# 11 336

No.

IN THE

# Supreme Court of the United States

JOHN M. CORBOY ET AL.,

*Petitioners,*

v.

DAVID M. LOUIE, ET AL.,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Rice* v. *Cayetano*, 528 U.S. 495 (2000), this Court held that a state classification of voters according to whether they are "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778" was an impermissible racial classification under the Fifteenth Amendment. Respondents have employed the same classification to determine whether a taxpayer is eligible for certain long-term leases that entitle lessees to significant tax exemptions. No equivalent exemption is available to petitioners because they do not fall within that racial classification.

Petitioners paid their taxes under protest and then sought refunds from their respective counties on the ground that their tax bills resulted from a racial classification inconsistent with the Constitution. The Hawaii courts declined to apply *Rice* or subject the classification to strict scrutiny. The question presented here is:

Whether the Hawaii courts erred in failing to recognize that petitioners have standing to seek a refund of their own taxes and that the Equal Protection Clause precludes a State or municipality from creating tax exemptions that are available only to members of a certain race.

## RULE 14.1(B) AND 29.4(B) STATEMENT

Petitioners are John M. Corboy, Stephen Garo Aghjayan, Garry P. Smith, Earl F. Arakaki, and J. William Sanborn.

Respondents are David M. Louie, in his official capacity as Attorney General of the State of Hawaii; the State of Hawaii; the County of Maui; the County of Kauai; the City and County of Honolulu; and the County of Hawaii.

This case draws into question the constitutionality of the Hawaiian Homes Commission Act, which was originally an Act of Congress, and arguably draws into question the constitutionality of Section 4 of the Hawaii Admission Act, an Act of Congress. Neither the United States nor any federal department, office, agency, officer, or employee is a party.

Title 28 U.S.C. § 2403(a) may apply. This petition for a writ of certiorari is being served on the Solicitor General.

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## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the Hawaii Supreme Court (App., *infra*, 1a-74a) is not yet published in West's Hawaii Reports and the Pacific Reporter. The order of the Hawaii Supreme Court denying reconsideration (App., *infra*, 75a-78a) is reported at 251 P.3d 601 (Table). The Hawaii Tax Appeals Court order granting respondents' motion for summary judgment (App., *infra*, 79a-84a) is unpublished.

## JURISDICTION

The Hawaii Supreme Court issued its decision on April 27, 2011, and denied reconsideration on May 18, 2011. App., *infra*, 75a. On August 1, 2011, Justice Kennedy extended the time for filing this petition to September 15, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides: "[N]or shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, § 1.

Relevant provisions of the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), *reprinted in* 1 HAW. REV. STAT. 135 (2009); the Hawaii Constitution, Article XII, Sections 1, 2, and 3; and the Hawaiian Homes Commission Act, 1920, Act of July 9, 1921 (HHCA), Pub. L. 67-34, 42 Stat. 108, *reprinted in* 1 HAW. REV. STAT. 261 (2009), are reproduced at App., *infra*, 85a-99a.

## STATEMENT

This case involves an explicitly racial classification. Yet neither court below subjected the racial classification to any level of constitutional scrutiny. Instead, they pretended that the case does not involve a racial classification.

One court held that the only relevant distinction is a nonracial one—between "lessees" and others—even though eligibility to be a lessee is limited by an explicitly racial classification. The other court, the state supreme court, held that petitioners lack standing to seek a refund of their own tax payments.

If the racial classification at issue involved African Americans and Caucasians, those arguments would likely have been laughed out of court. They should be taken no more seriously just because this case involves native Hawaiians. See *Rice* v. *Cayetano*, 528 U.S. 495 (2000). The Hawaii Supreme Court's maneuvering is perhaps understandable—policy questions regarding the treatment of Hawaii's aboriginal inhabitants and their descendants are often controversial—but it presents no obstacle to this Court's review. Indeed, the absence of full judicial review makes it all the more imperative that this Court determine whether Hawaii's use of an explicitly racial taxation scheme passes constitutional muster. This Court should grant certiorari to confirm that the same form of racial discrimination held to violate the Fifteenth Amendment in *Rice* v. *Cayetano* likewise violates the Fourteenth Amendment, and that the Hawaii courts cannot insulate Hawaii's clear constitutional violations from federal review.

### A. Background

1. Petitioners are Hawaiian citizens and municipal taxpayers challenging laws that discriminate against them on the basis of their race. Hawaii's constitution and the Hawaiian Homes Commission Act (HHCA) make "native Hawaiians" eligible to hold homestead leases, which—unlike property held by Hawaiian citizens who do not meet that racial definition—are exempt from property taxes. Because petitioners do not possess a sufficient quantum of the "blood of the races" required by the HHCA, they are categorically ineligible for those valuable tax benefits. Hawaiian Homes Commission Act, 1920, Act of July 9, 1921 (HHCA), Pub. L. 67-34, ch. 42, § 201(a)(7), 42 Stat. 108, *reprinted in* 1 HAW. REV. STAT. 261 (2009). As this Court made clear in *Rice* v. *Cayetano*, however, discrimination in favor of "native Hawaiians" is a purely racial classification. *All* such classifications must face strict scrutiny under the Fourteenth Amendment's equal protection guarantee. *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995).

