolution of native Hawaiian claims.

Id. (emphases added).

The Hawaii Supreme Court thus parsed the language of state statutes and found that these state laws, like the *Apology Resolution*, acknowledge native Hawaiian's unrelinquished claims over the ceded lands and the federal and state governments' commitment to reconciliation with native Hawaiians with regard to those claims. The court, on several occasions, made clear that the state-law support for its factual conclusions was independent of the *Apology Resolution* and adequate to support its ruling on the breach of trust claims and its issuance of the injunction. As noted, the Hawaii court expressly concluded that: (1) its holding was "also supported by related state legislation," *id.* at 903, (2) both "the *Apology Resolution* and related state legislation" under-girded its ruling, *id.* at 905, 912, 916, 918, 922, 926, 927, and (3) "all of the aforementioned pronouncements," including the *Apology Resolution* and state statutes, acknowledged native Hawaiians' claims over the ceded lands, *id.* at 923 (emphasis added).

This language constitutes a "plain statement" that the state court rested its decision on state law grounds parallel to, but independent of, the *Apology Resolution*. See, e.g., *Long*, 463 U.S. at 1042 (Where decision appears to rest on interwoven federal and state grounds, court lacks jurisdiction if it contains a "plain statement" that [it] rests upon adequate and independent state grounds."). The State's contrary argument misunderstands the relevant standard. See Pet'rs' Br. at 21 & n.11. This Court has found language far less compelling than that cited above to satisfy *Long*'s "plain statement" test. See, e.g.,

Sochor v. Florida, 504 U.S. 527, 534 (1992) (State court's statement that “[n]one of the complained-of jury instructions were objected to at trial, and, thus, they are not preserved for appeal . . . indicates with requisite clarity that the rejection of Sochor's claim was based on the alternative state ground that the claim was 'not preserved for appeal.'” (quoting *Vaught v. State*, 410 So. 2d 147 (Fla. 1982)). The opinion makes its state-law foundation sufficiently plain.

The State makes two arguments in response. *First*, it cites the following language in the Hawaii court's opinion:

“[I]t 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'rs' Br. at 22 (quoting *OHA*, 177 P.3d at 913) (emphasis omitted). The State claims that this language reveals that the *Apology Resolution* created the factual basis for OHA's claims. And the State argues that OHA cannot avoid this problem by citing the four state statutes that the Hawaii court relied on because three of the four were enacted before the *Apology Resolution*. Thus the State concludes, “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 [OHA's] cause of action did not even 'ar[i]se' until the later-enacted *Apology Resolution* was signed.” *Id.* (second alteration in original) (emphasis added).

The State’s argument ignores the context of the cited statement and the relevant legal analysis in the pertinent sections of the Hawaii court’s opinion, described above. Equally to the point, the Hawaii Supreme Court highlighted that the state statutes at issue were “enacted at around or subsequent to the adoption of the Apology Resolution.” *OHA*, 177 P.3d at 903. The plain import of the court’s analysis is that the state legislature enacted legislation to the same effect as the *Apology Resolution* around the time that Congress enacted the *Apology Resolution*. Thus, the lower court’s recognition that the *Apology Resolution* alerted native Hawaiians to the facts underlying unrelinquished claims to the ceded lands does not detract one whit from its simultaneous recognition that state law independently took the same path.

Second, the State also relies on the Hawaii court’s characterization of OHA’s argument that “[a]t the heart of plaintiffs’ claims . . . is the Apology Resolution,” and that their “claim for injunctive relief is . . . based largely upon the Apology Resolution.” Pet’rs’ Br. at 23 (quoting *OHA*, 177 P.3d at 899, 900) (emphasis omitted) (alterations in original). This argument misses the mark. Initially, the State ignores that OHA also argued before the state court that state law independently supported the state-law breach of trust claim and the issuance of an injunction. See, e.g., J.A. 138a (“The pertinent issues in this appeal are: (1) given the statements in Act 354 (1993), Act 359 (1993) and the *Apology Resolution* (collectively ‘1993 Legislation’) that admitted that Hawaiians have a claim to the ceded lands, would the State breach fiduciary duties as ceded lands trustee by selling ceded lands before that claim is

resolved . . .”). More importantly, the Hawaii Supreme Court characterized the OHA claim as

grounded in the[]view that the “recognition in [the *Apology Resolution and Acts 354 and 359*] of the illegality of the transfer of [the ceded] lands and the ongoing reconciliation and negotiation process dramatically reinforces the State’s fiduciary obligation to protect the corpus of the [p]ublic [l]and [t]rust until an appropriate settlement is reached.”

