

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15044

JOHN DOE, a minor, by his mother
and next friend, JANE DOE,
Appellants,

v.

KAMEHAMEHA
SCHOOLS/BERNICE PAUAHI
BISHOP ESTATE, and
CONSTANCE H. LAU, NAINOA
THOMPSON, DIANE J. PLOTTS,
ROBERT K.U. KIHUNE, and J.
DOUGLAS ING, in their capacities as
Trustees of the Kamehameha
Schools/Bernice Pauahi Bishop Estate,
Appellees,

MOTION OF *AMICI* NATIONAL
INDIAN EDUCATION
ASSOCIATION AND ALASKAN
FEDERATION OF NATIVES FOR
LEAVE TO FILE *AMICI CURIAE*
BRIEF IN SUPPORT OF PETITION
FOR REHEARING *EN BANC*

INTRODUCTION

The National Indian Education Association (NIEA) and the Alaskan Federal of Natives (AFN) respectfully request leave to file an *amicui curiae* brief in support of the petition for rehearing *en banc* filed by appellees Kamehameha Schools, *et al* on August 23, 2005 in the above captioned case. Attorneys for appellees state that they do not oppose this motion. Attorneys for appellants, John Doe and Jane Doe, state that they will oppose this motion.

A copy of the proposed *amicui curiae* brief is attached to this motion.

STATEMENT OF INTEREST AND GROUNDS FOR RELIEF

Amicus National Indian Education Association (NIEA) is the largest and oldest Indian education organization in the United States. NIEA was established for the purpose of advocating, planning and promoting the unique and special educational needs of American Indians, Alaska Natives and Native Hawaiians. NIEA is committed to increasing educational opportunities and resources for American Indian, Alaska Native, and Native Hawaiian students while protecting their cultural and linguistic traditions.


Amicus Alaska Federation of Natives (AFN) is the largest statewide Native organization in Alaska. AFN's members include the 13 Regional Native corporations formed pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 et. seq., the 12 regional non-profit Native organizations formed by Alaska Native tribes to deliver services and advocate for Native interests, and over two hundred Native villages (both federally-recognized tribes and village corporations) across Alaska. The mission of AFN is to enhance and promote the cultural, economic and political interests of the entire Alaska Native community.

Amici and their member tribes and tribal organizations have an interest in ensuring that the educational needs of American Indian, Alaska Native and Native Hawaiian students, and the public and private programs implemented to fulfill

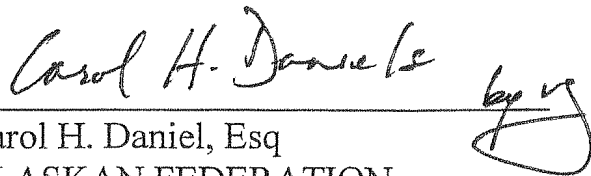
those needs, are protected and preserved under federal law. *Amici* offer a unique perspective on whether remediation of on-going socioeconomic and educational deficiencies suffered by native peoples as the result of the influx of western civilization provides “legitimate justification” to support a remedial race-conscious admissions policy of a private school which gives preference to native students.

This is a case of first impression which presents a significant issue under our statutory civil rights law. The attached *amici* brief will assist the Court in framing two questions of exceptional importance which requires *en banc* review: (1) the importing and modifying of the three-part *Weber* test for application in the private education context for the first time; and (2) whether the Native Hawaiians’ “special relationship” with the United States, a relationship that is similar to, but not identical with, the relationship between the federal government and Native Americans, affects the analysis under 42 U.S.C. § 1981.

