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 THE NATIVE HAWAIIAN LEGAL CORPORATION, ASSOCIATION OF HAWAIIAN CIVIC CLUBS, HAWAIʻI MAOLI, NATIVE HAWAIIAN CHAMBER OF COMMERCE, ʻILIOʻULAOKALANI COALITION, COUNCIL FOR NATIVE HAWAIIAN ADVANCEMENT, AND I MUA GROUP IN SUPPORT OF RESPONDENTS

CATHERINE E. STETSON *
JESSICA L. ELLSWORTH
RUBY Z. SHELLAWAY
HOGAN & HARTSON LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600

* Counsel of Record

Counsel for Amici Curiae

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INTERESTS OF AMICI CURIAE [1]

[1] Pursuant to Rule 37.3(a), counsel for *amici* states that the parties have consented to the filing of all *amicus* briefs. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* Native

Amici curiae include the following native Hawaiian organizations:

The Native Hawaiian Legal Corporation ("NHLC") is a non-profit, public interest law firm incorporated in 1974 to assert, protect, and defend Hawaiian land, water, and traditional rights. It is the only law firm in the state of Hawai'i that focuses on native Hawaiian rights; it provides legal assistance to families and communities engaged in perpetuating the culture and traditions of Hawai'i's indigenous people. NHLC's mission is to strengthen and enhance the lives of native Hawaiians and native Hawaiian communities through the protection and recovery of ancestral and trust lands, and the preservation of customs and practices vital to the perpetuation of Hawai'i's indigenous people.

The Association of Hawaiian Civic Clubs is the oldest Hawaiian community-based grassroots organization. It traces its beginnings to 1918, when the then non-voting Delegate to the United States House of Representatives, Prince Jonah Kūhiō Kalaniana'ole founded the first club. Today, the Association is a confederation of 56 Hawaiian Civic Clubs located throughout the continental United States, Alaska, and Hawai'i. The Association advocates at city, state, and federal levels for native Hawaiians' interests in areas, such as culture, health, economic development, education, housing, social welfare, and nationhood.

Hawaiian Legal Corporation receives a portion of its annual funding from Respondent Office of Hawaiian Affairs.

Hawai‘i Maoli is a non-profit entity of the Association of Hawaiian Civic Clubs that was founded in 1997 to facilitate cultural and educational grants and contracts providing services and support to its parent organization and the native Hawaiian community. Through its capacity as the official repository for the Kau Inoa Native Hawaiian Registration Program, Hawai‘i Maoli receives and maintains all completed Kau Inoa Native Hawaiian Registration forms and supporting documents.

The Native Hawaiian Chamber of Commerce was founded in 1974 to encourage and promote the interests of native Hawaiians. Its mission is to strengthen native Hawaiian businesses and professions through building on a foundation of Hawaiian values.

The ‘Ilio‘ulaokalani Coalition consists of native Hawaiian practitioners who are experts in traditional dance, artists, craftsmen, fishermen, and farmers. ‘Ilio‘ulaokalani is committed to preserving and protecting Hawaiians’ traditional way of life and ancestral rights.

The Council for Native Hawaiian Advancement is a non-profit organization whose membership consists of agencies and organizations that provide direct services to Hawaiians. It arranges for technical training and assistance in the areas of health and human services, housing, community-based economic development, and business development.

The I Mua Group is an organization of native Hawaiian men and women, primarily graduates of the Kamehameha Schools, who are leaders in their communities and professions. It works to promote

and foster programs and causes that will benefit and advance the well being of native Hawaiians.

These Native Hawaiian *Amici* Organizations have participated as *amicus curiae* in other cases before this Court and the Ninth Circuit involving issues relevant to native Hawaiians.[2] *See*, *e.g.*, *Rice* v. *Cayetano*, 528 U.S. 495 (2000); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43 (1997); *Arakaki* v. *Lingle*, 423 F.3d 954 (9th Cir. 2005), *vacated*, 547 U.S. 1189 (2006); *Richardson* v. *City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997).

