

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**

—◆—
**BRIEF AMICI CURIAE OF
EQUAL JUSTICE SOCIETY AND
JAPANESE AMERICAN CITIZENS LEAGUE
IN SUPPORT OF RESPONDENTS**

—◆—
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INTEREST OF *AMICI CURIAE*¹

The Equal Justice Society (EJS) is a national equal rights and social justice organization that aims to heighten public consciousness on race in the law and popular discourse. As heirs of the innovative legal and political strategists of *Brown v. Board of Education*, the organization broadly models its programmatic efforts after the late Honorable Constance Baker Motley and the Brown litigation team. Using a three-prong strategy of law and public policy advocacy, cross-disciplinary convenings and public communications, EJS seeks to restore race equity issues to the national consciousness, build effective progressive alliances, and advance the discourse on the positive role of government.

The Equal Justice Society has participated as *amicus curiae* before this Court in several cases, including *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Randall v. Sorrell*, 548 U.S. 230 (2006); and *Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007).

¹ Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

EJS also has supported Native Hawaiian initiatives, including serving as *amicus curiae* before the Ninth Circuit Court of Appeals in *Doe v. Kamehameha Schools*, 470 F.3d 827 (9th Cir. 2006) (en banc), arguing that a Native Hawaiian educational program designed to repair continuing harms to Native Hawaiians does not transgress civil rights, but instead, benefits all people. EJS has engaged in national public education efforts about Native Hawaiian history, education, and self-governance.

The Japanese American Citizens League (JACL), founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan civil rights organization with 113 chapters throughout the continental United States, Hawaii, and Japan. The JACL Honolulu Chapter is unique because it draws upon Hawaii's rich, multi-ethnic society and strong cultural values.

Since the 1940s, the JACL has been at the forefront of redress and reparation issues for individuals whose civil rights have been infringed. The JACL was instrumental in the passage of the Civil Liberties Act of 1988 (HR-442), which provided redress and an apology to those Japanese Americans who were denied their constitutional rights and incarcerated in internment camps during World War II for no reason other than their ethnicity. Subsequently, the JACL has supported numerous state redress and reparation programs, including Congress's Joint Resolution Acknowledging the 100th Anniversary of the January

17, 1893 Overthrow of the Kingdom of Hawaii. Further, the JACL has committed to and adopted Resolutions supporting Native Hawaiian reparations, sovereignty, self-determination and federal recognition at the JACL National Conventions in 1984, 1986, 1992, and 2000. Understanding the meaning and acknowledging the importance of redress and reconciliation set forth under state law, the JACL thus has an important and substantial interest in this case.



SUMMARY OF ARGUMENT

The three branches of Hawaii's government and its voting citizenry collectively have acknowledged the State's significant role in perpetuating historic injustice for Native Hawaiians, and they have committed the State to reparatory justice through reconciliation.

This commitment started in 1978, following a Constitutional Convention, when State voters overwhelmingly approved a constitutional amendment creating the Office of Hawaiian Affairs (OHA) for the purpose of representing Hawaiian people as beneficiaries of the Ceded Lands Trust. Those trust lands, originally taken by the United States following the "illegal overthrow" of the Hawaiian nation, had been transferred to the State upon statehood in 1959 partly for the benefit of Hawaiians.

The Hawaii legislature actualized the will of the populace in 1979. Implementing legislation identified

one of OHA's primary functions as serving "as a receptacle for reparations" for injustice. Subsequent legislation acknowledged the importance of Hawaiian self-determination as a response to historic harms, and it expressly committed the State to reconciliation. As part of that commitment, it initiated a process for some form of Hawaiian sovereignty, including the contemplated partial return of ceded lands to an entity representing the Hawaiian people.

The ceded lands hold unique cultural, spiritual and political significance for the Native Hawaiian people – they are not fungible or replaceable. Those lands, which belonged to the last Hawaiian monarch and the sovereign Hawaiian nation, were taken by the United States pursuant to annexation of Hawaii following what is now admitted to be the United States-aided "illegal overthrow" of the Hawaiian nation in 1893. The ceded lands were transferred to the State upon statehood in 1959, to be held in trust for, among other things, the betterment of living conditions for the Hawaiian people. Hawaii Statehood Admission Act (Admission Act), Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959). As recognized by the Hawaii Supreme Court, Hawaiians thus have both a unique attachment to and an unrelinquished claim to former Hawaiian lands, particularly the ceded lands. *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i*, 177 P.3d 884, 922, 926 (Haw. 2008) (OHA).

Hawaii's executive branch, through its current and former governors, reaffirmed the State's commitment

to reconciliation with Native Hawaiians. Hawaii's governor, in her 2003 State of the State address, by her administration's reparatory actions – including negotiating a settlement of ceded lands revenue long overdue to OHA – and by her administration's support for a form of Hawaiian self-governance and control over Hawaiian land and cultural resources, affirmed the State's commitment to settling Native Hawaiian claims to ceded lands.

In 2008, the Hawaii Supreme Court determined that the State's trust obligations extend to the State's commitment to reconciliation concerning the mutual resolution of Hawaiians' claims to ceded lands. The court cited this State reconciliation commitment as a primary legal basis for enjoining the State's sale of ceded lands until the State and a Hawaiian peoples' representative resolve Hawaiians' "unrelinquished claims" to those lands. *See OHA*, 177 P.3d at 903-05.

This State's reconciliation commitment to mutually resolve Hawaiian peoples' claims to ceded lands is thus rooted over time in all realms of state law: the Hawaii Constitution, multiple statutes, executive actions and the Hawaii Supreme Court's pronouncement. This State law commitment to reconciliation is a commitment to reparatory justice, and it entails a process of *recognition, responsibility, reconstruction and reparations*.

