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 PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

REPLY BRIEF FOR PETITIONERS

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Respondents do not even dispute that the Hawaii Supreme Court was *wrong on the merits* in construing the federal Apology Resolution to strip the State of essential attributes of sovereignty over almost all state-owned lands. Respondents offer no defense of that construction because it is indefensible. Respondents instead suggest, in effect, that precisely *because* the Apology Resolution cannot support the result below, the state court must have relied on state law instead. But the court's interpretation of the Apology Resolution was *both* indefensible *and* the primary basis for its judgment. The result is an unprecedented affront to state sovereignty, committed in the name of federal law, and only this Court can undo the damage.

I. THIS COURT HAS JURISDICTION

A. The Decision Below Easily Satisfies The *Michigan* v. *Long* Presumption

This Court has jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983). This is a classic case of that type.

Respondents claim (Opp. 11) that the decision below was primarily based not on the Apology Resolution, but on preexisting state trust law and four state enactments—none of which even purports to curb the State's authority to dispose of the ceded lands.[1] That argument is baseless. At three separate points in its opinion, the Hawaii Supreme Court emphasized that "it was not until the [federal] Apology Resolution was signed into law on November 23, 1993 that the plain-

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[1] The only state statute cited by respondents that even arguably requires the State to hold lands for a future "native Hawaiian entity," 1993 Haw. Sess. L. Act 340, is limited to land on a former military target range on Kaho'olawe island. Pet. App. 38a-39a. That land, which the United States conveyed 35 years after the Admission Act, constitutes only 2% of the land owned by the State, whereas the lands at issue in this case constitute nearly *all* State-owned lands. *See* Pet. 3 n.1. The other cited state statutes relate to this case only in the exceedingly attenuated sense that they criticize the overthrow of the Hawaiian monarchy, voice general support for native Hawaiians, and recite the undisputed fact that "[m]any native Hawaiians *believe*" that they have a legal claim either to the ceded lands or to "monetary reparations." Pet. 35a-38a (quoting 1993 Haw. Sess. L. Act 354, § 1 (some emphasis omitted)).

tiffs' claim regarding the State's explicit fiduciary duty to preserve the corpus of the public lands trust arose. As such, it was *not until that time that the plaintiffs' lawsuit could have been grounded upon such a basis.*" Pet. App. 62a-63a (emphasis added); *accord id.* at 58a-59a, 99a.

This thrice-repeated holding alone forecloses respondents' jurisdictional claim. As respondents observe, the Apology Resolution "was enacted *after* three of the four Hawaii laws at issue in the case" (Opp. 2 (emphasis added)) and after the development of common-law trust principles. Obviously, if the Hawaii Supreme Court had deemed these state-law grounds independent of the Apology Resolution and adequate to support the judgment, it would not have concluded that respondents' trust-law theory did not even "ar[i]se" until the later-enacted Apology Resolution was signed.[2]

These passages likewise refute respondents' perplexing suggestion that "[h]ad there never been a federal Apology Resolution, the Hawaii court could and would have reached the very same result and imposed the same remedy." Opp. 10. That is the opposite of what the court actually said. Perhaps respondents mean only that the Hawaii Supreme Court was so re-

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[2] The one state statute enacted after the Apology Resolution, Act 329, did not purport to limit the State's disposition of the ceded lands; it merely sought to clarify OHA's share of ceded-land revenues and endorsed continued "momentum" toward reconciliation with Native Hawaiians. 1997 Haw. Sess. L. Act 329, § 1. The Hawaii Supreme Court did not suggest that Act 329 had any special significance among the other state-law provisions. Instead, it repeatedly lumped them all together in the phrase "the Apology Resolution and ... *related state legislation.*" *E.g.*, Pet. App. 41a (emphasis added).

sult-oriented that, as a matter of *Realpolitik*, it would have found some state-law basis for reaching the same conclusion if the Apology Resolution had never been enacted. But that is not the standard. This Court presumes the good faith of state courts, and "[i]f the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes* v. *Wold Engineering, P.C.*, 467 U.S. 150, 152 (1984).

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

Although the court invoked several provisions of state law as secondary bases for its decision, it did not begin to "indicate[] clearly and expressly" that its

judgment was "alternatively based on bona fide separate, adequate and independent [state] grounds." *Long*, 463 U.S. at 1041. Indeed, any such statement would have contradicted the court's own repeated holding that "it was not until the [federal] Apology Resolution was signed into law" that the respondents' claim even arose. Pet. App. 62a-63a; *accord id.* at 58a-59a, 99a.

