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 FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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JANUARY 29, 2009

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QUESTION PRESENTED

Whether the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawaii strips the State of Hawaii of its authority to sell lands ceded to it by the federal government until it reaches a political settlement with Native Hawaiians about the status of those lands.

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BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS[1]

The National Congress of American Indians respectfully submits this brief as *amicus curiae* in support of respondents.

INTEREST OF *AMICUS CURIAE*

The National Congress of American Indians (NCAI) is the oldest, largest, and most representative American Indian and Alaska Native Organization in the United States, representing over 250 Indian nations, tribes, and village governments. NCAI is dedicated to improving the welfare of all indigenous peoples in the United States, to enlightening the public toward a better understanding of indigenous peoples, and to preserving inherent indigenous rights. Native Hawaiians are an indigenous people with whom the United States has a special relationship and are entitled to certain inherent rights which flow from their status.

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[1] Letters from the parties consenting to the filing of briefs by *amici curiae* have been filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The decision below temporarily precludes petitioner the State of Hawaii from transferring certain ceded lands to any third party until specific preexisting claims against those lands by Native Hawaiians are resolved through the political process. These lands had been ceded from Hawaii to the United States, shortly after the overthrow of the Hawaiian government in 1893, to be held by the United States in trust for the benefit of the Hawaiian people, *see* Hawaiian Annexation Joint Resolution, Res. No. 55, 30 Stat. 750 (1898). Upon Hawaii's admission to statehood in 1959, the lands were ceded to the State of Hawaii to be held by the State in trust to benefit, among other purposes, Native Hawaiians, *see* Hawaii Statehood Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959). Native Hawaiians have never relinquished their claims to those lands.

I.

Petitioners contend that the decision below by the Supreme Court of Hawaii to stay the transfer of the ceded lands pending the political resolution of the land claims was based on the federal Apology Resolution, a recent apology by Congress for the United States' role in the overthrow of the Hawaiian government. *See* Joint Resolution to Acknowledge the 100th Anniversary of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

Some of petitioners' *amici* attempt to interject at this late date a new issue of significant import in the instant case: whether the Apology Resolution violates the equal protection component of the Due Process Clause of the Fifth Amendment. These *amici* contend that if the Apology Resolution justifies the ruling below, that Resolution must be unconstitutional because it thereby provides a benefit to Native Hawaiians on the basis of their race in violation of equal protection.

That issue, however, is not before this Court and should not be addressed in this case. Neither the question presented nor the petition for a writ of *certiorari* includes any equal protection argument. Moreover, nothing in the Supreme Court of Hawaii's ruling below creates any preference in the ceded lands for Native Hawaiians that might implicate equal protection. Rather, the state court explicitly held that it was not deciding whether Native Hawaiians possess any entitlement to the ceded lands, and ordered only that the *status quo* be maintained until resolution of the Native Hawaiians' claims to the ceded lands.

More significantly, the Court should refrain from addressing *amici*'s equal protection argument because resolution of that issue would require this Court to decide the important predicate question of whether the Indian Commerce Clause, U.S. Const., art. I, § 8, cl. 3, which authorizes Congress to regulate

commerce with the Indian tribes, applies to Congress' dealings with Native Hawaiians. This Court previously has declined to resolve this issue which it believed "raise[d] questions of considerable moment and difficulty" that remain "a matter of some dispute." *Rice v. Cayetano*, 528 U.S. 495, 518 (2000).

II.

Should this Court decide to address *amici*'s equal protection argument, it is plain from the Constitution and this Court's precedent that any preference in favor of Native Hawaiians created by the Apology Resolution (although there is none) must be examined in the context of Congress' power to regulate the Nation's relationship with Indian tribes.

Throughout this Nation's history, Congress has used its authority under the Indian Commerce Clause to enact laws affecting all indigenous peoples within the then-current boundaries of the United States and this Court has deferred to the political branches in every instance. *The Kansas Indians*, 72 U.S. 737 (1867); *United States v. Holliday*, 70 U.S. 407, 419 (1866). While this deference is not absolute, it is subject only to this Court's oversight to ensure that no arbitrary characterization is made simply to bring a group or community under this power. *See United States v. Sandoval*, 231 U.S. 28, 47 (1913). There can be no dispute that Native Hawaiians constitute just such an indigenous people.