Respectfully submitted this 29th day of August, 2005,



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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of this *Motion of Amici Curiae Alaska Federation of Natives and National Indian Education Association For Leave to File an Amici Curiae Brief In Support Of The Petition for Rehearing* were served, via U.S. Mail, postage prepaid, on this 29th day of August, 2005 on the following:

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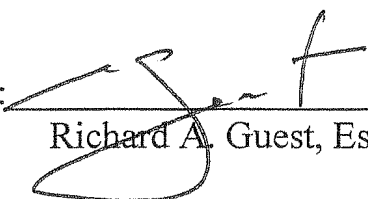
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Pursuant to Ninth Circuit Rule 31-1, I also certify that the original and fifty copies of this *Motion of Amici Curiae National Indian Education Association and the Alaska Federation of Natives For Leave to File an Amici Curiae Brief In Support Of The Petition for Rehearing* were sent, via Federal Express, this 29th day of August 2005, to the Clerk of the Court.

By: 
Richard A. Guest, Esq.

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**IN THE UNITED STATES COURT OF APPEALS
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and CONSTANCE H. LAU, NAINOA THOMPSON, DIANE J. PLOTTS,
ROBERT K.U. KIHUNE, and J. DOUGLAS ING, in their capacities as Trustees
of the Kamehameha Schools/Bernice Pauahi Bishop Estate,
Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII, Civil No. 03-00316-ACK

***AMICI CURIAE BRIEF OF THE NATIONAL INDIAN EDUCATION
ASSOCIATION AND THE ALASKAN FEDERATION OF NATIVES AND
THE IN SUPPORT OF THE PETITION FOR REHEARING EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus* National Indian Education Association is the largest and oldest Indian education organization in the United States. NIEA was established for the purpose of advocating, planning and promoting the unique and special educational needs of American Indians, Alaska Natives and Native Hawaiians.

Amicus Alaska Federation of Natives is the largest statewide Native organization in Alaska. AFN's members include the 13 Regional Native corporations formed pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 et. seq., the 12 regional non-profit Native organizations formed by Alaska Native tribes to deliver services and advocate for Native interests, and over two hundred Native villages (both federally-recognized tribes and village corporations) across Alaska

STATEMENT OF *AMICI CURIAE* INTEREST

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Amici and their member tribes and tribal organizations have an interest in ensuring that the educational needs of American Indian, Alaska Native and Native Hawaiian students, and the public and private programs implemented to fulfill

those needs, are protected and preserved under federal law. This case presents questions of exceptional importance. In particular, whether remediation of ongoing socioeconomic and educational deficiencies suffered by native peoples as the result of the influx of western civilization provides “legitimate justification” to support a remedial race-conscious admissions policy of a private school which gives preference to native students.

REASONS FOR GRANTING THE PETITION ARGUMENT

As acknowledged by the panel majority, the primary issue under consideration is “a significant one in our statutory civil rights law” and one which presents “a case of first impression in our circuit.” Slip op. at 8926. This significant issue raises two questions of exceptional importance.¹

A. The Importation and Modification of the Three-Part *Weber* Test for Application in the Private Education Context, For the First Time, Presents a Question of Exceptional Importance

After the court correctly determined that the more “deferential” form of scrutiny utilized in the Title VII/§ 1981 private employment context applies in this

¹ The facts in this case are undisputed. See Slip op. at 8926. The district court provides a fuller discussion of the historical and factual background of this case, including an overview of the end of the Hawaiian monarchy; the effect of western influence on the Native Hawaiians; the Congressional recognition of the need for reconciliation; and the origin of the Kamehameha Schools and its admissions policy. 295 F.Supp.2d 1141, 1147-57.

case, the majority panel imported, and professed to modify, the three-part test announced by the Supreme Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), for evaluating affirmative action plans adopted by private employers. Slip op. at 8950 (“these general principles may be rationally applied in the context of private education, with certain modifications to account for the differences of context”).

However, the panel majority’s opinion does not explain how its application of the three-part *Weber* test in the private education context is a modification of the test from the traditional employment context. The objectives underlying affirmative action plans in the workplace are substantially and substantively different from those underlying remedial race-conscious admissions policies in schools. *See* Petition for Rehearing at 16-17 (“employers use race preferences to integrate their own operations based on the demographics of the labor pool, educational institutions train students for the workforce outside in the larger society”). In contrast to the district court’s extensive analysis, the panel majority decision provides little discussion wherein the differences in context are taken into account and, in fact, does not modify the *Weber* test for application in the private education context. *See Doe v. Kamehameha Schools*, 295 F.Supp.2d 1141, 1165-1172 (D. Haw. 2003) (“Plaintiff asks this Court to strictly adhere to the private *employment* affirmative action framework. However, such a narrow lens forces the

inquiry to ignore the unique historical context which surrounds Kamehameha Schools, a private *educational* institution”).

