

No. 07-1372

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**In the Supreme Court of the United States**

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STATE OF HAWAII, ET AL., PETITIONERS

*v.*

OFFICE OF HAWAIIAN AFFAIRS, ET AL.

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

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**BRIEF FOR THE RESPONDENTS**

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### **QUESTION PRESENTED**

Whether the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii strips the State of Hawaii of its authority to sell lands ceded to it by the federal government until it reaches a political settlement with Native Hawaiians about the status of those lands.

### **PARTIES TO THE PROCEEDING**

Petitioners are the State of Hawaii; Linda Lingle, Governor of Hawaii; the Hawaii Housing Finance and Development Corporation (HFDC); Karen Seddon, Executive Director of HFDC; and Georgina Kawamura, Charles King, Betty Lou Larson, David Lawrence, Theodore E. Liu, Allan Los Banos Jr., Ralph Mesick, Linda Smith, and Richard Toledo Jr., Members of the Board of Directors of HFDC.

Respondents are the Office of Hawaiian Affairs; Rowena Akana, Haunani Apoliona, Donald Cataluna, Walter Meheula Heen, Robert K. Lindsey Jr., Colette Y. Machado, Boyd P. Mossman, Oswald Stender, and John Waihe'e IV, Members of the Board of Trustees of the Office of Hawaiian Affairs; Pia Thomas Aluli; Jonathan Kamakawiwo'ole Osorio; Charles Ka'ai'ai; and Keoki Maka Kamaka Ki'ili.

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**BRIEF FOR THE RESPONDENTS**

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**OPINIONS BELOW**

The opinion of the Hawaii Supreme Court (Pet. App. 1a-100a) is reported at 177 P.3d 884. The opinion of the trial court (Pet. App. 133a-279a) is unreported.

**JURISDICTION**

The opinion of the Hawaii Supreme Court was filed on January 31, 2008, and judgment was entered on March 24, 2008. The petition for a writ of certiorari was filed on April 29, 2008, and granted on October 1, 2008. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1257. For the reasons stated below, however, the Court lacks jurisdiction, and the petition should therefore be dismissed.

**CONSTITUTIONAL AND STATUTORY PROVISIONS  
INVOLVED**

The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii (Apology Resolution), Pub. L. No. 103-150, 107 Stat. 1510 (1993), is reproduced at Pet. App. 103a-111a. Article XII, Sections 4 to 7, and Article XVI, Section 7, of the Hawaii Constitution are reproduced in the appendix to this brief (App., *infra*, 1a-3a). Other relevant provisions of state law are reproduced at J.A. 19a-27a and Br. in Opp. 1a-27a.

**STATEMENT**

Respondents brought suit against petitioners in Hawaii state court, claiming, *inter alia*, that the prospective sale of a parcel of land by a state agency to a private property developer would violate the State's fiduciary duty to Native Hawaiians under Article XII, Section 4, of the Hawaii Constitution. After a bench trial, the trial court entered judgment in favor of petitioners. Pet. App. 133a-279a. The Hawaii Supreme Court vacated and remanded, directing the trial court to enjoin petitioners from selling the parcel of land at issue, or any other lands ceded to the federal government at annexation and subsequently transferred to the State, until the claims of Native Hawaiians to those lands have been resolved by the Hawaii Legislature. *Id.* at 1a-100a.<sup>1</sup>

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<sup>1</sup> Like the Hawaii Supreme Court (and Congress in the Apology Resolution), 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. 6a (erroneously reproducing footnote in text); 177 P.3d at 892 n.5 (quoting Apology Resolution § 2, 107 Stat. 1513). As discussed elsewhere in this brief,

### A. Historical Background

This Court will be familiar with the complex and sometimes turbulent history leading up to the creation of the State of Hawaii. See *Rice v. Cayetano*, 528 U.S. 495, 499-511 (2000). Only the most salient points of that history are recounted here.

1. The first inhabitants reached the Hawaiian Islands more than 1500 years ago. By 1778, when Captain James Cook became the first westerner to land on the islands, the indigenous Hawaiians had developed a sophisticated society and culture of their own, structured around a system of communal land tenure (with individual chiefs controlling, but not owning, units of land known as *ahupua'a*). When King Kamehameha I united the islands in a single kingdom in 1810, he retained the preexisting system of communal land tenure, with the King effectively serving as trustee and managing the land for the benefit of the chiefs and the people in common. See *Rice*, 528 U.S. at 500-501; *Napeahi v. Paty*, 921 F.2d 897, 899 (9th Cir. 1990), cert. denied, 502 U.S. 901 (1991); *State ex rel. Kobayashi v. Zimring*, 566 P.2d 725, 729 (Haw. 1977); Pet. App. 144a; *Cohen's Handbook of Federal Indian Law* § 4.07[4][b], at 365-366 (2005 & Supp. 2007) (Cohen).

In the years that followed, the Kingdom of Hawaii was recognized as a sovereign nation by, and entered into treaties with, the United States and the broader international community. At the same time, however, western settlers began to arrive on the islands, and those

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see, e.g., p. 49, *infra*, some provisions of federal and state law define the phrase more narrowly. The parties agree that no question concerning the propriety of that definition is before this Court. See Pet. Br. 7 n.4.

settlers demanded western-style property rights for the lands they occupied. In the mid-1840s, King Kamehameha III acquiesced, transferring a substantial portion of the Hawaiian lands to chiefs and other private parties and dividing the remaining lands into “crown” lands (held in trust by the monarch) and “government” lands. Although the private land awards were initially made subject to the rights of Native Hawaiian tenants, those lands largely came under the control of western settlers in the ensuing years. See *Rice*, 528 U.S. at 501-504; *Napeahi*, 921 F.2d at 899; *Zimring*, 566 P.2d at 730; Pet. App. 144a-145a; Cohen § 4.07[4][b], at 366-368.

In the late 1800s, tensions intensified between western settlers and the government of the Kingdom of Hawaii. In 1893, United States Minister to Hawaii John Stevens, acting with the assistance of the American military, conspired with a group of western settlers to overthrow Queen Lili’uokalani and replace the monarchy with a provisional government. That government later established the Republic of Hawaii. President Cleveland condemned the insurrection and called for the restoration of the monarchy. See *Rice*, 528 U.S. at 504-505; Pet. App. 146a-151a; H.R. Rep. No. 243, 53d Cong., 2d Sess. 3-14 (1893).

2. The federal government’s approach changed radically following the election of 1896. President McKinley opened negotiations with the Republic of Hawaii and reached agreement on a treaty of annexation. The Senate refused to pass the treaty by the required two-thirds majority. See *Rice*, 528 U.S. at 505; Pet. App. 151a-152a. Supporters of annexation then sought to achieve the annexation of Hawaii through a joint resolution instead. That resolution, known as the Newlands Resolution, passed both houses by simple majorities and was signed into law by President McKinley. See Hawaiian Annexation

tion Joint Resolution (Newlands Resolution), Res. No. 55, 30 Stat. 750 (1898). In its preamble, the Newlands Resolution provided that the government of the Republic of Hawaii would “cede \* \* \* to the United States the absolute fee and ownership of all public \* \* \* lands,” including both “crown” and “government” lands and totaling approximately 1.8 million acres. *Id.*, Preamble, 30 Stat. 750. At the same time, the resolution provided that all revenue from ceded lands, except for those lands used for governmental purposes, “shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.” *Id.* § 1, 30 Stat. 750. From the outset, therefore, it was understood that the Newlands Resolution had “subject[ed] the public lands in Hawaii to a special trust” for the benefit of the Hawaiian people. 22 Op. Att’y Gen. 574, 576 (1899).

Although the federal government claimed title to the ceded lands, it held those lands separately from other lands it owned, and the territorial government largely continued to administer the ceded lands itself. See Hawaiian Organic Act, ch. 339, § 91, 31 Stat. 141, 159 (1900). The federal government did set aside approximately 200,000 acres of the ceded lands for the purpose of leasing those lands to Native Hawaiians. See Hawaiian Homes Commission Act, 1920, ch. 42, §§ 203, 207, 42 Stat. 108, 109, 110 (1921).

3. On August 21, 1959, Hawaii became the fiftieth State in the Union. Pursuant to the act of admission, the federal government transferred title to approximately 1.2 million acres of the ceded lands to the State of Hawaii (in addition to the lands it had previously set aside for Native Hawaiian use), while retaining title over the remainder for federal use. See Hawaii Statehood Admission Act (Admission Act), Pub. L. No. 86-3, § 5(b)-(e), 73 Stat. 4, 5-6 (1959) (48 U.S.C. ch. 3 note); Pet. App. 155a-

156a. The Admission Act specified that the State was required to “manage[] and dispose[] of [its share of the ceded lands] for one or more of [five] purposes in such manner as the constitution and laws of [the] State may provide”: namely, (1) “for the support of the public schools and other public educational institutions”; (2) “for the betterment of the conditions of native Hawaiians”; (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), 73 Stat. 6. The Admission Act also provided that the federal government could bring suit for breach of trust if the lands were “use[d] for any other object.” *Ibid.*

4. For the first two decades after admission, the State devoted virtually all of the revenue from the ceded-lands trust to the support of public educational institutions, with little (if any) of the revenue going to the betterment of the conditions of Native Hawaiians. See *Rice*, 528 U.S. at 508. In 1978, however, the State convened its second Constitutional Convention, out of which emerged numerous constitutional provisions concerning the welfare of Native Hawaiians. Of particular relevance here, the new provisions expressly specified that the ceded lands transferred to the State at admission “shall be held by the State as a public trust for native Hawaiians and the general public,” Haw. Const. Art. XII, § 4, and that any legislation enacted by the Hawaii Legislature concerning the State’s trust obligations “shall not diminish or limit the benefits of native Hawaiians” under the foregoing provision, *id.* Art. XVI, § 7. The new provisions also established the Office of Hawaiian Affairs (OHA), *id.* Art. XII, § 5, which has the responsibilities, *inter alia*, to “manage and administer \* \* \* all income and proceeds” allocated to Native Hawaiians from the ceded-

lands trust and to “exercise control over real and personal property set aside by state, federal or private sources” for Native Hawaiians, *id.* Art. XII, § 6.<sup>2</sup>

Following the 1978 Constitutional Convention, the Hawaii Legislature enacted a statute providing that OHA was entitled to receive 20% of the revenue from the ceded-lands trust, to be used on behalf of Native Hawaiians. See Haw. Rev. Stat. § 10-13.5. In a series of subsequent cases, OHA brought suit against the State and various state officials, contending that the State was failing to comply with its obligations under that statute. See *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446 (Haw.), cert. denied, 484 U.S. 898 (1987); *Office of Hawaiian Affairs v. State*, 31 P.3d 901 (Haw. 2001) (*OHA I*); *Office of Hawaiian Affairs v. State*, 133 P.3d 767 (Haw. 2006) (*OHA II*). Although the Hawaii Supreme Court ultimately held that those disputes were nonjusticiable, it repeatedly emphasized that “the State’s obligation to native Hawaiians is firmly established in our constitution” and that, under the relevant constitutional provisions, it was “incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust.” *OHA I*, 31 P.3d at 914; see *OHA II*, 133 P.3d at 795.