OHA, 177 P.3d at 921 (alterations in original) (emphasis added). The decision makes clear that the lower court accepted the argument that the claim was based on factual findings in the *Apology Resolution* and, independently, on the identical findings in state statutes.

Because the Hawaii Supreme Court’s decision rests on an independent interpretation of state law that adequately supports issuance of the injunction, this Court lacks jurisdiction to review the judgment.

III. THERE IS NO OTHER BASIS FOR THIS COURT TO ASSERT JURISDICTION OVER OHA’S STATE-LAW CLAIM.

On two grounds, the State argues that this Court can assert jurisdiction even if the Hawaii Supreme Court’s judgment is founded on independent and adequate state law grounds. Pet’rs’ Br. at 25 n.14; Reply Br. in Supp. of Cert. at 6-7. Both lack merit.

First, the State relies on a test articulated in *dictum* in a footnote in this Court’s decision in *Florida v. Meyers*, 466 U.S. 380, 381 n.* (1984)—*dictum* this Court has not once relied upon in the 25 years since that decision issued. Pet’rs’ Br. at 25 n.14; Reply Br. in Supp. of Cert. at 6-7.

In *Meyers*, this Court considered Florida's appeal of a state appellate court decision which had reversed the trial court's denial of a defendant's motion to suppress evidence seized from his vehicle and thus vacated the defendant's conviction. The defendant contested this Court's jurisdiction, claiming that the state appellate court had reversed on two grounds—a failure to suppress evidence, unlawful under federal law, and undue restrictions on cross-examination of the victim, unlawful under state law. The defendant asserted that this Court could not reverse the second holding that independently required vacatur of his conviction.

On review, this Court concluded that it was "highly questionable whether the District Court of Appeal would have reversed the conviction had it not reversed the trial court's ruling on the suppression motion." *Meyers*, 466 U.S. at 381 n.*. Accordingly, this Court found that the state court decision did not rest on the independent and adequate state ground of unlawfully restricted cross-examination. But this Court stated that it would have had jurisdiction to review the case "even if the cross-examination ruling did provide an independent state ground for reversal," *id.*, because the trial court would have been *required* to address the federal suppression issue again if the state court had ordered a new trial on the cross-examination issue. Therefore, this Court's "resolution of that issue w[ould] affect *the proceedings below* regardless of how the District Court of Appeal rule[d] on remand." *Id.* (emphasis added).

If this *dictum* is good law,⁸ it avails the State nothing here. It applies only where this Court's decision of a federal issue would inevitably have an impact in proceedings below in the same case—proceedings that result from a remand based on an appellate reversal on an independent and adequate state ground. The State is not in this position. Because the Hawaii court also determined that state law recognized that native Hawaiians have unrelinquished claims over the ceded lands, there will not be any subsequent proceedings in which this Court's analysis of the *Apology Resolution* could have an effect.

The State nonetheless relies on *Meyers*, claiming that, “[i]f affirmed, the state court's interpretation of the *Apology Resolution* would . . . obstruct state-level efforts to restore the State's land-transfer authority.”

⁸ *Amici* have discovered no case in which this Court has held that it has jurisdiction to review a state-court judgment notwithstanding an independent and adequate state ground for the state court decision. *Meyers* has been cited by this Court on only nine occasions since it was decided and never once for this proposition. See *Kansas v. Marsh*, 548 U.S. 163, 168 (2006); *Pennsylvania v. Bruder*, 488 U.S. 9, 13-14 (1988) (per curiam) (Stevens, J., dissenting); *Colorado v. Connelly*, 474 U.S. 1050 (1986) (mem. of Brennan, J.); *New Jersey v. T.L.O.*, 469 U.S. 325, 375 n.12 (1985) (Stevens, J., dissenting); *United States v. Benchimol*, 471 U.S. 453, 458 (1985) (per curiam) (Brennan, J., dissenting); *United States v. Johns*, 469 U.S. 478, 488 (1985); *United States v. Sharpe*, 470 U.S. 675, 721 (1985) (Stevens, J., dissenting); *James v. Arizona*, 469 U.S. 990, 1000 (1984) (Brennan, J., dissenting); *Patton v. Yount*, 467 U.S. 1025, 1053 n.8 (1984) (Stevens, J., dissenting). As Justice Stevens, dissenting in *Meyers*, pointed out, the *Meyers dictum* represents a departure from the Court's jurisprudence on the independent and adequate state ground doctrine without so much as a citation to *Michigan v. Long*. *Meyers*, 466 U.S. at 384 n.1 (Stevens, J., dissenting).

