

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 Writ of Certiorari to
the Supreme Court of Hawaii**

**BRIEF OF THE SOVEREIGN COUNCILS OF THE
HAWAIIAN HOMELANDS ASSEMBLY,
NA ‘A‘AHUHIWA, THE NATIVE HAWAIIAN BAR
ASSOCIATION, HUI KAKO’O ‘AINA HO’O
PULAPULA, AND ‘AHAHUI O HAWA’I AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Amici will address the following question:

Whether the Hawaii Supreme Court's order that an injunction be entered against the sale or transfer of ceded trust lands until the claims of Native Hawaiians to the ceded lands are resolved rests on state law.

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INTEREST OF THE *AMICI CURIAE*

Amici are Hawaiian organizations that advocate justice for and the self-determination of the Hawaiian people, seeking to advance their collective land and cultural rights. Ensuring the integrity of the ceded lands trust at issue in this case is an integral part of *amici*’s missions.¹

The Sovereign Councils of the Hawaiian Homelands Assembly (SCHHA) is an umbrella organization that represents 24 Hawaiian Homestead Associations that, in turn, represent over 30,000 Native Hawaiian homesteaders. The members of SCHHA are Native Hawaiians who lease trust lands pursuant to the homestead program that Congress created in the Hawaiian Homes Commission Act, 42 Stat. 108 (1921). As Native Hawaiian homesteaders, SCHHA members are direct beneficiaries of the ceded lands trust under § 5(f) of the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 6 (1959), and under art. XII, § 4 of the Hawaii State Constitution.

Na ‘A‘ahuhiwa is an association of retired Native Hawaiian state judges organized to advise and advo-

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties’ letters consenting to the filing of this brief have been filed with the Clerk’s office.

cate on issues affecting Native Hawaiians, including those related to the ceded lands trust.

The Native Hawaiian Bar Association (NHBA) is a membership organization of Native Hawaiian lawyers, judges, and other legal professionals. NHBA provides a forum for discussion of legal issues affecting Native Hawaiians, and its members have extensive experience with Hawaii state trust law as it pertains to the ceded lands trust.

Hui Kako'o 'Aina Ho'opulalpula was formed to support applicants for Hawaiian Home Lands while they wait for a lease to be awarded and homes built. The mission of the organization is to create opportunities for self-sufficiency by advocating for the rights of applicants and seeking accountability of trust assets.

'Ahahui o Hawai'i is the Native Hawaiian law student organization at the William S. Richardson School of Law, University of Hawai'i at Mānoa. 'Ahahui members seek to promote Native voices in the debate over the legal status and rights of Native Hawaiians.

As advocates for beneficiaries of the ceded lands trust, *amici* have a direct and substantial interest in this matter. Reversal of the decision below would undermine their efforts to clarify and strengthen the legal rights of Native Hawaiians.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The judgment of the Hawaii Supreme Court in this case derives from principles of Hawaii state trust law. Although the federal Apology Resolution that is the centerpiece of petitioners' argument, Pub.

L. No. 103-150, 107 Stat. 1510 (1993), reprinted at Pet. App. 103a-111a, served to inform the court's findings of fact, it was ultimately the State's fiduciary obligations to Native Hawaiians² under state public trust law that shaped the court's opinion and determined its judgment. Contrary to petitioners' suggestion, the Hawaii Supreme Court did not place a cloud on the legal title to any land. Rather, the court ordered the entry of an injunction against selling or otherwise transferring to third parties any ceded trust lands until the claims of Native Hawaiians to those lands have been resolved through the political process. Pet. App. 100a. That judgment was firmly grounded in principles of state equity jurisprudence. Because the decision below rests on an application of state law and the Hawaii court's discussion of the Apology Resolution was not essential to its holding, there is no controlling issue of federal law in the case for this Court to resolve. The case accordingly should be dismissed, either for lack of jurisdiction or because certiorari was improvidently granted.

I. This Court has long recognized that its "power is to correct wrong judgments, not to revise opinions. * * * [I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117,

² This brief uses the phrase "Native Hawaiian" to refer to "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i." Pet. App. 110a-111a (Apology Resolution). As discussed at note 5 *infra*, terms such as "Hawaiian" and "native Hawaiian" may have distinct meanings in the various statutes discussed herein.

126 (1945). These principles should guide the Court in its consideration of the present controversy. In *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983), the Court determined that where a state-law ground is not clear from the face of a state court's opinion, the Court would adopt a "presumption[]" that the decision rests on federal grounds. *Id.* at 1042 n.8. But the Court also recognized that there would be circumstances in which application of that presumption would be inappropriate. *Id.* at 1041 n.6; see also *Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984). The *Michigan v. Long* presumption has never governed when a state supreme court, applying state trust law and state-law principles of equity, relies on a hortatory Joint Resolution of Congress that does not have the force of law for a finding of legislative fact supporting the issuance of an injunction. In these highly unusual circumstances, the *Michigan v. Long* presumption should give way to a more probing inquiry into whether the invocation of federal law was of outcome-determinative significance to the state court.

