No.

In the Supreme Court of the United States

VIRGIL E. DAY, JOSIAH L. HOOHULI, PATRICK L. KAHAWAIOLAA, and SAMUEL L. KEALOHA, JR.,
Petitioners,

v.

HAUNANI APOLIONA, individually and in her official capacity as Chairperson and Trusee of the Office of Hawaiian Affairs, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether officials of the State of Hawaii may expend funds subject to the trust established by § 5(f) of the Hawaii Admission Act for the betterment of Hawaiians without regard to the blood quantum established by § 201(a)(7) of the Hawaiian Homes Commission Act, 1920?

LIST OF PARTIES

Petitioners:

VIRGIL E. DAY, JOSIAH L. HOOHULI, PATRICK L. KAHAWAI-OLAA, and SAMUEL L. KEALOHA, JR.

Respondents:

HAUNANI APOLIONA, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs; ROWENA AKANA, DONALD CATALUNA, COLETTE Y. PI'IPI'I MACHADO, BOYD P. MOSSMAN; OSWALD STENDER, JOHN D. WAIHE'E IV, WALTER MEHEULA HEEN, and ROBERT K. LINDSEY JR., individually and in their official capacities as Trustees of the Office of Hawaiian Affairs; DANTE CARPENTER and LINDA KEAWE'EHU DELA CRUZ, former Trustees, in their individual capacities;

STATE OF HAWAII, Defendant-Intervenor (granted); and

WENDELL MARUMOTO, Plaintiff-Intervenor (denied).

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, VIRGIL E. DAY, JOSIAH L. HOOHULI, PATRICK L. KAHAWAIOLAA, and SAMUEL L. KEALOHA, JR., respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS IN THE CASE

The opinion of the Ninth Circuit Court of Appeals sought to be reviewed was filed July 26, 2010, in *Day v. Apoliona*, 616 F3d 918 (9th Cir. 2010) (*Day III*). This opinion is reprinted in the Appendix at page A-2. The unpublished ORDER GRANTING SECOND MOTION FOR SUMMARY JUDGMENT, filed in the U.S. District Court for the District of Hawaii, in *Day v. Apoliona*, Civil No. Civ. No. 05-00649 SOM/BMK, on June 6, 2008, is reprinted in the Appendix at page A-21.

JURISDICTION

This is a petition for writ of certiorari directed to the U.S. Court of Appeals for the Ninth Circuit to review the judgment filed and entered on July 26, 2010, in *Day v. Apoliona*, C.A. No. 08-16704. This Honorable Court has discretionary jurisdiction to review cases in United States Courts of Appeals by way of writ of certiorari as provided by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Admission Act, § 4

§4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.
Pub. L. No. 86-3, 73 Stat. 4 § (4) (1959)

Admission Act § 5(b)

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.
Pub. L. No. 86-3, 73 Stat. 4 § 5(b) (1959).

Admission Act § 5(f)

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit

may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.
Pub. L. No. 86-3, 73 Stat. 4 § 5(f) (1959).

Hawaiian Homes Commission Act, § 201(a)(7)

(a) That when used in this Title: . . . (7) The term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.
Pub. L. No. 67-34, 42 Stat. 108 § 201(a)(7) (1921).

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
42 U.S.C. § 1983.

STATEMENT OF THE CASE

This is a civil rights case pursuant to 42 U.S.C. § 1983 by native Hawaiian[1] beneficiaries of the compact and trust established by § 4 and § 5(f), respectively of the Hawaii Admission Act. The complaint alleges that defendant Trustees of the Office of Hawaiian Affairs (OHA) expended trust funds without regard to the blood quantum established by § 201(a)(7) of the Hawaiian Homes Commission Act, 1920. The complaint seeks declaratory and injunctive relief and damages.

In particular, the complaint alleges that OHA expended trust funds to support a bill, commonly known as the "Akaka Bill," to establish a Native Hawaiian Governing Entity. Native Hawaiian Government Reorganization Act of 2005, S. 147, 109th Cong. (2005). Which bill and its predecessors defined the term "Native Hawaiian" as persons descended from the aboriginal inhabitants of the Hawaiian Islands without regard to blood quantum.[2] The complaint further alleges that OHA contributed trust funds to three social service agencies, the Native Hawaiian Legal Corporation, Alu Like and Na Pua No'eau Education Program, which provide benefits to Hawaiians without

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[1] As used herein, the term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. The term "Hawaiian," when used as a noun referring to a person or persons, means any such descendant without regard to blood quantum.