The issue before the Court is whether the Supreme Court of Hawai'i acted within its authority when it enjoined the State of Hawai'i—under state trust law—from selling or otherwise transferring to third parties any lands currently in the State's public lands trust, based on the existence of unresolved claims to that land and an ongoing reconciliation process, as documented in, *inter alia*, Congress's 1993 Apology Resolution and similar State legislation. The injunction is to remain in place until a political reconciliation process can resolve any claims of unrelinquished title to these ancestral lands transferred at Statehood—including the subsidiary issues of who holds such claims and what the resolution encompasses.

Certain *amici* in support of petitioner, however—disregarding the limited issue that petitioner State

[2] This brief uses the term "native Hawaiian" in the same manner as Petitioners, Respondents, the Hawai'i Supreme Court, and the Apology Resolution—to mean "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i." *Infra* 15.

of Hawai‘i requested the Court review—have attempted to inject issues of who should hold rights as a native Hawaiian during the reconciliation process and what those rights should be, despite the fact such questions were not litigated below and have never been a part of this dispute between the parties to this case. The Native Hawaiian *Amici* Organizations submit this brief to respond to the misplaced arguments of petitioners' outlier *amici*. The equal protection issues that those groups seek to insert into the case at this juncture were neither raised nor ruled on below and cannot and should not be considered on the record in this case. The argument of those *amici* are also wrong on the merits. The issue in this case is not who is entitled to assert unrelinquished claims during the political reconciliation process, or how the unrelinquished-claims settlement process should proceed. Those questions were not asked or answered below—and on the record in this case, are neither ripe nor germane to the issue before the Court.

INTRODUCTION

When Congress admitted Hawai‘i to the Union as the 50th state in 1959, one of the conditions it imposed on the new State was that Hawai‘i hold certain lands granted to it by the United States in a public land trust. *See* Admission Act of Mar. 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4. Those lands included certain crown, government, and public lands that had belonged to the Kingdom of Hawai‘i before its overthrow in 1893. The Supreme Court of Hawai‘i has enjoined the State from alienating the remaining land in the public land trust, until the political reconciliation process has run its course and

settled on an appropriate resolution to unrelinquished claims to those lands—claims that date back to the overthrow of the Kingdom of Hawai‘i.

In 1993, Congress marked the 100th anniversary of the overthrow of the Kingdom of Hawai‘i by enacting a joint resolution—known as the Apology Resolution—seeking to educate the American public "on events surrounding the overthrow" of the Kingdom of Hawai‘i and to "provide for reconciliation between the United States and the native Hawaiian people." 139 Cong. Rec. S. 14,477, 103rd Cong. 1st Sess. (Oct. 27, 1993) (Sen. Akaka). The Apology Resolution detailed the role of the United States in the "illegal overthrow of the Hawaiian monarchy" and role of the "self-declared Republic of Hawaii" in ceding sovereignty of the Hawaiian Islands—and over 1,800,000 acres of crown, government, and public lands of the Kingdom of Hawai‘i—to the United States "without the consent of or compensation to the Native Hawaiian people of Hawai‘i or their sovereign government." Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai‘i, Pub. L. No. 103-150, 107 Stat. 1510 (1993) ("Apology Resolution"). These 1,800,000 acres are referred to as the "ceded lands." As the Apology Resolution acknowledged, "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." *Id.*

Hawai‘i too enacted similar legislation. One state statute, Act 354—titled "A Bill for an Act Relating to Hawaiian Sovereignty"—"acknowledge[d] that the actions by the United States were illegal and immoral, and pledg[ed the State's] continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians." 1993 Haw. Sess. L. Act 354, § 1. Similarly, another state statute, Act 359—also titled "A Bill for an Act Relating to Hawaiian Sovereignty"—was enacted to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing" and recognized that "the indigenous people of Hawaii were denied * * * their lands." 1993 Haw. Sess. L. Act 359, §§ 1-2; *see also* 1993 Haw. H.R. Con. Res. No. 179; 1993 Haw. Sess. L. Act 340, § 2; Pet. App. 35a-40a (discussing relevant State legislation).

