No. 06-1202

IN THE

Supreme Court of the United States

JOHN DOE, A MINOR, BY HIS MOTHER AND NEXT FRIEND, JANE DOE,

Petitioner,

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,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a wholly private school that receives no federal funds violates 42 U.S.C. § 1981 by giving priority to Native Hawaiians in admissions to educational programs that remedy undisputed and profound educational deficits still suffered by Native Hawaiians, an indigenous people with whom the United States has a special political and trust relationship and for whose benefit Congress expressly funds numerous similar exclusive, remedial programs.

RULE 29.6 STATEMENT

Kamehameha Schools/Bernice Pauahi Bishop Estate is a private, charitable, not-for-profit educational institution. Accordingly, it has no parent company and no stockholders.

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BRIEF IN OPPOSITION

Respondents 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 (hereinafter collectively "Kamehameha Schools" or "the Schools") respectfully submit this brief in opposition to the petition for a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The 2002 Native Hawaiian Education Act, 20 U.S.C. § 7512, provides in relevant part:

> **(12)** The United States has recognized and reaffirmed that—
>
> > **(A)** Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands;
> >
> > **(B)** Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship . . . .
> >
> > **(D)** the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives . . . .
>
> **(13)** The political relationship between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States . . . .

The 1993 Apology Resolution, Pub. L. 103-150, 107 Stat. 1510 (1993), provides in relevant part:

> Whereas the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries

> have been devastating to the population and to the health and well-being of the Hawaiian people; . . .
>
> The Congress . . .
>
> **(3)** apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination; [and]
>
> **(4)** expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people . . . .

STATEMENT

The decision below represents the rare example of a class of one—a ruling that gives rise to no precedent affecting any other school, public or private, or any other Native program, Hawaiian or otherwise. This case was brought by a single plaintiff, not a class, and involves no remaining claim for injunctive or declaratory relief. Petitioner seeks only monetary damages claimed to arise from an admissions policy operated by a not-for-profit school receiving no federal funds. The court of appeals properly rejected this challenge on narrow, entirely statutory, grounds. The statutory issue is well settled. No constitutional issue is presented. The decision neither conflicts with any decision of this Court nor presents any important question that warrants this Court's attention. The petition should be denied.

1. The facts in the record are undisputed. Kamehameha Schools was founded in 1887 under a "charitable testamentary trust established by the last direct descendant of [Hawaii's] King Kamehameha I, Princess Bernice Pauahi Bishop, who left her property in trust for a school dedicated

to the education and upbringing of Native Hawaiians." *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000); Pet. App. 172a.

Kamehameha Schools has sought from its inception to fulfill Princess Pauahi's intention to use education to lift up the Native Hawaiian people from the devastation they had suffered from Western contact—through self-help, "without asking any favors which they were not likely to receive." Pet. App. 174a. As one of the Ali'i (high chiefs) of the Hawaiian Kingdom, Pauahi held significant amounts of land in trust for the Native Hawaiian people. She died without issue and viewed all Native Hawaiian children as in effect her own.

Accordingly, Princess Pauahi's Will established a trust directing establishment of the Kamehameha Schools. She vested the Schools' trustees with discretion to determine admissions policy. Pet. App. 172a-175a. As the district court noted, citing an 1888 speech by Princess Pauahi's husband Charles Reed Bishop, the first chair of the Schools' Board of Trustees, her intent "was that preference be given to Native Hawaiians for admittance to the Kamehameha Schools in order that through proper education they might be competitive with newcomers in maintaining their socioeconomic status, culture, and participate in the governance of their communities." Pet. App. 175a.

2. Kamehameha Schools is an entirely private, charitable, not-for-profit organization and receives no federal funds. Pet. App. 37a n.11. Education at Kamehameha Schools is heavily subsidized. At the times relevant to this case, tuition for on-campus programs was $1,784 per year while educational costs per student averaged $20,000 per year. Sixty-five percent of students enrolled received needs-based financial aid, increasing that subsidy further. Pet. App. 7a-8a.

3. Kamehameha Schools' mission is to advance the educational opportunities and achievement of Native Hawaiian

children, defined as descendants of the indigenous inhabitants of the islands prior to the first Western landfall in 1778. The educational programs operated by the Schools seek to redress the profound educational deficits that Native Hawaiian people continue to suffer. As Congress found in the 2002 Native Hawaiian Education Act ("NHEA"), Native Hawaiians lag behind other groups markedly with respect to educational test scores, special education needs and representation in higher education. 20 U.S.C. § 7512 (14)-(18); *see* Pet. App. 168a-171a. These educational deficits contribute to Native Hawaiians' place at or near the bottom of all groups in Hawaii with respect to wealth, income, health and other indicators of social welfare.

Kamehameha Schools seeks in all its programs to increase the educational achievement of Native Hawaiians and to revitalize Native Hawaiian identity, language and culture. While Kamehameha Schools has existed for over a century, it was long a vocational school and only in recent decades has it developed on-campus programs for college-bound students. In its on-campus programs, Kamehameha Schools now employs a leadership model that seeks to increase the number of Native Hawaiians receiving college and advanced degrees and thus to improve Native Hawaiian representation in professional, academic and managerial positions. The on-campus programs aim to provide leaders who will help improve the lives of all Native Hawaiians and reduce the marginalization of the Native Hawaiian people. Pet. App. 176a.