The State has *recognized* some of the harms, accepted *responsibility* for some of the damage and for taking reparatory action and supported at least one

form of *reconstruction* of Hawaiian governance. And in the context of *reparatory actions* that are integral to reconciliation, it also has committed to resolution of ceded lands claims with a representative of the Hawaiian people. But the State is now attempting to short-circuit the reconciliation process by reneging on this key reparatory aspect of its commitment.

As recognized by the Hawaii Supreme Court, the State's unilateral attempt to sell ceded lands undercuts the heart of the State's reconciliation commitment. It undermines the will of the Hawaii citizenry, the policies and dictates of the legislature and the governors' affirmations. And by reneging on a key aspect of the State's reconciliation commitment directly involving ceded lands, the State's sale of those trust lands would breach its trust obligation. That is the general state law claim OHA and the individual Native Hawaiians asserted in this case.

Indeed, the Hawaii Supreme Court determined that by unilaterally selling ceded lands to which Hawaiians have "unrelinquished claims" and which are central to the reconciliation process, the State would breach its trust obligation under state law, resulting in irreparable harm to indigenous Hawaiians. *OHA*, 177 P.3d at 922.

The Hawaii court's ruling now on appeal rested independently on state law. The court's breach of trust ruling embraced an evolving conception of state public trust law. It articulated the State's public trust obligation where a State commitment to reconciliation

encompasses mutual resolution of indigenous beneficiaries' historically-rooted unrelinquished claims to return of the unique trust res. This state law, specifically tailored to the historical context and present circumstances of this case, is adequate to sustain the court's judgment. This Court, therefore, lacks federal question jurisdiction over the appeal. 28 U.S.C. § 1257. Alternatively, if it determines that jurisdiction exists, this Court can affirm the Hawaii court's judgment on the basis of state law. *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983).

◆

ARGUMENT

I. THE STATE OF HAWAII HAS A TRUST OBLIGATION NOT TO UNILATERALLY SELL CEDED LANDS BECAUSE THE STATE'S COMMITMENT TO RECONCILIATION REQUIRES MUTUAL RESOLUTION OF UNRELINQUISHED HAWAIIAN CLAIMS TO THOSE PUBLIC TRUST LANDS.

A. Through Its Constitution, Legislature, Governor and Judiciary, the State Committed to Reconcile with the Hawaiian People and Thereby to Repair Present-day Damage From Historic Injustice.

The State of Hawaii – through its voting populace, legislature, executive and judiciary – acknowledged its role in perpetuating historic harms against Native Hawaiians and committed itself to reparatory

justice through reconciliation. The State made this profound commitment through law because, in the words of one legislator, “[t]he injustice perpetrated on the Hawaiian people a century ago has been a cancer that insidiously and all too silently has been destroying the fabric of our community.” Discussion on Conf. Comm. Rep. No. 97 and S.B. No. 1028, 17th Leg., Reg. Sess., *reprinted in* 1993 House Journal, at 791 (statement of Rep. Okamura). If the people of Hawaii “deny the rights of our indigenous people, we undermine the integrity of our entire society. . . . Unless we move toward achieving that goal [of self-determination and healing] . . . [w]e will remain blocked by a hundred years of anger and frustration.” *Id.* at 792.

Initiating the commitment to reconciliation, Hawaii’s people overwhelmingly ratified a 1978 amendment to the state constitution, creating the Office of Hawaiian Affairs. This new organization – formed partly to rectify the legacies of U.S. colonialism² by affording Hawaii’s indigenous peoples a

² The United States annexed Hawaii as a territory, against the protest of the former government and most of the adult Hawaiian populace, in 1898. See Noenoe K. Silva, *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* (2004). That same year the United States acquired the Philippines, Puerto Rico, Cuba and Guam. See Stephen Kinzer, *Overthrow: America’s Century of Regime Change from Hawaii to Iraq* (2006). The first United Nations list of non-self-governing territories eligible for de-colonization included Hawaii. Transmission of Information under Article 73e of the Charter, G.A. Res. 66(I), at 125, U.N. Doc. A/64/Add. 1 (Dec. 14, 1946).

measure of self-determination – was created as a semi-autonomous government agency to administer ceded lands trust resources for the betterment of indigenous Hawaiian life. *See* Haw. Const. art. XII, §§ 5 and 6; Haw. Rev. Stat. § 10-3(6) (Supp. 2007).

In crafting the constitutional amendment creating OHA, the Constitutional Convention delegates expressly recognized the injustices suffered by Hawaiians over the last century and determined that it was “well past time” for the State to “meet the obligation that we have to do justice” for the Native Hawaiian people. *See* Debates in Comm. of the Whole on Hawaiian Affairs, Comm. Prop. No. 13, in 1978 Proceedings of the Constitutional Convention of Hawaii, Vol. 2, at 460 (statement of Delegate Barr). *See also id.* at 457, 458 (“[T]he Hawaiian had become . . . land-less” and the creation of OHA would “address the modern-day problems of Hawaiians which are rooted in as dark and sad a history as will ever mark the annals of time.”) (statement of Delegate De Soto).