When considered in this light, it is clear that the Hawaii Supreme Court's references to the federal Apology Resolution played no outcome-determinative role in its judgment and that review by this Court accordingly would "amount to nothing more than an advisory opinion." *Herb*, 324 U.S. at 126. Although plaintiffs invoked the Apology Resolution in framing the factual basis for their complaint, and the Resolution informed the Hawaii Supreme Court's appreciation of how Native Hawaiians' claims pertaining to the *legal* title to land held in the ceded lands trust might ultimately be resolved, it is that court's *equitable* judgment that is before the Court now. The OHA respondents made clear in their filings before

the Hawaii Supreme Court that OHA is “*not* asserting ownership of Ceded Lands * * * or asking [the Hawaii Supreme] Court to resolve Native Hawaiian claims. It is *not* requesting damages or a quiet title.” Pl.-App. OHA Opening Br. to the Haw. Sup. Ct. at 5. Rather, plaintiffs below sought, and the court below issued, “injunctive relief * * * seek[ing] preservation of the status quo.” *Ibid.*

Respondents have offered one reason why the injunction ordered by the court below is supported by a state ground that is adequate and independent of the Apology Resolution: The injunction was designed to prevent irreparable damage to Native Hawaiians until their claims are resolved through the state political process. In this Brief, *amici* offer a second adequate and independent state ground supporting the injunction. Whether or not Native Hawaiians have legal title to all or any portion of the ceded trust lands, they unquestionably have a *beneficial equitable* interest in the lands held in trust. For the State, as trustee, to alienate the lands to third parties before determining whether the equitable interests of Native Hawaiians require that some portion of these lands be allocated to them in kind would be a breach of trust. The Apology Resolution was not necessary for the Hawaii Supreme Court to reach that determination and to conclude that state-law principles of equity required that an injunction issue to protect the beneficial interests of Native Hawaiians. That equitable holding derives directly from well-settled Hawaii law giving “native Hawaiian beneficiaries of the ceded lands trust * * * a ‘right to bring suit under the Hawai‘i Constitution to prospectively enjoin the State from violating terms of the ceded lands trust’” and to enforce the State’s “high fiduciary duties nor-

mally owed by a trustee to its beneficiaries.” Pet. App. 39a.

II. Under state trust law, the court below had ample reason, wholly apart from the Apology Resolution, to conclude that the State’s fiduciary duties as trustee of the ceded lands would be breached if alienation of the disputed parcel to third parties were permitted before the claims of Native Hawaiians had been resolved. Native Hawaiians have a substantial claim, under general principles of trust and equity law, to receive an allocation of the ceded trust lands in their capacity as statutory beneficiaries of the trust. This substantial beneficial or equitable claim exists, and fully justifies the injunction entered below, whether or not the legal claims that Native Hawaiians have advanced to these lands based on unextinguished aboriginal rights are ultimately vindicated.

Under well-established Hawaii law, the State must take care to administer the trust solely in the interest of its beneficiaries, use reasonable skill and care to make the trust property productive, and deal impartially between the trust’s two beneficiaries, Native Hawaiians and the general public. By the same token, the special attachment Native Hawaiians continue to have to their homelands creates a unique relationship with the corpus of the ceded lands trust. Under these circumstances, discharge of the State’s fiduciary obligations, whether through the actions of a court or of the political branches, will likely involve transfer of at least some of the lands in the ceded lands trust to Native Hawaiians, rather than a purely monetary settlement. The Hawaii Supreme Court therefore correctly determined, as a matter of state law, that the State’s administration

of the trust must recognize and account for this special value the Native Hawaiian trust beneficiaries place on the lands.

III. Where a trustee intends to violate its fiduciary duties in a manner that might irreparably damage the beneficiary, equity demands injunctive relief. An irrevocable sale of the lands pending resolution of Native Hawaiian claims would cause irreparable damage to Native Hawaiian beneficiaries of the trust. Furthermore, following the invalidation (in separate litigation) of state legislation that attempted to define the nature of the ceded land trust, Hawaii's administration of the lands trust is infected by uncertainty as to the precise corpus within the trust. The court below properly enjoined sale of the corpus of the trust until the State takes steps to resolve these uncertainties.

Although petitioners and the United States as *amicus* devote substantial attention to questions surrounding legal title to the ceded lands, the *judgment* before this Court on certiorari pertains only to an equitable determination that the trustee should not alienate the trust corpus pending final determination of the substantial equitable claims of Native Hawaiians to those lands. That judgment is securely grounded in principles of state law and should not be disturbed. The case accordingly should be dismissed for lack of jurisdiction because the holding below rests on state law; alternatively, the writ of certiorari should be dismissed as improvidently granted because, given the state law governing the plaintiffs' equitable claims, a ruling by this Court would not affect the ultimate disposition of the case.

ARGUMENT

Hawaii law provides that the availability of an injunction is governed by a familiar three-part test:

[1] [W]hether the plaintiff has prevailed on the merits; [2] whether the balance of irreparable damage favors the issuance of a permanent injunction; and [3] whether the public interest supports granting such an injunction.

Pet. App. 99a-100a.

The Hawaii Supreme Court, in the judgment entered below, properly applied state law to conclude that all three prongs of this standard for entry of injunctive relief had been satisfied by respondents. This conclusion is compelled without regard to the federal Apology Resolution, and indeed would be compelled even if the Apology Resolution had never been adopted. It follows that the Apology Resolution played no outcome-determinative role in the case, the holding below rests entirely on state law, and the writ of certiorari should be dismissed.

