

No. 07-1372

In The Supreme Court of the United States

STATE OF HAWAII, ET AL., PETITIONERS,

v.

OFFICE OF HAWAIIAN AFFAIRS, ET AL.

*ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII*

**AMICUS CURIAE BRIEF OF
ABIGAIL KINOIKI KEKAULIKE
KAWANANAKOA
IN SUPPORT OF RESPONDENTS**

GEORGE W. VAN BUREN
Counsel of Record
VAN BUREN CAMPBELL & SHIMIZU
745 Fort Street, Suite 1950
Honolulu, Hawaii 96813
(808) 599-3800

*Attorneys for Amicus Curiae
Abigail Kinoiki Kekaulike Kawanananakoa*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT	7
CONCLUSION.....	17

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i</i> , 177 P.3d 884 (2008)	4
<i>Hawaii Housing Authority v. Midkiff</i> , 467 U.S. 229, 232, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984)	7
<i>State by Kobayashi v. Zimring</i> , 566 P.2d 725 (1977)	9
<i>In the Matter of the Estate of His Majesty Kamehameha IV</i> , 2 Haw. 715 (1864)	10
Constitutional and Statutory Provisions	
Joint Resolution to Acknowledge the 100 th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993).....	6, 16, 17
1993 Haw. Sess. L. Act	
340	14
354	14
359	14
1997 Haw. Sess. L. Act	
329	14

TABLE OF AUTHORITIES-CONTINUED

	<u>Page</u>
Legislative Materials	
“An Act to Relieve the Royal Domain from Encumbrances and to Render the Same Inalienable” (1865)	10
129 Cong. Rec. 10,098 (Apr. 27, 1983).....	2, 12
Other Authorities	
Bevans, Charles, <i>Department of State, Treaties and Other International Agreements of the United States of America 1776-1949</i> , Vol. 8 (1968)	11
Kamakau, S.M., <i>Ruling Chiefs</i> , (1992 rev. ed.).....	5
Queen Liliuokalani, “Declaration of Queen Liliuokalani”, (Jan. 17, 1893)	12
Queen Liliuokalani, “Official Protest to the Treaty of Annexation” (Jun. 17, 1897)	15
UH News “University of Hawaii Board of Regents approves honorary degree award to Princess Abigail Kinoiki Kekaulike Kawanananakoa” (Dec. 18, 2008), available at http://www.hawaii.edu/ cgi-bin/uhnews?20081218151858 (last visited Jan. 15, 2009)	2

TABLE OF AUTHORITIES-CONTINUED

	<u>Page</u>
“Native Hawaiians Study Commission, Report on Culture, Needs and Concerns of Native Hawaiians,” (Report issued pursuant to Pub. L. 96-565, Title III, 1983).....	7
Kuykendall, Ralph S., <i>Hawaii: A History from Polynesian Kingdom to American Commonwealth</i> (1948)	8
Kuykendall, Ralph S., Vol 1 <i>The Hawaiian Kingdom, 1778-1854 Foundation and Transformation</i> (1968).....	11

IDENTITY AND INTEREST OF AMICUS CURIAE

The Amicus Curiae is Princess Abigail Kinoiki Kekaulike Kawanananakoa. She submits this amicus curiae brief in support of Respondents, Office of Hawaiian Affairs, et al.¹ Princess Abigail Kinoiki Kekaulike Kawanananakoa is the great grand niece of King David Kalakaua and Queen Kapiolani and the granddaughter of Prince David Laamea Kahalepouli Piikoi Kawanananakoa and Princess Abigail Wahiikaahuula Campbell Kawanananakoa. Her mother, Lydia Kamakaeha Liliuokalani Kawanananakoa, in keeping with ancient adoption practices, allowed the infant princess to be raised from an early age by her grandmother, Princess Abigail, as a *punahele* child in the traditions of Hawaiian nobility. This unique upbringing and closeness to the royal legacy of the Hawaiian Monarchy has enriched Princess Abigail Kinoiki Kekaulike Kawanananakoa's cultural perspectives that have guided her in her chiefly role, as alii, royal, as evidenced by her tireless commitment towards the

¹ Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the court. Counsels of Record were notified more than ten days in advance that this brief would be filed.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or her counsel made a monetary contribution to its preparation or submission.