Anticipating the reconstruction of Hawaiian self-governance and ensuing reparations, the Convention’s Committee on Hawaiian Affairs expressly envisioned OHA as a “receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians[.]” Stand. Comm. Rep. No. 59, *reprinted in* 1978 Proceedings of the Constitutional Convention of Hawaii, Vol. 1, at 644. The Convention viewed the creation of OHA “of utmost importance” because it “provide[d] for accountability, self-determination, [and] methods for self-sufficiency

through assets and a land base[.]” *Id.* at 646. Specifically, OHA’s Board of Trustees would have “the power to accept the transfer of reparations moneys and land.” *Id.* at 645. OHA thus was created not only as a representative to receive income from trust lands but also as a vehicle for reparatory action.³

In 1979, the Hawaii legislature actualized the will of the populace through Act 196. That Act implemented the 1978 Constitutional amendment by creating OHA the organization, and thus reaffirmed the State’s “solemn trust obligation and responsibility to [N]ative Hawaiians[.]” Act Relating to an Office on Hawaiian Affairs, 1979 Haw. Sess. L. Act 196, § 2. Significantly, in order to better conditions for Hawaiians, the Act expressly identified one of OHA’s primary functions as serving “as a receptacle for reparations” for injustice. Haw. Rev. Stat. § 10-3(6).

Subsequent legislation acknowledged the importance of Hawaiian self-determination as a response to historic harms, and it expressly acknowledged the State’s commitment to reconciliation. Act 329, “Relating to the Public Land Trust,” highlighted the State’s

³ Delegate Waihe‘e, who later became the State’s governor, explained that passage of Committee Proposal No. 13 did not immediately transfer title of ceded lands to Native Hawaiians, but instead recognized the need for reparations and anticipated the power of OHA to accept the transfer of reparations moneys and lands in the future. *See* Debates in Comm. of the Whole on Hawaiian Affairs, Comm. Prop. No. 13, *reprinted in* 1978 Proceedings of the Constitutional Convention of Hawaii, Vol. 2, at 462.

collective commitment to “permanent reconciliation” with Native Hawaiians in order to achieve a “comprehensive, just, and lasting resolution” of Hawaiian justice claims.

The people of Hawaii, through amendments to their state constitution, the acts of their legislature, and other means, *have moved substantially toward [] permanent reconciliation*. Foremost among these achievements have been the creation of the [O]ffice of Hawaiian [A]ffairs and the allocation by legislative action to the [O]ffice of Hawaiian [A]ffairs of substantial funds out of a portion of the public land[s] trust established by section 5(f) of the Admission Act. The *overriding purpose of this Act is to continue this momentum, through further executive and legislative action in conjunction with the people of Hawaii, toward a comprehensive, just, and lasting resolution*.

1997 Haw. Sess. L. Act 329, § 1.

The legislature also determined that reconciliation “so desired by all people of Hawaii” could only be successful if the State recognized past injustice and accepted responsibility for repairing persisting damage:

The legislature finds that the events of history relating to Hawaii and Native Hawaiians, including those set forth in [the Apology Resolution] continue to contribute today to a deep sense of injustice among many Native

Hawaiians and others. The legislature *recognizes that the lasting reconciliation so desired by all people of Hawaii is possible only if it fairly acknowledges the past while moving into Hawaii's future.*

*Id.*⁴

Acting upon the State's reconciliation commitment, the legislature initiated a process for a form of Hawaiian sovereignty that encompassed "repossession of their land." It sought to "redress[] *the wrongs and inequities resulting from the overthrow of the Hawaiian Kingdom and usurpation of the government, lands, and treasury of the indigenous Hawaiian people . . . through empowerment of [Hawaiians'] self-determined institutions and repossession of their land, ocean, water, and financial resources.*" Conf. Comm. Rep. No. 97 on S.B. 1028, 17th Leg., Reg. Sess., *reprinted in* 1993 Senate Journal, at 782 (emphasis added).⁵ The Act facilitated "healing a hundred

⁴ The Hawaii legislature also "pledge[d] its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians." Act Relating to Hawaiian Sovereignty, 1993 Haw. Sess. L. Act 354, § 1.

⁵ Act 359 created a Hawaiian Sovereignty Advisory Commission to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." Act Relating to Hawaiian Sovereignty, 1993 Haw. Sess. L. Act 359, § 2. The Hawaii legislature "recognize[d] and affirm[ed] the inherent right of the indigenous Hawaiian people . . . to establish a sovereign government with powers, duties, and land, ocean, water, and financial resources[.]" Conf. Comm. Rep. No.

(Continued on following page)

years of mistrust and abuse.” Discussion on Conf. Comm. Rep. No. 97 and S.B. No. 1028, 17th Leg., Reg. Sess., *reprinted in* 1993 House Journal, at 791 (statement of Rep. Okamura).

The federal Apology Resolution of 1993 expressly acknowledged and commended these “efforts of reconciliation initiated by the State of Hawaii . . . with Native Hawaiians[.]” Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii (Apology Resolution), Pub. L. No. 103-150, § 1, 107 Stat. 1513 (1993).

B. The Resolution of Hawaiian Peoples’ Claims to Ceded Lands Is Central to the State’s Reconciliation Commitment.

This commitment to reconciliation for the benefit of all Hawaii’s people aimed to repair the persisting damage of historic injustice, and it envisioned specific reparatory acts – including the partial return of ceded lands to a Native Hawaiian entity. In 1993, the Hawaii legislature found that “[m]any native Hawaiians believe that the lands taken without their consent should be returned and if not, monetary reparations made[.]” Act Relating to Hawaiian Sovereignty, 1993 Haw. Sess. L. Act 354, § 1.

97 on S.B. 1028, 17th Leg., Reg. Sess., *reprinted in* 1993 Senate Journal, at 782.

The ceded lands hold unique cultural, spiritual and political significance for the Hawaiian people – they are not fungible or replaceable. *See Pele Defense Fund v. Paty*, 837 P.2d 1247, 1269 (Haw. 1992) (recognizing Hawaiians’ special cultural and spiritual connection to ceded lands). Those lands, which belonged to the last Hawaiian monarch and the sovereign Hawaiian nation, were taken by the United States pursuant to annexation of Hawaii following what is now admitted to be the United States-aided “illegal overthrow” of the Hawaiian nation in 1893. Apology Resolution § 1, 107 Stat. 1513; 1993 Haw. H.R. Con. Res. No. 179. The ceded lands were transferred to the State upon statehood in 1959, to be held in trust for, among other things, the betterment of living conditions for the Hawaiian people. Admission Act, § 5(f), 73 Stat. 6. As recognized by the Hawaii Supreme Court, Hawaiians thus have both a unique attachment and unrelinquished claims to former Hawaiian lands, particularly the ceded lands. *OHA*, 177 P.3d at 922, 926.