I. WHOLLY APART FROM THE APOLOGY RESOLUTION, NATIVE HAWAIIANS HAVE AN EQUITABLE INTEREST IN THE CEDED TRUST LANDS.

Under well-settled principles of equity and trust law, where the State as trustee is prepared to dispose of a trust res in a manner that could irreparably harm a beneficiary, a court of equity should enjoin that disposition pending a final determination of the beneficiary's interest. Because it is clear under Hawaii law that the State is the trustee for the ceded lands trust, and that Native Hawaiian peoples are

among the beneficiaries of that trust, respondents' success on the merits was assured even in the absence of the Apology Resolution. As it is clear that the Hawaii Supreme Court's equitable determination did not require conferring any legal significance on the Apology Resolution, this Court should not disturb the judgment below, even if it disagrees in some respects with the way the Hawaii Supreme Court characterized the Resolution.

A. The Hawaii Constitution And State Statutes Codify Congress's Delegation of Substantial Portions Of Its Trust Responsibility For The Ceded Lands To Hawaii.

A body of federal and state law predating the Apology Resolution determines the State of Hawaii's obligations in administering the ceded lands trust. The State's obligations as trustee of the ceded lands trust were first established in the federal Admission Act granting Hawaii statehood and have been further developed and refined by the State of Hawaii in its Constitution and statutes. The Hawaii Supreme Court has interpreted the trust to bind the State of Hawaii, in its trustee capacity for Native Hawaiians, to the high standard of duty owed by a fiduciary to the beneficiary of a private trust. That court has further held that the State must take care to administer the trust solely in the interest of its beneficiaries, use reasonable skill and care to make the trust property productive, and deal impartially between the beneficiaries.

The unique nature of the trust held by the State of Hawaii for Native Hawaiians originates in the federal government's own trust relationship with Native Hawaiians. The federal trust for Native Hawai-

ians grows out of Congress’s Indian affairs powers and has been defined and reinforced by a history of special legislation enacted by Congress on behalf of Native Hawaiians.³ Because Congress has delegated substantial portions of its trust responsibility to the State of Hawaii, the State has embedded in its constitutional and statutory law a special concern for Native Hawaiian interests that reflects both federal and state trust standards, as well as the unique historical and political role Native Hawaiians have played in Hawaii’s society.

The United States’ tumultuous interactions with Native Hawaiians have been recounted by this Court at length. See *Rice v. Cayetano*, 528 U.S. 495, 499-507 (2000). As pertinent here: Several years after a group of American businessmen, acting in league with the United States Minister to Hawaii and United States Armed Forces, toppled the Hawaiian monarchy, Congress extended formal recognition to the provisional government in the Joint Newlands Resolution of 1898. See Felix S. Cohen, *Handbook of Federal Indian Law* 801 (1982 ed.). The Newlands Resolution ceded 1.8 million acres of formerly Hawaiian “public, government, or Crown lands” to the United States government. J. Res. 55, 55th Cong., 30 Stat. 750 (1898). Two years later, Congress created the Territory of Hawaii, placing the ceded lands under direct federal control and instructing that any proceeds from the lands be used to benefit education and other public purposes in Hawaii. Hawaiian Organic Act, 31 Stat. 141 (1900).

³ See, e.g., Native Hawaiian Education Act, 20 U.S.C. §§ 7511 *et seq.* (2006); Native Hawaiian Health Care Improvement Act, 42 U.S.C. §§ 11701 *et seq.* (2006).

In 1920, in an effort to redress the rapidly declining economic and social status of Native Hawaiians, Congress placed 200,000 acres of the ceded lands into a trust administered by the Hawaiian Homes Commission, a subdivision of the new territorial government. Hawaiian Homes Commission Act (HHCA), 42 Stat. 108 (1921). Upon Hawaii's admission to statehood in 1959, Congress transferred responsibility for the 200,000-acre land trust to the State of Hawaii to continue the Hawaiian homesteading program, requiring the new State to adopt the provisions of the HHCA into its constitution. Act of Mar. 18, 1959 (Admission Act), Pub. L. No. 86-3, 73 Stat. 4 (providing for the admission of the State of Hawaii into the Union).

The Admission Act granted the remainder of the ceded lands—some 1.2 million acres—to the State of Hawaii under a public trust bound by strict conditions:

[T]ogether with the proceeds from the sale or other disposition of any such lands and the income therefrom, [the granted lands] shall be held by said State as a public trust: [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible, [4] for the making of public improvements, and [5] for the provision of lands for public use.

Admission Act, § 5(f).

Congress has continued to delegate various elements of its trust relationship with Native Hawaiians to the State of Hawaii. In the Native Hawaiian Education Act, for example, Congress specifically delegated to Hawaii the duty to “develop innovative educational programs to assist Native Hawaiians” and to “supplement and expand programs and authorities in the area of [Native Hawaiian] education.” 20 U.S.C. § 7513(1), (3). It affirmed in 1994 and again in 2002 that it has “delegated broad authority” to the State of Hawaii “to administer any portion of the Federal trust responsibility.” 20 U.S.C. § 7512(12)(c).

