

NO. 07-1372

IN THE SUPREME COURT OF
THE UNITED STATES

STATE OF HAWAII, *ET AL.*,
Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF HAWAII

AMICUS BRIEF OF THE STATES OF WASHINGTON,
ALABAMA, ALASKA, ARIZONA, COLORADO, FLORIDA,
GEORGIA, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS,
KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN,
MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE,
NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA,
OHIO, OKLAHOMA, OREGON, PENNSYLVANIA,
RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA,
UTAH, VERMONT, AND WYOMING IN SUPPORT OF
PETITIONER STATE OF HAWAII

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QUESTION PRESENTED

In the Joint Resolution To Acknowledge The 100th Anniversary Of The January 17, 1893, Overthrow Of The Kingdom Of Hawaii (1993 Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993)), Congress acknowledged and apologized for the United States' role in that overthrow. The question presented is whether this resolution stripped Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—twenty-nine percent of the total land area of the state and almost all the land owned by the state—unless and until it reaches a political settlement with native Hawaiians about the status of that land.

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INTEREST OF THE AMICI CURIAE STATES

The Supreme Court of Hawaii concluded that Congress' 1993 Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993), "clearly recognized that the native Hawaiian people have unrelinquished claims" to Hawaii's state lands. Pet. App. 32a. It accepted the respondent's argument that title to the state "lands is clouded as a result of the Apology Resolution's recognition that the native Hawaiian people never relinquished" claims to the land. Pet. App. 26a. Based on its recognition of such claims, the court restrained the State of Hawaii from selling its lands until future political processes reconciled disputes raised by the native Hawaiian groups. Thus, the Hawaii court interpreted the 1993 Apology Resolution to strip Hawaii of sovereignty over lands the United States granted the new state in the 1959 Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

The amicus curiae states are deeply concerned with the lower court's conclusion that the Apology Resolution creates or recognizes claims that cloud the title to Hawaii's state lands. As part of the "solemn agreement" embodied in the admission act, every state admitted into the Union since 1802 has received grants of land from the United States. *See Andrus v. Utah*, 446 U.S. 500 (1980). The acreage granted to the states is substantial, and the lands and proceeds from the lands support vital state institutions and programs across the nation. "Between 1803 and 1962, the United States granted a total of some 330,000,000 acres to the States for all purposes. Of these, some 78,000,000 acres were

given in support of common schools.” *Lassen v. Arizona ex rel. Arizona Highway Dep’t*, 385 U.S. 458, 460 n.3 (1967) (citing The Public Lands, Senate Committee on Interior and Insular Affairs, 88th Cong., 1st Sess., 60 (Comm. Print 1963)).

If the decision below is correct—that through a post-statehood resolution like the Apology Resolution the United States recognized claims that cloud title and eliminate authority to sell lands granted at statehood—then the legal force of state admission acts becomes doubtful and state sovereignty can be fundamentally undermined. The practical harm to the amici states would be significant, because the states rely on state lands to fund schools, institutions, and vital state programs. *See generally Lassen*, 385 U.S. at 460 (addressing grants that impose trust duties affecting granted lands and funds derived from such lands).

The risk of harm to the states, moreover, is quite real if a claim to state lands can be based on a resolution that, on its face, does nothing more than apologize on the 100th anniversary of a significant historic event and urge future conciliation among people. Congress should be free to recognize the historic faults of our nation and to offer an apology without being held to have impliedly created legal rights. An apology, such as the Apology Resolution, should not be held to undermine the grant of lands that formed a sovereign state of the Union.

SUMMARY OF ARGUMENT

The decision of the Hawaii Supreme Court should be reversed for three reasons. First, the decision is contrary to fundamental rules of statutory

construction. The 1959 Hawaii Admission Act granted Hawaii title to 1.2 million acres of lands formerly held by the United States Territory of Hawaii. The lands were granted subject to trust obligations imposed by Section 5(f) of the Admission Act and with unambiguous language allowing Hawaii to exercise full sovereignty and title. Pet. App. 116a. In contrast, the plain language of the Apology Resolution offers an apology; it does not repeal or amend the title and authority to manage and dispose of the lands provided by the Admission Act. Given an ordinary meaning, the Apology Resolution is harmonious with the Admission Act and does not repeal or recognize any claims to the lands granted to Hawaii at statehood.

Second, the decision below conflicts with this Court's decisions recognizing that Congress does not take land back after the land is granted at statehood. Congress did not redirect the use of the lands from the statehood grants to a new purpose—reconciliation of claims by native Hawaiian groups. Therefore, the court below erred in holding that the post-statehood apology affected title or state authority to manage lands granted at statehood.