In 1997, through Act 329, the legislature clarified “the proper management and disposition of the lands subject to the public land[s] trust and the proceeds and income therefrom . . . to effectuate article XII, section 6 of the Hawaii Constitution.” 1997 Haw. Sess. L. Act 329, § 1. Its express language identified the State’s paramount goal of moving “toward a comprehensive, just, and lasting resolution” of Hawaiian claims to the ceded lands. *Id.*

To achieve this “comprehensive, just, and lasting resolution” of Hawaiians’ ceded lands claims, the Act created “an open process to study and make recommendations on issues relating to the public land trust, *including whether land should be transferred to the Office of Hawaiian Affairs in partial or full satisfaction of obligations under Article 12, Section 6, of the Hawaii Constitution.*” Conf. Comm. Rep. No. 116 on H.B. 2207, 19th Leg., Reg. Sess., *reprinted in 1997 Senate Journal*, at 781 (statement of Senator Solomon) (emphasis added). The Senate Ways and Means Committee also highlighted the legislature’s intention to return a portion of the ceded lands to a Hawaiian entity to satisfy the State’s legal obligations.

A joint committee is being appointed to study and make recommendations on the transfer of lands to the Office of Hawaiian Affairs. . . . The committee will conduct public hearings to *facilitate discussions on the criteria for selection and the process of selection and transfer of portions of the public land trust to the Office of Hawaiian Affairs to satisfy all or a portion of the State’s obligations under the Admissions Act and the State Constitution.*

S. Ways and Means Comm. on H.B. 2207, Stand. Comm. Rep. No. 1482, 19th Leg., Reg. Sess., *reprinted in 1997 Senate Journal*, at 1454 (emphasis added).

Equally significant, the Senate committee handling all aspects of land and Hawaiian affairs acknowledged the historic injustices, and it recognized the centrality of Hawaiian claims to ceded lands to

the process of reparatory justice. Specifically, the Senate Committee on Water, Land, and Hawaiian Affairs intended that the legislation “*establish the process by which to finally and justly resolve the longstanding issues over the State’s responsibilities toward the Hawaiian people and managing the public [ceded] land and the Hawaiian home lands trusts.*” S. Water, Land, and Hawaiian Affairs on H.B. No. 2207, Stand. Comm. Rep. No. 1118, 19th Leg., Reg. Sess., *reprinted in 1997 Senate Journal*, at 1315-16 (emphasis added). The deliberative “mutually inclusive” process envisioned was reconciliation – a process that would “elevate the discussions over OHA’s entitlements to a level where sensitivity over the past injustices toward the Hawaiian people and collaboration over resolving the longstanding responsibilities bestowed upon the State in its Admission Act and State Constitution [concerning public lands trusts] prevails.” *Id.* at 1316.

[O]ne hundred-four years is a long time to wait for justice . . . the State should not rush into settling a part of history that many much rather forget. Rather . . . *justice requires that a thoughtful, comprehensive, and mutually-inclusive process be established in order to arrive at a compassionate and fair resolution* [of Hawaiian land trust claims]. It is only through this process, however painful and laborious, that we will truly learn the price of our State’s existence.”

Id. at 1315.

This State commitment to reconciliation, encompassing the partial return of ceded lands, is also demonstrated by legislation establishing the island of Kaho‘olawe as a public land trust. That legislation also mandated that the State transfer control of Kaho‘olawe to a sovereign Native Hawaiian entity upon its recognition by the United States and the State of Hawaii. Haw. Rev. Stat. § 6K-9 (1993). “Upon . . . return [of Kaho‘olawe] to the State, the resources and waters of Kaho‘olawe shall be held in trust as part of the public lands trust; provided that the State *shall transfer* management and *control of the island and its waters to the sovereign native Hawaiian entity upon its recognition* by the United States and the State of Hawaii.” Act Relating to the Island of Kaho‘olawe, 1993 Haw. Sess. L. Act 340, § 2.

Hawaii’s executive branch, through its current and former governors, reaffirmed the State’s commitment to reconciliation with Native Hawaiians. Hawaii’s governor, in her 2003 State of the State address, by her administration’s reparatory actions – including negotiating a settlement of ceded lands revenue long past due to OHA⁶

⁶ The Attorney General and OHA negotiated for four years and agreed upon a settlement seeking to resolve a 30-year dispute over revenue from ceded lands that would give OHA three parcels of land, \$13 million and a minimum of \$15.1 million per year in exchange for OHA’s agreement to waive further back claims to ceded lands income (but not to the transfer of ceded lands). The 2008 State Senate failed to approve the settlement. See Treena Shapiro, *Ceded Lands Settlement Bill Killed in Senate*, Hon. Adv., Mar. 18, 2008.

– and by her administration’s support for a form of Hawaiian self-governance and control over Hawaiian lands and cultural resources, committed to settling Native Hawaiian claims over ceded lands.⁷ See *OHA*, 177 P.3d at 923. Prior governors made similar commitments. See Office of the Governor, *An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust*, Jan. 1991, at 2 (“[t]he prevailing philosophy of this proposal is that proactive actions are needed to remedy historic controversies if the State is to successfully fulfill its current and future obligations under both trusts.”).⁸

⁷ “On January 21, 2003, in her ‘State of the State Address,’ Governor Lingle stated, ‘Here at home in Hawai‘i[,] I will continue to work with you [*i.e.*, the members of the legislature] and with the Hawaiian community to resolve the ceded lands issue once and for all.’” *OHA*, 177 P.3d at 923 (quoting Linda Lingle, Governor, State of Hawai‘i, *State of the State Address: An Outline of the Governor’s Agenda* (Jan. 21, 2003)).