preservation of authentic and traditional Hawaiian culture.²

Princess Abigail Kinoiki Kekaulike Kawanakoa is the highest-ranking alii alive today. She is the eldest granddaughter of Prince David Laamea Kahalepouli Kawanakoa, who was designated heir in succession to the Crown of the Hawaiian Kingdom by both King David Kalakaua and Queen Liliuokalani. Princess Abigail Kinoiki Kekaulike Kawanakoa's royal lineage reinforces her genealogical ties to the ruling chiefs of every island - Hawaii, Maui, Molokai, Lanai, Kahoolawe, Oahu, Kauai and Niihau. Senator Daniel K. Inouye noted that Princess Abigail Kinoiki Kekaulike Kawanakoa is "a member of the family with the closest blood ties to the Kalakaua dynasty."³

The alii today retain a deep commitment to the welfare of the Hawaiian people. The moral obligation of the alii to the people has always been a matter of the highest priority.

² University of Hawaii President David McClain noted: "Princess Kawanakoa's philanthropic work has been essential to the preservation of Hawaiian culture as a heritage for future generations. Through her dedication and generosity, she has helped to sustain authentic Hawaiian history, music, hula, literature and language", available at <http://www.hawaii.edu/cgi-bin/uhnews?20081218151858> (last visited Jan. 15, 2009).

³ Senator Daniel Inouye, "Anniversary Of Coronation Of King Kalakaua," 129 Congressional Record, 10,098 (April 27, 1983).

The history of service to the people through philanthropy of the alii is a proud heritage of the Hawaiian people. The alii trusts were created to meet the health, educational and other social and spiritual needs of the people.⁴ Examples of philanthropic work on behalf of the Hawaiian people established during the monarchy abound in contemporary Hawaii. The alii trusts include The Queens Hospital and St. Andrews Priory School for Girls established by King Kamehameha IV and Queen Emma. Kamehameha Schools was established by the will of Princess Bernice Pauahi Bishop. Hoooululahui and the Kapiolani Medical Center for Women and Children (originally known as the Maternity Home) were established by King Kalakaua and Queen Kapiolani. Queen Liliuokalani established a trust to provide for the care of orphans and other destitute children in Hawaii. The Liliuokalani Educational Society was created to provide for the educational training of young girls. King William Charles Lunalilo created the Lunalilo Home, a charitable trust for the benefit of the poor, the aged and the infirm people of Hawaiian ancestry.

Princess Abigail Kinoiki Kekaulike Kawananakoa would like to make clear at the outset that as the highest ranking living alii, it is her solemn obligation to protect the land illegally taken. She will continue to be an advocate for the interests of the Hawaiian people and to ensure that the State

⁴ Princess Abigail Kinoiki Kekaulike Kawananakoa's philanthropic work is conducted through the Kawananakoa Foundation, Na Lei Alii Kawananakoa, and other eleemosynary institutions.

and Federal governments of the United States endeavor to fulfill its moral and legal obligations to native Hawaiians.

SUMMARY OF ARGUMENT

The Hawaii Supreme Court properly issued an injunction prohibiting the sale or transfer of ceded lands from the public lands trust until claims of native Hawaiians to the ceded lands have been resolved. This is a complex matter that must be understood in terms of Hawaii's unique history as noted by the court below.⁵ The State of Hawaii has trust obligations to native Hawaiians that are in the process of being reconciled by the non-judicial branches of government. The trust and moral obligations of the State of Hawaii arise from Hawaii's complex history.

Part of that history involves the manner in which the system of fee simple title to land originated in Hawaii, and later how the land was illegally taken. Prior to contact with Western powers:

The land, under ancient custom, had been held by the ruling chief alone, and

⁵ “The issues presented in this case have their genesis in the historical events that led to the overthrow of the Kingdom of Hawai‘i, the surrender of 1.8 million acres of crown, government, and public lands to the United States, the admission of Hawai‘i as a state of the Union, and the creation of OHA and the public lands trust.” *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai‘i*, 177 P.3d 884, 891 (2008).

parceled out by him to his followers, subject to return to the ruling chief at the death of the follower, or treason on his part toward his chief. At the death or subjugation of the ruling chief the land reverted to his heir or conqueror for redistribution. Theoretically the ruling chief had the ultimate claim to all the land.⁶

In 1848, after Western contact, a division known as the Mahele divided the lands roughly equally between the king and the chiefs. The king then divided his lands into the crown lands and the government lands.

Ultimately it became necessary in the face of Western pressures to preserve the sovereign's Crown land by making it inalienable. In 1865 an Act of the legislature of the Kingdom of Hawaii codified the sovereign's obligation to preserve the land for the people by making it explicitly inalienable.