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<sup>2</sup> OHA is overseen by a nine-member board of trustees. See Haw. Rev. Stat. § 10-4. In *Rice*, this Court invalidated, as violative of the Fifteenth Amendment, a constitutional provision that permitted only Native Hawaiians to vote in elections for OHA trustees, see 528 U.S. at 524, and all registered voters are now eligible to vote in OHA elections, see Haw. Rev. Stat. § 13D-3. The parties agree that no similar constitutional questions are before the Court in this case. See Pet. Br. 27 n.16.

### B. The Reconciliation Process

Since the 1990s, Native Hawaiians have been engaged in a process of reconciliation with the State of Hawaii and the federal government, with the goal of finally resolving the grievances of Native Hawaiians arising from the overthrow of the Kingdom of Hawaii. That reconciliation process consists of two parts: (1) an effort to obtain additional recognition for Native Hawaiians as a native people and (2) an effort to resolve the claims of Native Hawaiians to the lands that were ceded to the federal government in the aftermath of the overthrow. This case concerns the latter of those efforts.

1. In April 1993, the Hawaii Legislature marked the 100th anniversary of the overthrow of the Kingdom of Hawaii by passing a concurrent resolution requesting that Congress and the President issue a formal apology for the involvement of the federal government in the overthrow. See 1993 Haw. H.R. Con. Res. No. 179. That resolution recounted at length the history leading up to the creation of the State of Hawaii. See *ibid.* In particular, the resolution contained findings (1) that the overthrow of the Hawaiian kingdom was “illegal”; (2) that “the indigenous Hawaiian people never directly relinquished their claims \* \* \* over their national lands to the United States”; and (3) that “the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.” *Ibid.* The resolution urged the federal government to “support reconciliation efforts between the United States and the Native Hawaiian people.” *Ibid.*

A few months later, Congress passed, and the President signed, the Apology Resolution. That resolution tracked, almost verbatim, the findings of the Hawaii Legislature’s joint resolution, including the findings that “the indigenous Hawaiian people never directly relin-

quished their claims \* \* \* over their national lands to the United States” and that “the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.” Preamble, 107 Stat. 1512. The Apology Resolution also contained a finding that it would be “proper and timely” for Congress to “support the reconciliation efforts of the State of Hawaii \* \* \* with Native Hawaiians.” Preamble, 107 Stat. 1513. In the operative provisions of the Apology Resolution, Congress acknowledged that the overthrow of the Hawaiian Kingdom was “illegal”; apologized for the involvement of the federal government in the overthrow; and expressed its support for “reconciliation between the United States and the Native Hawaiian people.” § 1, 107 Stat. 1513.

Around the same time, the Hawaii Legislature enacted a series of other statutes relating to the reconciliation process. The Legislature established the Hawaiian Sovereignty Advisory Commission to “facilitate the efforts of native Hawaiian people \* \* \* to be govern[ed] by an indigenous sovereign nation of their own choosing,” 1993 Haw. Sess. L. Act 359, § 2,<sup>3</sup> and authorized funding for programs to educate the public about Native Hawaiian sovereignty, 1993 Haw. Sess. L. Act 354, § 2. Perhaps most importantly, the Legislature provided that the Island of Kaho‘olawe—one of the eight primary Hawaiian islands, which was in the process of being returned by the federal government to the State—would

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<sup>3</sup> In its final report, which it issued before the commencement of this litigation, the Hawaiian Sovereignty Advisory Commission recommended, *inter alia*, that the State adopt a moratorium on the sale of ceded lands “until a sovereign Hawaiian entity is established and recognized.” Hawaiian Sovereignty Advisory Commission, Final Report 6 (Feb. 18, 1994).

be held as part of the ceded-land trust until such time as the federal and state governments recognized a “sovereign native Hawaiian entity,” whereupon that entity would assume “management and control of the island and its waters.” 1993 Haw. Sess. L. Act 340, § 2.

2. There have since been additional milestones in the reconciliation process. In 1997, the Hawaii Legislature set up a joint committee to “study and make recommendations on all outstanding and anticipated issues \* \* \* currently or potentially relating to the public land trust,” including “whether lands should be transferred to [OHA] in partial or full satisfaction of any past or future obligations” under the Hawaii Constitution. 1997 Haw. Sess. L. Act 329, § 3(a). In the same act, the Legislature noted that “the events of history relating to Hawaii and Native Hawaiians \* \* \* continue to contribute today to a deep sense of injustice among many Native Hawaiians and others”; that the Hawaiian people desired a “lasting reconciliation”; that, “over the last few decades, the people of Hawaii, through amendments to their state constitution, the acts of their legislature, and other means, have moved substantially toward this permanent reconciliation”; and that the Legislature’s goal was to “continue this momentum \* \* \* toward a comprehensive, just, and lasting resolution.” *Id.* § 1.

Although the claims of Native Hawaiians to the ceded lands have not been definitively resolved, there is considerable support on the state level for such a resolution. In 1998, Governor Cayetano pledged that he would “settle the ceded lands issue” before the end of his term in office. Benjamin J. Cayetano, *The Next Four Years: Completing the Vision*, Honolulu Advertiser, Oct. 16, 1998, at A-13. When he left office in 2002, he expressed regret for his inability to reach a definitive resolution of that issue. See Pat Omandan, *Governor Admits Failure*

*Over OHA*, Honolulu Star-Bulletin, Jan. 6, 2002, at A-6. Governor Cayetano’s successor, Governor Lingle, likewise pledged to “resolve the ceded lands issue once and for all.” Governor Linda Lingle, State of the State Speech (Jan. 21, 2003). She stressed that, “until we get [the ceded-lands issue] resolved[,] our community can never really come together as one.” *Ibid.*<sup>4</sup>

### C. Facts and Proceedings Below

Respondents, plaintiffs below, are OHA, its board members, and four Native Hawaiian individuals; petitioners, defendants below, are the State of Hawaii, Governor Lingle, the Hawaii Housing Finance and Development Corporation (HFDC), and its executive director and board members.

1. In the late 1980s, HFDC determined that it would be appropriate to use land from the ceded-lands trust—the so-called “Leiali’i parcel” in West Maui—for a large residential development.<sup>5</sup> Like other ceded lands, the

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<sup>4</sup> There is also considerable support for additional recognition of Native Hawaiians as a native people. Congress has been considering the Native Hawaiian Government Reorganization Act, popularly known as the Akaka Bill, which would “provide a process for the reorganization of the single Native Hawaiian governing entity \* \* \* for purposes of continuing a government-to-government relationship,” and authorize the federal government to enter into negotiations with that entity for the transfer of federal lands. H.R. 505, 110th Cong. §§ 4(b), 8(b) (2007); S. 310, 110th Cong. §§ 4(b), 8(b) (2007). In the last Congress, the Akaka Bill passed the House of Representatives but failed to attain the 60 votes required to invoke cloture in the Senate; it is expected to be reintroduced presently in the new Congress.

<sup>5</sup> While the development was to have contained some housing for Maui residents with incomes at or near the median, it was also to have contained other housing to be sold at “market” rates, and to have included an 18-hole golf course. See Pet. Trial Ex. LL.

Leiali'i parcel was then managed by the Hawaii Department of Land and Natural Resources (DLNR). By statute, OHA was entitled to 20% of the fair market value of the land upon its transfer to HFDC. See Haw. Rev. Stat. § 10-13.6. In light of the increasing momentum behind the reconciliation process, however, OHA was concerned that it would be sued if it accepted payment without a disclaimer preserving any claims of Native Hawaiians to the land. Accordingly, OHA proposed to include language in its agreement with HFDC indicating that, in accepting payment, it was “in no manner \* \* \* waiv[ing] or otherwise act[ing] in furtherance or diminution of any claim the Hawaiian people may have in the land comprising the site of the Villages of Le[i]ali'i project.” HFDC refused to include that language in the agreement. Notwithstanding the lack of an agreement with OHA, on November 4, 1994, DLNR transferred approximately 500 acres of the Leiali'i parcel to HFDC for \$1. Pet. App. 18a-22a, 201a-208a.