III.

The federal government's dealings with the indigenous peoples of the United States has created a "special relationship" with them which insulates from equal protection challenge legislation dealing with those peoples "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). This rule applies whether the legislation deals with members of a federally recognized tribe or not. *See, e.g.*, *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977). The Apology Resolution and other legislation that is tied to Congress' obligation toward Native Hawaiians thus are not subject to strict scrutiny and need only be rationally related to the unique obligations Congress has to the indigenous people of Hawaii.

ARGUMENT

I. THE QUESTION OF WHETHER LAWS THAT BENEFIT NATIVE HAWAIIANS VIOLATE EQUAL PROTECTION IS A QUESTION THAT IS NOT BEFORE THIS COURT AND SHOULD NOT BE ADDRESSED IN THIS CASE

A number of *amici curiae* in support of petitioners attempt to interject a constitutional issue of equal protection that is of considerable import but is not before the Court. *See, e.g.*, Br. of Pacific Legal Foundation et al.; Br. of Mountain States Legal

Foundation. The Court should not use this case to decide that equal protection question.

A. Rather than focus on the narrow and straightforward question presented by petitioners on which this Court based its grant of *certiorari*, certain *amici* seek to abolish all programs of respondent the Office of Hawaiian Affairs (OHA) and of petitioner the State of Hawaii, that "treat 'native Hawaiians' and 'Hawaiians' as different classes." Br. of Pacific Legal Foundation et al. 3; Br. of Mountain States Legal Foundation. These *amici* "argue that Hawaii, once and for all, is required to abandon" these congressionally authorized distinctions. Br. of Pacific Legal Foundation et al. 3; Br. of Mountain States Legal Foundation. These *amici* contend that the equal protection component of the Fifth Amendment precludes Congress from enacting any legislation that might favor Native Hawaiians over others. They argue that the Supreme Court of Hawaii's decision construing the Apology Resolution in this case creates such a preference for Native Hawaiians which must be reversed on that constitutional ground.

The argument that the federal Apology Resolution (or the programs of the OHA or the State) violates equal protection, however, is not included in the question presented, or anywhere else in the *certiorari* petition. Petitioner raised only the narrow question of whether the Apology Resolution temporarily precludes the transfer of ceded lands until there is a political resolution of ownership of those lands as amongst the United States, the State,

and Native Hawaiians. As such, the issues *amici* now ask this Court to resolve are not properly before the Court and should not be addressed. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); S. Ct. R. 14.1(a).

Amici should not be permitted to expand the questions presented in the case. *Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (noting that the Court will not "ordinarily address issues raised only by *amici*"); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 61 n.2 (1981) (same). This Court has made clear that "it is the petitioner himself who controls the scope of the question presented. The petitioner can generally frame the question as broadly or as narrowly as he sees fit." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

Petitioners also did not raise the *amici*'s equal protection argument below, so the state court did not have an opportunity to address the constitutional issue. This Court's practice is to refrain from addressing issues that have not been raised or addressed below. *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 455 (2007).

Moreover, petitioners affirmatively represented to this Court at the *certiorari* stage that "[t]he parties have not addressed, and this case does not present, * * * constitutional challenges * * * to governmental programs directed to native Hawaiians." Pet. Cert. Reply 9-10 n.4. And, in their briefs on the merits, petitioners, respondents, and the United States as

amicus curiae all have explicitly disavowed that the equal protection issue is before the Court. *See* Pet. Br. 27 n.16; Resp. Br. 7 n.2; U.S. Br. 22 n.3.

B. In any event, contrary to these *amici*'s contentions, the constitutional question they pose is not raised by the facts of this case because nothing in the Supreme Court of Hawaii's opinion creates a preference for Native Hawaiians that implicates equal protection.