In 1893 the Kingdom of Hawaii was overthrown with the assistance of citizens and agents of the United States. To avoid bloodshed, Queen Liliuokalani yielded her authority trusting in the United States to right the wrong.

It took one hundred years, but in 1993 the United States Congress formally acknowledged that

⁶ S.M. Kamakau, *Ruling Chiefs*, (1992 rev. ed.) at 403.

the overthrow constituted an illegal act.⁷ The Apology Resolution endorses a process of reconciliation between native Hawaiians the State of Hawaii and the United States.

The Apology Resolution raises the issue of what exactly was “ceded” to the United States and later transferred by the United States to the State of Hawaii. However, in the case of the Crown lands the answer of what was ceded to and transferred from the United States was no title at all. Even Queen Liliuokalani could not have transferred the Crown lands because they were inalienable. The reconciliation process contemplated by the Apology Resolution is necessary in part to resolve the present state of the title to the Crown, and other lands in Hawaii.

There are two distinct trust issues in this case. The first involves the injunction issued below in order to prevent irrevocable consequences from breaches of trust by the State of Hawaii as trustee of the public lands trust. The second trust issue should be of greater concern for this Court since it arises from the United States acquiescing to the “ceding” of land to it through the Newlands Resolution in 1898. The land “ceded” by the Republic of Hawaii to the United States was the very same inalienable land that had been expropriated from Queen Liliuokalani’s authority which she had yielded to the

⁷ The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1993 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (“Apology Resolution”).

United States trusting that it would be restored. At the time of statehood the United States transferred this illegally acquired inalienable land to the newly formed State of Hawaii.

The process of reconciliation presents political questions that should be left to the Hawaiian people and the political branches. The injunction imposed by the Hawaii Supreme Court avoids irreparable harm to native Hawaiians while providing the opportunity for reconciliation to take place.

ARGUMENT

THE CROWN LANDS COULD NOT BE CEDED

In the pre-contact period, the Hawaiian people were governed by a great chief, the “Alii Nui” or “Moi” and his chiefs and chiefesses, the “alii”. Prior to unification of the kingdom under Kamehameha I the system was island based, and more fluid than the unified constitutional monarchy that ultimately evolved. Hawaiian society was marked by the absence of private ownership of the land, or “aina”. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 232, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). Communal use of land existed from ancient times, survived the period of Western contact commencing in 1778, and continued until 1848. See, 1 Native Hawaiians Study Commission, Report on Culture, Needs and Concerns of Native Hawaiians, 253 (Report issued pursuant to Pub. L. 96-565, Title III, 1983); also see, Ralph S. Kuykendall, A. Grove Day,

Hawaii: *A History From Polynesian Kingdom to American Commonwealth*, 8 (1948). Communal ownership meant there was no need for a word for private property in the Hawaiian language, and none existed. See, Joint Appendix, 54a.

The land system in the Kingdom was never a feudal system but was based on reciprocal rights and obligations. For example, a commoner was always free to move to another ahupuaa – or traditional pie-piece-shaped division of land stretching from the mountains to the ocean and providing for almost every need of day-to-day subsistence – if the commoner was not treated fairly. The land was inalienable and, in western vernacular, held in trust. The alii acted as benefactor and protector – a role that has continued to this day.

The communal use of land was recognized in the Hawaiian Constitution of 1840 which stated:

The origin of the present government, and system of polity, is as follows: 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 common, of whom Kamehameha I was the head, and had the management of the landed property.

The origin of the Hawaiian people's communal right to the land has been noted by the Hawaii

Supreme Court: “It was long ago acknowledged that the people of Hawaii are the original owners of all Hawaiian land.” *State by Kobayashi v. Zimring*, 566 P.2d 725, 729 (1977).

Over time the Kingdom of Hawaii adapted to the pressures of Western contact by developing a constitutional monarchy and a system of recorded land title. However, with respect to the sovereign’s land, prominent features of the pre-contact period were retained including the obligation to preserve the land for the people as well as the people’s traditional rights to the land.