After enactment of this federal and state legislation, the Office of Hawaiian Affairs ("OHA") and individual plaintiffs sought to enjoin the State under state trust law from disposing of lands held in the public land trust until the ongoing political reconciliation process could resolve any questions of native Hawaiian claims to the ceded lands. As OHA and the individual plaintiffs pointed out, both the federal and state legislation unambiguously acknowledged that native Hawaiians' claims to their ancestral territory remained unresolved and that reconciliation efforts should be a priority. The trial court, after conducting a bench trial, concluded that the State had express authority to alienate the ceded lands and refused to enjoin the sale or transfer of lands from the trust. Pet. App. 3a.

The Supreme Court of Hawai‘i reversed and held that an injunction was warranted under state trust law. The issue, as presented to that court, was whether the State of Hawai‘i has a fiduciary duty, as trustee of the public lands trust, to preserve the corpus of the trust until the unrelinquished claims of the native Hawaiians have been resolved through the political process. Pet. App. 58a. The Supreme Court of Hawai‘i held that the State has such a fiduciary duty under State constitutional and statutory trust law, citing the Apology Resolution and related State legislation for support. Pet. App. 41a. The plaintiffs, as the court emphasized, "repeatedly made clear" that they were "not asking this court to return the ceded lands to the possession of the plaintiffs," but were only seeking an injunction barring alienation of the trust corpus until any unrelinquished claims are "resolved via the reconciliation process contemplated by the Apology Resolution and related state legislation." Pet. App. 69a; *see also* Pet. App. 73a (the plaintiffs "are not seeking a determination whether the native Hawaiian people are entitled to ownership of the ceded lands"). In granting the injunction, the Supreme Court went out of its way to note that "the issue of native Hawaiian title to the ceded lands will be addressed through the political process." Pet. App. 87a-88a. The court therefore would "not speculate" as to how that issue might ultimately be resolved. Pet. App. 88a.

The State of Hawai‘i petitioned for a writ of certiorari. It asked the Court to review whether the Apology Resolution could be a basis for "strip[ping] Hawaii of its sovereign authority to sell, exchange, or transfer" land held in the public land trust until the

State "reaches a political settlement with Native Hawaiians about the status of that land." Pet. i. The State contended that the Supreme Court of Hawai'i erred in "construing this federal apology to impair Hawaii's sovereign prerogatives" to sell or transfer land from the State's trust. Pet. 3; *see also id.* at 11. The Court granted certiorari on this statutory interpretation issue.

ARGUMENT

I. THE SOLE QUESTION PRESENTED FOR REVIEW IS WHETHER THE SUPREME COURT OF HAWAI'I CORRECTLY INTERPRETED THE APOLOGY RESOLUTION IN ITS RULING.

A. The Court Does Not Decide Questions Neither Raised Nor Decided Below.

A few of the State's *amici* have engaged in a misguided effort to inject certain constitutional questions into the case, in hopes that they can bring into contention a complex, unripe, and unbriefed issue: whether an entire cadre of federal and state legislation that use the term "native Hawaiian" are constitutional.[3] Because neither the trial court nor

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[3] For instance, *amicus* Pacific Legal Foundation ("PLF") asks the Court to hold unconstitutional an array of statutes enacted over the last eighty-eight years—ranging from the Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921), to the Hawai'i Admission Act of 1959, to the provision of the Hawai'i constitution creating OHA (Haw. Const., Art. XII, § 5) added by constitutional amendment in 1978, to the 1993 Apology Resolution. PLF *Amicus* Br. at 12-13. Similarly, *amicus* Grassroot Institute of Hawai'i ("GIH") seeks a ruling from the Court that the Hawai'i Const., Art. VII, §§ 4, 5, and 6, Haw. Rev. Stat. § 10-13.3, and "all other State laws purporting

the Supreme Court of Hawai'i were asked to resolve this question, it should not be decided by this Court either.

"It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969) (citing cases dating back to *Owings* v. *Norwood's Lessee*, 9 U.S. (5 Cranch) 344 (1809)). From those early days, the Court has "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision' " under review. *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997)); *see also Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973) (refusing to address issues not presented to state supreme court because "[w]e cannot decide issues raised for the first time here").