[2] The bill discussed by the Court of Appeals was a later version resubmitted in the 110th Congress as Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. (2007). That bill contains the same definition of "Native Hawaiian." The bill was completely rewritten as H.R. 2314, which was passed by the House on February 23, 2010. This latest version of the bill does not contain a definition of "Native Hawaiian."

regard to blood quantum.

Jurisdiction of the U.S. District Court was invoked pursuant to 28 U.S.C. § 1343 or, alternatively, pursuant to 28 U.S.C. § 1331.

The State of Hawaii filed an amicus brief suggesting that Petitioners lacked standing to bring suit. The District Court agreed and dismissed the case. On appeal, the Ninth Circuit Court of Appeals reversed and remanded. *Day v. Apoliona*, 496 F.3d 1027 (9th Cir. 2007) (*Day I*). The State's motion to intervene to file a motion for rehearing and rehearing *en banc* was granted. *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007) (*Day II*). The motion for rehearing was denied.

On remand, OHA moved for summary judgment. OHA admitted that they were using § 5(f) trust funds to support the Akaka Bill and the three service agencies. It was also undisputed that the service agencies provide benefits to Hawaiians without regard to blood quantum. OHA claimed, however, that it had discretion under the trust to make expenditures for these purposes. The District Court agreed and again dismissed the case.

The District Court concluded preliminarily that OHA was not limited by federal law in its use of trust funds to the betterment of the conditions of native Hawaiians. Expenditures could be justified under any one of the five § 5(f) trust purposes.

With respect to the Alu Like expenditures, the District Court noted that Alu Like provides social services to Hawaiians without regard to blood quantum as follows:

> Alu Like is a nonprofit organization that strives to help Hawaiians and native Hawaiians achieve social and economic self-sufficiency through the provision of early childhood education and child care, elderly services, employment preparation and

> training, library and genealogy services, specialized services for at-risk youth, and information and referral services.

A-45.

In view of these functions, the District Court concluded that OHA has discretion to contribute 5(f) trust funds to Alu Like under the first two of five trust purposes—supporting public schools or bettering the conditions of native Hawaiians.

The other challenged expenditures were similarly justified by the District Court. A-40-44. The Court also dismissed Petitioners claims for injunctive and declaratory relief, granting judgment in favor of OHA on all claims. A-46-48.

The State moved for summary judgment on the grounds that OHA's expenditures are not limited by the trust because the State spends more on the public schools than the income generated from the trust. The District Court did not address this issue as it was rendered moot by ruling on OHA's motion.

On appeal, Petitioners argued that state law is incorporated into § 5(f) by the language "in such manner as the constitution and laws of said State may provide" and that state law clearly limits OHA expenditures to the single purpose of the betterment of the conditions of native Hawaiians, as defined in HHCA.

Petitioners argued further that expenditure of trust funds for the benefit of Hawaiians without regard to the blood quantum was a common law breach of the duty of loyalty to the native Hawaiian beneficiaries.

Alternatively, even if OHA was permitted to expend trust funds for any one of the five trust purposes, Petitioners argued that the record, consisting only of the agency contracts allowing multiple uses some of which are permitted uses and some not, did not establish that the expenditures were actually for permitted

uses.

Finally, Petitioners argued that, to the extent that the law is unclear, they were entitled to declaratory relief establishing the extent to which trust funds can be used to provide benefits to Hawaiians not meeting the blood quantum, to wit: "so long as the primary benefits are enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries." See H.R.S. § 673-1(b)(1).

During oral argument, counsel for OHA and the state both admitted that under state law, OHA is restricted to using § 5(f) funds solely for the betterment of the conditions of native Hawaiians. OHA argued that, even so, they had discretion to determine that providing benefits to all Hawaiians would better the conditions of native Hawaiians. The Court of Appeals agreed.

The Court of Appeals held preliminarily that, under federal law, OHA may use § 5(f) trust funds for any one of the five enumerated purposes, as follows:

> First, the only "breach of trust" § 5(f) refers to is "use" of funds "for any other *object*," referring to the enumerated spending purposes. *Id.* (emphasis added). It does not encompass any other restrictions under state law. Second, we find it implausible that Congress gave Hawaii discretion to choose how to manage the trust yet provided for federal intervention to enforce those choices, whatever they might be.