The Hawaii Supreme Court avoided striking down this classification scheme by refusing to address the merits of petitioners' constitutional challenge. That court dismissed petitioners' challenge on standing grounds because they had not requested homestead leases—a benefit for which they are categorically *ineligible* because they do not meet the statute's racial definition of "native Hawaiian." Petitioners took the only practically available avenue for challenging the unconstitutional tax scheme: They paid their taxes under protest and filed suit to challenge the State's and counties' decision to grant tax exemptions by racial preference.

2. Hawaii's native people were mostly of Polynesian ancestry; Westerners first arrived when Captain Cook landed on the islands in 1778. *Rice*, 528 U.S. at 500. In 1810, King Kamehameha I, with Western aid, unified the islands into a single monarchy for the first time. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of the Native Hawaiians*, 106 YALE L.J. 537, 549 (1996). Over the course of the nineteenth century, significant numbers of settlers and missionaries from the West and Asia came to the islands. *Id.* at 550. Between 1826 and 1887, the United States entered into several treaties and conventions with successive Hawaiian monarchs, and the United States became increasingly involved in the affairs of the Hawaiian kingdom. *Rice*, 528 U.S. at 504.

The United States formally annexed Hawaii in 1898 via the Newlands Joint Resolution. Upon its annexation, Hawaii ceded to the United States 1,800,000 acres of land, which were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." J. Res. 55, 55th Cong., 2d Sess., 30 Stat. 750. In 1900, Congress passed the Hawaiian Organic Act, establishing a territorial government in Hawaii. The Organic Act placed the ceded lands into the "possession, use, and control of the government of the Territory of Hawaii * * * until otherwise provided for by Congress." Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 141, 159.

Twenty-one years later, Congress enacted the HHCA. The HHCA set aside approximately 200,000 acres of the ceded lands for the use of native Hawaiians and created the Department of Hawaiian Home Lands (DHHL) to manage those lands. HHCA §§ 202, 203.

The HHCA provides for long-term homestead leases—lasting for 99 years and renewable for an additional 100 years—for only $1 per year. Those leases, however, are available only to "native Hawaiian[s]," which the statute defines in explicitly racial terms to mean "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201(a)(7). Other provisions of the HHCA reinforce the proscription that only those with a certain amount of "native Hawaiian" blood may benefit from the homestead leases: lessees are prohibited from transferring their leases to persons who are not native Hawaiians, and on a lessee's death only native Hawaiians or close relatives who are at least one-quarter Hawaiian may succeed to the lease. *Id.* §§ 208(5), 209.

The HHCA gives homestead lessees preferential tax treatment over other Hawaiian property holders. The HHCA declares that an original lessee is exempt from all taxes for the first seven years of the lease. HHCA § 208(8). Under HHCA § 208(7), homestead lessees are supposed to bear full tax burdens after the initial seven-year lease period.

In 1978, Hawaii's constitution was amended to give counties the power to tax real property. HAW. CONST. Art. VIII, § 3. Each of Hawaii's four counties, with individual variations, has relieved homestead lessees of their tax burden for an indefinite period, thus extending the racially based tax break conferred by the HHCA. The City and County of Honolulu exempts homestead lessees from all taxes except for $100 minimum per year. Kauai County is apparently the same except that the minimum is $25 per year. Maui County is apparently the same except that the minimum is $150 per year. Hawaii County

exempts homestead land and, if certain filing requirements are met, allows an exemption for improvements as well. See Honolulu Rev. Ordinances § 8-10.23; Maui County Code § 3.48.555; Kauai County Code § 5A-11.23(a); Hawaii County Code §§ 19-89, 19-90(e).

When Hawaii entered statehood in 1959, Section 4 of the Hawaii Admission Act required Hawaii to adopt the HHCA in its constitution. Act of Mar. 18, 1959, Pub. L. No. 86-3, § 4, 73 Stat. 4, 5. The Admission Act also specifically prohibited Hawaii from making changes in the qualifications of homestead lessees without the consent of the United States. *Ibid.* Upon Hawaii's admission, the HHCA was removed from the U.S. Code and adopted by reference in Hawaii's constitution. See HAW. CONST. Art. XII, § 1, 2, 3; *Keaukaha-Panaewa Community Ass'n* v. *Hawaiian Homes Comm'n*, 588 F.2d 1216, 1226-1227 (9th Cir. 1978).

Because of this statutory scheme, only native Hawaiians are granted homestead leases, and those who receive such leases pay little, if any, property taxes, thus contributing virtually nothing to pay for their counties' services and infrastructure. By contrast, petitioners and other Hawaiian citizens who do not meet the HHCA's racial criteria enjoy no such benefit. Petitioners and thousands of other similarly situated Hawaiian property holders thus pay more in annual property taxes than homestead lessees pay. (For example, in Honolulu for year 2009-2010 the City and County of Honolulu Real Property Tax Administrator projected an average residential real property tax assessment of $1817 per parcel, but homestead lessees were assessed only $100 per parcel.) Because of the racial classification and the

tax break, favored native Hawaiians' share of the economic burdens of county government is borne by petitioners and similarly situated taxpayers, not by those native Hawaiians who hold homestead leases.