Kamehameha Schools also operates a range of other programs in addition to the regular school year K-12 on-campus programs, including pre-schools, enrichment programs, and summer school programs. Significant numbers of non-Native Hawaiian children are able to and do attend these programs along with Native Hawaiian children. *See* Pet. App. 8a-9a.

4. In order to fulfill its educational mission, Kamehameha Schools accepts Native Hawaiians before admitting non-Native Hawaiians. Pet. App. 177a. Where available places exceed the number of applications, the Schools' programs regularly enroll students not of Native Hawaiian ancestry alongside Native Hawaiian children. This is so, for example, for pre-school, summer school and enrichment programs. In its regular K-12 on-campus programs, however, the Schools can currently accommodate only a fraction of the applications by Native Hawaiians: at times relevant to this case, there were 4,856 on-campus openings and over 70,000 Native Hawaiian children of K-12 school age in Hawaii, more of whom sought places in the regular K-12 on-campus programs than there were places available. Pet. App. 177a.

5. Contrary to Petitioner's suggestion that the Schools practice "categorical" exclusion or "segregation" based on race, the district court found that the on-campus admissions policy "was not perpetual nor an absolute bar to admittance of other races to the Kamehameha Schools." Pet. App. 175a; *see* Pet. App. 201a. The Trustees regularly review the policy to determine if it is still necessary in light of the Schools' remedial purposes. Pet. App. 201a-203a. The district court also found that "non-Native Hawaiians will be admitted" when the goal of overcoming manifest "socioeconomic and educational imbalances" is attained or the Schools' capacity sufficiently increased. Pet. App. 203a. As Former Governor Ariyoshi testified, "I look forward to the day when Kamehameha Schools' admissions policy is no longer needed . . . But that day is not today." Pet. App. 204a.

6. Kamehameha Schools has been highly successful in its mission. Its success in educating Native Hawaiian children has received universal acclaim from diverse quarters of Hawaiian society. For example, Governor Linda Lingle, a Republican, testified that "Kamehameha Schools provides an essential training ground for the education and development

of our future Native Hawaiian leaders." Pet. App. 199a-200a. Former Governor George Ariyoshi, a Democrat, likewise testified that Kamehameha Schools helps produce leaders so that "future generations of Hawaiian children need not be reminded of failures but are inspired by success." Pet. App. 204a. Amici filed twelve briefs before the court of appeals—on behalf of the State of Hawaii, the congressional delegation from Hawaii, and numerous other groups—supporting Respondents and affirming the extraordinary esteem in which Kamehameha Schools is held by diverse groups throughout Hawaii for its success in transforming the lives of Native Hawaiian children. Pet. App. 13a n.6.

7. Congress has enacted numerous programs for the specific benefit of the Native Hawaiian people, based on the recognition that past actions of the United States itself have done Native Hawaiians grievous harm. Congress has acknowledged that "Native Hawaiians are a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago, . . . [who] lived in a highly organized, self-sufficient subsistence social system based on a communal land tenure system with a sophisticated language, culture, and religion." 20 U.S.C. § 7512(1). This successful civilization was virtually destroyed by disease and commercial exploitation after Western contact began in 1778, and by the twentieth century, the Native Hawaiian population had dramatically declined. *See* Pet. App. 160a-161a.

The Hawaiian Kingdom was unlawfully overthrown in 1893. Congress has expressly admitted the United States' complicity in the overthrow and has formally apologized for those actions. 1993 Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510, 1513 (1993); *see* Pet. App. 161a-163a. Congress likewise has recognized that the resulting economic and social changes in Hawaii "have been devastating to the population and to the health and well-being of the Hawaiian

people." 107 Stat. at 1512. In 1896, the use of the Hawaiian language was banned as a method of instruction in the schools, a ban that was lifted only in 1986. Indigenous art, music, craft and ceremonies likewise were nearly destroyed. Pet. App. 163a-165a. The United States annexed Hawaii in 1898.

8. To remedy these harms, Congress has enacted numerous laws directing programs specifically to Native Hawaiians. These include particular benefits for Native Hawaiians in educational programs. The Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130 (1988), authorized "supplemental programs to meet the unique educational needs of Native Hawaiians" and federal grants to Native Hawaiian Educational Organizations to help increase educational attainment among Native Hawaiians. 20 U.S.C. §§ 4902-03, 4905 (1988) (repealed 1994).

Congress again acted to remedy the educational disparities faced by Native Hawaiians in 1994, when it enacted the first NHEA. *See* Pub. L. No. 103-382 § 101, 108 Stat. 3794 (1994), (originally codified at 20 U.S.C. §§ 7901 *et seq.* (2000)). Recognizing that Native Hawaiians continue to have disproportionately low levels of educational attainment, *id.* § 7902(17), the NHEA established educational programs reserved expressly for Native Hawaiian students, *id.* §§ 7903-7910.

In 2002, Congress reenacted the NHEA, authorizing a variety of educational programs for Native Hawaiians in recognition that "Native Hawaiian students continue to begin their school experience lagging behind other students in terms of readiness factors such as vocabulary test scores," "continue to be underrepresented in institutions of higher education and among adults who have completed four or more years of college," and "are more likely to be retained in grade level and to be excessively absent in secondary school." 20 U.S.C.

§ 7512(16). The educational programs funded by the NHEA are targeted *exclusively* at Native Hawaiians. *See* 20 U.S.C. § 7515(3) (Supp. II 2002).[1]

Such congressional policies continue to the present. In February, 2007, Congress again authorized the appropriation of $62.5 million in federal funds for exclusive Native Hawaiian benefit programs, including nearly $34 million for Native Hawaiian education programs under the No Child Left Behind Act. *See $63M for Native Hawaiian Programs Awaits Bush's OK*, THE HONOLULU ADVERTISER, Feb. 15, 2007.