A-11.

Addressing the specific challenged expenses, the Court of Appeals applied the common law of trusts, specifically Restatement (Third) of Trusts, § 87, to conclude that OHA has broad discretion to determine how to use the trust funds which will not be disturbed absent an abuse thereof. The Court held that its only

function, therefore, was to "examine the challenged expenditures to determine whether any of them is beyond the bounds of a trustee's reasonable judgment that the project in question would serve § 5(f) trust purposes." A-14.

Applying these standards to the challenged expenditures, the Court concluded that all were well within OHA's reasonable judgment. In particular with respect to contributions to Alu Like, the Court of Appeals rejected the District Court's conclusion that it could be justified under the support of the public schools purposes, but that it was justified under the betterment of the conditions of native Hawaiians purpose, as follows:

> Finally, the OHA trustees had discretion to fund the Alu Like contract. That contract obligates Alu Like to provide "a comprehensive system for beneficiaries [including native Hawaiians and Hawaiians] to receive information, referrals, . . . case management, personal financial management, and emergency fund assistance" consistent with a proposal that Alu Like submitted to OHA. As the district court found, the trustees could have reasonably determined that the conditionss of native Hawaiians would benefit from Alu Like's efforts to "help [ ] Hawaiians and native Hawaiians achieve social and economic self-sufficiency."

A-17-18.

This holding, in essence, allows the expenditure of § 5(f) trust funds to better the conditions of Hawaiians, without regard to blood quantum.

The Court rejected the State's argument that its expenditures for public schools free OHA from the trust use restrictions. A-18-19.

REASONS FOR ALLOWANCE OF THE WRIT

A. How the native Hawaiians lost their land.

In 1778, upon arrival of Capt. James Cook in the Sandwich Islands the native Hawaiian population exceeded 300,000. *Native Hawaiian Data Book, 1998*, Office of Hawaiian Affairs, Honolulu (1998), Table 1.1. At that time, it has been suggested that land ownership was under a feudal type of system, in which all of the land was owned by the King and granted by him to his chiefs known as *konohikis*, and by them, in turn, to tenant farmers. See Chinen, Jon Jitsuzo, "Original Land Titles in Hawaii", Library of Congress No. 61-17314 (1961), p. 1; Cannelora, Louis, "The Origin of Hawaii Land Titles and of the Rights of Native Tenants", Security Title Corp., Honolulu, Hawaii (1974), p. 1. But more properly, it was in the nature of a trust with the King as trustee and the *konohikis* and native tenants as beneficiaries. This was recognized in the first Constitution of the Kingdom of Hawaii adopted in 1840. As provided therein:

> "Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and the people in common, of whom Kamehameha I was the head, and had the management of landed property."

State v. Zimring, 58 Haw. 106, 111 (1977) quoting *Fundamental Law of Hawaii* (1904) at 3 quoting The Constitution of 1840.

On December 10, 1845, the Board of Commissioners to Quiet Land Titles, commonly known as the Land Commission was established to adjudicate and settle disputes over titles of real property. Cannelora, supra, p. 7. It was recognized in the Principals of the Land Commission as well as the Privy Counsel that the

ownership of the land at that time was held in equal one-third undivided interests by the King, the *konohiki* landlords and the tenants living on the land. Cannelora, supra, pp. 10, 12. *See also Thurston v. Bishop*, 7 Haw. 421, 430 (1888).

The problem was that the Land Commission had no means to divide these interests, so that fee simple ownership of land could not be obtained unless all of these parties joined in the deed. In order to solve this problem, Kamehameha III and the *konohikis* divided their lands between themselves in what is known as The Great Mahele. This was actually a series of divisions between the king and *konohikis* made between January 27, 1848 and March 7, 1848, which allowed the *konohiki* to take his or her claim to the Land Commission and obtain fee title *subject to the rights of the native tenants*. Cannelora, supra, p. 13.