### B. Proceedings Below

Petitioners paid their property taxes under protest and filed suits in the Hawaii Tax Appeal Court. The complaints alleged violations of the Constitution and civil rights laws of the United States, including the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. Petitioners argued that, in the absence of equivalent exemptions for petitioners and other similarly situated municipal taxpayers, the homestead lease exemptions of their respective counties violate the Equal Protection Clause of the Fourteenth Amendment. Petitioners' complaints also alleged, "As to the HHCA, the Compact in § 4 of the 1959 Admission Act, and Art. XII of the Hawaii Constitution, in the absence of equivalent homestead leases and benefits for every Hawaii citizen without regard to race or ancestry, such provisions also violate the Equal Protection Clause and other civil rights laws of the United States."

Because the cases called into question the constitutionality of certain Hawaii statutes and of the HHCA (which was originally a federal statute), petitioners gave notice to the Attorney General of the State of Hawaii and the Attorney General of the United States. The State of Hawaii intervened, but the United States did not.

Petitioners' suits sought exemptions from real property taxes equivalent to those given to native Hawaiians holding homestead leases, and tax refunds reflecting the difference between what petitioners paid and what they would have paid if they

had received the same exemptions as the homestead lessees, or equivalent exemptions. Petitioners also sought corresponding declaratory and injunctive relief.

Respondents defended the race-based exemptions by arguing that "[n]o suspect classification is involved" in the homestead exemption "because the tax exemptions are *not* based upon whether a taxpayer is native Hawaiian or not, but rather whether the taxpayer is a *homestead lessee of HHCA land.*" Mem. in Support of State Mot. for S.J. at 2. Because the tax exemption is not claimed by *every* native Hawaiian—some native Hawaiians choose not to seek a homestead lease—respondents contended that it was irrelevant that only racially native Hawaiians could obtain a lease and the corresponding tax exemption. *Ibid.* Accordingly, respondents claimed, the classification was subject only to rational-basis review.

Respondents also argued that petitioners lacked standing because they had not proven that they actually desired homestead leases. Mem. in Support of State Mot. for S.J. at 4-5. Respondents contended, in effect, that the *only* reason petitioners were denied the exemption was that petitioners were not leaseholders. Thus, respondents concluded, petitioners' asserted injury—their tax burden—could not be traced to the native Hawaiian racial classification. *Ibid.*

The tax appeal court granted respondents' motion for summary judgment with no written opinion. App., *infra*, 79a-84a. The court accepted respondents' contention that discrimination in favor of native Hawaiian homestead lessees was not a suspect classification, and therefore was subject only to rational-basis review. See App., *infra*, 32a-33a.

The court then stated that there was no evidence refuting the State's proffered rational bases for the classification. See App., *infra*, 33a.

The Hawaii Supreme Court vacated the tax appeal court's judgment and remanded with instructions to dismiss petitioners' complaint for lack of jurisdiction. App., *infra*, 56a. The court did not explicitly reach the constitutionality of the tax exemption.

Instead, it accepted respondents' assertion that petitioners lacked standing because petitioners did not seek homestead leases—for which, it was undisputed, petitioners were ineligible because of their race. App., *infra*, 50a-51a n.32. To reach that result, the court "construe[d]" petitioners' "challenge to the tax exemption afforded to homestead lessees" as, in fact, "a challenge to [the] lease eligibility provisions." App., *infra*, 41a. The court relied on *Carroll* v. *Nakatani*, 342 F.3d 934 (9th Cir. 2003), in which the court *upheld* a plaintiff's standing to challenge a similar racial classification because "a person need only state a desire to obtain a lease" to demonstrate injury in fact. 342 F.3d at 943. The Hawaii Supreme Court concluded, however, that petitioners' failure to state a desire to obtain a lease meant that they had not suffered any actual injury—even though they had paid taxes and were seeking a refund. App., *infra*, 49a. As the Hawaii Supreme Court saw things, petitioners' claim that they suffered injury by paying far more in property taxes than native Hawaiian lessees merely "'amount[ed] to speculation.'" App., *infra*, 50a.

Justice Acoba concurred in the result but disagreed with the majority's standing rationale. He rejected the majority's recasting of petitioners' claim as a challenge to the eligibility criteria for homestead

leases rather than a challenge to the corresponding discriminatory tax exemption. App., *infra*, 61a. The disparate tax burden, he concluded, established a concrete injury-in-fact sufficient to confer standing under the majority's standing test. App., *infra*, 72a n.9. He also emphasized that petitioners had general taxpayer standing under longstanding Hawaii law. App., *infra*, 63a-64a & n.4 (citing *Hawaii's Thousand Friends* v. *Anderson*, 70 Haw. 276, 277 (1989); *Iuli* v. *Fasi*, 62 Haw. 180 (1980)).

Justice Acoba ultimately determined, however, that he need not confront the merits of petitioners' equal protection challenge. Because the federal Admission Act mandated Hawaii's original enactment of the tax exemption, he reasoned, petitioners' challenge was essentially a challenge to the Admission Act. App., *infra*, 67a-68a. Because petitioners challenged the constitutionality of a federal law, he concluded, the United States was an indispensable party to the lawsuit. App., *infra*, 69a-70a. Without further explanation, Justice Acoba stated that remanding for dismissal was the proper remedy and therefore concurred in the result reached by the majority opinion. App., *infra*, 69a.