Since 1959, Hawaii law has further elaborated upon the trust obligations created at the time of Hawaii’s admission to the Union. Constitutional amendments in 1978 effected fundamental alterations to the State’s implementation of the § 5(f) trust language. See *Office of Hawaiian Affairs v. State [OHA I]*, 31 P.3d 901, 903 (Haw. 2001). The amendments clarified that the ceded land trust has two distinct beneficiary groups: Native Hawaiians and the general public. Haw. Const. art. XII, § 4. The amendments also established the Office of Hawaiian Affairs (OHA), a new and separate division within the state government,⁴ to administer a portion of the revenues from the ceded land trust on behalf of “na-

⁴ The Hawaii Supreme Court has described OHA as a “self-governing corporate body” and “receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians.” *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446, 452-453 (Haw.), *cert. denied*, 484 U.S. 898 (1987). OHA may sue and be sued, and enter into contracts. Haw. Rev. Stat. § 10-4 (2006).

tive Hawaiians” and “Hawaiians.”⁵ *Id.* art. XII, § 5. Statutes enacted subsequently set forth the purposes and duties of OHA and endowed it with 20 percent of any “funds derived from” the ceded lands trust. Haw. Rev. Stat. § 10-13.5 (2006).

B. Hawaii State Courts Have Repeatedly Recognized That The State Of Hawaii Acts As Fiduciary And Trustee For Native Hawaiians.

Hawaii’s state courts have consistently affirmed and construed the State’s trust responsibilities for Native Hawaiians under state trust law. The Hawaii Supreme Court has interpreted the State’s duties to Native Hawaiians—which encompass the ceded lands trust along with other areas of responsibility—as the “high fiduciary duties normally owed by a trustee to its beneficiaries.” *Ahuna v. Dep’t of Hawaiian Home Lands*, 640 P.2d 1161, 1168 (Haw. 1982); see also *Pele Defense Fund v. Paty*, 837 P.2d 1247, 1264 (Haw. 1992) (applying *Ahuna*’s reasoning to the ceded lands trust; see *infra* at 21).

In *Ahuna*, the Hawaii Supreme Court defined the extent and nature of the trust relationship between the State of Hawaii and Native Hawaiians under the Hawaiian Homes Commission Act. The court held that the substance of the trust should be informed “by examining well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native

⁵ For purposes of OHA, state law defines “Native Hawaiian” as a Hawaiian with at least 50% blood quantum descended from races inhabiting Hawaii in 1778, and “Hawaiian” as a descendent of an inhabitant of Hawaii in 1778. Haw. Rev. Stat. § 10-2 (2006).

Americans.” 640 P.2d at 1168. Noting that this Court has described the trust relationship between Native Americans and the United States as one “measured by the same strict standards applicable to private trustees,” *United States v. Mason*, 412 U.S. 391 (1973), the Hawaii Supreme Court derived from federal trust and Indian jurisprudence three fundamental trust obligations owed by the State of Hawaii to Native Hawaiians. The first is the duty to “administer the trust solely in the interest of the beneficiary.” *Ahuna*, 640 P.2d at 1169 (citing *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981)); see also *Pele Defense Fund*, 837 P.2d at 1264 (quoting *Ahuna*); *OHA v. State*, 133 P.3d 767, 784 (Haw. 2006) (same). Second is the duty “to use reasonable skill and care to make trust property productive” and “to act as an ordinary and prudent person would in dealing with his own property.” *Ahuna*, 640 P.2d at 1169 (citing *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973); *Rippey v. Denver U.S. National Bank*, 273 F. Supp. 718 (D. Colo. 1967)). And third, the State has a duty to “deal impartially” when responsible for acting on behalf of two or more beneficiaries. *Ibid.*

In *Pele Defense Fund v. Paty*, 837 P.2d at 1264, the Hawaii Supreme Court confirmed that “[t]he State owes th[e] same high standard [articulated in *Ahuna*] to the beneficiaries of the ceded lands trust.”

The judgment below is the culmination of the *Ahuna/Pele* line of cases. Those authorities establish that the State of Hawaii, as trustee of the ceded lands, must dispose of the lands in such a way as to protect the equitable claims of Native Hawaiians as one of the principal beneficiaries of the trust. The judgment below is therefore not dependent upon any

determination, grounded in the Apology Resolution or otherwise, that Native Hawaiians have an unextinguished legal title to the lands that predates the creation of the trust. The judgment is fully supported by the beneficial or equitable interests of Native Hawaiians in the ceded public lands, which the State as trustee has a fiduciary obligation to protect.

C. Native Hawaiians Have A Special Interest In Ownership Of Their Lands That Transcends The Lands' Monetary Value.

The interests of Native Hawaiians in the ceded public lands are not merely monetary in nature. Native Hawaiians have a special bond with the lands held in trust, and this bond would be broken by alienation of the lands to third parties. Where a trust beneficiary maintains a special bond to land held in trust, the trustee's fiduciary responsibilities demand more than mere maximization of value. Hawaii, acting as trustee, must also protect the equitable or beneficial interest that Native Hawaiians have in preserving the lands themselves.

1. Hawaii Trust Law Recognizes Special Native Hawaiian Rights To Enjoyment Of Lands.

a. Native Hawaiians harbor unique attachment to the lands of Hawaii. Their spiritual and cultural connection with Hawaiian lands predates Western arrival to the island by more than a thousand years. Their welfare continues to be intricately intertwined with the lands that once sustained their culture and religious practice, and are now held in trust by the State of Hawaii for what remains of their community. As trustee, the State acts as a steward and protector of both the lands of Hawaii and the interests of

the Native Hawaiian people. In addition, Native Hawaiians maintain various unsettled claims to lands within the ceded lands trust. To the extent that they are entitled to use or possession of particular parcels within the trust, either as a matter of right or in the exercise of the State's sound discretion as trustee—a question not decided by the court below—it could breach the State's fiduciary duty for it to sell those parcels prior to a resolution of such claims.