Native tenants were not able to obtain fee title to their interests until 1850, when legislation was enacted allowing them to present *kuleana* claims to the Land Commission. Cannelora, supra, 17-19. But the law did not favor the granting of such claims. First, native tenants were less well educated and less informed than the *konohiki* class and may not have been aware of their right to obtain title or the means to perfect it. Second, native tenants were given only a 4 and one-half year period within which to file their claims after which they were forever barred, while *konohikis* were given up to 49 years to file. Cannelora, supra, p. 19. Third, native tenants were required to incur the considerable expense of a survey of their claim, while *konohikis* were not. *Id.* Ultimately, only 28,658 acres were awarded to native Hawaiian tenants out of the 4.1 million acres of land in Hawaii. Uyehara, Mitsuo, *Hawaii Ceded Lands*, Hawaiiana Almanac Publishing Co., Honolulu, 1977, p. 19.

Thus, this legislation purportedly to allow native tenants to obtain fee simple title to their land actually operated to extinguish the claims of the vast majority of native Hawaiian people who failed to go through the process of surveying and registering *kuleana* claims. Whereas before the *mehele*, native Hawaiian tenants owned an undivided one-third interest in the entire 4.1 million acres of land, after the *mehele* only a small number of them owned 28,658 acres, in fee simple, while the government held title to the land free and clear of any further *kuleana* claims. Upon annexation, the United States succeeded to ownership of 1.8 million acres of government land, a one-third interest in which had once been owned by the native Hawaiian tenants.

B. Hawaiian Homes Commission Act, 1920

It was the decline in population and loss of land by the native Hawaiian people that Congress purportedly sought to address when it enacted HHCA. The act provided that approximately 200,000 acres of land be set aside and designated as "available lands" to be awarded to native Hawaiians as 99-year leasehold homesteads pursuant to HHCA, § 207(a).

Unfortunately, the Hawaiian Homes Commission was only given a revolving fund of $2 million to work with. As a result by 1938, only 750 homestead leases had been awarded under the HHCA, representing about 10 per cent of the eligible beneficiaries. *Federal-State Task Force on the Hawaiian Homes Commission Act Report to the Secretary of the Interior and the Governor of the State of Hawaii*, Honolulu, 1983 ("Task Force"), pp. 141-2. Some allowance may be made for startup time. However, the rate of awarding leases did not pick up significantly over the succeeding years. As of June, 2004, the total number of homestead leases was 7418. Dept. of Hawaiian Home Lands, Annual

Report, 2004, p. 12. While DHHL has increased the rate of homestead awards since 2004, as of December 31, 2009, there remained a total of 25,244 individuals on homestead waiting lists. http://hawaii.gov/dhhl/application-wait-list/12-31-09/2009-12-31_07-Alpha_A-K_Waitlist_245pgs.pdf, p. 5.

C. Statehood.

Upon admission into the union, Hawaii received an extraordinary grant of nearly all of the public land within the state. Admission Act, supra, § 5(b). This grant was considerably more than the other 49 states which had received only one to four sections per township for support of the public schools. However, this grant was made upon the express condition, not imposed upon other states, that Hawaii would assume the role of the federal government of dealing with the particular needs of the native people. Admission Act, §§ 4 and 5(f). The legislative history of the Admission Act makes it clear that this was the intent of Congress.

Early versions of the statehood bill included provisions that the new state would succeed to title to all of the public land not then actually being used by the federal government. This idea derived from a provision of the Newlands Resolution of annexation, as follows:

> The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educa-

tional and other public purposes.
Resolution No. 55, 55th Congress; 30 Stat. at L. 750 (July 7, 1898).

Based on this provision, the proponents of statehood considered that all of the public land should be conveyed to the state upon admission. This also might have been justified by the fact that the land might be much more efficiently managed from Honolulu than from the Department of the Interior, 4,000 miles and half an ocean away.

Inasmuch as this grant would have included the home lands, early statehood bills included provisions for adoption of HHCA as state law similar to provisions now found in § 4 of the Admission Act. Notably, such provisions omited the requirement that all proceeds and income from the home lands be used to implement the Act. See, e.g., Task Force, supra, pp. 146-7 (H.R. 49, 80th Cong., (1947)).

The Secretary of the Interior objected to this disposition of the public lands. The Secretary argued that, upon statehood, the federal government should maintain control and management of the public lands with Hawaii being given only 180,000 acres (one-tenth). This would have been consistent with all other states receiving between one-eighteenth and one-ninth of the public land in trust to support the public schools and provide public improvements. *Id.*, pp. 147-8 (H. Rept. 194 on H.R. 49, p. 16).