## REASONS FOR GRANTING THE PETITION

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943), *quoted in Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000). Hawaii's taxation scheme directly offends that constitutional principle by awarding significant governmental benefits based expressly on the quantum of the "blood of [certain] races" coursing through a citizen's veins. By refusing

to subject this discriminatory regime to strict scrutiny, the decisions below directly violate this Court's holding in *Rice* v. *Cayetano* that "native Hawaiian" is a purely racial classification and scores of other decisions that have properly confined the use of such classifications to only the most extraordinary circumstances. This Court's review is urgently needed to restore the equal protection rights of petitioners and hundreds of thousands of other Hawaiian citizens who bear disproportionate tax burdens because they do not satisfy the HHCA's racial definition.

The Hawaii Supreme Court's efforts to dodge the merits of petitioners' constitutional challenge are no obstacle—jurisdictional or prudential—to this Court's review. As for the majority's standing analysis—that petitioners should have asked for homestead leases—it is inextricably bound up with the merits of the petitioners' equal protection challenge. Petitioners did not ask for those leases because it is undisputed that they are *racially ineligible for them.* Petitioners appropriately challenged the concrete injury they have suffered as a result of the HHCA: property taxes that they are forced to pay but others, by virtue of their race, are not. What is more, the federal Tax Injunction Act *required* petitioners to bring that challenge in state court, so the decision below leaves petitioners with no avenue other than review by this Court for protection of their federal rights. Such maneuvering by state courts cannot shield federal constitutional issues from this Court's review.

Justice Acoba correctly rejected the majority's strained standing analysis, but his alternative view, that the case should be dismissed because the United States is not a party, is indefensible. The U.S. Code

and the Federal Rules of Civil Procedure require *notice* to the United States when a federal statute is challenged on constitutional grounds, and such notice was given here. A challenge to a federal statute does not become nonjusticiable simply because the United States after proper notice chooses not to intervene.

The constitutional issue is thus squarely presented. It is also tremendously important. It affects petitioners and other Hawaiian citizens who pay constitutionally impermissible taxes. More generally, it affects all Americans who depend on the Equal Protection Clause to prevent politically favored racial classes from receiving preferential treatment. This Court's review is urgently needed.

## I. A TAXATION SCHEME FAVORING "NATIVE HAWAIIANS" IS AN EXPLICITLY RACIAL CLASSIFICATION WARRANTING STRICT SCRUTINY

A State may discriminate against individuals on the basis of their race only if its actions satisfy "strict scrutiny." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007). The discrimination can be upheld only if it is "narrowly tailored" to address a "compelling" government interest. *Ibid.* Such a "searching" standard is necessary because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Ibid.* (quoting *Gratz* v. *Bollinger*, 539 U.S. 244, 270 (2003)).

Even classifications that are alleged to be "benign" or "remedial" are subject to the highest level of scrutiny. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989). No matter their apparent pur-

pose, "[c]lassifications based on race carry a danger of stigmatic harm." *Ibid.* "[G]ood intentions" cannot protect a racial classification from exacting scrutiny because "any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be." *Adarand Constructors, Inc.*, v. *Peña*, 515 U.S. 200, 230, 240 (1995).

The HHCA's preferential treatment of "native Hawaiians" is just such a racial classification. Eleven years ago, this Court declared in *Rice* v. *Cayetano* that another Hawaii statute discriminating in favor of "native Hawaiians"—defined by a citizen's possession of the "blood of the races"—is exactly what it sounds like: a racial classification that is "neither subtle nor indirect." 528 U.S. at 514. The HHCA thus draws precisely the same distinction this Court rejected, and yet it remains the law of Hawaii. That is plainly wrong.

### A. Awarding Favorable Tax Treatment To "Native Hawaiians" Is Irreconcilable With *Rice* v. *Cayetano*

This Court has unequivocally held that the native Hawaiian classification at issue in this case—that is, the class of individuals who are "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778"—is a racial classification. *Rice*, 528 U.S. at 516. In *Rice*, the plaintiff challenged a state law allowing only "Hawaiians" and "native Hawaiians"—the latter defined exactly as the class in this case is defined, and the former defined as any descendant of people inhabiting the Hawaiian Islands in 1778—to vote in certain state elections. 528 U.S. at 499. This Court

struck down the voting classification under the Fifteenth Amendment, holding that the statute's reference to "[a]ncestry" was a transparent "proxy for race." *Id.* at 514. The challenged voting scheme was "neither subtle nor indirect," *ibid.*, the Court held, because it targeted only a select group of "inhabitants [that] shared common physical characteristics" and "had a common culture." *Id.* at 514-515. The "express racial purpose and * * * actual effects" of the classification, the Court squarely held, rendered it impermissible. *Id.* at 517.

Here, the classification itself ("native Hawaiians"), its purpose (to "treat the early Hawaiians as a distinct people, commanding their own recognition and respect," *Rice*, 528 U.S. at 515), and its effect (to afford a benefit only to members of a certain racial class) are all *identical* to those at issue in *Rice*. After *Rice*, it is simply inescapable that this classification is racial. The Fourteenth Amendment therefore demands that it be subjected to strict scrutiny. *Parents Involved*, 551 U.S. at 720.

Respondents' claims to the contrary are meritless. For starters, respondents' contention that the tax exemption depends *only* on a taxpayer's status as a homestead lessee status and not on race, Mem. in Support of State Mot. for S.J. at 2-3, ignores the undisputed fact that petitioners *are statutorily ineligible to hold such leases because they do not meet the HCHA's explicitly racial definition of "native Hawaiian."* Suppose a public university offered a "Special Scholars" program, for which only white students were eligible, and that all Special Scholars were awarded a full scholarship. Could university officials really suggest that the scholarships were awarded on racially neutral grounds? Of course not. But that is

precisely the tortured logic respondents cling to here by maintaining that tax exemptions go to homestead lessees without regard to their race.