9. Petitioner Doe, a non-Native Hawaiian student, filed a complaint in June 2003 alleging that he was denied admission to Kamehameha Schools on account of race in violation of 42 U.S.C. § 1981. Doe sued only in his individual capacity and not on behalf of a class. Having now graduated from high school, Doe can no longer seek injunctive or declaratory relief. Instead, he seeks only money damages.

The district court granted summary judgment in favor of Kamehameha Schools, issuing detailed findings of fact based on the undisputed evidence in the record. *Doe v. Kamehameha Schools*, 295 F. Supp. 2d 1141 (D. Haw. 2003); Pet. App. 153a-210a. The district court rejected Petitioner's request for strict scrutiny and held that the applicable

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[1] During Congress's consideration of the 2002 NHEA, the Report of the House Committee on Education and the Workforce expressly acknowledged Kamehameha Schools' mission and approved the Schools' efforts to redress Native Hawaiian educational deficits through private means:

> unlike other indigenous populations, Native Hawaiians have a trust, established by the last Hawaiian Princess, which exists *solely* to educate native Hawaiian children. . . . The Committee urges the Trust to redouble its efforts to educate native Hawaiian children.

Pet. App. 198a (quoting H.R. REP. NO. 107-63(I), at 732 (2001)) (emphasis added).

standard of review was the Title VII standard long applied in § 1981 cases.

Applying the Title VII standard, the district court found that Kamehameha Schools' admissions policy "has a legitimate justification and serves a legitimate remedial purpose by addressing the socioeconomic and educational disadvantages facing Native Hawaiians, producing Native Hawaiian leadership for community involvement, and revitalizing Native Hawaiian culture, thereby remedying current manifest imbalances resulting from the influx of western civilization." Pet. App. 204a-205a. The district court also found that the Schools' policy did not exceed what was necessary to accomplish that purpose, reasoning that the number of needy Native Hawaiian applicants exceeded the number of available spaces. Pet. App. 202a; *see* Pet. App. 205a (Kamehameha Schools' "means are not excessive in light of the great need for Native Hawaiian education").

In further support of these conclusions, the district court looked to other congressional enactments in determining how § 1981 should be construed in the circumstances of this case. Taking note of the numerous congressional enactments providing exclusive, remedial programs for Native Hawaiians, Pet. App. 205a-209a, the district court reasoned that the application of § 1981 to Kamehameha Schools' policy "should be considered in light of and in harmony with Congress's determination that the United States wrongfully participated in the overthrow of the Hawaiian Monarchy, and with its proclamation of a policy of reconciliation with the Native Hawaiian people and the numerous laws enacted for their exclusive benefit." Pet. App. 209a.

10. In a split decision, a three-judge panel of the Ninth Circuit reversed. *Doe v. Kamehameha Schools*, 416 F.3d 1025 (9th Cir. 2005); Pet. App. 109a-147a. While none of the judges on the panel agreed with Petitioner that strict scrutiny applied, the majority opinion, written by Judge

Bybee, found that, under the Title VII standard, Kamehameha Schools' admissions policy was not reasonably related to its remedial purpose because it imposed an "absolute bar" to non-Native Hawaiians. Pet. App. 137a.

Judge Graber dissented, reasoning that:

> 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 government that parallels (but is not identical to) that between the federal government and Native Americans.

Pet. App. 151a-152a (emphasis in original).

11. The court of appeals granted rehearing en banc, vacated the panel decision, and after oral argument, issued a decision affirming the district court's grant of summary judgment in favor of Kamehameha Schools. *Doe v. Kamehameha Schools*, 470 F.3d 827 (9th Cir. 2006) (en banc); Pet. App. 1a-108a.

All but three judges on the en banc court agreed that the Title VII standard was the appropriate standard for reviewing a private, remedial educational program, and not a single one of the fifteen judges sitting en banc embraced Petitioner's argument in favor of applying the strict scrutiny this Court has employed in reviewing race-conscious programs by public or publicly funded institutions.

Writing for the court, Judge Graber found that the Kamehameha Schools admissions policy amply satisfied the Title VII standard. She reasoned that the Schools' practice is legitimately related to remedying manifest economic and educational deficits caused by past harms to the Native Hawaiian people and its language, traditions, and culture. Pet.

App. 27a-29a. She found further that the policy does not operate as an absolute bar to the advancement of non-Native Hawaiians, nor unduly trammel Petitioner's educational opportunities in Hawaii. Pet. App. 29a-34a.

Judge Graber also noted that § 1981 should be construed in harmony with federal statutes authorizing remedial educational programs expressly for Native Hawaiians contemporaneously with Congress's reenactment of § 1981 in 1991. Pet. App. 34a-38a.