Eventually, Congress compromised. All of the land not being used by the federal government—1.4 million acres, including the home lands—was granted to the state, subject to the § 5(f) trust and § 4 compact. In this manner, Congress delegated to the State of Hawaii, the obligation to deal with native Hawaiian claims.

> The clause for the betterment of the conditions of native Hawaiians in Section 5(f) of the Admission

> Act indicates that Congress foresaw the emergent demands of native Hawaiians for reparation or settlement of their claims. In the Indian Claims Commission Act (1946) [Indian Claims Commission Act, Act of August 13, 1946, c. 959, Sec. 1, 60 Stat 1049, 25 U.S.C.A. Sec 70] and the Alaska Native Claims Settlement Act (1971) [Alaska Native Claims Act, Act of September 18, 1971, Public Law 92-203, 85 Stat 668, 43 U.S.C. §§1601-1624.] Congress had provided for direct settlement with the people affected. In the case of Hawaii, Congress can be said to have delegated the task to the State legislature under Section 5(f) of the Admission Act. It is to be noted that the language of Section 5(f) trust was first incorporated into the Hawaii Statehood bill in 1947, just a few months after the enactment of the Indian Claims Commission Act in 1946.

Uyehara, supra, p. 15.

D. The Oha fraud.

For twenty years after statehood, little was done for the betterment of the conditions of native Hawaiians. The State commingled § 5(f) income and proceeds with income and proceeds from other public lands, then, relying upon the "one or more of the foregoing purposes" language in § 5(f), transferred these proceeds to the Department of Education and then transferred an equal amount from the DOE to the general fund. *Id.*, pp. 6-9. By use of this money-laundering practice, the State was actually using the § 5(f) income and proceeds for general operation of the government, not even for the support of the public schools.

Eventually, native Hawaiian beneficiaries began to organize in protest of the State's egregious breach of the § 5(f) trust. *See Id.*, p. 15. The issue was purport-

edly addressed in the 1978 Constitutional Convention by the establishment of OHA. OHA was purportedly established to address prior abuse and neglect of native Hawaiian beneficiaries. See *OHA v. Yamasaki*, 69 Haw. 154, 737 P.2d 446 (1987).

In practice, however, OHA seems to have been the foundation of a State strategy to to shift the native Hawaiian problem back to the federal government. The first step of which was to increase the number of beneficiaries to increase the amount of their political pressure. The second step was to divert § 5(f) funds from the intended purpose of implementing HHCA. The third step was to convince Congress that the federal government was responsible for the plight of the beneficiaries. The final step was to create an entity that had authority to negotiate a settlement of native Hawaiian claims that would release the State from the § 4 and § 5(f) obligations in exchange for lands contributed to it by the state and federal governments.

1. **Increase the number of beneficiaries.**

There are less than 80,000 native Hawaiian beneficiaries of the § 5(f) trust. See *Rice v. Cayetano,* 528 U.S 495, 526 (2000) [Breyer, J., concurring]. This number will decrease over time through intermarriage. Having given Hawaii ten times a much public land as other states got for the support of the public schools, Congress had given Hawaii ample resources to provide homesteads and other benefits for the diminishing number native Hawaiians.

On the other hand, there are more than 130,000 Hawaiians who do not meet the one-half part blood quantum ("toenail Hawaiians"). *Id.* The number of toenail Hawaiians will continually increase through intermarriage. Given enough time and intermarriage, everyone in the world will be a toenail Hawaiian and

there will be no more native Hawaiians.

From its initial conception, OHA was designed to break the blood quantum and exponentially increase the number of beneficiaries. OHA was charged with the responsibility of bettering the conditions of native Hawaiians as well as all toenail Hawaiians. Haw. Const., Art. XII, §§ 4 and 5; H.R.S. §§ 10-3(1) and (2).

To make matters worse, the constitutional amendments made provision for funding OHA with a pro rata portion of the income and proceeds of the § 5(f) trust [excluding the home lands portion] while making no provision for funding for toenail Hawaiians. Haw.Const., Art. XII, §§ 4 and 6. To make matters still worse, the legislature provided for the election of OHA trustees by Hawaiians without regard to blood quantum. See *Rice v. Cayetano, supra.*

Even when OHA was first established the number of toenail Hawaiians was greater than the number of native Hawaiians. So making OHA responsible for bettering the conditions of all Hawaiians and having them be elected by all Hawaiians created a conflict of interest situation in which OHA trustees would naturally be looking to curry favor with the toenail Hawaiians.