That rationale is as ridiculous as it sounds, particularly considering that the Court rejected the same argument in *Rice*. There, state officials urged that the voting restriction was based on "[a]ncestry," not "race." 528 U.S. at 514. The Court promptly dispatched that argument, noting that "[a]ncestry can be a proxy for race," and holding that the "native Hawaiian" classification was exactly that. *Id.* at 514, 516. Adding the word "lessee" does not change anything where only "native Hawaiians" can be lessees.

It is no answer to suggest, as respondents have, that not *all* "native Hawaiians" benefit from the taxation scheme because some do not hold homestead leases. See Mem. in Support of State Mot. for S.J. at 3 (contending that the classification is race neutral because some native Hawaiians do not receive the tax exemption). This Court rejected the exact same argument in *Rice*, holding that the fact that "a class defined by ancestry does not include all members of the race" is not enough "to make the classification race neutral." 528 U.S. at 516-517. Respondents' fervent defense of this statutory scheme simply ignores the explicit holdings of *Rice*.

Even "facially neutral" measures may be unconstitutional because they are discriminatory in "purpose and effect." *Village of Arlington Heights* v. *Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-267 (1977); see also *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) (using residence as a proxy for race in voting districting); *Louisiana* v. *United States*, 380 U.S. 145 (1965) (using interpretation tests as a proxy for race

in voting regulations); *Terry* v. *Adams*, 345 U.S. 461 (1953) (using a white primary); *Guinn* v. *United States*, 238 U.S. 347 (1915) (using an ancestry-based "grandfather clause"). Here, the "lessees" must be "native Hawaiian," which is defined in explicitly racial terms according to how much "blood of [certain] races" a citizen possesses. If such a classification is "indirect," its indirect nature offers only the tiniest of fig leaves and does not protect the classification from strict scrutiny. See *Adarand*, 515 U.S. at 212-213 (holding that statutory scheme was subject to strict scrutiny when preference was provided to "disadvantaged" individuals, but members of certain racial minorities were rebuttably presumed to be disadvantaged).

In short, *Rice* ends any serious debate that awarding tax benefits only to "native Hawaiians" is a racial classification, plain and simple. The Equal Protection Clause thus requires that it face strict scrutiny, which it cannot possibly meet.

### B. *Morton* v. *Mancari* Does Not Shield The Exemption From Strict Scrutiny

Respondents have also attempted to justify this taxation scheme by relying on *Morton* v. *Mancari*, 417 U.S. 535 (1974), but that case offers no refuge. In *Mancari*, this Court upheld against a due process challenge a federal law that gave employment preferences to Indians applying for positions at the Bureau of Indian Affairs. The Court held that, because of Congress's "plenary power * * * to deal with the special problems of Indians," legislation affording special treatment to Indians was permissible as long as it was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

417 U.S. at 555. But *Mancari* has no application to the HHCA's native Hawaiian classification.

*Mancari* was expressly limited to federally recognized Indian tribes, whose "special relationship" with the federal government rests on Indians' unique history with the federal government. *Mancari*, 417 U.S. at 551-552. The Court in *Mancari* also emphasized that the challenged distinction was *political*, not racial, because it was "granted to Indians * * * as members of quasi-sovereign tribal entities." *Id.* at 553-554 & n.24. In other words, *Mancari*'s "central distinction was between tribes and nontribes, rather than Indians and non-Indians." Benjamin, *supra*, 106 YALE L.J. at 563; see also *United States* v. *Antelope*, 430 U.S. 641, 646 (1977). Indeed, the Court in *Mancari* repeatedly noted that the BIA preference was acceptable as a means to further Indian tribes' "*self-government*." 417 U.S. at 541, 543, 544 (emphasis added). And the Court recognized, *id.* at 552, that the Constitution directly authorized special treatment of Indian tribes in the Indian Commerce Clause, Art. I, § 8, Cl. 3, and the Treaty Clause, Art. II, § 2, Cl. 2.

The HHCA's racial classification shares none of those characteristics. "Native Hawaiians" are not federally recognized as quasi-sovereign entities. Nor do they share the same historical relationship with the United States as do federally recognized Indian tribes. Indians remained in political, self-governing organizations throughout their relationship with the U.S. government and even after becoming part of the United States, but native Hawaiians did not. See Benjamin, *supra*, 106 YALE L.J. at 582-583.

Moreover, the native Hawaiian definition itself is purely racial—there is nothing "political" about it. That much was definitively resolved in *Rice*. 528 U.S. at 515; see also *id.* at 519-520 (emphasizing ways in which the classification at issue in *Mancari*, unlike any distinction at issue under the HHCA, was political rather than racial).

Finally, neither of the constitutional provisions relied on in *Mancari* concerns native Hawaiians. Thus, unlike the preference upheld in *Mancari*, preferential treatment of native Hawaiians has no independent constitutional basis.

* * * * *

The merits of petitioners' constitutional argument do not present a difficult question—yet petitioners lost in both courts below. This Court should correct the error. As we next show, the error is important, and there is no obstacle to this Court's review.