Third, the decision below views the Apology Resolution in a manner that conflicts with the plan of federalism and the constitutional obligation of the United States not to interfere with the integrity of Hawaii as one of the sovereign states. Under the plan of federalism, the federal government cannot commandeer a sovereign state's lands to deal with present-day political claims made by descendents of native Hawaiians.

A. The Decision Below Fails To Adhere To Fundamental Rules Of Statutory Construction

The decision below interprets the 1993 Apology Resolution to strip Hawaii of title and authority over lands expressly granted to Hawaii in the 1959 Admission Act. In so holding, the court below failed to apply rudimentary rules of statutory interpretation. First, “[t]he starting point for our interpretation of a statute is always its language.” *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). Second, “repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest.” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) (internal quotations marks omitted). Third, when reviewing acts concerning the same subject, the Court will “read the statutes to give effect to each . . . while preserving their sense and purpose.” *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Finally, “a statute dealing with a narrow, precise, and specific subject”, such as the Admission Act grant of lands for specific purposes, “is not submerged by a later enacted statute covering a more generalized spectrum,” here, a general apology directed to historically significant events. *Nat’l Ass’n of Home Builders*, 127 S. Ct. at 2532. In each of these respects, the decision below is flawed and should be reversed.

The Hawaii court sidesteps these fundamental rules of construction when it reads the Apology Resolution to recognize unrelinquished claims requiring Hawaii to hold its lands subject to native Hawaiian claims. The extraordinary consequences

found by the Hawaii court are nowhere expressed in the Apology Resolution. The resolution should be read in harmony with the provisions of the Hawaii Admission Act to preserve the state's lands, not to impliedly repeal the title and authority granted to Hawaii in the Hawaii Admission Act.

1. The 1959 Admission Act Expressly Granted The Lands To Hawaii When Its People Voted To Join The United States

In 1959, the people of Hawaii voted to join the Union as a state according to the terms of the 1959 Hawaii Admission Act. The people voted yes to the proposition that Hawaii immediately be admitted into the Union as a state. Pet. App. 119a. The voters specifically considered and approved the following statement: “All provisions of the [Admission Act] prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people.” Pet. App. 119a (emphasis added). Thus, when the people of Hawaii voted overwhelmingly to approve statehood, the voters expressly approved of the grants of land from the United States to their newly formed state.

The plebiscite incorporated by reference Section 5 of the Admission Act. Section 5 granted over 1.2 million acres for the support of the new state. Pet. App. 115a–17a. Section 5(f) provided that Hawaii would manage *and dispose of* its granted lands consistent with public trust purposes specified in the Act. Pet. App. 116a. The unmistakable intent of the Act and the understanding of the voters is that

Hawaii would receive title to the lands to manage and sell for the benefit of all citizens of Hawaii, including those descended from native Hawaiians. *See Rice v. Cayetano*, 528 U.S. 495, 525 (2000) (Breyer, J., concurring) (“The Act specifies that the land is to be used for the education of, the developments of homes and farms for, the making of public improvements for, and public use by, *all* of Hawaii’s citizens, as well as for the betterment of those who are ‘native.’”).¹

2. Interpreting The 1993 Apology To Require Hawaii To Hold The Lands Is Inconsistent With The Admission Act Provisions Granting The Land And Authority To Sell And Lease

Congress adopted the 1993 Apology Resolution thirty-four years after Hawaii’s statehood. The resolution “acknowledges the historical significance” of the overthrow of the 1893 Hawaiian monarchy. Pet. App. 110a (Section 1(1)). Noting the participation of United States citizens in the 1893 overthrow, the resolution extends an apology to “any individual who is a descendent of the aboriginal people” of the islands. Pet. App. 110a (Section 2).

¹ The amici recognize that the Admission Act allows the State of Hawaii to use its lands for five purposes, one of which is the betterment of the conditions of native Hawaiians where that purpose is not inconsistent with the other purposes. Pet. App. 116a (Section 5(f)). Hawaii’s discretion to use lands for the allowed purposes, however, is not relevant to this case. The lower court explicitly based its injunction on its erroneous view that unrelinquished claims clouded title to the lands and that the state’s lands must be held to resolve such claims.