Immediately after its formation, OHA trustees sought to use § 5(f) trust funds for the benefit of toenail Hawaiians. The Hawaii Attorney General advised them not only that they could not do so, but that any purported authorization by the state legislature would violate § 5(f). See Op. Haw. Att'y Gen. 83-2 (Apr. 15, 1983).

2. Diversion and withholding of funds intended for homestead development.

The next step in the strategy was exacerbate the need of the native Hawaiian beneficiaries by withhold-

ing and diverting resources that Congress intended for their use and benefit. By allocating a pro rata portion of the income and proceeds from the § 5(f) trust to OHA instead of to the Dept. of Hawaiian Home Lands, the amount of funding for the implementation of HHCA was thereby reduced. Over the years, OHA has used only a small portion of its trust income for the betterment of the conditions of native Hawaiians. Instead, OHA has invested and reinvested the trust funds in an investment portfolio that had reached $409 million as of May 8, 2008. A-51. The OHA administrator, Clyde Namuo, did not even know whether or not that fund was part trust corpus limited to the uses and purposes of § 5(f). A-50-53.

When additional federal funds are received by DHHL for homestead development, they are not used to provide homesteads for the homeless. In one case $25 million in federal funding was given to a subsidiary of Kamehameha Schools, Bishop Estate to construct homes on home lands. Honolulu *Star-Bulletin*, October 16, 1998, p. 3. The leasehold homes were then *sold* to beneficiaries for about the same amount of money beneficiaries could have purchased a fee simple home in Kapolei, where developers have to purchase the land as part of their cost. This project provided significant profit to a subsidiary of KSBE, which has a $10 billion endowment of its own, but little benefit to the actual beneficiaries and no benefit to beneficiaries who could not afford to purchase a home.

3. Federal funding.

The third step was to ask Congress for funding for Hawaiians on the grounds that the state had been unfairly burdened with the obligation of providing for such a large number of indigenous people and had not been provided with adequate resources to do so. This is

foreshadowed by the 1978 constitutional amendments and legislation establishing OHA. In § 6 of Article XII of the Constitution, OHA is given the task of exercising control over property transferred by the *federal government* for "native Hawaiians and Hawaiians." Pursuant thereto, the legislature authorized and directed OHA:

> To apply for, accept and administer any federal funds made available or allotted under any federal act for native Hawaiians or Hawaiians;

H.R.S. § 10-6(a)(8).

In August, 1989, the Senate Committee on Indian Affairs and the House Committee on Interior and Insular Affairs held five days of joint hearings on the Administration of the Native Hawaiian Home Lands. S.Hrg. 101-555, 101st Cong. The five volume Report contains a long litany of complaints by beneficiaries of abuse and neglect. However, much of the time was allocated to state officials attempting to justify additional federal funding for the homestead program.

Gov. John Waihee's opening remarks set the tone. S.Hrg. 101-555, v. 1, pp. 11-13. Mr. Waihee suggests that "The Federal Government did not provide the best lands nor the most adequate resources for the development of those lands." This is nonsense, since § 5(b) grants the state *all of the public land* except that which the federal government was actually using. That is, essentially, all except the National Parks and military bases which are maintained at considerable expense by the federal government to serve and protect the general public. These expenditures by the federal government actually generate revenue for the state through taxes generated by increased tourism and economic activity.

Mr. Waihee then claims there are 200,000 Hawaiian people in the state. This ignores the blood quantum. In

fact, there are less than 80,000 native Hawaiians who are eligible for homestead awards, approximately 25,000 of whom were on the waiting lists at the time. He then suggests that Hawaiians benefit more than other ethnic groups from public education and welfare benefits and then concludes that the state cannot provide these things without federal assistance, as follows:

> Hawaiians depend on public education. The extent to which we are successful in our education reform efforts is the extent to which we will benefit Hawaiians, as well as every other student in our public school system. And if the Federal Government and the State are truly committed to the goal of individual and family self-sufficiency, then the welfare reform effort will benefit Hawaiians.
>
> Indeed, a conservative estimate prepared by the State's Department of Budget and Finance indicates that for fiscal year 1990 we will spend $285 million for Hawaiians.
>
> The State cannot be alone in our efforts to provide both general purpose and targeted programs for Hawaiians and all of our citizens. State directors and other witnesses will identify a number of areas in which new Federal dollars will make significant differences, especially if they are combined with existing State and private initiatives.

