

No. 06-1202

IN THE
Supreme Court of the United States

JOHN DOE, A MINOR, BY HIS MOTHER AND
NEXT FRIEND, JANE DOE,
Petitioner,

V.

KAMEHAMEHA SCHOOLS/
BERNICE PAUHI BISHOP ESTATE, ET AL.,
Respondents.

On Petition For A Writ Of
Certiorari To The United States Court
Of Appeals For The Ninth Circuit

**BRIEF OF THE HAWAII CONGRESSIONAL DELEGATION (U.S.
SENATOR DANIEL K. INOUE; U.S. SENATOR DANIEL K.
AKAKA; U.S. CONGRESSMAN NEIL ABERCROMBIE AND U.S.
CONGRESSWOMAN MAZIE K. HIRONO) AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*¹

Amici are members of the Hawaii Congressional Delegation (U.S. Senator Daniel K. Inouye; U.S. Senator Daniel K. Akaka; U.S. Congressman Neil Abercrombie and U.S. Congresswoman Mazie Hirono). *Amici* are intimately familiar with the problems facing the Native Hawaiian community, past legislative efforts undertaken to assist Native Hawaiians, and the current debate and consideration of further congressional enactments affording federal preferences and federal political recognition of Native Hawaiians. Because these issues remain under active review by Congress at this time, *amici* urge this Court to decline review of this case.

ARGUMENT

I. CONGRESS HAS RECOGNIZED THE SEVERE SOCIO-ECONOMIC DISADVANTAGES FACED BY THE NATIVE HAWAIIAN COMMUNITY.

In commemoration of the 100-year anniversary of the 1893 overthrow of the Native Hawaiian Government, Congress in 1993 enacted Pub. L. No. 103-150, the “Apology Resolution.” 107 Stat. 1510 (1993). In that Resolution, Congress stated that it “apologizes to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii . . . with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self determination.” *Id.* at 1513. The Resolution further notes, “[T]he long-range economic and social changes in Hawaii . . . have been

¹ This brief is filed with the consent of the parties. The parties’ letters of consent will be filed together with this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that the preparation and submission of this brief was performed by *amici’s* counsel on a pro bono basis, and that no other person made a monetary contribution to its preparation or submission.

devastating to the population and to the health and well-being of the Hawaiian people.” *Id.* at 1512.

Congress, through subsequent findings, has expressly recognized the continuing special needs of the Native Hawaiian community. With respect to education, many Native Hawaiians face significant risk factors even before they are born, as the Native Hawaiian community endures high rates of teenage pregnancy and late or no prenatal care. *See* The Native Hawaiian Education Act, 20 U.S.C. §§ 7511, 7512(16). These risk factors manifest themselves in low educational achievement later in life, with Native Hawaiians being underrepresented in institutions of higher education and among college graduates, while being disproportionately overrepresented in negative social statistics indicative of special educational needs. *Id.*

II. CONGRESS, IN RESPONSE TO THESE SIGNIFICANT NEEDS, HAS PROVIDED BENEFITS TO THE NATIVE HAWAIIAN PEOPLE SINCE 1920.

More than eighty years ago, Congress recognized the United States’ unique relationship with the Native Hawaiian people, enacting the Hawaiian Homes Commission Act, which created a homestead program for Native Hawaiians. *See* Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (1921); *see also* 20 U.S.C. § 7512(8) (“Through the enactment of the Hawaiian Homes Commission Act . . . , Congress affirmed the special relationship between the United States and the Native Hawaiians[.]”).

Congress has made clear that it “does not extend services to Native Hawaiians because of their race, but because of their *unique status as the indigenous people of a once sovereign nation* as to whom the United States has established a *trust relationship*,” 20 U.S.C. § 7512(12)(B) (emphasis added), and that “[t]he *political relationship*

between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States,” *id.* § 7512(13) (emphasis added). Congress also has stated that “the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives,” 20 U.S.C. § 7512(12)(D).

III. THE CONTOURS OF THE RELATIONSHIP BETWEEN THE UNITED STATES AND THE NATIVE HAWAIIAN PEOPLE REMAIN UNDER ACTIVE DEBATE AND CONSIDERATION BY BOTH HOUSES OF CONGRESS.

Although Congress has stated that the United States has a trust relationship with the Native Hawaiian people, *see, e.g.*, 20 U.S.C. § 7512(12), *amici* and their colleagues in the Senate and House of Representatives continue to discuss the precise contours of this relationship. Petitioner deems congressional action on this issue “irrelevant,” *see* Petitioner’s Reply Brief at 9 (March 27, 2007), but the thirteen congressional bills he identifies indicate the opposite--the political status of Native Hawaiians remains a point of vigorous political debate that now approaches legislative resolution.

In this term, Senators Akaka and Inouye have introduced the Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. (referred to Committee on Indian Affairs), which would confirm and clarify the existence of a political relationship between the United States and the Native Hawaiian people. The “Akaka Bill” has also been introduced in the House of Representatives. *See* Native Hawaiian Government Reorganization Act of 2007, H.R. 505, 110th Cong. (referred to Committee on Natural Resources). It is further important to note that, although versions of this Bill have been introduced in prior years, most recent changes to the Bill have been successfully negotiated with the Administration to address the concerns

of the Administration and those raised by other members of Congress. The Bill continues to have bi-partisan support in both Houses.

U.S. Senator Harry Reid, the Senate Majority Leader, has stated that he “strongly support[s] S. 310” and that he is “committed to ensuring Senate consideration of S. 310 and will work with the Senators from Hawaii to gain the support of members from both sides of the aisle.” 110th Cong. Rec. S3828 (daily ed. March 27, 2007) (Colloquy between Senators Reid, Akaka and Inouye).

Members of Congress from both parties see the upcoming consideration of the Akaka Bill as the proper time and forum for discussion of the relationship between the United States and the Native Hawaiian people. During the floor debate on the Homeownership Act, for example, some members of Congress questioned whether the Act created a political status for Native Hawaiians. Congresswoman Hirono addressed these concerns, noting that the proper time for Congress to discuss the merits of self-determination for Native Hawaiians would be when it addressed the Akaka Bill. *See* 110th Cong. Rec. H3166 (daily ed. March 27, 2007) (statement of Cong. Hirono) (“[W]e can and should have the debate on whether or not Native Hawaiians should enjoy the rights to self-determination given to other Native American groups when that bill is squarely before us in H.R. 505.”).

As these issues continue to be debated in both Houses of Congress, *amici* urge the Court to defer consideration of issues involving Native Hawaiian preferences, public or private, pending legislative resolution of these significant questions of policy. Such deference would be appropriate in light of both the Court’s long-standing comity toward the legislative branch and the possibility that the Court’s ruling, if at odds with subsequent congressional action, could undermine judicial economy.

CONCLUSION

The Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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