2. That same day, OHA and its board members brought suit against petitioners in Hawaii Circuit Court, seeking to enjoin the sale of the Leiali'i parcel, or any other ceded lands held by the State, to private parties. The individual respondents filed a similar action a few days later, and later consolidated their claims with those of the official respondents. In the consolidated complaint, respondents claimed that the sale of the Leiali'i parcel, or any other ceded lands, would violate the State's fiduciary duty to Native Hawaiians under Article XII, Section 4, of the Hawaii Constitution, see J.A. 34a, 35a, and that the sale would cause irreparable harm because “alienation of the land to a third party w[ould] erode the public land trust and the entitlement of the

Native Hawaiian people,” J.A. 35a; see also J.A. 36a (same).<sup>6</sup> Notably, the complaint made no claims under federal law; it cited the Apology Resolution only in the facts section. See J.A. 31a-32a.<sup>7</sup>

After a bench trial, the trial court entered judgment in favor of petitioners. Pet. App. 133a-279a. As is relevant here, the court concluded that “the sale of ceded lands at Leiali‘i would not constitute a breach of trust.” *Id.* at 226a. The court reasoned that “the Hawaii State Legislature has considerable discretion with respect to the handling of the ceded lands trust.” *Id.* at 261a. “[S]ales of ceded lands,” the court continued, “generally[] do not constitute a breach of trust,” as long as “the State does not otherwise breach the high standards applicable to it as trustee.” *Ibid.* While the court acknowledged that “the federal and state governments have recognized past injustices to native Hawaiians, and have expressed their support for native Hawaiian sovereignty and reconciliation,” the court rejected the argument that the Apology Resolution (or state law) “constitute[d] changed circumstances that \* \* \* would render any sale of ceded lands a breach of trust.” *Id.* at 258a.

3. The Hawaii Supreme Court unanimously vacated and remanded, directing the trial court to enjoin peti-

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<sup>6</sup> Respondents also claimed, in the alternative, that HFDC had used an erroneously low assessment of the fair market value of the Leiali‘i parcel for purposes of determining OHA’s statutory entitlement to a share of that value. See J.A. 37a, 38a. Those claims remain pending in the trial court.

<sup>7</sup> Before trial, respondents moved for the trial court to take judicial notice of the “findings and operative provisions” of the Apology Resolution and various other federal and state laws. See 8/9/99 Official Resp. Mem. in Support of Mot. for Jud. Notice 1-2. The trial court granted the motion. See 8/31/00 Order 1.

tioners from selling the Leiali'i parcel, or any other ceded lands held by the State, until the claims of Native Hawaiians to those lands have been resolved by the Hawaii Legislature. Pet. App. 1a-100a.

As is relevant here, the Hawaii Supreme Court held that the trial court erred by rejecting petitioners' breach-of-fiduciary-duty claims. Pet. App. 27a-41a, 84a-88a. At the outset, the court noted that respondents were arguing that, "in light of the Apology Resolution, any transfer of ceded lands by the State to third-parties would amount to a breach of trust," insofar as "such transfers would be without regard for the claims of Hawaiians to those lands to whom the State, as trustee, owes a fiduciary duty." *Id.* at 23a (internal quotation marks omitted). After reviewing the terms of the Apology Resolution, the court "agree[d] with [respondents] that the 'Apology Resolution by itself does not require the State to turn over the [ceded] lands to the [n]ative Hawaiian people.'" *Id.* at 32a (quoting J.A. 117a (reply brief of official respondents)). Instead, the court concluded, the Apology Resolution "acknowledges only that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims." *Ibid.*

The Hawaii Supreme Court then reasoned that its analysis was "also supported by related state legislation enacted at around or subsequent to the adoption of the Apology Resolution." Pet. App. 35a. The court concluded that the state legislation, like the Apology Resolution, "clearly contemplate[d] that native Hawaiians (1) never directly relinquished their claims to . . . their national lands to the United States, and (2) are determined to preserve, develop and transmit to future generations their ancestral territory." *Id.* at 41a (internal quotation marks and citation omitted).

As to the question of how the Apology Resolution and state law informed the disposition of the claims at hand, the Hawaii Supreme Court explained that it was “well-settled that native Hawaiian beneficiaries of the ceded lands trust have a ‘right to bring suit under the Hawai‘i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust.’” Pet. App. 39a (quoting *Pele Defense Fund v. Paty*, 837 P.2d 1247, 1262 (Haw. 1992)). The court further reasoned that, as trustee, the State was “under an obligation to ‘administer the trust solely in the interest of the beneficiary’ and to ‘deal impartially when there is more than one beneficiary.’” *Id.* at 41a (quoting *Ahuna v. Department of Hawaiian Home Lands*, 640 P.2d 1161, 1169-1170 (Haw. 1982)). The court ultimately held that, in light of “the Apology Resolution and related state legislation,” the State possessed a “fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved.” *Ibid.*

The Hawaii Supreme Court proceeded to hold that respondents were entitled to injunctive relief on their breach-of-fiduciary-duty claims. Pet. App. 81a-98a. The court reasoned that, under state law, there were three requirements for a permanent injunction: “(1) whether 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.” *Id.* at 84a.

As to the first prong of that test, the Hawaii Supreme Court held that respondents had prevailed on the merits of their breach-of-fiduciary-duty claims. Pet. App. 84a-88a. The court noted that “the ceded lands are at risk of being alienated and, as previously stated, once the ceded lands are sold or transferred from the public lands trust,

they will not be available to satisfy the unrelinquished claims of native Hawaiians.” *Id.* at 85a. The court observed that “the state legislature itself has announced that future reconciliation between the State and native Hawaiians will occur,” *id.* at 86a, though the court added that it “need not speculate as to what a future settlement might entail—*i.e.*, whether such settlement would involve monetary payment, transfer of lands, ceded or otherwise, a combination of money and land, or the creation of a sovereign Hawaiian nation,” *id.* at 88a.

As to the second prong, the Hawaii Supreme Court held that respondents would suffer irreparable harm if an injunction were not entered. Pet. App. 88a-94a. The court reasoned that, “without an injunction, any ceded lands alienated from the public lands trust will be lost and will not be available for the future reconciliation efforts contemplated by” the Apology Resolution and state law.” *Id.* at 88a. And as to the third prong, the court held that an injunction would be in the public interest. *Id.* at 94a-98a. The court noted that it “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.’” *Id.* at 94a (quoting 1997 Haw. Sess. L. Act 329, § 1). The court therefore remanded to the trial court with instructions to enter an injunction. *Id.* at 100a.

4. After the instant petition for certiorari was filed, the trial court entered an injunction barring the sale of any ceded lands held by the State until “the unrelinquished claims of the native Hawaiians \* \* \* have been resolved.” Br. in Opp. App. 28a.

#### SUMMARY OF ARGUMENT

I. Petitioners sought this Court’s review on the question whether the Apology Resolution “strips Hawaii

of its sovereign authority to sell” ceded lands. In doing so, petitioners were operating on an erroneous premise. The Hawaii Supreme Court did not hold that the Apology Resolution imposed an affirmative limitation, *under federal law*, on the State’s ability to sell ceded lands. Instead, it merely held that, in light of the ongoing reconciliation process, the sale of ceded lands would constitute a breach of the State’s fiduciary duty to Native Hawaiians *under state law*. That duty is derived from Article XII, Section 4, of the Hawaii Constitution, which served as the basis of respondents’ claims in their initial complaint (and has consistently done so since).

The Hawaii Supreme Court relied on findings in the Apology Resolution, and parallel findings in state law, simply to support the factual premise for its holding: namely, that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the reconciliation process. There is nothing problematic about a state court’s reliance on factual findings from a federal statute in that manner. And insofar as the Hawaii Supreme Court held that the fiduciary duty at issue emanated from state law, not federal law, there is no merit to petitioners’ suggestion that the Hawaii Legislature is somehow disabled from eliminating or alleviating any restraint resulting from the entry of an injunction. Because respondents claimed only that the sale of ceded lands would violate the State’s fiduciary duty under state law, and because there is no dispute in this case about the meaning of the Apology Resolution, this Court lacks jurisdiction, and the petition for certiorari should be dismissed.

II. Having sought this Court’s review on a question concerning the Apology Resolution, petitioners devote the majority of their brief, as does the United States as *amicus curiae*, to entirely different questions: specifi-

cally, whether any injunction barring the sale of ceded lands, even if it is based on state law, is precluded either by the Newlands Resolution (and similar federal statutes) or by the Admission Act. Those questions, however, are not within the scope of the question that was actually presented in the petition for certiorari, nor were they raised in the body of the petition. Indeed, petitioners' Newlands Resolution argument was neither pressed nor passed upon below. With the United States as a willing abettor, petitioners are thereby engaging in a classic bait and switch, by attracting the Court's attention on one question and then seeking a decision from the Court on others. That tactic should be seen for what it is: a brazen effort to disempower the Hawaii Supreme Court, which petitioners evidently view as an unfriendly forum in which to litigate state-law issues concerning the status of the ceded lands. This Court should decline petitioners' invitation to resolve questions of federal law as a matter of first impression.

In any event, the various newly minted arguments of petitioners and the United States lack merit. With regard to the Newlands Resolution, Native Hawaiians do not simply claim that they are entitled to the ceded lands as a matter of property law, but also have broader moral and political claims for compensation for the wrongs of the past. Even assuming, therefore, that the Newlands Resolution validly conveyed absolute title to the ceded lands to the federal government at the time of annexation, it would present no obstacle to the entry of an injunction pending the resolution of those broader (and concededly nonjusticiable) claims in the political process. With regard to the Admission Act, that statute merely prohibits the State from using ceded lands for other purposes besides the five enumerated purposes. The Admission Act affords the State broad discretion in the

administration of its trust responsibilities, and the State has enacted laws that guide and constrain the exercise of that discretion. In ordering the entry of an injunction, the Hawaii Supreme Court was simply interpreting those state laws; it was not thereby violating the Admission Act.

### ARGUMENT

#### I. THE HAWAII SUPREME COURT CORRECTLY HELD THAT, IN LIGHT OF THE ONGOING RECONCILIATION PROCESS, IT WOULD CONSTITUTE A BREACH OF FIDUCIARY DUTY UNDER STATE LAW FOR THE STATE TO SELL CEDED LANDS

The only question properly before this Court is whether the Apology Resolution “strips Hawaii of its sovereign authority to sell” ceded lands. Pet. i. The Hawaii Supreme Court, however, merely relied on factual findings in the Apology Resolution (and parallel findings in state law) in holding that, in light of the ongoing reconciliation process, the sale of ceded lands would constitute a breach of the State’s fiduciary duty to Native Hawaiians *under state law*. That holding is unremarkable as a matter of state law and presents no difficulties as a matter of federal law. Because this case, as it comes to the Court, presents no valid question of federal law, the petition for certiorari should be dismissed for want of jurisdiction.