## II. THE QUESTION PRESENTED IS IMPORTANT

If the decision below is left undisturbed, petitioners and hundreds of thousands of Hawaiian taxpayers will continue to suffer under an unconstitutionally discriminatory scheme for which they have no redress.

Eliminating government-mandated racial discrimination is, without question, fundamentally important. Because "[r]acial classifications of any sort pose the risk of lasting harm to our society," *Shaw* v. *Reno*, 509 U.S. 630, 657 (1993), this Court need not—and should not—wait for a split of authority in the state or lower courts before reviewing a question of such national significance. Indeed, in several of this Court's recent cases addressing state-sponsored ra-

cial classifications, no such split in authority existed. *E.g.*, *Rice* v. *Cayetano*, *supra*; *Adarand* v. *Peña*, *supra*; *Shaw* v. *Reno*, *supra*.

Respondents' invocation of *Mancari* in defense of this racial classification only underscores the need for this Court's review. There is a substantial question as to whether *Mancari* remains good law after *Adarand* v. *Peña*. See *Adarand*, 515 U.S. at 244-245 (Stevens, J., dissenting) (contending that the majority's logic would "view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to official discrimination against African Americans"); *Williams* v. *Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997) ("*Mancari*'s days [may be] numbered" after *Adarand*); *U.S. Air Tour Ass'n* v. *FAA*, 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002) (acknowledging plaintiff's argument that *Adarand* effectively overruled *Mancari*, but declining to address it because "lower courts do not have the power to make that determination").

And numerous lower courts have recognized the importance of *Mancari*, but have applied varied analyses of the case. See, *e.g.*, *Kahawaiolaa* v. *Norton*, 386 F.3d 1271, 1272 (9th Cir. 2004) ("[t]he significance of the question [of the definition of an Indian tribe] is immediately apparent from the text of the Indian Commerce Clause of the United States Constitution"); *id.* at 1278-1279 (rejecting the argument that *Rice* required strict scrutiny of the Department of Interior's regulations excluding native Hawaiians from obtaining federally recognized tribal status); *American Fed'n of Gov't Employees* v. *United States*, 330 F.3d 513, 519-521 (D.C. Cir. 2003) (rejecting the argument that *Adarand* requires strict scrutiny of a racial classification related to tribal economic develop-

ment); *Williams* v. *Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997) (suggesting that strict scrutiny applies to all Native American classifications that do not relate to "native land, tribal or communal status, or culture"); *Hoohuli* v. *Ariyoshi*, 631 F. Supp. 1153, 1159 n.22 (D. Haw. 1986) (noting in dicta that "if plaintiffs were Caucasi[a]ns challenging appropriations to both 'Hawaiians' and 'native Hawaiians,' strict scrutiny might be the appropriate standard"). This Court should grant review to clarify that it meant what it said in *Rice*, and that *Mancari* does not protect racial classifications like the one here from strict scrutiny.

## III. THERE IS NO OBSTACLE TO REACHING THE MERITS

In *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282 (1932), this Court observed that a party's federal "constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." That is precisely what happened in this case. The Hawaii Supreme Court went to great lengths to avoid reaching the merits of petitioners' constitutional challenge. None of those efforts shields Hawaii's taxation scheme from this Court's review.

### A. The State Court's Standing Ruling Is Not An Independent And Adequate State Ground Supporting The Decision Below

1. The Supreme Court of Hawaii purported to address standing as a question of state law. But petitioners challenged the racially discriminatory tax scheme as a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Standing to bring such a challenge is a federal question, not a question of state law. See generally

16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4023, at 354 (2d ed. 1996) ("[f]ederal standards may require that a state court recognize standing to assert a right that state courts are obliged to protect").

State-court decisions are not shielded from review by this Court if they are "interwoven" with the federal merits, *Abie State Bank* v. *Weaver*, 282 U.S. 765, 773 (1931), or based on an "antecedent ruling"—whether implicit or explicit—"on federal law," *Ake* v. *Oklahoma*, 470 U.S. 68, 74-75 (1985). Thus, in *Xerox Corp.* v. *Harris County*, 459 U.S. 145, 149 (1982), this Court reviewed a state court's state-law judgment because "an indispensable predicate to an award of judgment * * * was a determination that the taxes at issue were permissible under the United States Constitution."

This Court has on many occasions reviewed cases raising questions of justiciability that are ostensibly decided on state-law grounds but that are actually intertwined with the merits of the federal question presented. For example, in *Costarelli* v. *Massachusetts*, 421 U.S. 193, 197 (1975), this Court held that whether a federal constitutional claim was moot "is a matter of federal constitutional law, for determination * * * ultimately by this Court." In *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 304 (1964), this Court held that "the question of mootness is itself a question of federal law upon which we must pronounce final judgment," and reviewed a state court's mootness ruling and then addressed the merits of the federal claim. Accord *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522 (1959). In *Lawrence* v. *State Tax Comm'n*, 286 U.S. at 282, this Court addressed the merits of a federal challenge to a tax after a Mississippi court had held, on state-law grounds, that it was unnecessary to reach the merits because

the plaintiff would be liable for the tax whether or not the challenged provision was upheld.

