Supreme Court, U.S.
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No. 11-336

IN THE

Supreme Court of the United States

JOHN M. CORBOY ET AL.,

Petitioners,

v.

DAVID M. LOUIE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Hawaii

REPLY BRIEF FOR PETITIONERS

H. WILLIAM BURGESS
2299C ROUND TOP DRIVE
HONOLULU, HAWAII 96822
(808) 947-3234
hwburgess@hawaii.rr.com

ROY T. ENGLERT, JR.
Counsel of Record
MARK T. STANCIL
SARAH R. RIBSTEIN
ALEX POTAPOV
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, NW
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

As respondents concede, this case involves "the momentous question of whether provisions of Hawai-i's constitution—and the very terms on which it became a State—are invalid under the Fourteenth Amendment." Br. in Opp. 2. That is precisely why this Court should grant review. A provision that has been in the Hawaii constitution for Hawaii's entire statehood should not remain of doubtful constitutionality more than a half-century later. It should be upheld or struck down. Now.

It is also clear—for the reasons stated in the petition and the amicus briefs—that the Hawaii courts gave the wrong answer on the constitutional merits. Respondents try to insulate that blatantly incorrect result from review by arguing that petitioners lack standing. Petitioners rest on the discussion in the petition and amicus briefs for the proposition that standing in this case is not a pure question of state law. See also *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."). As for respondents' effort to defend the denial of standing as a matter of federal law, it fails.

Petitioners seek forward-looking relief as well as a refund of past taxes. They base their claims on the Equal Protection Clause. It is clear that they have standing under federal law, even if refunds are "speculati[ve]" (Br. in Opp. 2), even if "the refund

amount" is uncertain (Br. in Opp. 5), and even if some of their remedial theories involve "conjecture" (Br. in Opp. 6). A discriminated-against person "need not demonstrate that [he or she] has been, or will be, [the winner in a racially nondiscriminatory system, such as] the low bidder on a Government contract. The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.' *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville,* 508 U. S. 656, 667 (1993). The aggrieved party 'need not allege that he would have obtained the benefit but for the barrier in order to establish standing.' *Id.*, at 666." *Adarand Constructors, Inc.*, v. *Peña*, 515 U.S. 200, 211 (1995).

No application for a homestead lease is required. When a benefit cannot be obtained on racially discriminatory grounds, no futile exercise is necessary. "A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain prejudice. If an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs." *Teamsters* v. *United States*, 431 U.S. 324, 366 (1977).

It is abundantly clear that petitioners have standing. The only possible explanation for the obfuscation by the Supreme Court of Hawaii is its desire to insulate the blatant unconstitutionality of the racial discrimination in the HHCA from review by this Court for as long as Hawaii can get away with it. Cf. *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1442 (2009) (declining to "tarry long" over a

similar maneuver by the same court). This Court should not reward that tactic.

Imagine that this case arose in Mississippi, not Hawaii, and that the benefits—and burdens—of leasehold ownership were reserved by the state constitution for white people. Imagine that black people sued to challenge a tax break given to leaseholders. Imagine that the State defended on the grounds that the black plaintiffs hadn't expressed a desire to be leaseholders and that they lacked standing. Those arguments, as we said in the petition, would be laughed out of court. This case is no different.

For the foregoing reasons and those stated in the petition and amicus briefs, the petition for a writ of certiorari should be granted.

Respectfully submitted.

H. WILLIAM BURGESS
2299C ROUND TOP DRIVE
HONOLULU, HAWAII 96822
(808) 947-3234
hwburgess@hawaii.rr.com

ROY T. ENGLERT, JR.
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ALEX POTAPOV
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, NW
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

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