⁸ Governor John Waihe‘e’s 1991 “Action Plan” set forth a proposal to resolve Hawaiian claims to the trusts “as the beginning of action towards resolution.” *Action Plan*, at 3. In 1998, Governor Benjamin Cayetano pledged to “settle the ceded lands issue” before the end of his term. Benjamin J. Cayetano, *The Next Four Years: Completing the Vision*, Hon. Adv., Oct. 16, 1998, at A-13. Governor Linda Lingle stressed in 2003 that, “until we get [the ceded-lands issue] resolved[,] our community can never really come together as one.” Governor Linda Lingle, *State of the State Address*, at 4. Governor Waihe‘e, along with Hawaii’s congressional delegation, also played a key role in the transfer of Kaho‘olawe to the public trust. See Helen Altonn, *Waihee Signs Kaho‘olawe Bill*, Hon. Star. Bull., Jul. 1, 1993, at A-5.

C. The Hawaii Supreme Court Determined that the State's Trust Obligations Encompass Its Reconciliation Commitment to Mutual Resolution of Ceded Lands Claims.

In 2008, the Hawaii Supreme Court gave formal legal recognition to the State's reconciliation initiative – including the State's contemplated partial return of ceded lands to the Hawaiian people – as a primary legal basis for finding a State breach of trust and enjoining the State's sale of ceded lands until the State and a Hawaiian peoples' representative resolve Hawaiians' "unrelinquished claims" to those lands. The court recognized that "state legislation enacted at around or subsequent to the adoption of the Apology Resolution – specifically, Acts 354, 359, 329, and 340[,]” *OHA*, 177 P.3d at 903, informed the Resolution's call for reconciliation with the Native Hawaiian people, and thus "g[a]ve rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved.” *Id.* at 905.

The court acknowledged that with respect to ceded lands, "the state legislature itself has announced that future reconciliation between the State and native Hawaiians *will occur.*” *Id.* at 923 (emphasis added). According to the court, through its multiple Acts, the legislature recognized that "the indigenous people of Hawai'i were denied . . . their lands," and contemplated further government action

to reach “lasting reconciliation so desired by all people of Hawaii.” *Id.* (citing 1993 Haw. Sess. L. Act 359, § 1(9) at 1010 and 1997 Haw. Sess. L. Act 329, § 1 at 956).

Significantly, the Hawaii court determined that the State’s trust obligations extend to the State’s commitment to reconciliation concerning resolution of Hawaiians’ claims to ceded lands. “Congress, the Hawai‘i state legislature, the parties, and the trial court all recognize (1) the cultural importance of the land to native Hawaiians, (2) that the ceded lands were illegally taken from the native Hawaiian monarchy, (3) that future reconciliation between the state and the native Hawaiian people is contemplated, and, (4) once any ceded lands are alienated from the public lands trust, they will be gone forever.” *Id.* at 923.

In sum, the State’s commitment to reconcile with Native Hawaiians, crucially encompassing ceded lands, constitutes a trust obligation deeply rooted in all realms of state law: the Hawaii Constitution (overwhelmingly ratified by Hawaii’s voting citizenry), multiple statutes, executive affirmations and the Hawaii Supreme Court’s pronouncement.

II. THE STATE WOULD BREACH ITS TRUST OBLIGATION BY RENEGING ON A KEY REPARATORY ASPECT OF ITS RECONCILIATION COMMITMENT TO MUTUALLY RESOLVE HAWAIIAN CLAIMS TO CEDED LANDS.

A. A Commitment to Reconciliation Is a Commitment to a Process of Reparatory Action.

The state law question thus arises: With a state constitutional foundation and legislative mandate affirmed by the state Supreme Court, what are the State's reconciliation obligations, particularly concerning ceded lands?

Clearly, in this unique case, state laws collectively do far more than announce general policy. Rather, they legally commit the State to a process of reconciliation with Native Hawaiians. Although the legislature did not detail the specifics of the reconciliation process, the Hawaii Supreme Court's general pronouncements, in the context of global reconciliation initiatives and the growing field of reconciliation theory, provide insight into the court's thinking about the State's obligations.

Globally, reconciliation initiatives proliferate. Created by law, they have become a primary vehicle for established democracies to repair the persisting

damage of historic injustice⁹ – including the systemic harms to indigenous peoples. William C. Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 *Am. Indian L. Rev.* 1 (2002-2003). While these initiatives are mainly undertaken by national governments, some are advanced by state or local governments.¹⁰ Formal reconciliation initiatives have also mushroomed in

⁹ See generally Jennifer J. Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice*, 52 *U. Toronto J.L.* 253 (2002) (Canada); Pamela O'Connor, *Reparations for Australia's Removed Aboriginal Children: Defining the Wrong*, in *Third World Legal Studies Journal, Special Issue on Reconstruction and Reparations in International Law* (2000-2003) (Australia); Joe Williams, *Truth, Reconciliation and the Clash of Cultures in the Waitangi Tribunal*, *Austl. & N.Z. Law and History E-Journal* (2005) (Britain-New Zealand); Shellie K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 *Asian-Pac. L. & Pol'y J.* 23 (2002) (Japan); Eric K. Yamamoto and Ashley Kaiyo Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 *Asian Am. L.J.* (forthcoming Spring 2009) (United States and Japan).