Furthermore, in applying the unmodified *Weber* three-part test to the facts at hand, the panel majority summarily concluded that the Kamehameha Schools’ admissions policy created an absolute bar to the advancement of the non-preferred race, unnecessarily trammeling their rights. Slip Op. At 8950-51. In essence, the panel majority translated this prong of the *Weber* test into a *per se* rule. There are two fundamental flaws in this reasoning. First, the Kamehameha Schools did not concede that its admission criteria were “exclusively racial.” *See* Petition for Rehearing at 7-9. Second, even if the admissions policy were based solely on race and posed an absolute bar for the non-preferred race (which also is not conceded), the panel majority should have gone a step further in their inquiry and determined whether such an absolute bar goes beyond what is needed by Kamehameha Schools to accomplish its mission of remedying the severe socioeconomic and educational deficiencies faced by Native Hawaiians. The immense needs of Native Hawaiians are well documented in the record and are undisputed. Doe, who has the ultimate burden of proof under the *Weber* test, has provided no evidence to the contrary.

Given that this is a case of first impression – the first time the general principles of *Weber* are applied in the private education context – the panel

majority's failure to do what it purported to do, leaves a question of exceptional importance unanswered, renders the subsequent holding suspect and therefore warrants *en banc* review.

B. Whether the Native Hawaiians' "Special Relationship" with the United States, a Relationship that Is Similar to, But Not Identical with, the Relationship Between the Federal Government and Native Americans, Affects the Analysis under 42 U.S.C. § 1981, is a Question of Exceptional Importance

This case also requires the court to properly consider the unique history of the Kamehameha Schools and the special relationship of the Native Hawaiians to the United States in its analysis under § 1981.

The panel majority characterized this inquiry as a "generalized appeal to the 'special relationship doctrine' typically advanced to support preferences accorded members of federally recognized Indian tribes." Slip op. at 8955. It concluded erroneously, however, that this "special relationship" justification for a race-conscious admissions policy is foreclosed by the Kamehameha Schools' "concession" that the preference at issue "is exclusively racial in nature, design and purpose." Slip op. at 8960-61.

The Kamehameha Schools never conceded that the preference at issue is exclusively racial, nor waived the argument that the special relationship doctrine applies to Native Hawaiians. Because it erroneously assumed such a concession, the panel majority never properly considered whether the special relationship

doctrine is applicable to the Kamehameha Schools admissions policy giving preference to Native Hawaiian students. In her dissent, Judge Graber vigorously disputes the majority’s notion that use of a race conscious admissions policy *ipso facto* forecloses use of the “special relationship doctrine” to support that policy.²

This Court is not being asked, nor does it need, to define the specific parameters or contours of the special relationship between Native Hawaiians and the United States, and the extent to which they are similar to or different from those of federally recognized Indian tribes. That is the proper role of Congress. The authority for Congress to act on behalf of Native Hawaiians – to grant them special rights and privileges – is derived from the same authority for Congress to act on behalf of Native Americans and Native Alaskans – the Indian Commerce Clause.³ Congress has exercised that authority to extend a host of special rights,

² Slip Op. at 8966-67. Judge Graber states: “I do not perceive such a dichotomy between the racial and the political aspects of the Schools’ preference for Native Hawaiian applicants. That is, if “Native Hawaiian” is indeed a racial category, then Congress has shown by its actions that an exclusive, remedial, racial preference *can* be permissible, at least when it is employed to remedy demonstrable and extreme educational and socioeconomic deficiencies that are faced by a racial group that (a) is descended from people whose sovereignty and culture were upended and nearly destroyed, in part by the actions of the United States, and (b) consequently enjoys a special trust relationship with the United States that parallels (but is not identical to) that between the federal government and Native Americans.