The court below did not grant respondents, or Native Hawaiians generally, any additional rights to the ceded lands. Rather, the state court ordered an injunction to maintain the *status quo* "until the claims of the native Hawaiians to the ceded lands have been resolved." Pet. App. 100a. The Hawaii court explained:

> The primary question before this court on appeal is whether, in light of the Apology Resolution, this court should *issue an injunction* to require the State, as trustee, to preserve the corpus of the ceded lands in the public lands trust until such time as the claims of the native Hawaiian people to the ceded lands are resolved. The important distinction here is that this Court is *not* being asked to decide whether native Hawaiians are *entitled* to the ceded lands.

Pet. App. 79a.

The court "agree[d] with [respondents] that the 'Apology Resolution by itself does not require the

State to turn over the [ceded] lands to the [n]ative Hawaiian people[.]' " Pet. App. 32a (brackets in original). The Court below explained that "the Apology Resolution acknowledges only that unrelinquished claims exist and plainly contemplates future reconciliation with the United States and the State with regard to those claims." *Ibid.*

The *amici* disregard this actual rationale of the state court, however. They seek from this Court an advisory opinion to indicate that, if the United States and the State of Hawaii ultimately decide that Native Hawaiians have a right to the ceded lands, such a future decision would violate equal protection. Such an advisory opinion would violate the limits of Article III.

C. This is not a case where any exceptional circumstances militate in favor of this Court reaching beyond the question presented and what was presented to and addressed by the state court below. *Cooper Industries, Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004); *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225 (1927). *Amici*'s challenge to the authority of respondent OHA or Congress (or even petitioner the State of Hawaii) to implement programs that exclusively benefit Native Hawaiians (*amici*'s ultimate grievance to this Court, *see* Br. of Pacific Legal Foundation et al.) can be raised in a different case that directly challenges such programs. Should Native Hawaiians ultimately prevail through the political process and gain full title to the ceded lands at issue in this case, that decision will almost

certainly be subject to judicial review and constitutional challenges by parties more directly affected.

Moreover, the equal protection arguments that *amici* raise are highly contested and cannot be easily resolved as they now are presented to this Court. This is so because *amici*'s equal protection challenge requires the Court to resolve a predicate "proposition" as to whether "Congress may treat the native Hawaiians as it does the Indian tribes," *Rice*, 528 U.S. at 518, so that Congress can enact "legislation dedicated to their circumstances and needs." *Id.* at 519. Such legislation—including the Apology Resolution (as *amici* read it) and the programs *amici* more generally challenge—need only be "tied rationally to the fulfillment of Congress' unique obligation toward Indians." *Id.* at 520 (quoting *Mancari*, 417 U.S. at 555).

The Court has described that predicate "proposition[ ]"—*i.e.*, whether Native Hawaiians may be treated like Indian tribes—to "raise questions of considerable moment and difficulty" that ultimately remain "a matter of some dispute." *Id.* at 518. Although a detailed analysis demonstrates that Native Hawaiians can be constitutionally treated by Congress like Indian tribes, this Court in *Rice* intentionally "stay[ed] far off that difficult terrain," *id.* at 519, that *amici* now unnecessarily ask the Court to address.

As such, even if it were possible to resolve *amici*'s constitutional arguments in this case, the Court should await a case in which the issues were litigated and addressed in the court below and were presented in the *certiorari* petition and fully briefed by the parties before this Court. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 164-165 (2007) ("Although [petitioner] is doubtless correct that we could consider the question of what standard applies as anterior to the question whether the standards may differ, the issue of the substantive content of the causation standard is significant enough that we prefer not to address it when it has not been fully presented"; it would be "unfair" to allow petitioner to "switch gears.").

II. THE CONSTITUTION CONFERS ON CONGRESS THE AUTHORITY TO REGULATE THE NATION'S AFFAIRS WITH ALL INDIGENOUS PEOPLES OF THE UNITED STATES

In the event this Court deems it necessary to address the equal protection question now inappropriately posed by *amici curiae*, the Court still should affirm the state court ruling below. At bottom, the equal protection arguments raised by various of petitioner's *amici* are without merit because those arguments ignore this Court's well-settled precedent that a law which explicitly targets the indigenous peoples of the United States, such as Native Hawaiians, need be only rationally related to Congress' unique obligations to those peoples.