Here, the Hawaii Supreme Court's belief that petitioners cannot complain about the HHCA's scheme if they have not requested homestead leases itself rests on an implicit assumption that the tax benefits are awarded on the basis of "lessee status," not on the basis of race. But that is just another way of embracing the erroneous merits argument that a transparent proxy for race (here, lessee status) is the real determining factor and would thus have to be the source of petitioners' asserted injury. Cf. *Hillside Dairy Inc.* v. *Lyons*, 539 U.S. 59, 67 (2003) (reaffirming that the Privileges and Immunities Clause invalidates, at a minimum, "classifications that are but proxies for differential treatment" on a forbidden basis). As explained above, however, this Court has repeatedly rejected such arguments—in the context of this very same "native Hawaiian" classification, no less. See pp. 12-16, *supra*.

It bears repeating that petitioners are statutorily ineligible to claim the right that the Hawaii Supreme Court claims they should have claimed in order to establish standing. This is not a scenario in which petitioners could have made a facially plausible claim to satisfy the proxy behind which respondents hide; here, the HHCA explicitly limits the award of homestead leases to "native Hawaiians." Petitioners sensibly challenged the real-world injury the HHCA imposes on them—racially discriminatory tax burdens—rather than a related but distinct injury caused by their ineligibility for leases in the first place. Respondents cannot evade constitutional scrutiny simply because the HHCA might inflict *other* kinds of constitutional injuries in addition to disparate tax treatment.

2. Even if standing were a pure question of state law, the standing ruling in this case would not constitute an independent and adequate state ground. This Court generally does refuse to review state-court decisions that rest on purely state-law grounds, if those grounds are both independent from the federal issues in the case and adequate to support the state court's judgment. *Lee* v. *Kemna*, 534 U.S. 362, 375 (2002). But the Hawaii Supreme Court's standing rationale was neither adequate nor independent of the federal merits. Rather, it was a transparent attempt to avoid vindicating petitioners' federal rights and thus is no barrier to this Court's review.

State courts cannot avoid review by this Court when they put forth state-law grounds that are no more than an attempt to evade vindicating a federal right. See, *e.g.*, *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) ("The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance."). Rather, "to assure that there is no 'evasion' of [this Court's] authority to review federal questions," the Court demands "that the nonfederal ground of decision have 'fair support.'" *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2608 (2010); see also, *e.g.*, *Ward* v. *Comm'rs of Love Cnty.*, 253 U.S. 17, 22 (1920) ("if nonfederal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided"). There is nothing remotely resembling "fair support" for the Hawaii Supreme Court's assertion that petitioners lacked standing because they had "failed to allege an injury-in-fact with regard to the HHCA's native Hawaiian ancestry qualification for homestead leases." App., *infra*, 42a.

That is because *petitioners did not challenge their eligibility for inclusion in the homestead lease program*. Rather, they challenged the highly favorable *tax treatment* afforded only to native Hawaiians under the HHCA. The Hawaii Supreme Court simply mischaracterized petitioners' claim as challenging the leases themselves. A state ground of decision lacks "fair support" when it rests on a demonstrably false premise—here, that petitioners asked for something (inclusion in the lease program) that they quite plainly did not.

Moreover, under Hawaii law petitioners quite clearly *do* have standing to challenge the tax exemption and the native Hawaiian classification underlying the exemption, as the concurring Justice concluded. App., *infra*, 63a-64a; see *Hawaii's Thousand Friends* v. *Anderson*, 70 Haw. 276, 277 (1989); *Iuli* v. *Fasi*, 62 Haw. 180 (1980). Hawaii law requires (1) a concrete injury that is actual or imminent; (2) is fairly traceable to the defendant's actions; and (3) is redressable by a favorable ruling. App., *infra*, 43a; see also *Akinaka* v. *Disciplinary Bd. of the Hawaii Supreme Court*, 91 Haw. 51, 55 (1999). The unequal treatment petitioners experience based solely on their race is plainly not "speculation," see App., *infra*, 50a—they have paid thousands of dollars in taxes that others, because of their race, do not. The injury is "fairly traceable" to the native Hawaiian classification, which is the determining factor in defining who is eligible for the preferential tax treatment. And the injury is plainly redressable by either removing the exemption or providing an equivalent exemption that is available to persons other than native Hawaiians.

What is more, the state defendants *conceded* that petitioners had standing to challenge the tax exemption directly. See Ans. Brief at 8 n.9. Because Hawaii's standing doctrine is prudential rather than

jurisdictional, *Sierra Club* v. *Dep't of Transp.*, 115 Haw. 299, 319 (2007), the court would have been able to assume the existence of standing based on the parties' agreement. There is, in short, nothing other than the decision below to suggest that Hawaii standing law forecloses petitioners' challenge to this preferential tax treatment.

3. In any event, the Supremacy Clause dictates that "[a] State's authority to organize its courts, while considerable, remains subject to the strictures of the Constitution," and this Court has therefore consistently held that state courts may not erect barriers to entertaining federal causes of action. *Haywood* v. *Drown*, 129 S. Ct. 2108, 2117 (2009). The Hawaii court's standing rationale is exactly that—a barrier erected with the specific goal of avoiding a federal question. "State courts simply are not free to vindicate the substantive interests underlying a state rule of decision at the expense of [a] federal right." *Felder* v. *Casey*, 487 U.S. 131, 152 (1988). This Court has repeatedly struck down such efforts. See, *e.g.*, *Howlett* v. *Rose*, 496 U.S. 356, 369, 371 (1990) ("A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.' * * * An excuse that is inconsistent with or violates federal law is not a valid excuse."); *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 44-49 (1990) (a state court may not rely on state-law grounds to deny a postdeprivation remedy when a taxpayer has paid an unconstitutional tax with no predeprivation process for avoiding payment).