This rule is related to the Court's more general " 'not pressed or passed upon' rule" and is supported by the same "sound justifications." *Illinois* v. *Gates*

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to give Hawaiians or native Hawaiians any right title or interest in the Ceded Lands Trust not given equally to other beneficiaries are unconstitutional and void." GIH *Amicus* Br. 35. And *amicus* Mountain States Legal Foundation ("MSLF") requests the Court declare that "Congress is legally and factually incorrect" as to the United States government's relationship with native Hawaiians, because (in its view) "the United States has no legally cognizable relationship with persons of Hawaiian ancestry at all"—thereby rendering unconstitutional every federal legislative act benefiting native Hawaiians. MSLF *Amicus* Br. 6-7.

462 U.S. 213, 222 (1983).[4] One such justification is the scope of the record: where an issue was not pressed below, the Supreme Court declines to take the first crack at making fully informed factual findings. *See id.* at 221 (emphasizing that " 'questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind' ") (quoting *Cardinale*, 394 U.S. at 439). Another is the "important interest" in comity. *Adams*, 520 U.S. at 90. When the review sought is from a state court, " 'due regard for the appropriate relationship of this Court to state courts' " requires that constitutionality of state law and state actions be first considered in the courts of that state. *Gates*, 462 U.S. at 221-222 (quoting *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-436 (1983)).

Both considerations—record and comity—apply with force here. There is no question that the Hawai'i courts were never presented with nor asked to rule on any constitutional or equal protection issues related to native Hawaiian rights. Nor was a record developed that would support a ruling on this issue. Therefore, as in *Rice*, 528 U.S. at 521-522, the Supreme Court should assume without addressing the validity of statutory benefits for native

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[4] This Court has made clear over and over that it is not a forum to raise new issues not litigated in the lower courts and that it "do[es] not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *see also Fitzgerald* v. *Barnstable Sch. Committee*, -- S. Ct. --, 2009 WL 128173, at *10 (Jan. 21, 2009) (same); *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1011 (2008) (same); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 194 (2007) (same). This well-established rule should bar consideration of *amici*'s constitutional arguments.

Hawaiians and address only the question that is before the Court.

Undeterred by either the undeveloped record or the fact that Petitioners do not raise this issue, *amicus* PLF asks the Court to engage in a strict scrutiny analysis and conclude not only that all legislation concerning native Hawaiians is unconstitutional, but also that any claim to ceded lands by a "native Hawaiian" or "Hawaiian" is "invalid." PLF *Amicus* Br. 8. No record was developed that would support any sort of constitutional analysis—let alone a finding of unconstitutionality—as to any of these enactments or potential land claims.[5] Equally off base is *amicus* GIH's proposal that the Court address the constitutional issues to remedy the fact that Hawai'i—the Petitioner—"did not raise the constitutional" arguments in the Hawaii state courts. GIH *Amicus* Br. 2. And finally, MSLF is calling for a holding that the Apology Resolution is unconstitutional on the theory that had Congress been asked to provide support for a compelling interest, it would not have been able to do so. MSLF *Amicus* Br. 39-40. Such a wholly unprecedented and utterly irrational rule of judicial review—that the

[5] The lack of record is especially obvious when PLF accuses OHA of failing to provide "sufficient evidence of a compelling interest" and failing to show that OHA cannot devise a narrowly tailored, individualized procedure. *Id.* at 16. The lack of evidence is for a simple reason: OHA was not asked to address, or compile a record to establish, either a compelling interest or narrow tailoring; the issue was not being litigated before the Hawai'i courts in this case. And a particularized inquiry and record would be necessary as the various statutes include both broader and narrower definitions of native Hawaiians. *Compare* Hawaiian Homes Commission Act § 201(7) *and* Admissions Act § 5(f) *with* Apology Resolution § 2.

Court can simply declare the rights of parties without waiting for the facts to be developed—is not how this Court's review works; nor is it how a constitutional analysis proceeds at any level of judicial review, state or federal. Questions not raised or decided below should not be addressed now.