##### A. In Holding That It Would Constitute A Breach Of Fiduciary Duty Under State Law For The State To Sell Ceded Lands, The Hawaii Supreme Court Merely Relied On Factual Findings In The Apology Resolution

Petitioners contend (Br. 27-30) that the Hawaii Supreme Court erroneously held that the Apology Resolution imposed an affirmative limitation, as a matter of federal law, on the State’s ability to sell ceded lands.

That contention is misplaced, because petitioners' reading of the Hawaii Supreme Court's opinion is incorrect. Instead, the court simply held that, in light of the ongoing reconciliation process, the sale of ceded lands would constitute a breach of the State's fiduciary duty to Native Hawaiians *under state law*. The court relied on the Apology Resolution (and various state laws) simply to support its central factual determination that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through that reconciliation process.

1. The Hawaii Supreme Court plainly understood that the State's fiduciary duty to Native Hawaiians arose from state law: specifically, from Article XII, Section 4, of the Hawaii Constitution, which provides that the ceded lands "shall be held by the State as a public trust for native Hawaiians and the general public." Citing an earlier decision interpreting that provision, the court explained that it was "well-settled that native Hawaiian beneficiaries of the ceded lands trust have a 'right to bring suit under [Article XII, Section 4] to prospectively enjoin the State from violating the terms of the ceded lands trust.'" Pet. App. 39a (quoting *Pele Defense Fund*, 837 P.2d at 1262). Expounding the scope of that duty, the court noted that, as trustee, the State was "under an obligation to 'administer the trust solely in the interest of the beneficiary' and to 'deal impartially when there is more than one beneficiary.'" *Id.* at 41a (quoting *Ahuna*, 640 P.2d at 1169-1170).

Of particular importance here, in holding that the State's sale of ceded lands would breach its fiduciary duty, the Hawaii Supreme Court relied on the Apology Resolution (and various state laws) simply to support the factual premise that Native Hawaiians have unresolved claims to the ceded lands that are being addressed

through the reconciliation process. In the principal paragraph in which it analyzed the relevance of the Apology Resolution, the court “agree[d] with [respondents] that the ‘Apology Resolution by itself does not require the State to turn over the [ceded] lands to the [n]ative Hawaiian people.’” Pet. App. 32a (quoting J.A. 117a (reply brief of official respondents)). And the court concluded that the Apology Resolution “acknowledges only that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims.” *Ibid.* Those findings in the Apology Resolution (and similar findings in state law) provided the *factual* basis for the court’s ultimate *legal* holding that the sale of the ceded lands would breach “the State’s fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved.” *Id.* at 41a.

Petitioners correctly note (Br. 16) that, at other points in its opinion, the Hawaii Supreme Court suggested that the Apology Resolution “dictate[d] that the ceded lands should be preserved,” Pet. App. 85a, or “itself support[ed] the issuance of an injunction,” *ibid.* Those shorthand statements, however, are entirely consistent with the foregoing reading of the court’s opinion: *viz.*, that the court relied on the Apology Resolution simply to support its factual determination that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the reconciliation process. Insofar as the findings in the Apology Resolution are by themselves sufficient to make that factual showing (which, in turn, supported the legal holding that the State’s sale of ceded lands would breach its fiduciary duty), the Apology Resolution could be said to have “supported” or even “dictated” the issuance of the in-

junction. Conversely, in the absence of the Apology Resolution (and various state laws to the same effect), respondents may not have been entitled to an injunction, because they may not have been able to make the relevant factual showing.<sup>8</sup> None of the passages on which petitioners rely therefore suggests that the Hawaii Supreme Court believed that the Apology Resolution imposed an affirmative limitation, as a matter of federal law, on the State’s ability to sell ceded lands.<sup>9</sup>

2. Contrary to petitioners’ assertions (Br. 11-14), respondents consistently argued before the state courts that the sale of ceded lands would constitute a breach of the State’s fiduciary duty to Native Hawaiians *under state law*. First, and most obviously, in the consolidated

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<sup>8</sup> For that reason, notwithstanding petitioners’ suggestion (Br. 21-22), it is not problematic that, in holding that respondents’ claims with regard to the Leiali’i parcel were not barred by waiver or equitable estoppel as a matter of state law, the Hawaii Supreme Court suggested that those claims did not arise until the date when Apology Resolution was enacted. See Pet. App. 58a-59a, 62a-63a. The court presumably concluded that the factual predicate for respondents’ claims—that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the reconciliation process—had not been sufficiently established until on (or around) that date.

<sup>9</sup> In a passage on which petitioners do not rely, the Hawaii Supreme Court did state that the Apology Resolution and related state legislation “g[a]ve rise” to the State’s fiduciary duty not to sell ceded lands. Pet. App. 41a. When read in isolation, that statement is somewhat imprecise, because the fiduciary duty to Native Hawaiians independently exists as a matter of state law—as the next sentence of the court’s opinion makes clear. See *ibid.* (citing *Ahuna*, 640 P.2d at 1169). A more precise formulation is that the Apology Resolution and the cited state laws factually inform the state-law determination whether the State’s sale of ceded lands would be a breach of its fiduciary duty to Native Hawaiians.

complaint, respondents claimed that any such sale would violate the State's fiduciary duty under Article XII, Section 4, of the Hawaii Constitution. See J.A. 34a, 35a. Respondents cited the Apology Resolution only in the facts section of the complaint. See J.A. 31a-32a. Consistent with the theory that the Apology Resolution was factually relevant to their claims of a breach of fiduciary duty under state law, respondents successfully asked the trial court to take judicial notice of the Apology Resolution and its factual findings. See p. 13 n.7, *supra*. Respondents also presented evidence confirming the accuracy of those findings. See, *e.g.*, J.A. 68a (testimony of Prof. Davianna McGregor).

Nor did respondents' claims "evolve[]" over the course of the litigation, as petitioners suggest (Br. 12). In the opening sentence of their opening brief to the Hawaii Supreme Court, the individual respondents contended that "[t]he central issue in this case is whether, in light of the admissions in [various state laws] and the Apology Resolution \* \* \*, the State would breach fiduciary duties if it sold ceded lands before the Hawaiians' claim to ownership of the ceded lands is resolved." Br. 1 (footnote omitted). The individual respondents proceeded to analyze principles of Hawaii trust law at length. See *id.* at 17-26. With regard to the Apology Resolution, the individual respondents reasoned that "the fact that the Apology Resolution may not create a new cause of action or change existing law does not excuse the State from complying with its fiduciary duties or allow the State to ignore the factual admissions in [the Apology Resolution or related state laws]." *Id.* at 32. In their reply brief, the individual respondents reiterated that "the trustee would clearly breach fiduciary duties, specifically the duty of impartiality, if it sold ceded lands

against the interests of [native] Hawaiians before resolution of the Hawaiians' claim to [those] lands." J.A. 143a.

For their part, in their opening brief below, the official respondents noted that "[t]he State's role as trustee of the Public Trust Lands for the benefit of Native Hawaiians is acknowledged expressly in Article XII, Section 4 of Hawaii's Constitution." Br. 35. They contended that they were "asking the judiciary only to protect the trust assets while the dispute is being resolved by the political branches," *id.* at 29, and that, "[i]n light of the[] ongoing reconciliation negotiations, it is imperative that the trust corpus be preserved by the trustee—the State of Hawai'i," *id.* at 40. With regard to the Apology Resolution, the official respondents noted that the Apology Resolution constituted "a significant step in the process of reconciliation with Native Hawaiians by enacting a formal apology and making certain admissions." *Id.* at 11. In their reply brief, the official respondents reiterated that they were seeking to "preserve the trust corpus until the reconciliation process between the government and the Native Hawaiian people is completed." J.A. 105a. And quoting the trial court's opinion, they stated that the Apology Resolution merely "confirm[ed] the factual foundation" for preexisting claims. J.A. 115a (quoting Pet. App. 175a). While respondents' briefs contained a few statements concerning the (unquestionable) importance of the Apology Resolution as a milestone in the reconciliation process, therefore, they consistently made clear that respondents' claims were based on the State's fiduciary duty *under state law*.

**B. The Hawaii Supreme Court's Reliance On Factual Findings In The Apology Resolution Was Proper**

1. A state court may permissibly rely on factual findings in a federal statute to inform its determination

whether the State breached a duty it possessed under state law. It is well established, of course, that federal courts should defer to congressional factual findings when they consider constitutional challenges to federal statutes. See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 196 (1997); *Board of Education v. Mergens*, 496 U.S. 226, 251 (1990); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985). *A fortiori*, while a state court is not *required* to rely on a congressional factual finding (or to attach a particular amount of weight to that finding) in determining whether a State breached a state-law duty, nothing in federal law *disempowers* a state court from doing so.

An example cited by the United States (Br. 30 n.5) proves the point. In 2006, Congress passed a joint resolution in honor of Chief Justice Rehnquist—and, in the preamble to that resolution, recognized the “intellect, fairness, and humor” of the late Chief Justice. See Joint Resolution to Memorialize and Honor the Contribution of Chief Justice William H. Rehnquist, Pub. L. No. 109-223, Preamble, 120 Stat. 374.

It would certainly be erroneous if, say, a Wisconsin state court construed that resolution as imposing an affirmative duty on the State of Wisconsin to erect a monument to the late Chief Justice. If a preexisting Wisconsin statute required the State to erect monuments to all Wisconsin-born public officials who possessed a superior intellect, however, a Wisconsin state court could certainly take judicial notice of (and rely on) Congress’s factual findings concerning Chief Justice Rehnquist in holding that, under the state statute, the State was obligated to erect a monument in his honor. And while it might be somewhat unusual for a state court to rely *entirely* on a congressional factual finding in making that sort of determination, it would be much less un-

usual if the state court also relied on parallel findings in a contemporaneous state resolution honoring the late Chief Justice (and on testimony from his former law clerks attesting to his superior intellect). So too here, it was entirely appropriate for the Hawaii Supreme Court to rely on Congress's findings (and on parallel findings in state law) that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the ongoing reconciliation process in holding that the sale of ceded lands would constitute a breach of the State's fiduciary duty to Native Hawaiians under state law.