A. Consistent With The Purpose And History Of The Indian Commerce Clause, Congress Has Properly Determined That Its Obligations And Unique Legislative Authority With Respect To "Indian Tribes" Includes Native Hawaiians

Amici contend that Congress cannot enact or approve any laws that explicitly benefit Native Hawaiians. As such, *amici* argue, in the broadest sense, that the indigenous inhabitants of Hawaii fall outside the scope of the Indian Commerce Clause, U.S. Const., art. I, § 8, cl. 3, and are not an indigenous people with whom the federal government may separately deal on a political basis.

Amici reach this result by adopting a hypertechnical and restrictive reading of the term "Indian tribes" in the Indian Commerce Clause as not including those who are neither "Indians" nor organized into "tribes," such as the indigenous people of Hawaii. This reading of the Indian Commerce Clause is inconsistent with Congress' prior construction of the Clause throughout this Nation's history.

1. The Constitution's use of the term "Indian tribes" in the Indian Commerce Clause is the result of the Framer's decision to label as "Indians" all the indigenous peoples of North America with whom they were then familiar and to categorically denominate all the political organizations of those peoples as "nations" or "tribes" regardless of the many

distinctions between those various peoples and their organizations. *See* Harold E. Driver, *Indians of North America* 299-302 (2d ed. 1969). The reference to Indian tribes in the Indian Commerce Clause thus was a reference by the Framers to all those peoples who are Native to North America rather than to any particular ethnicity, culture or political organization actually inherent in those indigenous peoples.

This decision by the Framers can be traced to Columbus's landing in the "New World" in 1492. Because Columbus believed he had arrived in his intended destination of Asia, he referred to the indigenous peoples he encountered as "los Indios"—the Indians. *See* Robert F. Berkhofer, Jr., *The White Man's Indian* 4-5 (1978). Far from being a handful of homogenous and identical Indian tribes, however, as Columbus and other Europeans first believed, these "first residents of the Americas were by modern estimates divided into at least two thousand cultures and more societies." *Id.* at 3. All these various indigenous peoples "practiced a multiplicity of customs and lifestyles, held an enormous variety of values and beliefs, spoke numerous languages mutually unintelligible to the many speakers, and did not conceive of themselves as a single people—if they knew about each other at all." *Ibid.* The different indigenous peoples did not share a singular, or even similar, political structure and culture, but Columbus "categorized the variety of cultures and societies as a single entity for the purposes of description and analysis." *Ibid.*

It is against this backdrop that the use of the term "Indian tribes" in the Constitution's Indian Commerce Clause must be understood. It is a term to broadly encompass all the indigenous peoples of North America. The Framer's use of the term reflects the common sense interpretation of Indian tribes to encompass the full diversity among the indigenous peoples of the United States.

That approach is in accord with the fact that the ultimate geographical limits of the United States were unknowable at the time of the Founding, as were the variety of indigenous peoples that occupied the Americas. *See* Driver, *supra*, at 287-308. Subsequent to the adoption of the Constitution, the United States continued to encounter indigenous peoples who were not ethnically "Indian" and whose organizational structures differed from those of eastern "tribes." The Constitution nonetheless was found to encompass, without question, the relations with all indigenous peoples within the geographic limits of the United States.[2] *Weems v. United States*, 217 U.S. 349, 373 (1910).

Accordingly, Native Hawaiians are included in the indigenous peoples covered by the Indian Commerce Clause. It is undisputed that prior to

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[2] This is true even in the case of a tribe that came into the United States from a foreign country. *See* 25 U.S.C. § 495 (establishing a reservation in Alaska for the Metlakatla Tribe which came into the United States from Canada).

discovery in 1778, Native Hawaiians inhabited the islands for centuries. *See Rice*, 528 U.S. at 500. Their status as an indigenous people within the United States in and of itself is enough to classify them as an "Indian tribe" under the Constitution, because, as discussed above, that term necessarily encompasses a wide-variety of peoples who often shared only the characteristics of being foreign to European explorers and being indigenous to lands that would become the United States.

2. Consistent with this longstanding historical approach, Congress has concluded that Native Hawaiians fall within the scope of the Indian Commerce Clause.