B. The Court Considers Only Questions That Are "Fairly Included" In The Question Presented In The Petition.

There is another reason not to indulge the exhortations of these *amici* to expand the issues in the case at this stage. The sole question presented is a straightforward one of statutory interpretation: whether the Hawai'i Supreme Court erred in interpreting facts recited in the Apology Resolution as support for enjoining the State from selling ceded lands until the political reconciliation process has run its course. Pet. i. This case is not about what the ultimate settlement might involve, who might be parties to it, or whether native Hawaiians should be granted self-governance and self-definition rights akin to the federally recognized Indian tribes. Those questions, and the framework within which their answers will be rendered, are not presented here.

Yet *amici* PLF, GIH, and MSLF take the unusual—and improper—stance of requesting that the Court ignore the fact the State did not raise below and did not seek review of any of those questions. In fact, despite the State's explicit repudiation of these *amici*'s contentions (Hawai'i Br. 27 n.16), *amici* MSLF, PLF, and GIH assert that this Court should opine on their issues anyway. *See* GIH *Amicus* Br. 5; MSLF *Amicus* Br. 2-3; PLF *Amicus* Br. 17. This Court's rules suggest otherwise.

Rule 14.1(a) specifies that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. Rule 14.1. The Court has made clear what this rule means: Unless a question is "fairly included" in the question presented, Rule 14.1 prevents the Court from reaching it. *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 352 n.13 (2005) (citing Rule 14.1 and *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42 n.5 (1998)). Under this rule, even a question that is " 'complementary' or 'related' to the question presented in the petition for certiorari is not ' "fairly included therein." ' " *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (quoting *Yee* v. *Escondido*, 503 U.S. 519, 537 (1992)).

As the Court has previously explained, it has good reasons for maintaining this limitation: it would thwart "the integrity of the process of certiorari" to permit parties—or in this case, *amici*—to alter at the merits stage the issues on which certiorari was granted. *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992); *accord Irvine* v. *California*, 347 U.S. 128, 129-130 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari.").

The Court should hew to its standard practice of not permitting new questions to be inserted after the writ of certiorari has been granted. The *amici* supporting petitioner who are attempting to "smuggl[e]" into the case new (and undeveloped) constitutional questions are asking this Court to deviate from its rules. *Id.* But such "analytically and factually" distinct questions have no place at this

stage of the case and should not be addressed by the Court under Rule 14.1. *See Izumi Seimitsu*, 510 U.S. at 32.

If there were any question about the scope of the question presented, moreover, Petitioners and the Solicitor General rebuff these *amici*'s assertion that the case constitutes a referendum on how federal and Hawaiian law deal with native Hawaiian issues. Petitioners' opening brief confirms that the question of *which* Hawaiian citizens may hold unrelinquished claims is not before the Court. Hawai'i Br. 7 n.4; *id.* 27 n.16 (disclaiming any attempt by an amicus brief to challenge constitutionality of governmental programs directed at native Hawaiians and confirming this issue is not before the Court). For that reason, Petitioners use the term "native Hawaiian" as Congress used it in the Apology Resolution: to mean "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i." Hawai'i Br. 7 n.4; Apology Resolution § 2. The Supreme Court of Hawai'i did the same thing. Pet. App. 6a. As all parties recognized below and here, the state-law distinction between the terms "Hawaiian" and "native Hawaiian" is not essential or relevant to the issues presented in this case. Hawai'i Br. 27 n.16; OHA Br. 3 n.1, 7 n.2.

The brief of the Solicitor General further confirms that the question presented is one of statutory interpretation, wholly unrelated to issues requiring analysis of any " 'ancestral inquiry.' " U.S. Br. 22 n.3. The Government explains that the case does not involve any challenge "to the constitutionality

of special statutory provisions for the benefit of native Hawaiians (especially provisions approved by Congress); the only question is whether the state-court injunction is contrary to the governing Acts of Congress[.]" *Id.*[6]

Rule 14.1 limits review to the question presented, or fairly considered therein. Petitioners have confirmed that their question presented does not speak to, or fairly include, constitutional equal protection issues. Their *amici*'s efforts to introduce such questions at this late stage of the game—and on an undeveloped record—should be rejected.