2. Petitioners fail to cast any doubt on the ability of the Hawaii Supreme Court to rely on Congress's factual findings in the Apology Resolution.<sup>10</sup>

Petitioners first contend (Br. 16) that the Hawaii Supreme Court relied "primarily" on the Apology Resolution and that the court invoked various state laws "only as ancillary support" in its analysis. Even assuming that is true, but see, *e.g.*, Pet. App. 86a, it is neither problematic nor surprising. As noted above, the Hawaii Supreme Court could validly have relied *exclusively* on the Apology Resolution as support for its factual determination

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<sup>10</sup> In fact, in a position statement defending the constitutionality of the Akaka Bill, Attorney General Bennett recognized that it would be appropriate for "[a] court [to] give deference to [the] [c]ongressional findings" in the Apology Resolution and that those findings "are independently supported by the testimony of experts, including in recent and pending litigation." See *Can Congress Create A Race-Based Government?: Hearing Before the Subcomm. on the Constitution of H. Comm. on the Judiciary*, 109th Cong., 1st Sess. 114 n.4 (2005). In light of those concessions by petitioners' counsel, it would be remarkable if petitioners now disputed the proposition that a state court could rely on congressional findings in ruling on questions of state law. Cf. U.S. Br. at 2 n.1, 16-17, *Rice*, *supra* (No. 98-818) (relying on the findings in the Apology Resolution).

that the Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the ongoing reconciliation process. See pp. 24-26, *supra*.

The Hawaii Supreme Court's emphasis on the Apology Resolution, moreover, is entirely understandable in light of the fact that the enactment of the Apology Resolution constituted an important milestone in the reconciliation process. In addition to its findings concerning the existence of Native Hawaiian claims to the ceded lands, Congress recognized that the overthrow of the Kingdom of Hawaii was "illegal." Apology Resolution § 1, 107 Stat. 1513. That recognition was particularly significant in light of the involvement of the federal government in the overthrow, see p. 4, *supra*; indeed, it provided an obvious boost for any moral and political claims by Native Hawaiians to be compensated for the wrongs of the past, see pp. 37-42, *infra*, as well as for efforts to obtain additional recognition for Native Hawaiians as a native people. For present purposes, however, the critical point is that the Hawaii Supreme Court in no way held that the Apology Resolution created any affirmative duties or obligations as a matter of federal law. For that reason, the court's reliance on the Apology Resolution, "primar[y]" or otherwise, was entirely proper.

Petitioners also contend (Br. 29) that the disclaimer in Section 3 of the Apology Resolution "cuts against" the Hawaii Supreme Court's interpretation. Section 3 provides that "[n]othing in this \* \* \* Resolution is intended to serve as a settlement of any claims against the United States." 107 Stat. 1514. That language, however, merely means what it says: *i.e.*, that the Apology Resolution does not *settle* any claims *against the federal gov-*

*ernment*.<sup>11</sup> It says nothing about whether a state court can rely on the Apology Resolution’s factual findings in ordering the entry of an injunction as a matter of state law pending the resolution of underlying claims against the State in the state political process. It would be an impossibly muscular interpretation of that language to read it to foreclose a state court from relying on the resolution’s factual findings even for state-law purposes.

Petitioners suggest (Br. 23-24) that, because the Apology Resolution is federal law, the Hawaii Supreme Court’s decision relying on the Apology Resolution would “trump” any effort by the Hawaii Legislature to overcome the terms of any injunction. That suggestion is misplaced, however, because the Hawaii Supreme Court held that the State’s fiduciary duty to Native Hawaiians existed as a matter of state law—and, having done so, further held only that it would be a breach of that fiduciary duty to sell ceded lands *while the reconciliation process remains ongoing on the state level*. Under the terms of the injunction entered on remand by the trial court, the State would be free to dispose of ceded lands as it sees fit once “the unrelinquished claims of the native Hawaiians \* \* \* have been resolved,” Br. in Opp. App. 28a—whether by an act of the Hawaii Legislature that definitively resolves those claims by providing land or monetary compensation, or by an act that determines that compensation for those claims is inappropriate (and thereby terminates the reconciliation proc-

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<sup>11</sup> Contrary to petitioners’ suggestion (Br. 37 n.21), because the injunction in this case was based on the State’s breach of its fiduciary duty to Native Hawaiians with regard to the disposition of the State’s portion of the ceded lands, it reaches only those ceded lands held by the State. Any settlement concerning ceded lands retained by the federal government would have to occur on the federal level.

ess). To the extent that the injunction imposes any restraint on the State, therefore, it does so purely as a matter of state law—and the State retains plenary power to eliminate or alleviate that restraint.<sup>12</sup>

**C. The Hawaii Supreme Court Correctly Held As A Matter Of State Law That It Would Constitute A Breach Of Fiduciary Duty For The State To Sell Ceded Lands**

If the Hawaii Supreme Court properly relied on the factual findings in the Apology Resolution, the only remaining question is whether the court correctly held that, in light of the fact that Native Hawaiians have unresolved claims to the ceded lands that are being addressed through the ongoing reconciliation process, the sale of ceded lands would constitute a breach of the State’s fiduciary duty to Native Hawaiians. While that question is one of state law that this Court lacks the authority to review, the Hawaii Supreme Court’s holding was in any event correct.

1. Hawaii law defines the contours of the State’s trust obligations with regard to the ceded lands. Article XII, Section 4, of the Hawaii Constitution, provides that the ceded lands “shall be held by the State as a public trust for native Hawaiians and the general public.” Interpreting that provision, the Hawaii Supreme Court has confirmed that the State owes a fiduciary duty to all of

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<sup>12</sup> In fact, Governor Lingle—a petitioner in this case—has recently and repeatedly stated that “we don’t have any intention of going out and selling ceded lands.” Governor Linda Lingle, Media Release (Jan. 18, 2009) <[tinyurl.com/linglerelease](http://tinyurl.com/linglerelease)>; see Olena Rubin, *Protest in Waikiki Over Ceded Lands*, KHON-2 News (Jan. 17, 2009) <[tinyurl.com/linglekhon](http://tinyurl.com/linglekhon)> (quoting Governor Lingle’s statement that “there is no intention to sell ceded lands”). Those statements raise serious questions as to whether a live dispute actually remains in this case.

the beneficiaries of the ceded-lands trust—and that beneficiaries, including Native Hawaiians, may bring suit to enjoin the State from engaging in conduct that constitutes a breach of that trust. See *Pele Defense Fund*, 837 P.2d at 1262. Other contemporaneous provisions of the Hawaii Constitution, in turn, make clear that, while the State retains the discretion to use assets in the ceded-lands trust for any of the purposes set out in the Admission Act, the State owes a particularly high duty to Native Hawaiians. See, e.g., Haw. Const. Art. XVI, § 7; cf. *OHA I*, 31 P.3d at 914 (noting that “the State’s obligation to native Hawaiians is firmly established in our constitution”).

As the Hawaii Supreme Court noted in this case, a fundamental principle of trust law, applicable to the ceded-lands trust, is that a trustee is obligated to “deal impartially when there is more than one beneficiary.” Pet. App. 41a (quoting *Ahuna*, 640 P.2d at 1169-1170); see, e.g., Restatement (Third) of Trusts § 79(1) (2003). The court did not dispute that the State was proposing to sell the Leiali’i parcel for a valid trust purpose: *viz.*, for the development of home ownership. See Admission Act § 5(f), 73 Stat. 6. Instead, the court held that the State would effectively abuse its discretion by selling ceded lands for that purpose (or another valid trust purpose) in light of the ongoing reconciliation process, because such a sale would be in substantial derogation of the interests of another class of trust beneficiaries, the Native Hawaiians. The court noted that, “once the ceded lands are sold or transferred from the public lands trust, they will not be available to satisfy the unrelinquished claims of Native Hawaiians” in the reconciliation process. Pet. App. 85a.

Crucially, while the Hawaii Supreme Court noted that the Native Hawaiians’ claims could be resolved by

monetary compensation (rather than the transfer of land), Pet. App. 88a, that court, like the trial court before it, recognized the central importance of land to the Native Hawaiian people. See *ibid.* As the trial court noted, ‘*aina*, or land, is “of crucial importance to the Native Hawaiian People—to their culture, their religion, their economic self-sufficiency, and their sense of personal and community well-being.” *Id.* at 196a-197a. To the Native Hawaiians, “land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians.” *Id.* at 197a. Indeed, “[t]he ‘*aina* is part of [Native Hawaiians’] ‘*ohana* [or family], and they care for it as they do for other members of their families.” *Ibid.* Because of the very real possibility that at least some portion of the ceded lands would be transferred to the Native Hawaiians at the culmination of the reconciliation process (and the resulting irreparable harm if the lands were sold in the intervening period), the Hawaii Supreme Court correctly held that it would constitute a breach of the State’s fiduciary duty to Native Hawaiians to sell ceded lands while the reconciliation process remains ongoing, even for another valid trust purpose. See *id.* at 84a-88a.

2. Petitioners could argue, as they did below, that the State retained plenary power, as a matter of state law, to sell ceded lands for any valid trust purpose, see, *e.g.*, Pet. Haw. S. Ct. Br. 23-36—and that the Hawaii Supreme Court therefore erred in striking the balance that it did between the trust objective of bettering the conditions of Native Hawaiians and other trust objectives. Because any such argument would turn on state law, this Court would lack the authority to consider it. In any event, as the foregoing discussion demonstrates, the Hawaii Supreme Court was correct in holding that the State would breach its fiduciary duty to Native Hawai-

ians by selling ceded lands while the reconciliation process remains ongoing.

**D. Because The Hawaii Supreme Court’s Decision Rested On State Law, This Court Should Dismiss The Petition For Lack Of Jurisdiction**

1. In the petition for certiorari, petitioners invoked this Court’s jurisdiction under 28 U.S.C. 1257, which provides, in relevant part, that the Court has jurisdiction to review “[f]inal judgments or decrees rendered by the highest court of a State \* \* \* where any title, right, privilege, or immunity is specially set up or claimed under [federal law].” Because respondents claimed only that the sale of ceded lands would violate the State’s fiduciary duty under Article XII, Section 4, of the Hawaii Constitution, and because the Hawaii Supreme Court ruled in respondents’ favor only on those claims, respondents have not claimed, and the Hawaii Supreme Court did not set up, any “title, right, privilege, or immunity” under the Apology Resolution.