The Mahele (or division) was the process whereby Kamehameha III, divided the kingdom’s land. The modern land system of recordable fee simple title was a direct consequence of the Mahele. The *Zimring* Court also commented on the impetus for the Mahele:

Responding to pressure exerted by foreign residents who sought fee title to land, and goaded by the recognition that the traditional system could not long endure, King Kamehameha III undertook a reformation of the traditional system of land tenure by instituting a regime of private title in the 1840’s. In adopting a system under which individuals could hold title to land, the public domain, which theretofore had been all-encompassing, necessarily was diminished. *Id.*

Following the Mahele, lands granted to the chiefs and the makaainana were capable of being transferred in fee simple from one individual to another. The Crown and Government lands were retained for the fulfillment of the royal obligations to the people in perpetuity. All of the land remained encumbered by the rights of the makaainana.

In 1864 the Supreme Court of the Kingdom of Hawaii made clear in *In the Matter of the Estate of His Majesty Kamehameha IV*, 2 Haw. 715 (1864) that the King's Crown land was not private property capable of being passed by will to a third party, but must pass to his successor. Following this decision the legislature of the Kingdom of Hawaii confirmed that the sovereign's land was indeed inalienable.

In 1865 the legislature of the Kingdom of Hawaii passed "An Act to Relieve the Royal Doman from Encumbrances and to Render the Same Inalienable". From 1865 until 1893 this Act assured that the land base of the monarchy would not be diminished. Accordingly, Queen Liliuokalani could not diminish the land base regardless of the provocation.

On January 20, 1891 Queen Liliuokalani became Queen of the Kingdom of Hawaii succeeding her brother, the late King Kalakaua. She therefore became vested with the monarch's interest in and to all the rents, profits and emoluments derived from the Crown Lands after deducting the necessary and proper expenses of managing the same. On January 17, 1893, the Queen was deposed by a small group of

self interested interlopers with the assistance of citizens and agents of the United States. This action violated the laws of the Kingdom, the basic precepts of international law, and the treaty obligations between the Kingdom and the United States.

Moreover, at the time of the overthrow the Kingdom of Hawaii and the United States enjoyed normal diplomatic relations. “Of the Great powers of the world, the United States was the first with which Hawaii was able to make a satisfactory treaty.” R.S. Kuykendall, *The Hawaiian Kingdom* at 374.⁸ During the treaty negotiations, Secretary of State Buchanan was concerned that the posturing of the United States might become an obstacle to consummating the treaty: “They will consider that this would trench too much upon *their rights as an independent nation.*” *Id.* at 376 (Emphasis supplied). The minutes of a conversation involving Secretary Buchanan concerning the relationship of the Kingdom to the United States reveals his view that “Mr. B reiterated the assertion in the fullest manner, that the U.S. Gov’t had recognized the Sovereignty of Sand. Is. and should treat her upon the footing of a free & independent nation. ... He explained somewhat at length his views on the subject of a treaty, wh. were just & friendly to the

⁸ Although the first formal treaty was signed in 1849 there were prior arrangements with the United States dating from 1826. 8 *Department of State, Treaties and Other International Agreements of the United States of America 1776-1949*, p. 861 (C. Bevans comp. 1968).

independence & growth of the Hawn. Islands.” *Id.* at 378.⁹

Forty-seven years after entering into a treaty with Hawaii, that independent nation --- as a result of an illegal overthrow --- ceased to exist. This marked the first, and only time that the United States engaged in a regime change with a friendly power. The Queen under duress, yielded to the United States. On January 17, 1893 Queen Liliuokalani signed the following under protest:

I, Liliuokalani, by the grace of God and under the constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional government of the Hawaiian Kingdom by certain persons claiming to have established a provisional government of and for this Kingdom.

That I yield to the superior force of the United States of America, whose minister plenipotentiary, his excellency John L. Stevens, has caused United

⁹ Upon the occasion of the celebration marking the coronation of King Kalakaua in 1883 Princess Abigail Kinoiki Kekaulike Kawanakoa echoed the spirit of the Hawaiian people of the time by noting, “The people who gathered a century ago brought with them hope for the survival of their country in a troubled world. They wished for a place of respect in that world.” 129 *Congressional Record*, 10,098 (Apr. 27, 1983). The Hawaiian peoples hope for survival of their land is no less felt in 2009 than it was in 1883.

States troops to be landed at Honolulu and declared that he would support the provisional government.

Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representative and reinstate me and the authority which I claim as the constitutional sovereign of the Hawaiian Islands.

Following the overthrow in 1893, the alii, foreigners, and the commoners who had acquired their land as a consequence of the Mahele all retained their land. The conspirators who overthrew Queen Liliuokalani likewise retained their land. The only lands lost in the overthrow were those lands controlled by Queen Liliuokalani for the benefit of the Hawaiian people in perpetuity.