C. No Consideration Is Due To Claims Raised Solely By *Amicus Curiae*.

There is yet a third reason to disregard the equal protection discourse offered by some of petitioner's *amici*. The Court has repeatedly expressed its reluctance to consider arguments raised only in

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[6] In emphasizing that the Court should assume the "substantive validity" of various federal and state statutes discussing the term "native Hawaiian," the Solicitor General also notes that federal law has at times inconsistently defined the term; the definition in the Admissions Act, for example, is narrower than the definition in the Apology Resolution, which is the one the Supreme Court of Hawai'i used in interpreting that Resolution. U.S. Br. 22 n.3. *Compare* Hawaiian Homes Commission Act § 201(7) (native Hawaiian includes "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778) *with* the Apology Resolution § 2 (native Hawaiian includes "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i"). This inconsistency, not challenged or addressed below, is yet another reason the validity of statutory provisions for the benefit of native Hawaiians is not before the Court.

amicus briefs. *See Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001) (declining to address argument for reversal raised solely by *amici* that "was not raised or decided below, or presented in the petition for certiorari"); *Kamen* v. *Kemper Fin. Servs.*, *Inc.*, 500 U.S. 90, 97 n.4 (1991) (leaving "for another day" issue raised only by government as *amici* seeking reversal); *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 61 n.2 (1981) (declining to consider argument for reversal raised only by *amici* "since it was not raised by either of the parties here or below"); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979) (holding that Court had "no occasion to reach" issue that was not "urged by either party in this Court"); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960) (holding that Court has "no reason to pass upon" issue raised by *amicus* but not by petitioner). The State of Hawai'i did not raise—and indeed expressly disclaimed—the complex constitutional questions *amici* seek to introduce here. This is further confirmation that the Court should decline to address those questions.

II. *AMICI* SEEKING REVERSAL ON CONSTITUTIONAL GROUNDS ARE ALSO WRONG ON THE MERITS.

The view of the State's *amici* is also incorrect on the law and the facts, and the Native Hawaiian *Amici* Organizations cannot permit that view to go unanswered.

Benefits provided to native Hawaiians under federal or state law, including unrelinquished land claims, are benefits based on political status—not race—and are rooted in the governance of the once-sovereign political community in the Kingdom of

Hawai‘i. Such benefits may be constitutionally accorded to native Hawaiians. *Amici* are legally and factually incorrect to contend otherwise.

A. Congressional Legislation Benefiting Descendants Of The Native Populations Of The United States Is Constitutional.

For over two hundred years, the United States has recognized certain legal rights and protections for America's indigenous peoples. Indeed, the Constitution allocates to Congress "plenary power over Indian affairs." *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998). This includes the power to recognize and define tribal status, as well as "restore[ ] previously extinguished tribal status—by re-recognizing a Tribe whose tribal existence it previously had terminated." *United States* v. *Lara*, 541 U.S. 193, 203 (2004); *see also Cohen's Handbook of Federal Indian Law* §§ 3.02[2], [8][c] at 137, 168 (2005 ed.) (discussing variation in how federal government has defined, recognized, and restored the tribal status of various native populations).[7] Congress has undertaken an enhanced duty of care for all of America's indigenous peoples based on their prior sovereignty and their status as the original inhabitants of the lands the United States acquired. *See*, *e.g.*, Report of the Committee on Indian Affairs, S. Rep. No. 110-260 at 7 (Feb. 5, 2008); *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913).

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[7] Congress relied on its plenary authority, for example, in enacting the Alaska Native Claims Settlement Act, Pub. L. 92-203 (1971), as amended, 43 U.S.C. §§ 1601, *et seq.*

This Court has repeatedly recognized that the benefits Congress accords Native Americans, under its enhanced duty of care, do not reflect an impermissible racial preference. In *Morton* v. *Mancari*, 417 U.S. 535 (1974), for example, when reviewing a hiring preference for Native Americans at the Bureau of Indian Affairs, this Court held that the preference was not a "racial preference"; "the preference [was] political rather than racial in nature" and was based on tribe members' "unique legal status" under federal law. 417 U.S. at 554-555 & n.24.