Nor, as the case comes to this Court, is there any dispute about the *meaning* of federal law. To the extent that the Hawaii Supreme Court relied on factual findings under the Apology Resolution in holding that the sale of ceded lands would constitute a breach of the State’s duty under state law, there is no disagreement about what Congress actually meant in those findings—and there is therefore no substantial question involving the interpretation of federal law for this Court to resolve. See Pet. App. 88a (noting that “Congress, the Hawai’i state legislature, the parties, and the trial court all recognize,” *inter alia*, “the cultural importance of the land to native Hawaiians”; “that the ceded lands were illegally taken from the native Hawaiian monarchy”; and “that future reconciliation between the state and the native Hawaiian people is contemplated”). While petitioners may dis-

agree about the implications of the Apology Resolution's findings under *state* law, that disagreement does not suffice to confer jurisdiction on this Court.

2. For the reasons stated above, see pp. 19-24, *supra*, the correct reading of the Hawaii Supreme Court's opinion is that the court held that, in light of the ongoing reconciliation process, the sale of ceded lands would constitute a breach of the State's fiduciary duty to Native Hawaiians under state law. In the event that this Court were to conclude that there is any ambiguity as to whether the decision below rested on state law or federal law as the source of that duty, however, the appropriate course would be to vacate the Hawaii Supreme Court's judgment and remand the case for further proceedings, so as to afford that court the opportunity to clarify that its decision did in fact rest on state law. See, *e.g.*, *Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984) (*per curiam*); *Michigan v. Long*, 463 U.S. 1032, 1041 n.6 (1983).

Even assuming, moreover, that it would have been erroneous for the Hawaii Supreme Court to rely *in any way* on the Apology Resolution (even on its factual findings), it is worth noting that all of the relevant findings in the Apology Resolution were accompanied by parallel findings in state law: indeed, in the opinion under review, the Hawaii Supreme Court arguably placed as much weight on the latter findings as it did on the former. See, *e.g.*, Pet. App. 86a. In its 1993 concurrent resolution, the Hawaii Legislature made materially identical findings to the ones Congress made in the Apology Resolution a few months later, including the findings (1) that the overthrow of the Hawaiian kingdom was "illegal"; (2) that "the indigenous Hawaiian people never directly relinquished their claims \* \* \* over their national lands to the United States"; and (3) that "the health and well-being of the Native Hawaiian people is

intrinsically tied to their deep feelings and attachment to the land.” See 1993 Haw. H.R. Con. Res. No. 179. Other state laws—which the Hawaii Supreme Court discussed at length in its opinion, see Pet. App. 35a-39a—contained findings to the same effect. In addition, there was abundant other evidence concerning the ongoing reconciliation process. See pp. 8-11, *supra*.

Notwithstanding the importance of the Apology Resolution as a milestone in the reconciliation process, therefore, the Hawaii Supreme Court could readily have reached the same result without relying on the Apology Resolution at all. Because the Hawaii Supreme Court did not impermissibly rely on the Apology Resolution in the opinion under review, however, the Court should simply dismiss the petition for want of jurisdiction.

## **II. THE REMAINING ARGUMENTS CONCERNING FEDERAL LAW PRESENTED BY PETITIONERS AND THE UNITED STATES ARE NOT PROPERLY BEFORE THE COURT AND IN ANY EVENT LACK MERIT**

Having sought this Court’s review on the question whether the Apology Resolution “strips Hawaii of its sovereign authority to sell [ceded lands] unless and until it reaches a political settlement with native Hawaiians about the status of th[ose] land[s],” Pet. i, petitioners devote a scant four pages of their opening brief to that question. See Br. 27-30. Instead, having successfully obtained this Court’s review on that question, petitioners devote the remainder of their brief, and the United States devotes the majority of its brief, to entirely different questions: namely, whether any injunction barring the sale of ceded lands, even if based on state law, is precluded either by the Newlands Resolution (and similar federal statutes) or by the Admission Act. Those ques-

tions are not properly presented, and the underlying arguments in any event lack merit.

**A. Petitioners’ Argument Concerning The Newlands Resolution And Similar Federal Statutes Is Not Properly Before The Court And Should Be Rejected**

Petitioners contend (Br. 31-46) that, by initially vesting absolute title to the ceded lands in the federal government, “[t]he Newlands Resolution and similar federal enactments \* \* \* preclude any injunctive relief—whether based on federal or state law—that is designed, as the current injunction is, to preserve possible Native Hawaiian claims of legal title.” Br. 31. That contention is not properly raised, because it is not within the scope of the question presented, was not raised in the petition for certiorari, and was not pressed or passed upon below. That contention also lacks merit, because it is based on a further misreading of the Hawaii Supreme Court’s opinion: *i.e.*, that the court ordered entry of an injunction based solely on the existence of *legal* claims by Native Hawaiians of entitlement to the ceded lands as a matter of property law.

1. It is plain that any argument based on the Newlands Resolution (or similar federal statutes) is not within the scope of the question presented. That question is whether the *Apology Resolution* “strips Hawaii of its sovereign authority to sell” ceded lands, Pet. i—not whether an injunction barring the sale of ceded lands, regardless whether that injunction is based on the *Apology Resolution* or on state law, would contravene the *Newlands Resolution*, Pet. Br. 31. Nor did petitioners so much as cite the Newlands Resolution, even once, in the petition (or, for that matter, in the reply).

It is a familiar rule of this Court that “[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court.” S. Ct. R.

14.1(a). That rule “help[s] to maintain the integrity of the process of certiorari,” and “allowing the able counsel who argue before us to alter the[] questions [presented] or to devise additional questions at the last minute would thwart this system.” *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). Although petitioners were represented at the certiorari stage by some of the most able and experienced members of this Court’s Bar, petitioners made no effort to preserve any argument concerning the Newlands Resolution. That failure constitutes a sufficient basis for this Court to refuse to consider the Newlands Resolution argument now.

Even if petitioners had presented their additional question concerning the Newlands Resolution in the petition for certiorari, moreover, it would not be appropriate for this Court to consider that question, because it was neither pressed nor passed upon below. Although it was clear that respondents were seeking an injunction pending the resolution of the underlying claims of Native Hawaiians in the reconciliation process, see, *e.g.*, J.A. 35a, 36a, petitioners did not argue before the Hawaii Supreme Court that, because the federal government had absolute title to the ceded lands pursuant to the Newlands Resolution (or similar federal statutes), an injunction would be improper. In fact, petitioners cited the Newlands Resolution only once in their brief below—and that in a single sentence of the facts section. See Pet. Haw. S. Ct. Br. 5-6. Accordingly, in the course of its actual analysis, the Hawaii Supreme Court did not discuss the Newlands Resolution either. As “a court of review, not of first view,” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), this Court ordinarily does not consider questions that were neither pressed nor passed upon below, particularly when reviewing state-court decisions. See, *e.g.*, *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per

curiam); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). That settled practice constitutes an independent basis for this Court to refuse to address any question concerning the Newlands Resolution.

Remarkably, while petitioners are quick to point out in their opening brief that other arguments raised by their amici are not properly before this Court because they were “neither raised in or decided by” the Hawaii Supreme Court, see Br. 27 n.16, they make no effort to justify their own failure to raise the Newlands Resolution argument either below or in their certiorari petition. This Court should not countenance such flagrant defiance of its rules and practices.<sup>13</sup>

2. In any event, petitioners’ argument based on the Newlands Resolution (and similar federal statutes) lacks merit. Petitioners contend that, in the Newlands Resolution, the federal government took absolute title to the ceded lands, and that the federal government therefore passed absolute title to the State at the time of admission. Petitioners further contend that, in ordering the entry of an injunction barring the sale of ceded lands while the reconciliation process remains ongoing, the Hawaii Supreme Court relied solely on the existence of

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<sup>13</sup> It is ironic that the State would seek to introduce new issues into the case before this Court, because, in *Rice*, the State successfully *opposed* a similar effort by the petitioner in that case. In response to the petitioner’s suggestion that other aspects of state law relating to the treatment of Native Hawaiians (besides the restriction on eligible voters in OHA elections) were unconstitutional, Governor Cayetano asserted that “[t]his Court’s customary practice is to deal with the case as it came here and affirm or reverse based on the ground relied upon below.” Resp. Br. at 16, *Rice, supra* (No. 98-818) (internal quotation marks and citation omitted).

*legal* claims by Native Hawaiians to the ceded lands. Because those claims are foreclosed by the Newlands Resolution, petitioners' argument goes, any injunction, whether based on federal or state law, would be invalid.

That argument lacks merit, because petitioners' minor premise is flawed: the Hawaii Supreme Court did not order entry of an injunction based on any assumption that Native Hawaiians had exclusively legal claims to the ceded lands. As a preliminary matter, respondents effectively conceded below that any underlying claims to the lands (as opposed to their instant claims for breach of fiduciary duty) were nonjusticiable, see, *e.g.*, *Yamasaki*, 737 P.2d at 457-458, and that such underlying claims would therefore be resolved only through the state political process. See, *e.g.*, Official Resp. Haw. S. Ct. Br. 29 (stating that respondents "[are] not seeking a judicial resolution of the underlying claim for a return of lands, but [are] rather asking the judiciary only to protect the trust assets while the dispute is being resolved by the political branches"); Individ. Resp. Haw. S. Ct. Br. 13 (noting that respondents "do not seek an ownership determination or even a declaration that they are entitled to the beneficial use and/or occupancy of the ceded lands"). Consistent with those statements, the Hawaii Supreme Court recognized that it was "*not* being asked to decide whether native Hawaiians are *entitled* to the ceded lands," Pet. App. 79a, and that the "ultimate resolution of the [n]ative Hawaiian claims must be through the political process," *ibid.* (quoting J.A. 122a (reply brief of official respondents)).<sup>14</sup>

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<sup>14</sup> Petitioners do not claim that there is anything wrong, as a matter of state remedial law, with the entry of an injunction, based on breach of a state-law duty, to maintain the status quo while underlying claims are being addressed through the political process. See,

Petitioners nevertheless contend (Br. 33) that the Hawaii Supreme Court operated on the premise that there was a “cloud on the title” to the ceded lands as a result of the Apology Resolution and related state laws—and therefore that the underlying claims of Native Hawaiians to the ceded lands were exclusively legal claims. As a preliminary matter, to the extent that respondents referred in their briefs below to the concept of a “cloud on the title” to the ceded lands, it suggests only that *some* type of claims were being made concerning the ceded lands—not that the underlying claims were necessarily *legal* claims.