Pet’rs’ Br. at 25 n.14 (emphasis added). The State cites nothing in support of this proposition; nor could it find support. Nothing in the decision suggests that federal law would forbid the State to amend its Constitution, alter its laws, or otherwise use the political process to address the State’s land-transfer authority. Moreover, any effect of the decision on “state-level efforts”—i.e., the political process in the Hawaii State Legislature—would not create an Article III “case or controversy.” See *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 102 (1998) (“We have always taken [the case-or-controversy requirement] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.”); see also *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 382 (1980). *Meyers* does not salvage jurisdiction for the State here.

Second, the State now argues that “this Court has jurisdiction . . . because . . . the decision on review . . . affirmatively conflicts with the Newlands Resolution and related federal enactments in violation of the Supremacy Clause.” Pet’rs’ Br. at 24. This is essentially an argument that the Hawaii court should have held *sua sponte* that the state-law cause of action was preempted by federal law. This argument fails for several independent reasons.

Preliminarily, the question whether the Hawaii court’s construction of state law conflicts with federal law was not raised in the petition for certiorari. It is the long-standing rule of this Court that “[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court.” Sup. Ct. R. 14(a); see also *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992) (“[O]ur Rule 24.1(a) states that a brief on the merits should not ‘raise additional questions or

change the substance of the questions already presented’ in the petition.” (quoting *Yee v. Escondidito*, 503 U.S. 519, 592 (1992))).

In the petition for certiorari, the State argued only that the Hawaii Supreme Court’s interpretation of the *Apology Resolution* erroneously barred the State from conveying title to the ceded lands, contending that (1) the court’s interpretation of the *Apology Resolution* conflicted with the *Resolution*’s express terms and (2) the Hawaii court’s construction of the *Apology Resolution* was erroneous and would give rise to federalism concerns. See Pet. for Cert. at 11-15. The State did not argue that the decision conflicted with other federal laws, most notably the Newlands Resolution and the Organic Act, as it now contends. See Pet’rs’ Br. at 24-25, 31-46. Neither of these federal provisions was even cited. This Court granted certiorari to address only “whether [the *Apology Resolution*] strips Hawaii of its sovereign authority to sell, exchange, or transfer [the ceded lands] . . . unless and until it reaches a political settlement with native Hawaiians about the status of that land.” Pet. for Cert. at i.⁹

This Court should adhere to its usual practice and decline to address a question not fairly embraced by the question presented.¹⁰ Indeed, the new issue in the “petitioner’s brief . . . [is] improperly presented” because the issues in this appeal “are fixed by the petition.” *Irvine v. California*, 347 U.S. 128, 129-30 (1954) (plurality opinion). “[I]t is neither fair to the

⁹ As discussed *supra* p. 14, the State’s characterization of the federal question presented here misunderstands the decision of the Hawaii Supreme Court.

¹⁰ The State also did not raise this question in the reply in support of the petition.

litigants nor good practice for this Court to reach out to decide questions not raised by the certiorari petition.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 159 (1999) (Stevens, J., concurring in part and dissenting in part).

If more reason were needed to decline to address this claim, *Amici* note that the State did not raise this question before the Hawaii court. “Ordinarily this Court does not decide questions not raised or resolved in the lower court.” *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam); see also *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998).

The State did not make this waived argument of federal conflict until this Court’s jurisdiction over the matter was disputed in OHA’s brief in opposition to the State’s petition, and it should be rejected for this reason alone.

CONCLUSION

For the reasons set forth in OHA's brief and above, the Court should dismiss this case for lack of jurisdiction.

Respectfully submitted,

SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY
SUPREME COURT
PRACTICUM
357 East Chicago Ave.
Chicago, IL 60611
(312) 503-0063

VIRGINIA A. SEITZ*
ISAAC ADAMS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

January 29, 2009

* Counsel of Record