¹⁰ For example, state and territorial governments in Australia committed to reconciliation with Australia's aboriginal people, and the national government created the Council for Aboriginal Reconciliation and established a local government accountability regime. Council for Aboriginal Reconciliation Act of 1991, 1991 (Austl.); *Reconciliation: Australia's Challenge*, Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament (Dec. 2000).

emerging democracies transitioning from repressive regimes.¹¹

One commonality among these varying reconciliation efforts is that they are undertaken to establish or enhance a government's stature as a democracy committed to civil and human rights through reparatory justice. Eric K. Yamamoto, et al., *American Reparations Theory and Practice at the Crossroads*, 44 Cal. West. L. Rev. 1 (2007); Bradford, *supra*. A second commonality is the belief that reconciliation can be a win-win process if all engage in good faith – healing the wounds of those injured while lessening social divisions, guilt and mistrust and rebuilding community for the benefit of all. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. Rev. 323, 397 (1987).

A third commonality is that these reparatory initiatives are not mere expressions of hope or general policy. The initiatives are authorized by law and reflect a commitment to social healing through the rule of law. Hlengiwe Mkhize, *Introductory Notes to the Presentation of the Truth and Reconciliation Commission's Proposed Reparation and Rehabilitation Policies*, in *When Sorry Isn't Enough* 501-02 (Roy

¹¹ See *The Handbook of Reparations* 3-4 (Pablo de Greiff ed., 2006) (reparations/reconciliation initiatives in the transitioning democracies in Argentina, Chile, Brazil, El Salvador, South Africa and Malawi).

L. Brooks ed., 1999) (“The legal basis for reparations [is the legislative Act] . . . which gives us our mandate . . . to provide for the ‘taking of measures aimed at the granting of reparations to, and the rehabilitation and the restoration of the human and civil dignity.’”); Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. § 1989) (1988) (Japanese American internment redress, encompassing acknowledgments, an apology, reparations and public education).

While reconciliation laws often do not specify the particular outcomes of the process, they do mandate that a government affirmatively engage in both words and actions – so that the government’s commitment does not dissolve into words alone and an attempt at achieving “cheap grace.” Eric K. Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* 194-195 (2000). Some reconciliation laws do detail specific claims for resolution – for instance, the Hawaii Constitution and legislation expressly identify resolution of Hawaiian claims to ceded lands as part of the reconciliation process. *See* 1997 Haw. Sess. L. Act 329, § 1.

A fourth commonality is that although there is no set formulation, this law-created and -guided reconciliation process constitutes a commitment to reparatory justice, and it generally encompasses stages or dimensions. Those stages or dimensions, which are integral to genuine reconciliation, are *recognition*, *responsibility*, *reconstruction* and *reparations*. Yamamoto, *Interracial Justice*, *supra*, at 172. This multi-dimensional process

is grounded in many disciplines, including theology, social psychology, history, economics, law, sociology, political theory and indigenous healing practices.¹² And it is employed in varying ways by governments engaged in redress efforts throughout the world. See Brief of *Amici Curiae* Asian American Justice Center, et al. in Support of Respondent, in *State v. Office of Hawaiian Affairs*, No. 07-1372 (describing global sweep of reconciliation initiatives responding to historic injustices that include acknowledgments and apologies).

¹² See, e.g., John Dawson, *Healing America's Wounds* (1994) (theology); Donald W. Shriver, *An Ethic for Enemies: Forgiveness in Politics* (1995) (theology and political theory); Elizar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2000) (history and cultural studies); Harlon Dalton, *Racial Healing* (1995) (critical race theory); Rebecca Tsosie, *Engaging the Spirit of Racial Healing within Critical Race Theory: An Exercise in Transformative Thought*, 11 Mich. J. Race & L. 21 (2005) (Native American law); Judith Lewis Herman, *Trauma and Recovery* (1992) (social psychology); Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (2004) (law and theology); *When Sorry Isn't Enough: The Controversy Over Apology and Reparations* (Roy L. Brooks ed. 1999) (law); Alfred Brophy, *Reparations Pro & Con* (2006) (law); Emma Coleman Jordan & Angela P. Harris, *Economic Justice* (2005) (economics); *Pacific Indigenous Dialogue: on Faith, Peace, Reconciliation and Good Governance* (Tui Atua Tupua Tamasese Taisi Efi, et al. eds., 2007) (Pacific indigenous people's peace-making and reconciliation); Eric K. Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* (2000) (coalescing multidisciplinary insights into social healing through reconciliation).

More specifically, *recognition* acknowledges ways in which individuals, because of their group identity, continue to suffer pain, fear, shame and anger. It also looks at a grievance's history and decodes stock stories embodying cultural stereotypes that seemingly legitimate injustice. And it examines the ways that institutional structures embody discriminatory or exclusionary policies that deny fair access to jobs, housing and education or promote aggression and the denial of self-determination. Eric K. Yamamoto and Ashley Kaiiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 Asian Am. L.J. (forthcoming spring 2009); Pablo de Greiff, *Justice and Reparations*, in *The Handbook of Reparations* 460 (Pablo de Greiff ed., 2006); Jonathan R. Cohen, *Coping With Lasting Social Injustice*, 13 Wash. & Lee J. Civ. Rts. and Soc. Just. 259 (2007).

Responsibility entails an assessment of "power over" others and an acceptance of responsibility for repairing the damage of "disabling constraints" imposed on others through power abuses. It reflects a duty to heal group-based wounds, whether grounded in personal culpability, receipt of privileges and benefits, or a simple need to rebuild community. Yamamoto, *Interracial Justice*, *supra*, at 185-190; Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 Colum. L. Rev. 973 (2002).