Anthropologists date the first settlement in Hawaii as early as 300 A.D. Patrick Kirch, *Feathered Gods and Fishhooks* 348 (1985). Prior to the arrival of Westerners in Hawaii in 1778, Native Hawaiians participated in a complex and interdependent system of land allocation that centered around land use rights. Neil M. Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 849 (1975). Although organized into larger administrative divisions, the basic Native Hawaiian landholding unit was the *ahupuaa*, an economically self-sufficient land unit governed by use rights. *Ibid.* The system was hierarchical in nature, with chiefs and sub-chiefs controlling larger divisions of land, while commoners enjoyed small plots for their own use as well as gathering rights on non-cultivated lands. Cohen, *supra*, at 798-799. The concept of fee simple absolute did not exist in traditional Native Hawaiian society. *Ibid.*

Under this system, Native Hawaiians lived in reciprocity with their *'aina*, or land base, which they believed would sustain and nurture them so long as they properly cared for it. Under traditional Native Hawaiian belief, the *'aina* embodied the *akua*, or the gods. Lilikala Kame'eleihiwa, *Native Land and Foreign Desires: Pehea La e Pono Ai?* 23-25 (1991); see

also David Malo, *Hawaiian Antiquities* 241-244 (2d. ed. 1951). As the descendents of their gods, Native Hawaiians were responsible for tending to the 'aina in a way that respected its sacred nature. Kame'eleihiwa, *supra*, at 23-25. Land thus could not be commodified or privately owned. Levy, *supra*, at 849. Natural resources were held in trust and managed for the common good, and private commercial uses were restricted to ensure they would not detract from the welfare of the community. *Ibid.*

b. These beliefs shaped Native Hawaiian practice and customary law up until the arrival of Western culture. Over the course of the nineteenth century, large, privately-owned cash crop plantations came to dominate the Hawaiian landscape, replacing the *ahupua'a* system. Cohen, *supra*, at 799-800. American and British interests controlled the great majority of these plantations and brought Western concepts of ownership and exclusion to Hawaii's land system. *Ibid.*

There is no doubt that Western rule has radically altered Native Hawaiians' relationship with their land. In addition to privatizing lands originally occupied by Native Hawaiians, Hawaii's post-1893 governments repeatedly banned many Native Hawaiian cultural and spiritual practices. See Apology Resolution, Pet. App. 103a-111a. Long separation of many Native Hawaiians from their lands impaired the cultural and spiritual connection they had maintained with it for generations. *Ibid.*

Notwithstanding these changes, however, Hawaii law has come to recognize the unique claims of Native Hawaiians to the land in several ways. The Hawaii Supreme Court has held that Native Hawaiians have the right to enter undeveloped lands

owned by third parties to enjoy “continuously exercised access and gathering rights necessary for subsistence, cultural or religious purposes,” so long as no harm to private property occurs from this practice. See *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 748 (Haw. 1982) (citing Haw. Const. art. XII, § 7, which grants to tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 “all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua’a*”).

Various state statutes also acknowledge the importance of preserving traditional Hawaiian custom and precedent, requiring, for example, the consideration of cultural impacts on Native Hawaiians under the state’s NEPA-equivalent environmental assessment requirements. Haw. Rev. Stat. § 343-2 (2008).

In *Ka Pa’akai O Ka ‘Āina v. Land Use Commission*, the Hawaii Supreme Court evaluated a challenge by Native Hawaiians to the state Land Use Commission’s decision to reclassify 1000 acres of trust land on Hawaii island’s Kona coast for tourism and commercial uses. 7 P.3d 1068 (Haw. 2000). The court vacated the commission’s decision, ruling that Hawaii state agencies must “protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians” and “not act without independently considering the effect of their actions on Hawaiian traditions and practices.” *Id.* at 1083. The court delineated three specific findings that the State must make before it may reclassify land:

- (1) the identity and scope of “valued cultural, historical, or natural resources” in the petition area, including the extent to which traditional and customary native Hawaiian

rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [Land Use Commission] to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 1084 (footnotes omitted).

2. *Any Authority To Sell Ceded Lands Must Be Exercised Consistent With The State's Fiduciary Duties.*

Petitioners argue that the Admission Act, the Hawaii Constitution, and Hawaii statutes all anticipate that the State will sell lands from the ceded lands trust. Pet. Br. 4-6, 26. But to say that the trustee has the *authority* to sell the trust res is only the beginning of the inquiry. Two conditions must be met before a trustee may sell property from the corpus of the trust in any given case: (1) the trust instrument must authorize the sale (either explicitly or implicitly), and (2) *the sale must be consistent with the trustee's fiduciary duties*. See Restatement (Third) of Trusts § 190 (1992). While the State might be able to satisfy the first condition, it cannot hope to satisfy the second.

To sell property from the corpus of the estate, the trustee must find express or implied authorization in the trust instrument. See *In re Estate of Campbell*, 1958 WL 9932 (Haw. Terr. June 20, 1958); see also Restatement (Third) of Trusts § 190. But even where such authorization has been conferred, the trustee's authority to dispose of trust property is not unfet-

tered. It is elementary that a trustee may not exercise granted powers in a way that is detrimental to the trust beneficiaries. Specifically, sales of trust property may only be made if they do not conflict with the trustee's other fiduciary duties. See Haw. Rev. Stat. § 554A-3(b) (2006) ("In the exercise of the trustee's powers including the powers granted by this chapter, a trustee has a duty to act with due regard to the trustee's obligation as a fiduciary * * * ."); see also *In re Estate of Campbell*, 1958 WL 9932, at *12 (holding that where the trust instrument gives the trustee the authority to sell, any person questioning that sale has the burden to produce evidence to overcome a "presumption of regularity and good faith" on the part of the trustee, but that where such evidence is produced, the trustee bears "the ultimate burden of establishing the regularity and good faith of the questioned action by a preponderance of the evidence"); *Powell on Real Property* § 42.05 (2008) ("[I]f the trust instrument gives the trustee the power, but not the obligation to sell, the courts will examine any sale to see if the trustee abused her discretion.").