More broadly, while petitioners contend that the Hawaii Supreme Court “adopted [a] ‘cloud on the title’ argument as the basis for issuing its injunction” (Br. 33), they tellingly cite no passage in which the court actually did so. That is unsurprising, because the court did not rely on the concept of a “cloud on title” in the course of its actual analysis. Instead, in the passages petitioners do cite in support of that critical contention, the court merely recognized that Native Hawaiians have “unrelinquished claims,” without opining on the nature (or validity) of those claims. See Pet. App. 85a (noting that “the

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*e.g.*, 1 Dan B. Dobbs, *Dobbs’ Law of Remedies* § 2.9(2), at 227 (2d ed. 1993) (noting that “injunctions may run even when the plaintiff does not assert a developed legal theory or a preexisting primary right that would be subject to other remedies”); cf. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) (ordering entry of an injunction, as a matter of federal law, of the sale of lands claimed by Native Americans). Any such claim would not properly lie before this Court and would also lack merit, because the Hawaii Supreme Court has previously held that it has broad equitable powers to enforce the State’s fiduciary duty to Native Hawaiians pursuant to the ceded-lands trust. See *Pele Defense Fund*, 837 P.2d at 1262.

native Hawaiian people have unrelinquished claims over the ceded lands”); *ibid.* (referring to “the unrelinquished claims of native Hawaiians”). There is therefore no reason to believe that the Hawaii Supreme Court ordered entry of an injunction based on the assumption that Native Hawaiians had solely *legal* claims to the ceded lands.

Regardless whether Native Hawaiians have legal claims to the ceded lands, however, they clearly have broader moral and political claims: *i.e.*, claims that they are entitled to compensation for the wrongs of the past, even if the original cessation of lands to the United States was valid as a matter of federal law. See, *e.g.*, Official Resp. Haw. S. Ct. Br. 37 n.24; 11/27/01 Tr. 25, 33 (testimony of Prof. David Getches).<sup>15</sup> There is nothing unusual about such moral and political claims: when Congress established the Indian Claims Commission, it expressly conferred authority on the Commission to consider that type of claims. See Indian Claims Commission Act, ch. 959, § 2(5), 60 Stat. 1049, 1050 (1946) (providing forum for Indian tribes to bring, *inter alia*, “claims [against the United States] based upon fair and honorable dealings that are not recognized by any existing rule

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<sup>15</sup> It is true that, at earlier points in this litigation, respondents did suggest that Native Hawaiians have potentially valid (if not justiciable) legal claims to the ceded lands, based on, *inter alia*, (1) the status of the Kingdom of Hawaii as an independent nation; (2) the involvement of the United States in the conspiracy to overthrow the Kingdom, in violation of its treaties with the Kingdom and other international obligations; and (3) Congress’s failure, in the Newlands Resolution, validly to extinguish those obligations. See, *e.g.*, Individ. Resp. Haw. S. Ct. Br. 26 & n.21; *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934). The critical point, however, is that none of the parties asked the Hawaii Supreme Court to rule on the nature (or validity) of the underlying claims, and the court accordingly did not do so.

of law or equity”); see also, *e.g.*, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 387 (1980). Such moral and political claims have served as the basis for Congress to grant lands (or trust rights) to Native American tribes and individuals, see, *e.g.*, Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437, and indeed to set aside a portion of the ceded lands specifically for Native Hawaiians, see Hawaiian Homes Commission Act § 207, 42 Stat. 110. Indeed, even petitioners freely recognize that “Native Hawaiians \* \* \* have strong *moral* claims on the political branches of government for recompense.” Br. 45.

To the extent that Native Hawaiians have moral and political claims concerning the ceded lands, moreover, the Newlands Resolution would present no obstacle to the entry of an injunction pending the resolution of *those* claims in the political process. If the Hawaii Legislature were to provide compensation to the Native Hawaiians for the wrongful taking of lands previously owned by the Kingdom of Hawaii—whether that compensation involved the transfer of land or some other form of recompense—it could readily do so without casting any doubt on the validity of the cessation of lands to the United States. The only even arguable limitations on the Hawaii Legislature’s ability to provide such compensation would stem not from the Newlands Resolution, but from any countervailing trust obligations under the Admission Act and state law. At bottom, petitioners’ recognition (Br. 45) that Native Hawaiians have valid moral and political claims cannot be reconciled with their unelaborated suggestion (*ibid.*) that the Newlands Resolution somehow disables the Hawaii Supreme Court from ordering the

entry of an injunction pending the resolution of those claims in the political process.<sup>16</sup>

3. Petitioners' argument fails for the related reason that, insofar as they are arguing that the eventual *resolution* of Native Hawaiians' underlying claims to the ceded lands might violate the Newlands Resolution, such an argument is unripe. If, for example, the Hawaii Legislature were eventually to confer land on Native Hawaiians for the express reason that the federal government's taking of absolute title to the ceded lands at the time of annexation was legally invalid, such legislation could conceivably be challenged on the ground that it is inconsistent with the Newlands Resolution. As noted above, however, if the Legislature were to provide compensation to Native Hawaiians simply for the wrongs of the past, without stating any opinion on the legality of the federal government's taking of title to the ceded lands, no issue involving the Newlands Resolution could possibly arise. See pp. 37-42, *supra*. Because the Hawaii Legislature has not yet taken any action on Native Hawaiians' underlying claims, it is simply premature to speculate about the possibility that such an action would be inconsistent with the Newlands Resolution.

By contrast, the injunction that the Hawaii Supreme Court ordered, based on its disposition of respondents' *instant* breach-of-fiduciary-duty claims, presents no difficulty under federal law. As the Hawaii Supreme Court repeatedly noted, that injunction merely preserves the status quo as a matter of state law until the *underlying*

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<sup>16</sup> For the same reason, the Newlands Resolution would not disable the Hawaii Legislature from passing a statute declaring a moratorium on the sale of ceded lands until it has the opportunity to resolve the underlying claims of Native Hawaiians to the lands.

claims of Native Hawaiians are resolved in the reconciliation process. See, *e.g.*, Pet. App. 95a. It is in no way based on any definitive conclusion that those underlying claims are valid, whether as legal claims or as moral and political claims. That is presumably why petitioners did not invoke the Newlands Resolution before the Hawaii Supreme Court. And it is yet another reason why this Court should refuse to consider petitioners' late-breaking Newlands Resolution argument now.

**B. The United States' Argument Concerning The Admission Act Is Not Properly Before The Court And Should Be Rejected**

The United States contends (Br. 20-23) that “[a]ny judicially imposed freeze on transfer of trust assets would necessarily contradict Congress’s authorization to the State,” in the Admission Act, “to sell or otherwise dispose of lands to promote the trust purposes.” Br. 21. That argument, like petitioners’ Newlands Resolution argument, is not properly raised, because it is not within the scope of the question presented and was not raised in the petition for certiorari. It also lacks merit, because the Admission Act does nothing more than to specify the purposes for which trust assets may be used.

1. Any argument based on the Admission Act is not within the scope of the question presented. Again, the question presented in this case is whether the *Apology Resolution* “strips Hawaii of its sovereign authority to sell” ceded lands, Pet. i—not whether an injunction barring the sale of ceded lands, regardless whether that injunction is based on the Apology Resolution or on state law, would violate the *Admission Act*, U.S. Br. 21. Although petitioners noted in the petition for certiorari that the State had “[the] sovereign power \* \* \* to manage and sell or exchange its own public lands within the broad limits set forth in the Admission Act,” Pet. 15,

they nowhere suggested that an injunction would itself actually *violate* the Admission Act. Accordingly, in the brief in opposition, respondents noted that the petition “d[id] not assert a violation of the \* \* \* Admission Act,” Br. in Opp. 2 n.1; in their reply, petitioners did not so much as cite the Admission Act by way of a response. No question concerning the Admission Act can therefore be said to have been “set out in the petition” or “fairly included therein.” S. Ct. R. 14.1(a).

To be sure, petitioners did contend before the Hawaii Supreme Court, albeit in passing, that the Admission Act authorized the State to sell ceded lands. See Pet. Haw. S. Ct. Br. 22-23. The court noted, but did not specifically address, that contention. See Pet. App. 82a n.26. Even assuming that the argument that an injunction would violate the Admission Act had been sufficiently pressed and passed upon below, however, it would not excuse petitioners’ failure to raise that argument in their petition for certiorari.

In a footnote tucked away at the end of its brief, the United States seemingly attempts to excuse petitioners’ failure, in their petition, to raise an Admission Act defense to the injunction. In full, that footnote states as follows: “The state supreme court did not address the federal [*i.e.*, Admission Act] defense to the injunction expressly. Because the relevant principles of federal law are made clear in examining the Apology Resolution and the body of law it left intact, however, this Court can and should resolve the case at this stage.” Br. 32 n.6. With no disrespect to the Solicitor General, it is hard to know how to respond to that argument, because it is hard to know what it means. If the United States is suggesting, however, that a question presented that focuses exclusively on the Apology Resolution somehow opens the door for this Court to consider any other question con-

cerning any preexisting provision of federal law relating to the ceded lands, that is an astonishing proposition indeed. No question concerning the Admission Act was in this case as it was presented to the Court at the certiorari stage, and there is no basis for permitting an amicus curiae, even the United States, to inject that question into the case at the merits stage.