Concurring in Judge Graber's opinion but adding an additional "narrower ground for upholding Kamehameha Schools' admissions policy," Pet. App. 39a, Judge Fletcher, joined by four other members of the majority, would have held that "'Native Hawaiian' is not merely a racial classification. It is also a political classification." Pet. App. 39a-40a. Reasoning that Congress established a "special relationship" with the Native Hawaiian people through "the NHEA and the myriad other federal statutes that confer benefits on Native Hawaiians," he concluded that § 1981 should be construed to permit private programs for Native Hawaiians such as those employed by Kamehameha Schools. Pet. App. 51a. Because "the NHEA continues to allocate money to private nonprofit organizations to provide programs for the exclusive benefit of Native Hawaiians," he reasoned, Congress cannot have intended § 1981 to be read "to impose upon private institutions a more restrictive standard for the provision of benefits to Native Hawaiians than it has imposed upon itself." *Id.*

12. Seven judges joined four dissents. All seven dissenters commended the mission and success of Kamehameha Schools. Writing for all the dissenters, Judge Bybee stated, "I agree with the majority that Native Hawaiians suffer from severe socioeconomic disadvantages and believe that Kamehameha Schools should be commended for attempting to remedy those hardships." Pet. App. 52a. Judge Rymer,

writing for five dissenters, observed that "Kamehameha Schools is a well-recognized, widely-acclaimed private school, established before Hawaii became a state, whose primary mission has been to educate Native Hawaiian students in a culturally sensitive, challenging way." Pet. App. 101a. Judge Kleinfeld, writing for three dissenters, acknowledged "admiration for Kamehameha Schools." Pet. App. 107a. But the dissenters viewed themselves as constrained to invalidate the Schools' admissions policy, reasoning that § 1981 forbids an admissions policy that has the practical effect of excluding non-Native Hawaiians. Judge Rymer characterized this result as "altogether infelicitous." Pet. App. 101a.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals correctly applied the standard of review, derived from Title VII cases, that is appropriate to remedial race-conscious programs operated by a purely private actor such as Kamehameha Schools. The court also properly read § 1981 in harmony with other congressional enactments on behalf of Native Hawaiians. Petitioner does not even allege any conflict with a decision of any other court of appeals or state high court. Despite Petitioner's efforts to conjure conflicts with this Court's past decisions, the court of appeals' decision is fully consistent with this Court's precedents.

The decision of the court of appeals is also exceedingly narrow. The court of appeals looked to the unique history of Kamehameha Schools, the special trust and political relationship between the United States and the Native Hawaiian people, and the particular statutory context in which Congress has repeatedly enacted express and exclusive preferences for Native Hawaiians. This factual and legal backdrop is too singular to give rise to an issue of national importance warranting this Court's review.

Moreover, Congress is currently considering a bill titled the Native Hawaiian Government Reorganization Act of 2007. While Congress has already stated that "the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives," 20 U.S.C. § 7512(12)(D), the enactment of this new legislation might confirm and clarify that status. In a case of pure statutory interpretation, Congress's views are highly relevant, and the pendency of this legislation counsels further against granting the petition.

I. THE COURT OF APPEALS CORRECTLY APPLIED THE APPROPRIATE LEVEL OF SCRUTINY UNDER § 1981, AND ITS DECISION IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS

Petitioner would have this Court take this case to reach an unprecedented holding: that private institutions, in deciding how to spend their own funds, are held to the same strict scrutiny as governmental actors or recipients of federal funds. But § 1981 challenges to remedial uses of race by private actors have long been reviewed under the more flexible standard developed by this Court in the Title VII context. The decision of the court of appeals correctly applied this well-settled standard.

The Title VII standard requires that a policy that employs race be reasonably related to a legitimate purpose. The court of appeals properly upheld the Kamehameha Schools admissions policy under this standard, finding that policy reasonably related to the legitimate remedial purpose of correcting the devastating harms that Native Hawaiians still suffer as a result of the United States' overthrow of the Kingdom of Hawaii and the near destruction of Native Hawaiian identity, language, culture and heritage.

The court of appeals also applied the Title VII standard consistently with current congressional policy relating to

Native Hawaiians. It held that, under § 1981, Kamehameha Schools' mission of remedying the educational deficits of Native Hawaiians must be construed to serve legitimate purposes in light of the numerous congressional enactments providing for express and often exclusive federally funded programs for Native Hawaiians.

Contrary to Petitioner's assertions, the decision of the court of appeals is correct and fully consistent with prior decisions of this Court.

A. The Decision Below Is Fully Consistent with This Court's Decisions in *Grutter* and *Gratz*

Petitioner devotes considerable space to arguing that this Court should announce a novel rule extending to *private* educational institutions employing race-conscious measures the same strict scrutiny this Court has applied to the use of race-conscious programs in *public* educational institutions. *See* Pet. 15-19. Petitioner relies in particular upon this Court's decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the use of race in a public law school's admissions policy), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating the use of race in a public university's undergraduate admissions policy). Petitioner's renewed reliance on this argument is surprising, as it failed to garner even a single vote from the seventeen judges who have heard this case to date.

Petitioner's argument is readily dispatched. This Court has long drawn significant distinctions between the antidiscrimination standards applicable to public and publicly funded institutions, on the one hand, and to private institutions, on the other. Such distinctions recognize that government wields a monopoly of power that requires strong constraint, while the private sector protects variety, competition and choice that should be allowed greater flexibility. Petitioner offers no reason why these long-settled distinctions

should be treated as meaningless, or the world of private philanthropy newly constitutionalized.

Grutter and *Gratz* involved challenges to race-conscious admissions policies by a *public* university, the University of Michigan, that is subject to constitutional constraints. This case, in contrast, involves a wholly *private* school, and thus involves no government conduct and no constitutional claim. The allegations in this case arise "in the area of private discrimination, to which the ordinance of the Constitution does not directly extend." *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989).