³ Under the Indian Commerce Clause, the federal government is vested with the authority to deal with all indigenous peoples within the United States. U.S. Const. art I, § 8, cl. 3. Throughout this Nation’s history, the courts have deferred to the

privileges and benefits to Native Hawaiians based solely on their status as indigenous peoples. *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1282-83 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 2902 (2005). Indeed, the panel majority recited at length the numerous statutes conferring these special rights, privileges and benefits, Slip op. at 8957-59, yet failed to appreciate the importance of this extensive exercise of congressional authority.⁴

At present, Native Hawaiians may not have a “government-to-government” relationship with the United States, as do federally recognized Indian tribes. However, this difference does not justify the panel majority’s conclusion that the Schools’ admission policy is premised exclusively on race and nothing else. Based on Congress’ explicit recognition of a special relationship with the indigenous people of Hawaii, manifested in numerous federal statutes enacted since 1920 for the exclusive benefit of Native Hawaiians, Native Hawaiians – like Native Americans and Alaska Natives – are distinguishable from other racial minority

political branches as to which peoples will be dealt with under the Indian Commerce Clause, subject only to judicial oversight to ensure that no arbitrary characterization is made to bring a people under this power. *United States v. Sandoval*, 231 U.S. 28, 47, (1913).

⁴ In contrast, the district court found: “More than 80 years ago, Congress recognized that a special relationship exists between the United States and the Native Hawaiian people, in enacting the Hawaiian Homes Commission Act of 1920. Congress has continued to recognize a political relationship with and special trust obligation to the Native Hawaiian people since that time as evidenced most recently by the 2002 NHEA [Native Hawaiian Education Act].” [cites omitted]. *Doe v. Kamehameha*, 295 F.Supp2d at 1151.

groups for purposes of the § 1981 analysis. The contours of their special relationship with the United States may be different from Indian tribes, but the relationship exists none the same. “Since [Hawaii] bec[ame] the 50th State, Congress has established a program of federal benefits and entitlements for Native Hawaiians that is different from that afforded federally recognized Indian tribes in the contiguous United States and Alaska. * * * Congress, because of the unique history of Hawaii, has excluded them from some statutes while enacting others that benefit Native Hawaiians only.” *Kahawaiolaa*, 386 F.3d at 1282.

The panel majority, having erroneously concluded that the Kamehameha Schools had waived the “special relationship doctrine” argument, never properly considered the issue and its effect upon the proper § 1981 analysis. *See Slip op.* at 8954 (“it would be overreaching to interpret these statutes [providing special funding for minorities] as blanket approval for private race discrimination that is otherwise violative of § 1981.”).

Once this Court corrects the misapprehension of the majority panel as to the critical interplay between race and the special relationship between Native Hawaiians and the United States, it will then be able to apply the three-part *Weber* test with an understanding that the Schools’ admission policy is not exclusively based on race, but serves – as both the district court and the dissent concluded – legitimate remedial, non-discriminatory purposes.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Rehearing

En Banc.

Respectfully submitted,

Date: August 29, 2005



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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that the attached *Amici Curiae Brief of the National Indian Education Association and the Alaskan Federation of Natives in Support of the Petition for Rehearing En Banc* in Case Number 04-15044 is proportionally spaced, using a 14-point Times New Roman – Microsoft Word font, and contains 1,974 words.

Respectfully submitted,

Date: August 29, 2005



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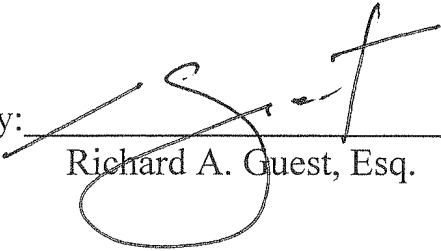
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