2. In any event, the United States' argument based on the Admission Act, like petitioners' argument based on the Newlands Resolution, fails on its own terms. The Admission Act provides that the State is required to "manage[] and dispose[] of [its share of the ceded lands] for one or more of [five] purposes in such manner as the constitution and laws of [the] State may provide," including, as is relevant here, "for the betterment of the conditions of native Hawaiians" and "for the development of farm and home ownership on as widespread a basis as possible." § 5(f), 73 Stat. 6. While it is certainly true that the Admission Act contemplates the possibility that the State might sell all or some of the lands for trust purposes, the Admission Act provides no guidance as to *how* the State should balance the competing trust purposes. To the contrary, it authorizes the State to "provide" in state law for the "manner" in which it will administer the ceded lands. *Ibid.* Moreover, it authorizes the State to manage the lands for "one or more" of the five enumerated purposes (thereby presumably allowing the State to use the lands exclusively for any one, or for fewer than all, of those purposes). *Ibid.*

As a practical matter, therefore, the only affirmative limitation imposed by the Admission Act is that it prohibits the State from using ceded lands for other purposes *besides* the five enumerated purposes: for example, by giving a parcel of land to a private circus troupe. See *Price v. Hawaii*, 921 F.2d 950, 955 (9th Cir. 1990)

(noting that, “at least at the outer limits[,] federal law must act as a barrier beyond which the State cannot go in its administration of the ceded lands pursuant to section 5(f)”). Indeed, the provision in the Admission Act that authorizes the federal government to bring suit for a breach of trust confirms as much, because it authorizes suit only in the event that the ceded lands are “use[d] for any other object”: *i.e.*, for a purpose besides the five enumerated purposes. § 5(f), 73 Stat. 6.

By affording the State such broad discretion in the administration of its trust responsibilities, the Admission Act differs from other acts of admission. For example, the New Mexico-Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910), specified particular beneficiaries for public lands, required the creation of separate trust accounts for each beneficiary, and imposed a variety of procedural requirements concerning the administration of those accounts. See *Ervien v. United States*, 251 U.S. 41, 47 (1919). Unlike the Admission Act, that act contained no provision broadly delegating authority to the State to administer the trust.<sup>17</sup> The mere fact that the Hawaii

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<sup>17</sup> The United States contends that, in *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), this Court interpreted the phrase “as the State legislature may direct” in “the New Mexico Enabling Act” as “not licens[ing] the state legislature to disregard the Enabling Act’s ‘express restrictions.’” Br. 23. In the cited part of that opinion, however, the Court was construing not the New Mexico-Arizona Enabling Act, but rather the Jones Act, ch. 57, 44 Stat. 1026 (1927), “a brief statute that extended the terms of the original grant of lands in the Western States to encompass mineral lands as well.” 490 U.S. at 626. In the Jones Act, Congress provided that any new land grants “shall be of the same effect as prior grants” under the New Mexico-Arizona Enabling Act, but that the State may grant leases “as the State legislature may direct.” § 1, 44 Stat. 1026. The Court held that, notwithstanding the latter language, the lands covered by the

ceded-lands trust was *established* by federal law—and is therefore, as the United States repeatedly admonishes, a “federal trust,” Br. 1, 8, 9, 12, 19, 20, 21, 25, 32—does not alter the fact that the Admission Act leaves broad discretion to the State in the administration of its trust responsibilities. Indeed, in an earlier brief to this Court, if not in its brief in this case, the United States recognized as much. See U.S. Br. at 10, *Rice, supra* (No. 98-818) (stating that, “[i]n the Admission Act, Congress delegated broad authority to Hawaii to act for the betterment of Native Hawaiians”).<sup>18</sup>

Because the State possesses such broad discretion under the Admission Act to use the ceded lands for any of the enumerated trust purposes, it necessarily follows (as the Admission Act recognizes) that the State has the authority to enact laws that guide, and even constrain, the exercise of that discretion. The State did exactly that when it adopted the 1978 amendments to the Hawaii Constitution, which provided that the ceded lands “shall be held by the State as a public trust for native Hawaiians and the general public,” Haw. Const. Art. XII, § 4, and specifically emphasized the importance of providing for Native Hawaiians, see, *e.g.*, Haw. Const. Art. XVI, § 7. The State thus made clear that it had a fiduciary duty to the enumerated beneficiaries of the ceded-lands trust, particularly to Native Hawaiians—and that the

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Jones Act were subject to all of the same requirements provided in the Enabling Act. See *ASARCO*, 490 U.S. at 628-633.

<sup>18</sup> See also Resp. Br. at 8-9, *Rice, supra* (No. 98-818) (noting that, “[i]n light of Hawaii’s unique historical and geographic circumstances, it is perhaps not surprising that Congress chose to delegate to the State authority to manage the public trust for Native Hawaiians”).

State’s administration of the trust would be governed by ordinary trust principles *as a matter of state law*.<sup>19</sup> In holding that the State would breach its fiduciary duty to Native Hawaiians if it sold ceded lands while the reconciliation process remains ongoing, even if the State did so for another valid trust purpose, the Hawaii Supreme Court was merely interpreting state law (specifically, the nature and scope of the State’s fiduciary duty to Native Hawaiians under Article XII, Section 4, of the Hawaii Constitution). It was not unwittingly transgressing some limitation implicit in the Admission Act.

The United States contends that, by permitting the State to manage the ceded lands “in such manner as the constitution and laws of [the] State may provide,” Admission Act § 5(f), 73 Stat. 6, Congress “referred to state law as a way to fill in the details of the State’s federal-law trusteeship obligation, not to authorize a state court to rewrite that trusteeship obligation.” Br. 22-23. Under the Admission Act, however, the State’s sole “trusteeship obligation” is not to use ceded lands for a purpose *besides* the five enumerated purposes. Where the State provides in its “constitution and laws” that its discretion to use the ceded lands for the five enumerated purposes is to be exercised in a particular manner, it is entirely natural that the State’s highest court retains the power to interpret the State’s constitution and laws as it sees fit. In doing so, the court is not “rewrit[ing] [the State’s] trusteeship obligation” under the Admission Act; in-

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<sup>19</sup> Because the constitutional provisions establishing the State’s fiduciary duty to Native Hawaiians were adopted pursuant to the Admission Act’s authorization to “provide” for the “manner” in which the State will administer the ceded-lands trust, the resulting duty is not “external” to the trust, as the United States suggests (Br. 9, 20, 21, 32).

stead, it is merely exercising its familiar authority to construe state law.<sup>20</sup>

3. Finally, the United States suggests (Br. 22) that, if the State of Hawaii were to resolve the claims of Native Hawaiians by providing land or monetary compensation, it would independently violate the Admission Act, because the Admission Act defines Native Hawaiians only as those descendants of “not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.” Hawaiian Homes Commission Act § 201(7), 42 Stat. 108; see Admission Act § 5(f), 73 Stat. 6 (incorporating definition). Like petitioners’ Newlands Resolution argument, however, that argument fails because, insofar as the United States is implying that the eventual resolution of Native Hawaiians’ underlying claims to the ceded lands might violate the Admission Act, such an argument is unripe.

In the event that the Hawaii Legislature decides to make provision to Native Hawaiians who do not meet the Admission Act’s narrow definition of the phrase, the resulting legislation could perhaps be challenged on the ground that it constitutes an impermissible use of trust assets under Section 5(f) of the Admission Act (though subsequent federal statutes have consistently used a

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<sup>20</sup> Perhaps not surprisingly, petitioners do not seem to embrace the United States’ apparent view that the Admission Act occupies the field with regard to the administration of the ceded-lands trust. Instead, they suggest only that “a state court could violate the Admission Act if it disregards ‘the constitution and laws’ of Hawaii.” Br. 46 n.26. In the decision below, however, the Hawaii Supreme Court did not “disregard” any state law. Instead, it simply interpreted and applied state law in holding that the State would breach its fiduciary duty to Native Hawaiians if it sold ceded lands while the reconciliation process remains ongoing.

broader definition, see, *e.g.*, 42 U.S.C. 2992c(4)). Indeed, the federal government itself would be free to bring suit on that ground—if it truly believed that, notwithstanding the subsequent federal statutes, there was an Admission Act violation. See Admission Act § 5(f), 73 Stat. 6. Because the Hawaii Legislature has not yet taken any action on Native Hawaiians’ underlying claims, however, it is simply premature to speculate about the possibility that such an action would be inconsistent with the Admission Act, just as it would be premature to speculate about possible inconsistency with the Newlands Resolution. Like the other federal-law issues that petitioners and the United States seek to introduce into the case at this late hour, that issue can be left for another day.

\* \* \* \* \*

All that the Hawaii Supreme Court actually did in this case was to order the entry of an injunction, as a matter of state law, prohibiting the executive branch of the state government from selling lands the State holds in trust until the state legislature resolves the claims of a group of beneficiaries to those lands. Notwithstanding the history with which the underlying dispute is freighted, therefore, this case, as it comes to the Court, presents only questions of state law. Far from working an affront to state sovereignty, as petitioners suggest, the Hawaii Supreme Court’s decision simply maintains the status quo and puts the ball back in the court of the Hawaii Legislature, so that it can bring an end, one way or the other, to decades of uncertainty concerning the status of Native Hawaiians’ claims to state-owned lands. There is no legitimate reason for the Court to interfere with that ongoing process. Because this case presents no valid dispute about the meaning of federal law, the Court should dismiss the petition for want of jurisdiction.

**CONCLUSION**

The petition for a writ of certiorari should be dismissed. In the alternative, the judgment of the Hawaii Supreme Court should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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## APPENDIX

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article XII, Section 4, of the Hawaii Constitution provides:

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as “available lands” by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

2. Article XII, Section 5, of the Hawaii Constitution provides:

There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

3. Article XII, Section 6, of the Hawaii Constitution provides:

The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

4. Article XII, Section 7, of the Hawaii Constitution provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua'a* tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

5. Article XVI, Section 7, of the Hawaii Constitution provides:

Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.