Congress has repeatedly and unequivocally explained that "[t]he authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of * * * Hawaii." 42 U.S.C. § 11701(17) (findings for federal law relating to Native Hawaiian health care); *see also* 42 U.S.C. § 11702(a) ("The Congress hereby declares that it is the policy of the United States in fulfillment of its special responsibilities and legal obligations to the indigenous people of Hawaii resulting from the unique and historical relationship between the United States and the Government of the indigenous people of Hawaii."). And Congress has explained that "Congress does not extend service 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." Pub. L. 106-569, title V, § 512(13)(B), 114 Stat. 2966, 2968 (2000).

Congress has used its authority under the Indian Commerce Clause to include Native Hawaiians in numerous other federal laws relating to Indian tribes. For example, in the Native American Languages Act, 25 U.S.C. § 2902(1), Congress has defined "[t]he term 'Native American' [to] mean[ ] an Indian, Native Hawaiian, or Native American Pacific Islander." *Ibid.*[3]

B. The Court Has Consistently Deferred To Congress' Determination As To The Scope Of The Indian Commerce Clause

As discussed above, Congress has already determined, in numerous legislative contexts, that the Indian Commerce Clause includes Native Hawaiians. Under this Court's longstanding precedents, such decisions are subject to considerable deference. This Court has never overturned—after facing the issue in a variety of contexts—a congressional decision to recognize an indigenous people or category of peoples. This Court has deferred to such congressional determinations irrespective of

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[3] For a more comprehensive listing of legislation treating Native Hawaiians the same as Indians, *see* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95, 106 n.67 (1998).

whether or not the indigenous peoples at issue had dissimilar land tenure, political organization, or ethnic composition to the "traditional" Indian tribes within the territorial United States at the time of the Founding.

1. The Court has not required any particular historical land tenure or ownership criteria in order for the Indian Commerce Clause to apply

Contrary to some of *amici*'s contentions, *see* Br. of Mountain States Legal Foundation 24-25 (noting that no European power colonized or occupied Hawaiian Islands), this Court has not required any specific historical land tenure or ownership criteria in order for an indigenous people to be treated as an Indian tribe, but instead has deferred to Congress' determination. In *United States v. Sandoval*, for example, the Court addressed whether the land of the Santa Clara Pueblo was Indian country for purposes of federal jurisdiction—*viz.*, whether the Pueblo came within the meaning of the Indian Commerce Clause. *See* 231 U.S. at 38. The Pueblo, unlike nomadic Indians, was a sedentary and agricultural people. Rather than have its lands held in public trust by the United States, the Pueblo owned its land in communal fee simple under grants from the King of

Spain which were confirmed by Congress.[4] *See id.* at 39-40.

This Court concluded that any such distinction of land ownership between the Pueblo and other Indian tribes was of no moment. The Court held that the Pueblo land held in fee simple could be subject to Congress' jurisdiction under the Indian Commerce Clause as much as other public lands reserved for Indian tribes. The Court explained that Congress could exercise jurisdiction over "all dependent Indian communities within its borders, whether within its original territory or *territory subsequently acquired*, and whether within or without the limits of a State," *id.* at 46 (emphasis added), and the Court concluded that such determinations were within the province of Congress rather than the courts. *Id.* at 46 (holding that "the questions whether, to what extent, and for what time [indigenous people] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts").[5]

[4] The members of the Pueblo also made a claim to citizenship. *See Sandoval*, 231 U.S. at 48. The claim to citizenship was not passed upon because the Court felt that "citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people." *Ibid.*

[5] The *Sandoval* Court followed longstanding precedent in granting deference to the political branches in these matters.