The two isolated passages on which respondents rely do not support their contrary position. First, respondents erroneously claim (Opp. 14) that the Hawaii Supreme Court was comparing the state statutes *to the Apology Resolution* when it stated: "More importantly, the state legislature itself has announced that future reconciliation between the State and native Hawaiians will occur." Pet. App. 86a. To the contrary, the court was stating that this general legislative aspiration to "future reconciliation" was legally "[m]ore important" than similar aspirations voiced in a report by the Justice and Interior Departments, *not* more important than the Apology Resolution. *See* Pet. App. 85a-86a. The court removed any doubt about the overriding importance of the Apology Resolution itself by stating, in the same section of its opinion, that "a plain reading of the Apology Resolution ... dictates" the answer to the actual legal question presented in this case: whether the State may *sell its lands*. Pet. App. 85a (internal citation omitted).

Respondents also attribute misplaced significance to the court's statement that "we need look no further than the legislative pronouncement contained in Act 329, declaring that a 'lasting reconciliation [is] desired by all people of Hawai'i,' to conclude that the public interest supports granting an injunction." Pet. App. 94a (internal citation omitted). But here respondents are

simply quoting from an inapposite section of the opinion. When considering injunctive relief, the Hawaii Supreme Court—like other courts—looks not only to the legal merits, but also to equitable factors such as the "public interest." The passage respondents quote appears in the court's weighing of equitable considerations, which it addressed only after concluding that, in light of the Apology Resolution, respondents "have prevailed on the merits." Pet. App. 84a-85a. This petition, of course, challenges that underlying merits determination.

B. This Court Would Have Jurisdiction Even If The Decision Below Did Rest Alternatively On Adequate State-Law Grounds

This Court would have jurisdiction here even if the decision below *did* rest on adequate and independent state-law grounds, because the Court's resolution of the federal-law issue would still affect these parties' interests in this ongoing dispute. That conclusion follows from close examination of the underlying source of the "adequate and independent state law ground" doctrine: the case-or-controversy requirement of Article III.

This Court lacks jurisdiction to issue "advisory opinions" that might resolve some abstract point of law but could have no practical impact on the parties, because the parties would then lack the requisite adversity in the outcome, and the case would not present a genuine case or controversy. *See Florida* v. *Meyers*, 466 U.S. 380, 381-382 n.* (1984) (final paragraph). In contrast, if the parties *do* have mutually antagonistic interests in this Court's resolution of a federal-law issue, there can be no case-or-controversy objection to this Court's jurisdiction. *See id.*

In the *typical* case presenting *Michigan* v. *Long* issues, the presence of adequate and independent state-law grounds would keep any resolution of the federal issue from having any practical impact on the parties—and would thereby deprive this Court of jurisdiction. *Long* itself illustrates the concern. There the state court had identified two potential sources of constitutional law—one state, one federal—for vacating a criminal defendant's conviction. *See* 463 U.S. at 1037 & n.3. If the state-law ground had been an adequate and independent basis for that outcome, this Court's reversal on the federal-law ground (in favor of the prosecution) would have made no practical difference to the parties, because the defendant's conviction still would have been vacated.

This case differs from the norm in that *these* parties have antagonistic interests in the resolution of the federal-law issue quite apart from how any state-law issues are resolved. So long as the federal-law holding below remains intact, it will obstruct state-level efforts to restore the State's land-transfer authority, because native Hawaiian interests can claim that this holding trumps any state-law initiatives. *See* Pet. 16-17. Petitioners thus have a concrete interest in securing removal of this federal-law obstacle to state-level political checks. *See* Pet. 16-17. Respondents, in contrast, have a strong competing interest in *sustaining* the Hawaii Supreme Court's conclusion that "the [federal] Apology Resolution ... dictates" the result below (Pet. App. 85a), no matter how state law is amended.

That adversity of interest would support this Court's jurisdiction even if the decision below *had* "indicate[d] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." *Long*, 463 U.S. at 1041; *see Meyers*, 466 U.S.

at 381-382 n.* ("even if [there was] an independent state ground for reversal [of a conviction], we would still be empowered to review" the federal issue because "there is no possibility that our opinion will be merely advisory," given its potential to affect subsequent proceedings). Respondents offer two objections to this point, neither of which has merit. First, they claim that this jurisdictional rationale "would spell the end of the adequate and independent state grounds doctrine" because, they say, resolution of disputes about federal law could always trigger future state-level changes to parallel issues of state law. Opp. 17. That argument misses the mark. Again, in the typical *Long*-type case, this Court's decision could not affect the interests of the parties at bar and could at most trigger state-law changes affecting only hypothetical *future* parties in hypothetical *future* disputes. But this case presents no such danger because this Court's disposition of the federal issue would concretely affect the interests of *these* parties to *this* dispute.

Respondents also object that it may be difficult to "estimate what effect, if any, [a] decision has on state politics," and "the anticipated state political movement may never even materialize." Opp. 17. But that cannot plausibly be a concern here. The remedy ordered below is an injunction against the sale of the ceded lands while "the issue of native Hawaiian title to the ceded lands [is] addressed *through the political process*." Pet. App. 87a-88a (emphasis added). And the whole point of that remedy is to *alter* that political process by (supposedly) "leveling the playing field during the pendency of settlement negotiations and [the] reconciliation process." *Id.* at 95a. It is nonsensical to argue that *reversing* this intentional alteration of the state political process would have no *effect* on the state political process.