Reconstruction aims to build a new productive relationship. It includes apologies and other acts of atonement (if appropriate), a joint re-framing of history of interactions and, most important, the reallocation of political and economic power. Yamamoto & Obrey, *supra*; Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. Rev. 1419 (2007). The power restructuring aims to remake institutions to assure non-repetition of the underlying abuses through “legislative or other reforms affecting the state’s social, legal or political institutions and policies.” Arturo J. Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, in *The Handbook of Reparations*, at 526-527.

Finally, *reparations* include money but encompass much more (potentially including restoration of property, rebuilding culture and economic development, as well as educational and financial support for individuals and communities in need). In other words, reparations often encompass restitution, rehabilitation and monetary payments. *See* Carrillo, *supra*, at 512; Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006). In addition, public education can be an integral component of reparations, whether in the

form of memorials, school curricula, media presentations or scholarly publications.

In most situations, in order to heal social wounds, policymakers, groups and the general populace collectively need to fully engage all of these “Four Rs.” Otherwise, even the most sincere healing efforts will likely be experienced as incomplete and insufficient and ultimately judged a failure. Yamamoto, *Interracial Justice, supra*, at 162.

The Hawaii Supreme Court has not expressly embraced a particular framework of reconciliation. Nevertheless, its choice of reconciliation language in describing the State’s commitment indicates resonance with the foregoing approach.¹³ According to this

¹³ The Hawaii Supreme Court generally endorsed the reconciliation approaches contemplated by both the State and Federal governments, encompassing the dimensions of recognition, responsibility, reconstruction and reparatory action. The court first highlighted the importance of governmental *recognition* of past injustices and the acceptance of *responsibility* for repair. It “believe[d] Congress has *clearly recognized* that the native Hawaiian people have unrelinquished claims over the ceded lands which were taken without consent or compensation[.]” 177 P.3d at 901 (citing Pub.L. No. 103-150, 107 Stat. 1510) (emphasis added). “Equally clear” for the court was “Congress’s ‘express[ed] . . . 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 [n]ative Hawaiian people.’” *Id.* at 901-02 (quoting Pub.L. No. 103-150, 107 Stat. 1510). The Hawaii court also highlighted the importance of the State’s acknowledgment of harms to Hawaiians: “The legislature recognizes that the *lasting reconciliation* so desired by all people of Hawai‘i

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is possible only if it *fairly acknowledges the past* while moving into Hawaii's future.'" *Id.* at 904 (quoting 1997 Haw. Sess. L. Act 329, § 1 at 956).

The Hawaii court also cited federal and state enactments highlighting the dimensions of *reconstruction* and future *reparatory action*. It referred specifically to the federal *From Mauka to Makai* report in which the Departments of the Interior and Justice acknowledged *responsibility* for repair and recommended further *reconstruction* and *reparation*: "For generations, the United States has *recognized the rights and promoted the welfare* of [n]ative Hawaiians as an indigenous people within our nation through legislation, administrative action, and policy statements. To safeguard and enhance [n]ative Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should *enact further legislation* to clarify [n]ative Hawaiians' political status and to *create a framework for recognizing a government-to-government relationship* with a representative [n]ative Hawaiian governing body.'" *Id.* at 903 (quoting *From Mauka to Makai: The River of Justice Must Flow Freely: Report on the Reconciliation Process between the Federal Government and Native Hawaiians*, Oct. 23, 2000) (emphasis added). Some Hawaiian groups strongly support federal recognition, while others thoughtfully and forcefully argue that the governmental restructuring envisioned by the Departments and related legislation fail to provide the Hawaiian people with genuine independence. Gordon Y.K. Pang, *Hawaiian Independence Groups Send 'No' Message*, Hon. Adv., Jul. 1, 2005.

The court also emphasized the State's comprehensive commitment to *recognition, reconstruction* and *repair* through its legislative acts: "The [state] legislature '*acknowledged* that the actions by the United States were illegal and immoral, and *pledge[d] its continued support* to the native Hawaiian community by *taking steps to promote the restoration* of the rights and dignity of native Hawaiians.'" *Id.* (quoting 1993 Haw. Sess. L. Act 354, § 1 at 999-1000) (emphasis added). Moreover, as cited by the court, "the people of Hawai'i through amendments to their state constitution, the acts of their legislature, and other

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approach, the State committed itself through law to a process encompassing recognition of past and present harms, acceptance of responsibility for repair and social healing, reconstruction of institutional relationships and reparatory action.

As the state legislature and judiciary have instructed, upon reconstruction of a new institutional relationship (through recognition of a self-governing representative of the Hawaiian people), one key aspect of the commitment to reparatory action is the resolution of Hawaiians' "unrelinquished claims" to ceded lands held in trust by the State. *OHA*, 177 P.3d at 922-23, 926; 1997 Haw. Sess. L. Act 329, § 1.

means, have moved substantially toward this permanent reconciliation.'" *Id.* at 904 (quoting 1997 Haw. Sess. L. Act 329, § 1 at 956). As the court emphasized, the State sought to "continue this momentum, through *further executive and legislative action* in conjunction with the people of Hawaii,'" *id.*, "toward a *comprehensive, just, and lasting resolution*' regarding native Hawaiian claims to the ceded lands." *Id.* at 923 (quoting 1997 Haw. Sess. L. Act 329, § 1 at 956) (emphasis in original). The court recognized that the Hawaii legislature "*contemplated further action . . . to reach a 'lasting reconciliation so desired by all people of Hawaii.'*" *Id.* (quoting 1997 Haw. Sess. L. Act 329, § 1 at 956).

Thus, the court acknowledged that, without the opportunity for further *reparatory action*, the reconciliation between the State and Native Hawaiians would falter: "Without an injunction, the ceded lands are at risk of being alienated and . . . once the ceded lands are sold or transferred from the public lands trust, they will not be available to satisfy the unrelinquished claims of native Hawaiians and will . . . undoubtedly have a negative impact on the contemplated reconciliation efforts." *Id.* at 922.