While *Grutter* rejected a § 1981 challenge along with a Fourteenth Amendment equal protection challenge, and *Gratz* upheld challenges on both grounds, nothing in either decision's statements concerning § 1981 with respect to *public* programs governs analysis of § 1981 challenges to *private* programs.[2] In any challenge to a *public* university's practices, there would have been little point in reviewing the § 1981 claim under a lesser legal standard, since the application of strict scrutiny to the constitutional claim would have rendered such a ruling superfluous. The Michigan decisions say nothing about the applicable standard in a § 1981 action against a *private* defendant. That issue was not presented in *Grutter* or *Gratz*, and this Court did not purport to address it.

Nor does Petitioner succeed in analogizing the standard of scrutiny applicable here to that applicable in challenges to race-conscious programs under Title VI of the Civil Rights

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[2] Petitioner mischaracterizes several isolated sentences in *Grutter* and *Gratz* as suggesting that § 1981 is co-extensive with the Equal Protection Clause in all respects. *See* Pet. 15. In the passages cited by Petitioner, this Court referred to *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-90 (1982), for a much narrower proposition—namely, that both § 1981 and the Equal Protection Clause require a showing of purposeful discrimination. That observation does not address the appropriate standard of scrutiny.

Act, 42 U.S.C. § 2000d *et seq.*, which prohibits race discrimination by institutions receiving federal funding. *See* Pet. 15-16. Title VI claims are subject to the constitutional standard of strict scrutiny because the defendants are supporting their conduct by the use of federal money. As the Court made clear in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Title VI was designed by Congress to ensure that federal funds are spent in accordance with the Constitution's equal protection guarantees, and thus reflects the "incorporation of a constitutional standard into Title VI." *Id.* at 286 (opinion of Powell, J.); *see id*. at 285-87. Strict scrutiny of Title VI claims against private actors thus ensures that the *government* does not unwittingly participate in unlawful race discrimination through public funding—a consideration irrelevant to Kamehameha Schools, which receives no federal funds.

In contrast, Title VII of the Civil Rights Act "was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206 n.6 (1979). Just one year after *Bakke* held that Congress intended strict scrutiny of Title VI claims, this Court in *Weber* exhaustively canvassed the legislative history of Title VII and concluded: "Title VII and Title VI . . . cannot be read *in pari materia*." *Id. Weber* accordingly upheld a private remedial skills training plan after applying a standard considerably less searching than strict scrutiny, and the circuit courts, interpreting Title VII in accordance with *Weber*, have consistently read it to allow private employers a reasonable measure of flexibility in employing race-based remedies. *See Johnson v. Transp. Agency*, 480 U.S. 616, 630 n.8 (1987) (noting Congress's "desire to preserve a relatively large domain for voluntary employer action"); Pet. App. 18a-20a.

Indeed, were Petitioner to prevail on his strict scrutiny argument, America's private employers would face disruptive

new challenges to long-settled voluntary programs designed to include members of historically excluded groups. Virtually all Title VII race discrimination claims may be pleaded in the alternative as § 1981 claims. Under Petitioner's argument, a private employer could defeat such claims only if it could make the same stringent showing required of a government entity. It would make little sense to open the door to flexible race-conscious measures in private employment under Title VII, only to close it under § 1981.

B. The Decision Below Is Fully Consistent with this Court's Decisions in *Runyon* and *Bob Jones*

Petitioner also attempts to analogize this case to cases in which this Court has disapproved invidious racial discrimination by private educational institutions. Petitioner relies in particular on this Court's decisions in *Runyon v. McCrary*, 427 U.S. 160 (1976), and *Bob Jones University v. United States*, 461 U.S. 574 (1983). Pet. 23-25. But Petitioner's attempted analogy to these cases fails. Both cases involved race discrimination against African-Americans—a type of discrimination that Congress, then as now, had unambiguously condemned as illegitimate. Neither case involved the use of race-conscious measures adopted for the legitimate purpose of remedying harm to a minority group. And neither case involved remedying harm to an indigenous people for whose benefit Congress has itself funded numerous remedial federal programs.

Runyon held illegal, under § 1981, private academies made available on a commercial basis to "whites only," deeming such private practices a transparent effort to perpetuate segregation despite this Court's decisions ordering the desegregation of the public schools. *Bob Jones* affirmed an Internal Revenue Service ruling determining that a private college could not qualify as a public charity eligible for a tax

exemption because its racially discriminatory ban on inter-racial dating was contrary to fundamental public policy.

This case bears no resemblance to *Runyon* or *Bob Jones* other than the fact that education is involved. First, both of those cases involved race discrimination that was invidious, not remedial. As the court of appeals correctly noted, *Runyon* "involved a straightforward case of discrimination, not a remedial policy" like Kamehameha Schools' admissions policy. Pet. App. 17a. Indeed, had *Runyon* been decided after *Weber*, its "whites-only" admissions policy would have swiftly failed the first part of the *Weber* test because such a policy could have no legitimate purpose. *Runyon* did not consider whether a private *remedial* admissions policy like Kamehameha's, targeted at historically disadvantaged indigenous minority students, would be permissible under § 1981.

Likewise, the private policy at issue in *Bob Jones* was based on archaic racially discriminatory stereotypes and had no conceivable legitimate remedial purpose. This case, by contrast, involves an educational policy adopted for an indisputably legitimate remedial purpose, and thus the court of appeals' decision presents no inconsistency.