A few years later, in *United States* v. *Antelope*, 430 U.S. 641, 645 (1977), this Court clarified that "[t]he decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." It went on to explain that "[q]uite the contrary" is true: "classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians." *Id.* (internal footnote omitted). Classifications for Indian tribes are based on the "governance of once-sovereign political communities" and are "not to be viewed as legislation of a 'racial group consisting of Indians.' " *Id.* at 646. Thus Congressional authority to legislate on behalf of Native Americans is related in large part to the prior sovereign status of the Native American tribes.

B. Congressional Legislation Benefiting Native Hawaiians Is Likewise Constitutional.

i. Prior to Western intervention, native Hawaiians were a sovereign people.

When Captain James Cook arrived on the shores of Hawai‘i in 1778, he found a Hawaiian people whose cultural and political structures had developed over more than 1,000 years. *Rice*, 528 U.S. at 500. Hawaiian society had "its own identity, its own cohesive forces, its own history." *Id.* The islands were soon united as the Kingdom of Hawai‘i under the leadership of Kamehameha I in 1810. *Id.* at 501. In the years that followed, the United States and the Kingdom established a government-to-government relationship. Though other nations had interests in Hawai‘i, *id.* at 504, by the latter part of the nineteenth century, Americans had gained control over three-fourths of Hawai‘i's commerce and most of its available land, as well as dominating political discourse. *See* U.S. Br., *Rice* v. *Cayetano*, 1999 WL 569475 at *2 (hereinafter "U.S. *Rice* Br.").

The social and economic changes in Hawai‘i had a devastating effect on native Hawaiians. *Id.* In 1893, Queen Lili‘uokalani sought to introduce a new constitution that would reestablish native Hawaiian control over governmental affairs. Fearing a loss of power, a group representing American commercial interests overthrew the monarchy. They were aided by the United States Minister to Hawai‘i, who ordered armed U.S. naval forces to invade Hawai‘i. *Id.* at *2-*3.

The American interests established a provisional government, which the United States Minister

immediately recognized as a United States protectorate. *Id.*; *see also* Apology Resolution, 107 Stat. at 1511. In 1894, the provisional government declared itself the Republic of Hawai'i. *Id.* at 1512. In 1898, Congress enacted a joint resolution annexing Hawai'i, signed by President McKinley, and the Republic of Hawai'i ceded sovereignty over the Hawaiian Islands to the United States. *Id.*

The Apology Resolution was enacted to recognize and apologize for the role that agents and citizens of the United States played in the "illegal" overthrow, which "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people" and "the deprivation of the rights of Native Hawaiians to self-determination." *Id.* at 1513.

ii. Native Hawaiians have the same rights and privileges accorded to other Native American communities.

The United States has long recognized that native Hawaiians are entitled to many of the same rights and considerations as other indigenous American peoples. *See*, *e.g.*, S. Rep. 110-260 at 7, 15; U.S. *Rice* Br. at *9 ("Congress has identified Native Hawaiians as a distinct indigenous group within the scope of its Indian affairs power, and has enacted dozens of statutes on their behalf pursuant to its recognized trust responsibility.").[8] Indeed, Congress enacted the

[8] While native Hawaiians do not currently have a recognized governmental body, several significant steps have recently been taken in that direction. For example, after the Apology Resolution, the Department of the Interior and the Department of Justice issued a report recommending "[a]s a matter of justice and equity" that "Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes." Dep't of the

first law benefiting native Hawaiians, the Hawaiian Homes Commission Act, shortly after the creation of the new Territory. Since then, Congress has enacted over 150 statutes addressing the conditions of native Hawaiians and providing them with benefits. S. Rep. 110-260 at 7, 19; *see also* U.S. *Rice* Br. at *4 ("Since Hawaii's admission into the Union, Congress has continued to accept responsibility for the welfare of Native Hawaiians" and "has established special Native Hawaiian programs in the areas of health care, education, employment, and loans.").

The entire premise of *amici*'s argument seems to be that native Hawaiians are not currently a federally recognized "Indian tribe." *See*, *e.g.*, PLF *Amicus* Br. 23-28; MSLF *Amicus* Br. 32-33. That distinction is misplaced. The "historical and unique legal relationship [between the United States and native Hawaiians] has been consistently recognized and affirmed by the Congress through the enactment of Federal laws which extend to the Hawaiian people *the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities*." 42 U.S.C. § 11701(19) (citing the Native American Programs Act of 1974, 42 U.S.C. §§ 2991, *et seq*.; the American Indian Religious Freedom Act, 42 U.S.C. § 1996; the National Museum of the American Indian Act, 20 U.S.C.