II. CERTIORARI IS WARRANTED TO PRECLUDE MISUSE OF FEDERAL LAW TO SUBVERT STATE SOVEREIGNTY

For decades after Hawaii was admitted to the Union, the State had undisputed authority to dispose of the ceded lands as it deemed appropriate so long as it satisfied its "public trust" obligations, which run to *all* the citizens of Hawaii, not (as respondents suggest) just to native Hawaiians. *See* Pet. 4, 12-13; Pet. App. 116a-117a. Both the federal Admission Act and state law contemplate that, as is common in such arrangements, the State will discharge its trust obligations by selling some of the ceded lands and using the proceeds to benefit its citizens.[3] For example, both the Act and the state constitution direct the State to use these lands to promote private "farm and home *ownership* on as widespread a basis as possible." Pet. App. 116a (Admission Act; emphasis added); *accord* Haw. Const. art. XI, § 10 (same language); *see Big Island Small Ranchers Ass'n* v. *State*, 588 P.2d 430, 435 (Haw. 1978) (this language "refers expressly to farm and home ownership and not leaseholds"). And both the Admission Act and state law direct the State to use the "proceeds from the *sale*" of the ceded lands to fund any of five broad categories of public programs. Pet. App. 116a (emphasis added); *accord* Haw. Rev. Stat. § 171-18.[4]

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

[4] Many of those proceeds are used to fund programs for native Hawaiians. *See* Pet. 5. The parties have not addressed, and this case does not present, the constitutional challenges raised by

This dispute arose when the State tried to sell a small parcel to provide affordable housing and thereby promote "home ownership on as widespread a basis as possible." The Hawaii Supreme Court has now prohibited that and all similar initiatives by, in effect, allowing native Hawaiian interests to veto any sale of state lands until the court has satisfied itself that the State has reached some yet-undefined "political resolution" with native Hawaiians. That would be bad enough if the court had relied primarily on state law, but instead it relied on a federal-law determination beyond the state government's power to correct.

Only this Court can undo that affront to the State's sovereignty interests. Respondents untenably claim (Opp. 9) that this petition "invit[es] this Court to meddle in what are quintessentially state-level affairs." The truth is the opposite. This petition asks the Court to empower the state-level political process to operate precisely as it should, "disabused of [a state court's] erroneous view of what [federal law] requires." *Arizona* v. *Evans*, 514 U.S. 1, 8 (1995); *see also* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485, 1510 (1987) (where "a state court [has] intentionally muddled the state and federal questions in order to prevent [the] state's democratic branches from recognizing their power to alter the result," Supreme Court "[d]eference to the state court on that basis parodies true deference to the state").

Even though the affected lands constitute nearly *all* lands owned by the State, respondents further dis-

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amicus Pacific Legal Foundation to governmental programs directed to native Hawaiians.

parage as "limited" the State's interest in selling any of them to promote affordable housing and for other purposes. Opp. 24 (capitalization altered). This is as wrong as it is patronizing. Although, as respondents note (*id.*), the State has refrained from selling many of these lands since respondents filed suit, that is hardly surprising, given that OHA's very claim here is that the State *cannot pass good title to buyers*. Now that the state courts have concluded nearly fourteen years of dilatory litigation on that issue, further delay would thwart not just the programs the State can implement only by selling some of its lands, but the dignitary interests at the heart of state sovereignty.

Finally, there is no merit to respondents' claim that, by reversing, this Court would engage in "mere error-correction of a factbound Hawaii issue." Opp. 19. The lands at issue constitute 1.2 million acres—nearly 30% of Hawaii's total land area. *See* Pet. 3 n.1. The "error" at issue affects all citizens of Hawaii. And that error has not only violated this State's sovereignty, but alarmed many other States as well, which is why 29 States have filed an amicus brief in support of certiorari. These States understand that, following the Hawaii Supreme Court's example, any state judiciary may impair state sovereignty interests not by construing state law, but by making "federal law determination[s] that could not be overturned by [the State's] legislature or electorate" and are thus "virtually beyond the reach of democratic politics." Ruth Bader Ginsburg, *Book Review*, 92 Harv. L. Rev. 340, 343-344 (1978) (reviewing Tribe, *American Constitutional Law* (1978)) (internal quotation marks omitted). This Court should grant cer-

tiorari to reaffirm that state courts may not misuse federal law in that manner.[5]

CONCLUSION

The petition should be granted.

Respectfully submitted.

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[5] Although respondents claim that federal legislation proposed in 2001 might someday affect "[f]ederal law toward native Hawaiians" (Opp. 27 n.11), they identify no reason to think that the legislation, if passed, could somehow affect *this case*.