Relying solely on recitals in the Apology Resolution that broadly summarize the historic events, the court below held that Congress had “recognized that the native Hawaiian people have unrelinquished *claims over the ceded lands . . .*” Pet. App. 32a (emphasis added). Thus, based on its view that the resolution recognized these unrelinquished claims, the court directed Hawaii to hold its state lands as a “*foundation* (or starting point) for reconciliation” of those claims. Pet. App. 33a. By reading the Apology Resolution as holding Hawaii’s lands as a “foundation” for resolution of land claims, the court adopted an interpretation inconsistent with the purposes of granting the land at statehood and the explicit provisions of the Admission Act.

The Admission Act granted the lands to Hawaii and required Hawaii to use the lands

“[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.” Pet. App. 116a.

Hawaii’s title and authority over its lands is explicitly granted by these provisions of the Admission Act. The Act provides that “lands, proceeds, and income *shall be managed and disposed*

of for one or more of the foregoing purposes”
Pet. App. 116a (emphasis added).

If the Apology Resolution requires Hawaii to hold its lands for resolution of land claims, then the resolution has impliedly repealed these provisions of the Admission Act. To support schools and institutions with the land and its proceeds, Section 5(f) necessarily authorized Hawaii to sell and lease the land. To develop farm and home ownership, make public improvements, and allow public use, the Admission Act necessarily granted Hawaii full title, as well as authority to sell and lease. Apart from the Hawaii court’s view of recitals in the later Apology Resolution, nothing in the Admission Act itself suggests Hawaii received anything less than clear title. To the contrary, in light of its purpose to grant lands to a new state, the Admission Act is susceptible to but one conclusion—Congress granted the new state of Hawaii full and perfect title, just as it granted lands to other states upon admission to the Union.²

² Notably, the Hawaii Admission Act omits a provision found in other admission acts where the United States was concerned with Native American lands. *See, e.g.*, Enabling Act for Admission of North Dakota, South Dakota, Montana, and Washington, ch. 180, § 4(2), 25 Stat. 676 (1889) (the people of the new states “forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States”). In the 1959 Hawaii Admission Act, Congress did not address native Hawaiians as landholders. Instead, native Hawaiians were, together with all people, the beneficiaries of the grant of state lands. Pet. App. 116a. Furthermore, native Hawaiians were to benefit from the

The Hawaii court thus erred by adopting an unwarranted reading of the Apology Resolution. It read the resolution as if that later congressional action had repealed, by implication, the grant of lands in the Admission Act. The resolution did not, by implication, change the express grant of lands in the Admission Act. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2533.

3. The Plain Language Of The Apology Resolution Does Not Recognize Claims To The Lands Previously Granted By The Admission Act

The plain language of the Apology Resolution does not amend the Admission Act, or make more than a passing reference to the admission of Hawaii into the Union. A natural reading of the Apology Resolution, therefore, confirms that Congress had no intent to affect the land previously granted to Hawaii under the Admission Act. It simply intended to apologize.

The Apology Resolution includes a number of recitals describing two centuries of complex history. After the recitals, the resolution simply states that Congress offers an apology to acknowledge that the overthrow of the Hawaiian monarchy has “historical significance”. Pet. App. 110a. This modest language, together with the absence of any language directed to the Admission Act provisions, confirms that Congress intended no substantive effect on the

Hawaiian Homes Commission Act, 1920, referenced in the Admission Act. Pet. App. 114a.

state's lands. Congress merely commits to "acknowledg[ing] the ramifications of the overthrow" in the future. Pet. App. 110a. Similarly, Congress "urges the President [to] acknowledge the ramifications of the overthrow [and] to support reconciliation efforts". Pet. App. 110a. Whatever salutary effect this language may have as an apology, it is plainly not intended to change the Admission Act or affect the title or use of lands granted at statehood.

The Hawaii court, however, couches its ruling by saying "the Apology Resolution is not *per se* a *settlement* of claims, but serves as the *foundation* (or starting point) for reconciliation, including the future settlement of the plaintiffs' unrelinquished claims." Pet. App. 33a–34a. To achieve this conclusion, the court below cites recitals implying the Republic of Hawaii wrongly ceded its government lands to the territorial government, and reciting that native Hawaiian people "never *directly* relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States[.]" Pet. App. 108a (emphasis added). The concordance between recitals used in the Apology Resolution and the elements of history argued by the groups challenging the state's title, however, does not imply that the resolution recognizes legal claims contrary to the Admission Act grant. The resolution states only that claims are "unrelinquished" from one point of view, and does not imply that it is recognizing any legal claim to the state's lands.