In short, Queen Liliuokalani yielded to the United States Government, not the interlopers, in order to avoid bloodshed and with the fullest expectation that this great and good land would undo the wrong that was done.

Even assuming, *arguendo*, that any valid transfer occurred, the Queen could not transfer the Crown lands because the Crown lands were inalienable by law. It is axiomatic that one can only

transfer to a transferee that which belongs to the transferor. Accordingly, any purported transfer could, *at most*, have only transferred that which was alienable.

THE INJUNCTION WAS PROPERLY ISSUED AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DISMISSED

The Hawaii Supreme Court was absolutely correct in granting an injunction preventing the transfer of the ceded lands until the claims of native Hawaiians can be resolved. This process of reconciliation has already and finally begun. The State of Hawaii has begun to address these grievances with legislation in 1993 (Acts 340, 354, and 359) and with legislation in 1997 (Act 329).

The lifting of the injunction will not only unreasonably interfere with the reconciliation process, but will result – again – in the loss of land. Without the land there can be no reconciliation. Beginning with the Mahele the land has been lost to foreigners. The people of Hawaii in 1865 had the foresight to render the Crown lands inalienable because not only was the land for the people but because there was the realization that the loss of the land – regardless of whether paid for – would undermine the foundation of what it means to be Hawaiian. To the Hawaiians, land is not fungible but is sacred providing both physical and spiritual sustenance.

Queen Liliuokalani yielded to avoid bloodshed and only yielded to this great country until it could undo the actions of 1893. It would be terribly ironic for this Honorable Court to interfere with the process that may - if not undo the overthrow in 1893- at least lead to a reconciliation of claims so long avoided. As Queen Liliuokalani stated on June 17, 1897 in her Official Protest to the Treaty of Annexation:

Therefore I, Liliuokalani of Hawaii, do hereby call upon the President of that nation, to whom alone I yielded my property and my authority, to withdraw said treaty, (ceding said Islands) from further consideration. I ask the honorable Senate of the United States to decline to ratify said treaty, and I implore the people of this great and good nation, from whom my ancestors learned the Christian religion, to sustain their representatives in such acts of justice and equity as may be in accord with the principles of their fathers, and to the Almighty Ruler of the universe, to him who judgeth righteously, I commit my cause.¹⁰

¹⁰ In this instance, Queen Liliuokalani's plea was answered and annexation of Hawaii by treaty failed in the Senate. Remarkably this was the second time the Senate rejected annexation by a treaty of cession. Finally giving way to expediency, Congress "annexed" Hawaii by a simple joint resolution, not a treaty between sovereign states.

THE TRUST THAT QUEEN LILIUOKALANI PLACED IN THE UNITED STATES IN 1893 IS NOW RECOGNIZED THROUGH THE APOLOGY RESOLUTION. THIS COURT SHOULD TAKE NO ACTION THAT WOULD JEOPARDIZE THE RECONCILIATION PROCESS.

The case before this Court potentially places native Hawaiians on the verge of a tragic irony. In 1893 Queen Liliuokalani placed her Kingdom in the care of the United States. In 1993 the United States recognized that the overthrow constituted an illegal act and has encouraged reconciliation as well as the resolution of the claims of native Hawaiians to the ceded lands. If this Court were to find that the State of Hawaii has perfect title to the land transferred to it by the United States the process of reconciliation will be over before it has begun. The irony of finding perfect title in the wake of an illegal act when the United States came into possession of land it knew, in part, to be inalienable, while the Queen was at gunpoint, would be the saddest end to one of the saddest chapters in American history.

Such an outcome would be doubly ironic because the Hawaii Supreme Court has found that the State of Hawaii as trustee of the ceded lands has trust obligations under state law to protect the corpus of the trust given the advent of the Apology Resolution. Why would this Court wade into an utterly unique political question, especially one that arises from an admittedly illegal act by the United States itself?

This Court should take no action which has the practical effect of terminating the process of reconciliation set in motion by the Congress.

CONCLUSION

The judgment of the Hawaii Supreme Court should be affirmed so that the reconciliation process dictated by the Apology Resolution may proceed under the direction of the political branches. In the alternative, the writ of certiorari should be dismissed.

Respectfully submitted,

GEORGE W. VAN BUREN
Counsel of Record
VAN BUREN CAMPBELL &
SHIMIZU
745 Fort Street, Suite 1950
Honolulu, Hawaii 96813
Telephone: (808) 599-3800

January 2009