Second, both *Runyon* and *Bob Jones* involved private policies that were contrary to, rather than consistent with, Congress's intent. In analyzing § 1981 claims against private defendants, this Court has long stated that its "role is limited to interpreting what Congress . . . has done." *Patterson*, 491 U.S. at 188. Both *Runyon* and *Bob Jones* emphasized that the private use of race in those cases was contrary to contemporaneous congressional policy. *Runyon* looked to contemporaneous congressional policy to determine that private discrimination in education *against* African-Americans violated § 1981. *See* 427 U.S. at 174-75 (noting a recent and "clear[] indication of congressional agreement with the view that § 1981 [reaches] private acts of racial discrimination");

id. at 191 (Stevens, J., concurring) (looking to the "policy of the Nation as formulated by the Congress in recent years").

Likewise, *Bob Jones* rested ultimately on congressional determination of the "contours of public policy." *Bob Jones*, 461 U.S. at 612 (Powell, J., concurring). The Internal Revenue Service ruling affirmed in *Bob Jones* responded to what Congress had identified as "a dramatic and unquestionably tragic new movement in American education; namely, the creation of all white, tax-supported, private segregation academies that have sprung up throughout the areas in which the courts have ordered there be desegregation." *Equal Educational Opportunity: Hearings before the Senate Select Comm. on Equal Educational Opportunity*, 91st Cong., 2d Sess. 1991, 2028 (1970).

In sharp contrast, congressional policy expressly approves and funds programs aimed at remedying the same educational deficits of Native Hawaiian children at which Kamehameha Schools aims its programs. As discussed above, Congress has enacted numerous explicit programs for Native Hawaiians both before and after its 1991 reenactment of § 1981.[3] Congress has made findings of need within the Native Hawaiian community, including findings of educational disparities that call for remedial assistance. Congress has likewise repeatedly authorized educational grants to private Native Hawaiian organizations in an effort to increase educational attainment among Native Hawaiians. *See* 20 U.S.C. § 4905(b) (1988); 20 U.S.C. §§ 7901 *et seq.*; 20 U.S.C. §§ 7511 *et seq.* The severe educational deficits facing Native Hawaiians that Kamehameha Schools' educational programs seek to redress are identical to

[3] Petitioner suggests that Congress did not really reenact § 1981 in 1991. Pet. 9 n.1. But a later statute may modify an earlier one without an explicit statement it is doing so, by virtue of the "canon that specific provisions qualify general ones." *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).

the deficiencies identified by Congress. *See* 20 U.S.C. § 7512(16)(B)-(D), (F)-(G). Congress even went so far as to refer explicitly to Kamehameha Schools' mission of educating Native Hawaiians in the 1988 Stafford-Hawkins Amendments, which were still in effect when Congress reenacted § 1981 in 1991. In harmonizing § 1981 with this continuous set of enactments for Native Hawaiians, the court of appeals properly fulfilled its responsibility under *Patterson* to "interpret what Congress has done."[4]

C. The Decision Below Is Fully Consistent with This Court's Decision in *Weber*

This Court has long upheld against Title VII challenge private employers' race-conscious remedial efforts. *See Weber*, 443 U.S. at 208; *see also Grutter*, 539 U.S. at 330-31. Yet Petitioner argues that, even if the Title VII standard applies, the court of appeals' decision conflicts with *Weber* and its progeny because it upholds a supposed "absolute bar" to non-Native Hawaiians and because it is in any event designed to correct "external" rather than "internal" imbalances. Pet. 20-23. Both claims of supposed conflict, however, are unavailing.

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[4] In light of these numerous congressional enactments, the Internal Revenue Service expressly advised Kamehameha Schools in 1999 that it, unlike Bob Jones University, was acting in accordance with established public policy: "[W]hile the School does give preference to some Hawaiian ancestry, there are many Federal laws designed to provide beneficial treatment to Native Hawaiians. In contrast, we find no laws or court cases indicating that a restrictive admissions policy in favor of Native Hawaiians would cause the Estate to violate clearly established public policy, nor do we find that this policy is of the type, either in origin or result, that gave rise to the opinion in *Bob Jones*. Instead, in view of the numerous federal and state legislative statutes that provide for an Hawaiian preference in all ways of life, including education, it is reasonable to conclude that there is a public policy in favor of such a preference and that the School's practices are consistent with this policy." I.R.S. Tech. Adv. Mem. at 14 (April 19, 1999), http://www.ksbe.edu/newsroom/filings/1999TAM.pdf.

To begin with, the district court found as a matter of fact that Kamehameha Schools' admissions policy is *not* an "absolute bar" to the admission of non-Native Hawaiians, because non-Native Hawaiians are admitted to programs when places are available, as they frequently are in several programs, and because the Trustees continually review the policy for conformity to the Schools' capacity and remedial purpose.

Even if the Schools' admissions policy could be characterized as an absolute bar, however, a remedial policy such as Kamehameha's would satisfy the *Weber* test. By definition, remedial measures are properly tailored to those who have been wronged. Unlike measures aimed at increasing racial diversity, where the interests of newcomers must be balanced against the interests of those already present, it makes little sense to offer a *remedy* to persons outside the injured class. For example, if retroactive pay equity adjustments are made to women and minorities who previously suffered pay discrimination, it does not "unnecessarily trammel" the interests of white men to decline to afford them similar back pay. *See, e.g.*, *Rudebusch v. Hughes*, 313 F.3d 506, 522-23 (9th Cir. 2002). Because non-Native Hawaiians do not suffer the continuing effects of past wrongs done to Native Hawaiians, it would make no sense to require Kamehameha Schools to provide its remedial programs to non-Native Hawaiian children, who do not need them, at the expense of Native Hawaiian children, who do.