The Apology Resolution is easily harmonized with the Admission Act. The Admission Act granted the land to Hawaii. The Apology Resolution

respectfully acknowledges the significance of historic events to a particular group of people. The court below erred by viewing these recitals as if Congress had recognized claims clouding the title granted in the Admission Act.³

B. The Decision Below Is Contrary To Decisions Of This Court Concerning The Power Of Congress To Diminish Title Granted At Statehood

The decision of the Hawaii court also conflicts with this Court’s decisions in two significant respects. First, the Court has held that Congress cannot take back lands granted at statehood. Second, the Court has held that lands granted at statehood are to be used for the purposes enumerated in the Admission Act.

With regard to submerged lands, “Congress cannot, after statehood, reserve or convey submerged lands that ‘ha[ve] already been bestowed’ upon a State.” *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001) (alteration in original); *see also id.* at n.9 (recognizing entire Court agrees on this

³ The Hawaii court’s reading of the Apology Resolution is equally inconsistent with a line of federal enactments stretching back to the Newlands Resolution, which annexed the Territory of Hawaii. As shown by the petitioner, the line of federal enactments extinguishes any inconsistent claims to the lands, such as a claim of unextinguished aboriginal title on behalf of the original inhabitants. *See generally* Br. Pet’r 31–46. The amici states focus on the Admission Act because, when the Act is read according to its plain language and in light of congressional purposes to admit a new state and the power of Congress, the Admission Act alone shows that the United States granted Hawaii perfect title to the lands.

principle). There is no reason why the statement in *Idaho* does not apply with equal force to land granted by the United States for state purposes such as funding schools and state institutions. Both submerged lands and lands granted for state purposes are intended to serve fundamental attributes of sovereignty for a new state. The Court should therefore reject the Hawaii court's reading of the Apology Resolution and apply the rule that Congress cannot, after statehood, reserve or convey interests in lands that "'ha[ve] already been bestowed' upon a State." *See Idaho*, 533 U.S. at 280 n.9 (alteration in original); *see also* Part C *infra*.

Similarly, the decision below is contrary to this Court's decisions that if federal law enumerates the purpose for which lands are granted to a state, the enumerated purpose "is necessarily exclusive of any other purpose". *Ervien v. United States*, 251 U.S. 41, 47 (1919); *see also Lassen*, 385 U.S. at 467 (applying the rule from *Ervien*). Both *Ervien* and *Lassen* dealt with lands granted at statehood subject to enumerated conditions like the conditions in Section 5(f) of the Hawaii Admission Act. In both cases, the Court held the terms for using the land imposed by the laws granting land at statehood preclude inconsistent purposes imposed by the states after statehood.

The rule from *Ervien* and *Lassen*, however, applies equally to the question of whether the Apology Resolution directs Hawaii to hold its state lands for the purposes of resolving native Hawaiian claims. The grant of lands at statehood is a "solemn agreement" between the people of the new state and

the rest of the Union. *Andrus v. Utah*, 446 U.S. 500, 507 (1980). The grantee—a state—cannot alter terms of that solemn agreement by directing the lands to be used for a new purpose selected by the grantee. So too, the United States cannot alter the terms of the statehood agreement and direct the granted lands to a new purpose. The enumeration of the conditions for using the land in the agreement creating a state equally restricts the state and the federal government from unilaterally altering the conditions of the grant.⁴

C. The Hawaii Court's Decision Is Inconsistent With The Constitutional Plan Of Federalism

The Hawaii court's decision that the Apology Resolution recognized claims to state lands should be rejected because that decision is squarely inconsistent with the constitutional plan of federalism. The decision takes from Hawaii fundamental attributes of its sovereignty over its lands. If correct, the decision below suggests that the United States has commandeered state lands to remedy a problem created entirely by the United States, one that the state had no hand in making and that it has no legal obligation to rectify.

⁴ The position of amici curiae does not conflict with congressional power to extend regulations of general applicability to state lands. *See Case v. Bowles*, 327 U.S. 92, 100 (1946). Nor does the position conflict with federal power to condemn state lands by paying just compensation. *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). The Apology Resolution does not purport to regulate or condemn lands.

1. Hawaii Entered The Union With All The Attributes Of A Sovereign State Including Title To Its Lands

The sovereignty of the states of the Union starts from the principle that the states have all of the attributes of sovereignty except those surrendered in the Constitution.