Authority to sell is therefore a necessary but not sufficient condition for sale. Here, any sale of lands from the ceded lands trust will dissipate the corpus of the trust. Such dissipation is lawful only if consistent with the State's fiduciary duty to protect the beneficial interest of Native Hawaiians in preserving the ceded lands. Consequently, directing a sale of lands before the beneficial rights of native Hawaiians are resolved would be a breach of trust.

3. *Prior To This Case, Hawaii Courts Had Never Determined Whether A Sale of Ceded Lands Amounted To A Breach of Trust Under Hawaii Law.*

Petitioners argue that “[f]or 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 * * * .” Pet. Br. 26. This argument again confuses the question whether the State as trustee had the legal *power* to alienate lands—which is not disputed—with the question whether such alienation is consistent with its trust obligations. Prior to the Hawaii Supreme Court’s decision below, no Hawaii court had ruled on the question of whether sale of the ceded lands amounts to a breach of trust given the Native Hawaiians’ claim to the land.

Indeed, 16 years ago, in the case most closely resembling the one at hand, the Hawaii Supreme Court indicated that prospective relief might be available to prevent a sale of ceded lands in violation of the State’s trust obligations. In *Pele Defense Fund*, a Hawaii nonprofit corporation challenged the State’s decision to exchange ceded lands for other lands. Among other claims, the plaintiffs asserted that the exchange was a breach of trust under Hawaii trust law and the Hawaii Constitution. 837 P.2d at 1261-1264. The court held that the State had fiduciary duties and obligations as the trustee of the ceded lands:

The decision of this court will not render these provisions meaningless and will not leave the people of Hawaii without the means to hold their government to these promises. Therefore, we hold that [plaintiff] has a right

to bring suit under the Hawaii Constitution to *prospectively* enjoin the State from violating the terms of the ceded lands trust.

Id. at 1262 (emphasis added). The court went on to hold, however, that no relief was available in *Pele Defense Fund* because the plaintiff was “not seeking to prospectively enjoin a constitutional violation in this case, but would have us turn back the clock and examine actions already taken by the State. The doctrine of sovereign immunity deters judges from this course * * *.” *Ibid.*

In the present case, the court below determined that, unlike in *Pele Defense Fund*, sovereign immunity did not bar the plaintiffs’ claims. Pet. App. 45a-53a, 63a-69a. Thus, for the first time, the court was able to reach the merits of a claim for breach of trust in connection with the sale of ceded lands, and correctly determined that any such sale would constitute a breach of trust.

II. NATIVE HAWAIIANS WOULD SUFFER IRREPARABLE DAMAGE IF TRUST LANDS WERE ALIENATED PRIOR TO A SETTLEMENT OF THEIR CLAIMS.

Native Hawaiians have established two types of irreparable damage they would suffer if the State were allowed to dispose of ceded lands at the present time. First, due to their unique relationship with the Hawaiian lands (described above), unilateral alienation of the ceded lands by the State will permanently impair their interest in the land itself. Second, because the State has failed to provide Native Hawaiians with an accounting of their interest in the ceded lands trust, in violation of the State’s fiduciary duties, the rights of Native Hawaiians could be perma-

nently impaired if lands are sold before a proper accounting takes place.⁶

A. Native Hawaiians Will Suffer Irreparable Damage If The State Alienates Trust Lands Without Regard To Native Hawaiians’ Historic Attachment To Those Lands.

Basic principles of equity compel an injunction against the sale of property from a trust while a dispute is pending, where such sale would preclude vindication of the beneficiary’s position in the dispute. Those principles apply with special force where, as here, the beneficiary Native Hawaiians have a special connection to the land held in trust for their benefit:

Many breaches of trust are of such a nature that, if accomplished, they would completely defeat the right of the beneficiary to the specific trust property * * * . [E]quitable remedies of all kinds to enforce trusts * * * and fi-

⁶ It is not clear petitioners even deny the existence of irreparable damage. Petitioners focus on their argument that “Native Hawaiians have no *legal* claim to the ceded lands that federal law permits any court to recognize,” Pet. Br. at 19-20, yet admit that “Native Hawaiians have a clear *moral* basis for asking the political branches to grant them recompense.” But respondents’ position, both here and in the court below, is that they are “*not* asserting ownership of Ceded Lands * * * or asking [the courts] to resolve Native Hawaiian claims” and “*not* requesting damages or a quiet title,” but rather request “preservation of the status quo” while the political branches reach a conclusion on the legal title question. Pl.-App. OHA Opening Br. to the Haw. Sup. Ct. at 5. The “*moral* basis” petitioners concede is precisely the irreparable damage Native Hawaiians will suffer if trust lands are alienated precipitously.

duciary duties concerning specific property * * * would be of comparatively little practical value, unless the court could by injunction restrain the alienation, transfer, or encumbrance of such property[.]