As an integral part of reconciliation, the State’s reparatory action obligation does not preordain the ultimate resolution of those ceded lands claims. But it does impose upon the State the duty not to dispose of those trust lands at the heart of the ongoing reconciliation initiative before the State and a Hawaiian representative mutually resolve those claims. Indeed, as the Hawaii Supreme Court acknowledged, the federal Apology Resolution “and related state legislation give rise to *the State’s fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved[]*” as part of the reconciliation process. *OHA*, 177 P.3d at 922 (emphasis added).

B. By Unilaterally Selling Ceded Lands the State Would Renege on a Key Reparatory Aspect of Its Reconciliation Commitment to Mutually Resolve Hawaiians’ Claims to Ceded Lands, and It Would Thereby Breach Its Trust Obligation.

The State – through its constitutional amendment, statutes and high court ruling – “recognized” the historic injustice and persisting harms, accepted at least partial “responsibility” for repair and supported the beginnings of “reconstruction” (through its own sovereignty initiative and its support for federal self-governance legislation). Most important, *OHA*, as

current representative of Hawaiian people and authorized “receptacle for reparations,” and the State commenced the legislatively-directed process of reparatory action in part by focusing on Hawaiian claims for ceded lands income payments and for return of a portion of the trust lands themselves.¹⁴

But the State is now attempting to short-circuit this key aspect of that process. As recognized by the Hawaii Supreme Court, the State’s unilateral attempt to alienate ceded lands undercut the State’s reconciliation commitment to reparatory action. *See OHA*, 177 P.3d at 922, 926. And in doing so it transgressed the

¹⁴ In other areas, the State has engaged in some form of *recognition, responsibility, reconstruction* and *repair* of historic harms to Native Hawaiians. For example, after years of illegal and uncompensated State use of lands in the Hawaiian Homelands trust, Hawaii’s Governor George Ariyoshi cancelled Executive Orders that had improperly withdrawn Homelands from the trust inventory. *See Action Plan, supra*, at 35. After litigation and successful lobbying, in 1995, the Hawaii legislature passed and the Governor approved Act 14, which committed the State to pay \$30 million a year for 20 years, \$600 million total, to the Hawaiian Homelands Trust. *See Act Relating to Hawaiian Home Lands 1995 Haw. Sess. L. Act 14, § 6. See also* Haw. Const. art. XII, § 7 (protecting traditional and customary Native Hawaiian rights); Haw. Const. art. X, § 4 (mandating that the State “promote the study of Hawaiian culture, history and language . . . [and] provide for a Hawaiian education program consisting of language, culture and history in the public schools”); Haw. Rev. Stat. § 6E-43 (1993) (establishing a process for preservation of Native Hawaiian burial sites); Hawaii Advisory Committee to the U.S. Commission on Civil Rights, *Reconciliation at a Crossroads* 23 (June 2001) (identifying State programs designed to assist Native Hawaiians).

will of Hawaii's citizenry, the policies and dictates of the State's legislature and the affirmations of its governors that the State and a representative of the Hawaiian people mutually resolve Hawaiians' "unrelinquished claims" to ceded lands as an integral part of the reconciliation process. *See supra*, Section I.

On the precipice of renegeing on a key aspect of the State's reconciliation commitment through its attempted sale of ceded lands – challenged here by OHA and individual trust beneficiaries – the State was poised to breach its trust obligation. As the Hawaii court determined, "any future transfer of ceded lands by the State would be a breach of the State's fiduciary duty to preserve the trust res." *OHA*, 177 P.3d at 922.

By ascertaining and applying state law on reconciliation, as it relates to public trust lands, the Hawaii Supreme Court did not dictate how the State and the Hawaiian people will resolve the claim to ceded lands. But it did preserve the heart of that claim – the possibility of return of the actual ceded lands taken by the United States as a result of the admittedly "illegal overthrow" of the Hawaiian nation and now held in trust by the State – until the claim is mutually resolved. *See id.* at 927.

In light of the State's commitment to reconciliation and impending state law breach of trust, the Hawaii court properly ordered injunctive relief to allow the "state legislature a 'reasonable opportunity to craft and enforce,' . . . relevant laws consistent with

the congressional and legislative calls for reconciliation and settlement of native Hawaiian [ceded lands] claims.” *Id.* at 918 (citation omitted).

III. THE HAWAII SUPREME COURT’S INJUNCTION ORDER CAN AND THEREFORE SHOULD BE AFFIRMED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

The Hawaii Supreme Court’s decision now on appeal rested independently on state law. The court’s breach of trust ruling embraced an evolving conception of state public trust law. *Id.* at 905 (quoting *Ahuna v. Dep’t of Hawaiian Homelands*, 640 P.2d 1161, 1170 (Haw. 1982) regarding the State’s “obligation to use reasonable skill and care to make trust property productive”). The court articulated the State’s public trust obligation where a State commitment to reconciliation encompasses mutual resolution of beneficiaries’ historically-rooted unrelinquished claims to return of the unique trust res. This state law, specifically tailored to the historical context and present circumstances of this case, is adequate to sustain the Hawaii court’s judgment. This Court, therefore, lacks federal question jurisdiction over the appeal. 28 U.S.C. § 1257. Alternatively, if it determines that jurisdiction exists, this Court can affirm the Hawaii Supreme Court’s judgment on the basis of state law. *See Long*, 463 U.S. at 1040-42.



CONCLUSION

For the foregoing reasons, *Amici* urge this Court to dismiss the petition, or in the alternative, affirm the judgment of the Hawaii Supreme Court.

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