“The States which existed previous to the adoption of the Federal Constitution possessed originally all the attributes of sovereignty; and they still retain those attributes, except as they have been surrendered by the formation of the Constitution, and the amendments thereto; that the new States, upon their admission into the Union, became invested with equal rights, and were thereafter subject only to similar restrictions[.]” *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 318–19 (1867).

This principle applies equally to every state because a state can be admitted “only on the same footing with” the original states. *Escanaba & Lake Michigan Transp. Co. v. City of Chicago*, 107 U.S. (17 Otto) 678, 689 (1883). The principle of equal sovereignty of the states is, thus, as old as the Constitution itself. *See, e.g.*, 1 Stat. 491 (1796) (admitting Tennessee on an “equal footing”); 2 Stat. 701, 703 (1812) (admitting Louisiana); *United States v. Texas*, 143 U.S. 621, 634 (1892) (citing 9 Stat. 108, which admits the former Republic of Texas “into the Union on an equal footing with the original states in all respects whatever”). The states are to be “equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to

the United States by the Constitution itself.” *Coyle v. Smith*, 221 U.S. 559, 567 (1911). “To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission.” *Id.*

Therefore, when Congress admitted Hawaii on “an equal footing with the other States in all respects whatever” (Pet. App. 113a), Hawaii received the same attributes of sovereignty held by the other states. The attributes of each state’s sovereignty include the right to own lands free and clear from later actions of Congress that would reserve or convey the state’s lands. *See Idaho*, 533 U.S. at 280 (submerged lands)⁵; *see also Wilcox v. Jackson ex dem. McConnel*, 38 U.S. (13 Pet.) 498, 517 (1839) (the laws of the United States control the question of whether title to land has passed, but once title has passed “then that property, like all other property in the State, is subject to State legislation . . .

⁵ With regard to submerged lands, the original states and the subsequent states hold title and sovereignty over navigable waters and submerged lands, and the United States cannot refrain from granting such title to a new state. *Pollard v. Hagen*, 44 U.S. (3 How.) 212 (1845). There is “not the slightest suggestion” that the state’s title to such submerged lands is “defeasible”. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977). Although the Constitution itself grants submerged lands to the states, the grant of lands in the Hawaii Admission Act is equally complete and not defeasible.

consistent with the admission that *the title passed and vested* according to the laws of the United States” (emphasis added)). The attributes of a state’s ownership of its land necessarily include the power to possess, use, and dispose of the land. *See United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (property includes the rights “to possess, use and dispose”); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (an interest in real property is taken when a law eliminates all right to devise the property).

The Apology Resolution and the Admission Act should be read together and consistent with the plan of federalism. The title to lands granted to a state vest in the state. The states have not surrendered their sovereignty over lands and therefore a later act of Congress cannot reserve or convey—or recognize—legal rights that would contradict the title received at statehood. The Hawaii court, thus, erred by viewing the resolution to recognize claims to the state land.

2. A Post Admission Act Resolution Recognizing Or Validating Claims To Lands Granted At Statehood Would Impermissibly Impair State Sovereignty

The Hawaii court’s interpretation of the Apology Resolution as recognizing a legal claim and cloud on title should be rejected because the interpretation assumes a federal power to commandeer state lands for a federal purpose, a power that the federal government does not possess. *See New York v. United States*, 505 U.S. 144 (1992). *New York* held that Congress lacked the power to

transfer title to low level radioactive waste to the states. A federal law compelled the states to take title to this personal property. The Court held that the law was contrary to the principle that Congress may legislate, but “it may not conscript state governments as its agents.” *Id.* at 178. The Hawaii court’s view of the Apology Resolution assumes just such a conscription of the state of Hawaii and its lands to accomplish a federal purpose.

In this respect, the conclusion of the Hawaii court is predicated on an impermissible view of the Apology Resolution. Congress does not seek to take back state lands or conscript the lands for a federal purpose. Instead, Congress presumably acts to preserve the states as part of an “indestructible Union, composed of indestructible States.” *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

“[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” *White*, 74 U.S. at 725.

Congress should not be viewed as wielding power in a manner that would destroy a state. “[N]either [the state nor federal] government may destroy the other nor curtail in any substantial manner the exercise of its powers.” *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (“States retain

substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”). Consistent with the plan of federalism, Congress granted the new state of Hawaii perfect title and statehood. The Apology Resolution does not recognize claims that would cloud Hawaii’s title.

CONCLUSION

The amici states urge the Court to reverse the opinion and judgment of the Supreme Court of Hawaii.

RESPECTFULLY SUBMITTED.

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