Pomeroy on Equity Jurisprudence § 1339 (1994). Thus, “in general, in all suits to enforce an equitable right against specific property, * * * the court will grant an injunction to restrain a threatened transfer of the property, whether land, chattels, or securities, during the pendency of the action.” *Id.* § 1340; see also 42 Am. Jur. 2d *Injunctions* § 52 (2008) (“A court of equity will interpose by injunction to prevent the transfer of a specific thing which, if transferred, will be irretrievably lost to the owner, such as * * * a conveyance or transfer by a trustee in violation of the trust * * * .” (internal citations omitted)).

This principle applies with special force to real property. Courts are more likely to find a prohibition against selling trust property where that property is land to which the settlor or the beneficiaries have a special relationship. See, e.g., Restatement (Third) of Trusts § 190 cmt. d (1992) (“There is a greater reluctance in the trust law to find a duty to retain land that had been purchased by the settlor for purposes of investment than to find a prohibition against sale of land that had been occupied as a residence by the settlor and his or her family, especially when the beneficiaries are members of the family.”).⁷

⁷ In *In re Estate of Campbell*, 1958 WL 9932 (Haw. Terr. June 20, 1958), the court found that the trust instrument (a will) contained an implied power to sell lands from an estate. Although the court equated the transaction at issue to a sale of real property, it actually involved only a sale of topsoil, rock, and sand,

Two doctrines of Hawaii law recognize the special relationship between a property-owner and his or her property, as well as the reality that real property is more likely to be irreplaceable than other forms of property. First, in a breach of contract action involving the sale of real property, courts are likely to award specific performance. See *Kalinowski v. Yeh*, 847 P.2d 673, 678 (Haw. App. 1993) (“[I]t is a well accepted principle that where the parties have fairly and understandingly entered into a valid contract for the sale of real property, specific performance of the contract is a matter of right and equity will enforce it * * * .” (internal quotes omitted)); see also *Hurst v. Kukahi*, 25 Haw. 194 (Haw. Terr. 1919); Restatement (Second) of Contracts § 360 cmt. e (1981) (“Contracts for the sale of land have traditionally been accorded a special place in the law of specific performance. A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money.”). If these doctrines are applicable in routine land disputes, they must surely control in the context of unique aboriginal connections to public trust lands.

Second, in the event of a partition of real estate, Hawaii property law favors partition in kind over sale. Haw. Rev. Stat. § 668-1 (2008) (expressing preference for a partition in kind unless “it appears that a partition cannot be made without great prejudice to the owners”); see also *Pomeroy on Equity Jurisprudence* § 1390 (1994) (“As between a sale and a partition, however, the courts will *favor* a partition as not disturbing the existing form of the inheritance.”).

and not a permanent and irrevocable alienation of real property as in the case at hand.

As Hawaii courts have made clear, the State's duty as trustee of the ceded lands trust is based on settled principles of state law. See *supra* at 13. Thus, the foregoing principles of trust, equity, property, and contract inform that duty.

A moratorium on all irrevocable transfers of ceded lands until the beneficial claims of Native Hawaiians to these lands can be properly addressed and resolved is an appropriate equitable device to ensure compliance with the State's trust obligations. This Court has upheld such moratoriums in the past. See *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919) (restraining the Secretary of Interior from listing or disposing of any Pueblo lands until Pueblo claims over these lands could be properly resolved); see also *Native Village of Allakaket v. Hickel*, Civ. Action No. 706-70 (D.D.C. Apr. 3, 1970), discussed in Sophie Thériault et al., *The Legal Protection of Subsistence*, 22 Alaska L. Rev. 35, 39 n.28 (2005) (enjoining the development of an Alaska pipeline through certain lands claimed by Native Alaskans until native claims over these lands were settled). Were Hawaii to sell the ceded lands before Native Hawaiians' beneficial claims to these lands are resolved, Native Hawaiians with claims would suffer the irreparable injury of potentially unlawful alienation of unique real property.

B. Native Hawaiians Suffer Irreparable Damage When The State Alienates Trust Lands Without Providing An Accounting Of Their Rights Under The Trust.

Native Hawaiians would suffer a second form of irreparable damage upon premature sale of trust lands because the State has not fulfilled its fiduciary duty to inform them of their rights under the trust. Under Article XVI, § 7 of the Hawaii Constitution,

“it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust.” *Office of Hawaiian Affairs v. State [OHA II]*, 133 P.3d 767, 795 (Haw. 2006) (quoting *Office of Hawaiian Affairs v. State [OHA I]*, 31 P.3d 901, 914 (Haw. 2001)). The state courts have held that the State is in breach of this fundamental constitutional and fiduciary duty, and this breach necessitates the injunction issued below.

As a matter of Hawaii constitutional and common law, the State has a “duty to inform” Native Hawaiians of their rights under the public lands trust. *OHA II*, 133 P.3d at 784. This obligation accords with the basic principle of trust law that a beneficiary “is entitled to know what his rights under the trust are and what the status of the trust administration is, so that he can secure performance of the trust or redress for a breach.” G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 861, p. 9 (2d rev. ed. 1982). In recognition of this principle, the Hawaii Supreme Court has found that the State has a fiduciary duty to give Native Hawaiians “complete and accurate information as to the nature and amount of trust property.” *OHA II*, 133 P.3d at 784 (internal citations and emphasis omitted).