Moreover, nothing in the decision below conflicts with the holding in *Weber* and its progeny permitting the correction of "internal" racial imbalances on previously segregated shop floors. *Weber* itself upheld a program that in part corrected *external* imbalances by preferring African-American candidates for fully fifty percent of the spaces in an industrial skills training program. Such training would not have been necessary if African-Americans *outside* the workplace had

not so severely lagged behind in educational attainment. Moreover, it cannot be doubted that the very purpose of race-conscious admissions and other policies in education is to promote a stronger corps of leaders *external* to schools and universities upon graduation. *See Grutter*, 539 U.S. at 332 (stressing the role of higher education in "cultivat[ing] a set of leaders with legitimacy in the eyes of the citizenry") (quoted at Pet. App. 25a).

Petitioner's claim of conflict with *Weber* in any event rests on a mistaken assumption that private programs that consider race are one-size-fits-all. But "[t]he *Weber* Court did not establish a rigid formula for testing the validity of an affirmative action plan." *Johnson v. Transp. Agency*, 770 F.2d 752, 757 (9th Cir. 1984), *aff'd*, 480 U.S. 616 (1987). That an educational program designed to advance the achievement of a particular disadvantaged group of students rests on different factual findings than a remedial preference in employment does not indicate a conflict between decisions in the two contexts.

D. The Decision Below Is Fully Consistent with This Court's Decision in *Rice v. Cayetano*

Petitioner suggests that the court of appeals' decision is in tension with this Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000). *See* Pet. 27. This case, however, is readily distinguished from *Rice*.

Rice addressed the constitutionality of a provision of the Hawaiian Constitution that limited to Native Hawaiians the right to vote in state elections for statewide *public* officers—the trustees of the Office of Hawaiian Affairs ("OHA"). This case, by contrast, involves an entirely *private* school governed only by § 1981, which affords considerably greater leeway to private entities than the Constitution does to public entities in the adoption of race-conscious remedial programs. Because this case involves purely statutory claims of dis-

crimination under § 1981, and not any constitutional claims of race discrimination against a public actor, *Rice* is inapplicable.

In finding the franchise restriction in *Rice* unconstitutional, moreover, this Court was careful to confine its holding to *voting* rights under the *Fifteenth* Amendment. *Id*. at 521-22. While "[r]acial classifications with respect to voting carry particular dangers," *Shaw v. Reno*, 509 U.S. 630, 657 (1993), this Court declined in *Rice* to reach the question whether the programs administered by OHA, which provide benefits expressly for Native Hawaiians, violate the Equal Protection Clause of the *Fourteenth* Amendment. *Rice*, 528 U.S. at 521-22. A fortiori, *Rice* did not reach the permissibility of programs operated by entirely private actors.

II. THIS CASE RAISES NO ISSUE OF NATIONAL IMPORTANCE WARRANTING THIS COURT'S REVIEW

Having failed to establish a conflict with any precedent of this or any other court, Petitioner also fails to identify any issue of national importance presented by this case that warrants this Court's review. Petitioner is a single plaintiff now seeking only monetary damages. This is not a class action. Any claims for injunctive or declaratory relief are moot. No constitutional issue is presented.

As discussed above, the statutory issue is narrow and settled. The court of appeals summarized the unique factual and legal backdrop underlying its narrow holding as follows: "Congress intended that a preference for Native Hawaiians, in Hawaii, by a Native Hawaiian organization, located on the Hawaiian monarchy's ancestral lands, [should] be upheld because it furthers the urgent need for better education of Native Hawaiians, which Congress has repeatedly identified as necessary." Pet. App. 38a.

Nothing in this ruling extends to any circumstance beyond the Kamehameha Schools, nor the unique statutory setting of congressional programs directed at remedying the damage done to Native Hawaiians by overthrow of their kingdom and near destruction of their culture. Nor is there any reason to suppose that the decision below will "sanction racially exclusive private schools for any group that could point to 'significant imbalances in educational achievement,'" as Petitioner ominously warns. Pet. 14. Nowhere in the United States does there exist another school like Kamehameha Schools, which is entirely private and not-for-profit, and which carries out a remedial educational mission for the benefit of the children of an indigenous people with whom Congress has a special trust and political relationship. In the century and a half that § 1981 has existed, no other such school has ever been challenged. Indeed, Judge Kozinski noted that he had "found no case where section 1981 has been applied to a charity" at all. Pet. App. 108a. This hardly gives rise to well-founded fears of a slippery slope.

In short, the precedential value of the court of appeals' decision is limited to the idiosyncratic facts of this case, and Petitioner presents no question of national importance warranting the attention of this Court. Moreover, Congress is actively considering proposed legislation that might well clarify the political status of the Native Hawaiian people in ways relevant to determination of the issues in this case. All these factors further counsel denial of the petition.

A. Kamehameha Schools Is Unique in Its Origins and Mission

The court of appeals' decision simply declined to require a private school designed to benefit Native Hawaiians to educate all comers. This decision sets no precedent for any other private school, or any other Native Hawaiian program. To the contrary, the history of Kamehameha Schools is so

unique as to render the court of appeals' decision inapplicable in other contexts.