This is the rule even when the plaintiff *would* have been able to vindicate his federal right in federal court. See generally *Haywood*, 129 S. Ct. 2108. It applies with even greater force here, where the Tax Injunction Act prevented petitioners from suing in federal court. See 28 U.S.C. § 1341 ("The

district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."). Thus, *no* court can review petitioners' equal protection claims if the state courts refuse to do so.

The Hawaii Supreme Court's standing analysis, therefore, is plainly insufficient to foreclose review in this Court. Particularly given the importance of the questions at stake, the Court should grant certiorari to reach the merits of the equal protection claim.

### B. The Absence Of The United States As A Party Is Not An Obstacle To Reaching The Merits

The concurring justice below joined in the judgment on the ground that the United States was a required party to this action. App., *infra*, 60a, 69a. Justice Acoba argued that the county tax exemptions at issue were mandated by the HHCA, which, in turn, cannot be amended without the consent of the United States under Section 4 of the Admission Act. App., *infra*, 67a-68a. Because the exemptions are mandated by federal legislation, he concluded, "any change in the classification for the exemption requires the participation of the United States," and the taxpayers' complaints should be dismissed. App., *infra*, 68a-69a (citing *Carroll* v. *Nakatani*, 342 F.3d 934, 944 (9th Cir. 2003), and *Arakaki* v. *Lingle*, 477 F.3d 1048, 1052 (9th Cir. 2007)).

That argument, which was not even raised by respondents, is not an adequate and independent state ground for at least two basic reasons. First, it was not a ground of the majority's decision and is therefore not a bar to federal review. See *Orr* v. *Orr*, 440 U.S. 268, 275-276 (1979). Second, the concurring

justice's conclusion was not rooted in state law, because it relied entirely on two Ninth Circuit opinions applying federal law. App., *infra*, 68a-69a (citing *Carroll* v. *Nakatani*, 342 F.3d 934 (9th Cir. 2003); *Arakaki* v. *Lingle*, 477 F.3d 1048 (9th Cir. 2007)). In any event, any conceivable invocation of state law in the concurring Justice's opinion certainly lacked the "plain statement" required by *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983).

Furthermore, the view that the United States is an indispensable party to any action challenging a federal statute is meritless. Indeed, it has been squarely rejected by this Court. In *California* v. *Grace Brethren Church,* the Court considered "whether certain state and federal statutes violate * * * the First Amendment by requiring religious schools unaffiliated with any church to pay unemployment insurance taxes." 457 U.S. 393, 396 (1982) (footnote omitted). The Court did not reach the merits, however, because it concluded that the district court lacked jurisdiction under the Tax Injunction Act, *ibid.,* and that the constitutional claims could be addressed in the state courts, *id.* at 414. The Court then addressed the argument that "because the Federal Government is an indispensable party to this action, and could not be compelled to submit to state-court jurisdiction, the state courts could not afford the appellees complete relief." *Id.* at 417 n.38. The Court explicitly rejected that view: "[T]he error in this argument is its premise; as *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981), demonstrates, the Federal Government *need not be a party in order for the appellees to litigate their statutory and constitutional claims*." *Ibid.* (emphasis added).

Justice Acoba's position also flies in the face of the procedure furnished by the U.S. Code to ensure that the United States can make its views heard on constitutional challenges to federal legislation. Title 28 U.S.C. § 2403(a) (implemented by Federal Rule of Civil Procedure 5.1 and Federal Rule of Appellate Procedure 44(a)) instructs federal courts to notify the Attorney General of any case in which "the constitutionality of any Act of Congress affecting the public interest is drawn in question" and "the United States or any agency, officer or employee thereof is not a party." The United States then has the *option* to intervene. *Ibid.*

Under Justice Acoba's theory, that statute is entirely nugatory, because the United States would already be a required party in any proceeding where a federal statute was challenged. But the statute presupposes that a constitutional challenge can go forward if the United States declines to intervene. Indeed, federal courts regularly resolve constitutional challenges in such circumstances. See *Zehner* v. *Trigg*, 133 F.3d 459, 461 (7th Cir. 1997) (considering constitutional question after being assured that the Department of Justice had actual notice); *Tonya K. ex rel. Diane K.* v. *Bd. of Educ.*, 847 F.2d 1243, 1247 (7th Cir. 1988) (similar); *Wallach* v. *Lieberman*, 366 F.2d 254, 257-258 (2d Cir. 1966) (resolving a constitutional question after the United States declined to intervene).

In this case, the plaintiffs notified both the State of Hawaii and the United States that their claims put state and federal laws into question. The State chose to intervene, but the United States did not. A decision against intervention does not rob the courts of their ability to decide the constitutional issue.

Any Ninth Circuit decision to the contrary is simply indefensible.

In the end, it is not difficult to understand the motivation for the justices of the state supreme court to seek grounds for avoiding the constitutional merits: They wish to avoid upsetting a politically popular program, but they realize that *Rice* v. *Cayetano* forecloses any serious defense of that program on the merits. To say that the motivation is understandable, however, is not to say that it is legitimate for a court of law. It plainly is not. Only this Court can force the courts of Hawaii to accept the plain import of *Rice* v. *Cayetano*. This Court should grant certiorari to do so.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 15, 2011