Native Hawaiian beneficiaries have a particularly strong interest in a full accounting of their rights under the public lands trust. As the land transaction that gave rise to this suit illustrates, the State is frequently on both sides of contracts that alienate public lands. Because the state legislature must balance Native Hawaiians’ interests against those of the general public, there is a pressing need for a judiciary “vested with the responsibility to en-

sure” that the State “uphold[s its] fiduciary duties.” *Id.* at 795. This type of judicial oversight is only possible, however, if Native Hawaiians have the information they need to assert their beneficial rights in court.

Yet despite the State’s clear fiduciary duty to inform, Native Hawaiians’ rights under the trust remain ill-defined. There are at least two major areas of trust law that are currently unsettled: *which* lands are part of the trust res and the *amount* of trust revenue to which Native Hawaiians are entitled. The Hawaii Legislature recently recognized this uncertainty, directing the state attorney general to enter negotiations with OHA over some of these issues. 2008 Haw. Sess. Laws Act 158, § 8 (“[T]he attorney general * * * shall resume negotiations * * * to resolve the dispute concerning the * * * proceeds from the * * * public trust that the [Office of Hawaiian Affairs] should have received * * * pursuant to * * * the state constitution.”). Until the state legislature clarifies the scope of Native Hawaiians’ beneficial interest, however, an injunction is essential to prevent alienation that might otherwise irreparably injure Native Hawaiians.

In 1978, Hawaii voters approved a constitutional amendment that specifies that the ceded lands trust is “held by the State * * * for native Hawaiians and the general public.” Haw. Const. art. XVI, § 7. Shortly thereafter, the state legislature attempted to give effect to this provision by promising Native Hawaiians “[t]wenty percent of all funds derived from the public land trust.” Haw. Rev. Stat. § 10-13.5 (2006). By enacting Section 10-13.5, the legislature sought to fulfill the State’s constitutional and fiduciary duties to Native Hawaiians by specifying the

portion of trust revenues to which they are entitled. Litigation designed to compel a complete accounting of the trust res under Section 10-13.5 failed, however, when the suit was dismissed as presenting a nonjusticiable political question. *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446 (Haw. 1987).

Recognizing the uncertainty created by Section 10-13.5 and the *Yamasaki* decision, the Hawaii Legislature in 1990 passed Act 304. This Act clarified important elements of the trust by specifying which lands were part of the trust res and how much trust revenue Native Hawaiians should receive. 1990 Haw. Sess. Laws Act 304.

Because it constituted a difficult political compromise, Act 304 included a non-severability provision that required the Act be invalidated in its entirety if federal law ever preempted its application.⁸ In 2000, the Hawaii Supreme Court ruled in *OHA I* that federal regulations preempted the Act's award of certain airport revenues to OHA.⁹ As a result, Act

⁸ Section 16 of Act 304 provides:

The provisions of the Act are not severable and if any provision of the Act, or the application thereof to any * * * circumstance is held to conflict with any federal * * * law, rules, or regulations, this Act, in its entirety, shall be invalid.

1990 Haw. Sess. Laws Act 304, p. 953.

⁹ The Honolulu International Airport sits on trust lands, and thus Act 304 would have entitled Native Hawaiians to twenty percent of its revenue. Federal law, however, requires airport owners to use "revenues generated by [the] airport * * * for the capital or operating costs of the airport, the local airport system, or other local facilities * * * directly related to the actual transportation of passengers or property." Airport and Airway

304 was “effectively repealed,” and the Hawaii courts were again “left with no judicially manageable standards by which to determine whether OHA is entitled to * * * specific revenues.” *OHA I*, 31 P.3d at 914.

With Act 304 invalidated, the state legislature has a renewed duty to clarify Native Hawaiians’ rights under the trust. The injunction in this case requires the State to fulfill its fiduciary responsibilities to do so.

III. THE PUBLIC INTEREST SUPPORTS THE INJUNCTION ENTERED BELOW.

In the unique posture of this case, the public-interest prong of Hawaii’s permanent injunction standard effectively merges with the analysis of irreparable injury. The duties plaintiffs seek to enforce here derive directly from the Hawaii Constitution, the Admission Act that created Hawaii as a state, and important state doctrines concerning land management. The public-interest analysis thus favors the injunction for the same reasons, and to the same extent, as does the “balance of irreparable damage” analysis.

Moreover, the Hawaii Supreme Court indisputably resolved the public-interest prong of its own analysis with reference *only* to state law. Pet. App. 94a (“Here, we need look no further than the legislative pronouncement contained in [Hawaii] Act 329 * * * to conclude that the public interest supports granting an injunction.”). As this case comes to the

Improvement Act, 49 U.S.C. § 47107(b)(1). Because the *OHA I* court found application of Act 304 to conflict with this federal statute, it held the Act invalid in its entirety.

Court, that determination is not subject to further review.

* * * *

The judgment of the Hawaii Supreme Court rests firmly on state-law principles of trust law and equity. The Apology Resolution provided useful and interesting background for the state court's decision, but construction and application of the Apology Resolution was not the basis for, and was in no respect essential to, the holding below. There accordingly is no reason to believe that anything that this Court could say about the Apology Resolution would lead the litigation to a different outcome or have any effect on the ultimate disposition of the case. For these reasons, the Court should dismiss the case for lack of jurisdiction, or dismiss the writ of certiorari as improvidently granted.

CONCLUSION

The case should be dismissed for lack of jurisdiction; alternatively, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted.

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