S.Hrg. 101-555, v. 1, p. 12.

Mr. Waihee claims that the state endeavors to enforce Kamehmeha I's Law of the Splintered Paddle, "Let every elderly person, woman and child lie by the roadside in safety." Nothing could be further from the truth. In fact, all too often, state law enforcement officers are sent out in military array to evict or arrest large groups of homeless native Hawaiians living in tents on beaches or in public parks. As recently as

July, 2010, 350 homeless people were evicted from a tent camp on a beach in Waianae. One of these people later committed suicide. http://www.thehawaiiindependent.com/story/faced-with-eviction/. This suicide was not even reported in the Honolulu *Star-Advertiser*. It seems that native Hawaiians do NOT have the right in Hawaii to lie homeless by the roadside in safety. They are bad for tourism.

During the testimony of Hawaiian Homes Commission Chairperson, Ilima Pi'ianaia, in the August, 1989 joint hearings, she thanked Senator Inouye for making federal funds available for the Hawaiian Homes program for the first time and then asked for an additional $500 million. S. Hrg. 101-555, v. 1, p. 70.

4. The Akaka bill.

This bill will create a governing entity made up of Hawaiians without regard to blood quantum in which toenail Hawaiians outnumber native Hawaiians. While the present bill does not define "Native Hawaiian" at all, it does contain a complex six-page definition of a "Qualified Native Hawaiian Constituent." H.R. 2314, § 3(12). These are the people who will be organizing the Native Hawaiian Governing Entity. This definition basically includes anyone who the Commission finds is an 18 year-old, U.S. citizen, descendant of an aboriginal Hawaiian without regard to blood quantum, with some exceptions for out-of-state residents. The individual seeking to participate in this process must be willing to certify that he or she meets these qualifications.

As noted above, the number of toenail Hawaiians who meet this definition is greater than the number of native Hawaiian. In addition, the requirement that the person certify that he is a U.S. citizen will exclude a significant number of native Hawaiians who claim

sovereignty and do not acknowledge U.S. citizenship. This requirement is similar to the loyalty oath that the Republic of Hawaii used to disenfranchise native Hawaiians. This requirement will tend to increase the influence of toenail Hawaiians in the organization of the Entity.

The lack of a blood quantum is in conflict with federal Indian law which generally imposes a not less than one-half part blood quantum on individuals seeking to reorganize Indian tribes. 25 U.S.C. § 479 (one-half part blood quantum for Indians not living on a reservation). Lack of a blood-quantum may also render the Akaka bill unconstitutional. See *Rice v. Cayetano, supra.*

The purpose of allowing toenail Hawaiians to organize the Entity will assure that there will be no blood quantum for membership in the Entity itself. Why would a toenail Hawaiian vote to exclude himself from membership in the Entity?

The State will then be able to offer to transfer the home lands and OHA investment portfolio to the Entity in exchange for a release of its trust obligations under §§ 4 and 5(f). Naturally, native Hawaiians would oppose such an arrangement, but they will likely be outvoted by toenail Hawaiians.

E. The Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

This case arises out of a trust consisting of public land within the State of Hawaii. Except with respect to a suit against federal officials to compel enforcement thereof[3], these cases will only be decided in the Ninth

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[3] In *The Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9th Cir. 1999), the Ninth Circuit held that federal officials have sovereign (continued...)

Circuit Court of Appeals. Therefore, certiorari cannot be based upon a conflict between the Circuits under Supreme Court Rule 10(a).

The Court of Appeals has held that OHA can expend § 5(f) trust funds for the betterment of the conditions of Hawaiians without regard to blood quantum. This is an important question of federal law that has not been, but should be, settled by this Court. Supreme Court Rule, 10(c).

Dated: Honolulu, Hawaii, October 25, 2010.

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[3](...continued)
immunity from a suit for mandamus to enforce the terms of the trust.

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