Interior & Dep't of Justice, *From Mauka to Makai: The River of Justice Must Flow Freely* at 17 (Oct. 23, 2000). And multiple bills have been introduced in the House and Senate to provide that framework, most recently in 2007; the 2007 bill passed in the House and was referred to the Senate; the Senate voted the bill out of Committee, but it did not reach a full vote before the end of the Session. Native Hawaiian Gov't Reorg. Act of 2007, S. 310, 110th Cong. (2007); H.R. 505, 110 Cong. (2007).

§§ 80q, *et seq*.; and the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001, *et seq*.) (emphasis added). Thus, while native Hawaiians may not currently exercise self-governance in the formal manner of federally-recognized Indian tribes, Congress has repeatedly enacted statutes confirming the similarity of their status and has recognized native Hawaiians as a " 'distinct and unique indigenous people.' " U.S. *Rice* Br. at *4-*5 (citing statutes).[9]

As the United States explained in *Rice*, "the existence of a [recognized] tribal government * * * is not a necessary predicate for the exercise by Congress itself of its unique power to fulfill the Nation's obligation toward indigenous people." *Id.* at *18.[10] Congress is therefore free to exercise its plenary authority on behalf of native Hawaiians just

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[9] *See*, *e.g.*, 20 U.S.C. § 7512(1) ("Native Hawaiians are a distinct and unique indigenous people[.]"); 42 U.S.C. § 11701(1) (same); 20 U.S.C § 7512(12)(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[.]"); 42 U.S.C. § 11701(13) (the Hawaiian Homes Commission Act "affirm[ed] the trust relationship between the United States and the Native Hawaiians" as confirmed by the Committee Report explaining that " 'natives of the islands [ ] are our wards' "), *id.* § 11701(20) ("The United States has also recognized and reaffirmed the trust relationship to the Hawaiian people through legislation which authorizes the provision of services to Native Hawaiians[.]").

[10] The Court in *Rice* assumed without deciding that Congress could treat Hawaiians or native Hawaiians as a tribe, 528 U.S. at 519, but went on to hold that even if they were a tribe, tribal status could not be a basis for limiting voting for a State's public officials under the Fifteenth Amendment. *Id.* at 520.

as it would any other Native American group, and *amici* have no legal basis to suggest otherwise. Indeed, the United States has explained that for native Hawaiians, any requirement "that there be a recognized tribal government would be particularly unjustified" because the United States' trust obligation to native Hawaiians arose from its "responsibility for the destruction of their government and the unconsented and uncompensated taking of their lands." *Id.* Congress directs many services and benefits to native Hawaiians; it does not do so "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." *Id.* at *10; *accord* 20 U.S.C. § 7512(12)(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"); Hawaiian Homelands Homeownership Act of 2000, Pub. L. 106-569, § 512, 114 Stat. 2944, 2966-69 (2000) (Congressional findings in support of 25 U.S.C. § 4221) (same).

The United States continues to recognize its special relationship with, and heightened sense of duty to, the indigenous people of Hawai'i—a duty it reaffirmed in the Apology Resolution. *Amici*'s attempt to re-write the history and the present for native Hawaiians is a deeply misguided effort. The United States' position is clear and unambiguous: "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 claim to its

sovereignty or its sovereign lands." U.S. *Rice* Br. at *9. The history of our Nation's trust relationship with the native Hawaiian people renders "native Hawaiian" a permissible political classification similar to those recognized by this court in *Mancari* and *Antelope*. Contrary to *amici*'s because-we-say-so assertions—"native Hawaiian" is something far different, and far richer, than a mere racial classification.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Hawai'i should be affirmed.

Respectfully submitted,

CATHERINE E. STETSON *
JESSICA L. ELLSWORTH
RUBY Z. SHELLAWAY
HOGAN & HARTSON LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600

* Counsel of Record

Counsel for Amici Curiae