First, the remedial purpose of Kamehameha Schools' admissions policy has uniquely powerful *bona fides*. The Schools' educational programs have been designed since their inception to overcome specific historical injustices—the near destruction of the Native Hawaiian people through Westernization and the overthrow of the Hawaiian Kingdom with the United States' complicity. The education offered by the Schools to children of Hawaiian ancestry is a testamentary gift from Princess Pauahi intended to help reverse the devastating suppression of Native Hawaiian culture and marginalization of the Native Hawaiian people. Princess Pauahi created the Kamehameha Schools, "in which Hawaiians have the preference," so that "her own people" could once again thrive. Pet. App. 174a (quoting Charles Reed Bishop's Founders Day Address, Dec. 19, 1888). There is no other private, not-for-profit school in the United States that can trace its origins back without interruption to the efforts of an indigenous leader to reverse the near decimation of her people.

Second, the original and largest campus of the Schools is located on the Hawaiian monarchy's ancestral lands. Were the Kamehameha Schools a Native educational institution located on tribal lands in the continental United States or Alaska, there would be little question that it might permissibly give priority in admission to Native schoolchildren. Any decision upholding such practices would have little bearing on practices by non-indigenous private schools.

Third, the Schools employ a cultural immersion program that aims to restore and revitalize Native Hawaiian culture, language and heritage as a living tradition that "'reconnects the children with the values . . . that guided their ancestors, and builds their pride and senses of dignity.'" Pet. App. 199a. Such cultural immersion aims to reverse the damage

done by forced imposition of a Western-style school system that eliminated Native Hawaiians' customary methods of learning, curtailed the transmission of Native Hawaiian culture, and marginalized Native Hawaiians by preparing them only for vocational and low-paying jobs. This feature too distinguishes Kamehameha from other private schools.

Fourth, Kamehameha Schools has had exceptional success in reversing the marginalization of Native Hawaiians by helping its graduates attain professional and leadership positions, seeding the ranks of civic, economic, academic, military and professional society with Native Hawaiian leaders. The record is replete with evidence that the Schools prepare Native Hawaiian leaders who are knowledgeable about and proud of their culture, with many becoming leaders in the State of Hawaii and the Native Hawaiian community.

The need for Kamehameha Schools' remedial program, and its manner of achieving its legitimate remedial purpose, thus are inextricably tied to the specific history of the Native Hawaiian people and are not generally applicable to any other race-conscious admissions policies that other private schools might employ. A case concerning a private school that so specially serves the children of a displaced indigenous people is a poor vehicle for considering the application of nondiscrimination law to private entities more generally.

B. Congress Has Provided Native Hawaiians a Unique Set of Federally Funded Programs

Because this case involves solely a matter of statutory construction, § 1981 should be construed in harmony with Congress's other enactments dealing with Native Hawaiians. The relevant statutory context includes numerous federal laws providing remedial grants and programs targeted expressly and often exclusively toward Native Hawaiians. But this statutory context is so specialized that interpretation of

§ 1981 in this case can have little bearing on other cases arising under § 1981.

Of particular relevance to this case, the NHEA, enacted by Congress in 1994 and again in 2002, provides benefits specifically to improve the educational attainment of Native Hawaiians. At one time, Congress even directed federal funding to Kamehameha Schools by name to provide "fellowship assistance to Native Hawaiian students." 20 U.S.C. § 4905(a) (1988).

As the court of appeals correctly found, "[i]t would be incongruous to conclude that while Congress was repeatedly enacting remedial measures aimed exclusively at Native Hawaiians, at the same time Congress would reject such Native Hawaiian preferences through § 1981." Pet. App. 38a. Legislative history thus gives unusually strong evidence of congressional approval for remedial programs such as Kamehameha Schools'. A decision based on such specific congressional enactments could provide little guidance outside the context of this case.

C. The Political Status of the Native Hawaiian People Is Currently Under Debate in Congress

As the court of appeals noted, *see* Pet. App. 36a, 51a, Congress has acknowledged that the United States has a special political relationship with and a special trust obligation to Native Hawaiians. The 2002 NHEA explained that "Congress does not extend services to Native Hawaiians because of their race, but because of their *unique status as the indigenous people of a once sovereign nation* as to whom the United States has established a *trust relationship*," 20 U.S.C. § 7512(12)(B) (emphasis added), and that "[t]he *political relationship* between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States," *id.* § 7512(13) (emphasis added). Congress also has stated that "the political status of Native Hawaiians is

comparable to that of American Indians and Alaska Natives," 20 U.S.C. § 7512(12)(D).

Congress is currently giving active consideration to a bill that might further confirm and clarify this status. On January 17, 2007, Hawaii Senator Daniel Akaka introduced The Native Hawaiian Government Reorganization Act of 2007, S. 310, 110th Cong. (2007) (commonly known as the "Akaka Bill"). A previous version of the Akaka Bill came within several votes of proceeding to a Senate floor vote during the last session of Congress. The Akaka Bill, if enacted, would launch a process to form a Native Hawaiian governing entity that could negotiate with the state and federal government on behalf of Native Hawaiians, enabling a government-to-government relationship with the United States similar to that of American Indians and Alaska Natives. The House of Representatives is also considering a similar bill, H.R. 505, 110th Cong. (2007), which was introduced by Hawaii Representative Neil Abercrombie on January 17, 2007.

Given that the status of Native Hawaiians is being currently debated by Congress, it would be premature for the Court to decide a strictly statutory case related to these issues. While nothing in the court of appeals' decision turns on the outcome of congressional debate on the Akaka Bill, and while the decision was correct regardless of the outcome, congressional action might have a bearing on the Court's consideration of the issues presented. Thus, out of respect for a coordinate branch as well as concerns of judicial economy, this Court should decline Petitioner's invitation to enter this "difficult terrain." *Rice*, 528 U.S. at 519.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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