(Continued on following page)

2. The Indian Commerce Clause applies to indigenous peoples irrespective of their political organization

Amici also are wrong that Native Hawaiians should be excluded from the general rules of Indian law because they lack a political organization similar to the indigenous groups first encountered in North America. Br. of Mountain States Legal Foundation 26-27.

a. Many Indians are members of political entities that are very different from those of the eastern tribes. *See* Driver, *supra*, at 287-308. As this Court has recognized, some Indians had "little or no tribal organization." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 (1979). Indeed, in California, "tribes" in the political sense may not have existed at all. *See* Driver, *supra*, at 295. Courts thus have recognized that "[t]ribe is most appropriately a cultural concept. Except for some eastern woodland confederacies, few Indians had tribal organizations that governed their activities." *United States v. Washington*, 641 F.2d 1368, 1373 n.6 (9th Cir. 1981) (quoting Graham D. Taylor, *The New Deal and American Indian Tribalism* 2 (1980)); *see also Elser v. Gill Net Number One*, 246 Cal.App.2d 30, 38, 54 Cal. Rptr. 568, 575 (1966) (explaining that when applied to California Indians,

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United States v. Holliday, 70 U.S. 407 (1866); *The Kansas Indians*, 72 U.S. 737 (1867).

the term tribe must be understood as synonymous with ethnic group rather than as denoting political unity because tribes in a political sense did not exist in California.)

As this Nation expanded westward, the United States came in contact with indigenous peoples who lacked the political organization characteristic of the eastern tribes. That absence of tribal organization, of course, did not impede any federal dealings with those peoples as Indian tribes. To the contrary, "the record shows that the territorial officials who negotiated the treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties." *Fishing Vessel Ass'n*, 443 U.S. at 664 n.5. Congress even "created 'consolidated' or 'confederated' tribes consisting of several ethnological tribes, sometimes speaking different languages."[6] Felix S. Cohen, *Handbook of Federal Indian Law* 6 (1982 ed.) [hereinafter Cohen, 1982 *Handbook*]. For example, "the Confederated Bands and Tribes of the Yakima Indian Nation comprise 14 originally distinct Indian tribes that joined together in the middle of the 19th century for

[6] "Examples are the Wind River Tribes (Shoshone and Arapahoe), the Cheyenne-Arapaho Tribes of Oklahoma, the Cherokee Nation of Oklahoma (in which the Cherokees, Delawares, Shawnees and others were included), and the Confederated Salish and Kootenai Tribes of the Flathead Reservation." Cohen, 1982 *Handbook*, at 6 (citations omitted).

purposes of their relationships with the United States." *Washington v. Yakima Nation*, 439 U.S. 463, 469 (1979). These 14 tribes signed a treaty with the United States in "which it was agreed that the various tribes would be considered 'one nation' and that specified lands * * * would be set aside for their exclusive use." *Ibid*.[7]

b. Moreover, even where tribal status was absent, Congress has legislated as to groups of indigenous peoples. The Indian Claims Commission Act (ICCA) was passed to provide a remedy for many of the injustices suffered by the indigenous peoples of the United States. The Act provided that, "[t]he Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska * * * ." Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1050 (1946).

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[7] "On the other hand, Congress has sometimes divided a single tribe, from the ethnological standpoint, into a number of tribes or 'bands.' " Cohen, 1982 *Handbook*, at 6; *see also United States v. John*, 437 U.S. 634 (1978) (Choctaws remaining in Mississippi after most moved west); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977) (Delaware Tribe divided into 'Kansas Delawares' and 'Absentee Delawares'); *United States v. Boyd*, 83 F. 547 (4th Cir. 1897) (Eastern Band of Cherokees in North Carolina a 'tribe' even though main body of tribe had moved to Oklahoma).

The Justice Department, charged with defending these claims, initially argued that to fall within the ICCA, any group had to "possess the characteristics of a 'tribe' or 'band,' which are, mainly, a common government or leadership, continuity of existence and concert of action." *Loyal Creek Band or Group of Creek Indians v. United States*, 1 Indian Cl. Comm. 122, 127 (1949). The Commission and Court of Claims, however, rejected the government position and held that if the "group can be identified and it has a common claim it is * * * an 'identifiable group of American Indians'" and can bring a claim under the ICCA. *Id.* at 129; *see also Peoria Tribe v. United States*, 169 Ct. Cl. 1009 (1965); *Nooksack Tribe v. United States*, 162 Ct. Cl. 712 (1963), *cert. denied*, 375 U.S. 993 (1964).[8]

In short, federal dealings with indigenous peoples within the United States have never depended upon their organization into tribes. *Amici*'s

[8] Congress also has imposed obligations on newly formed bands of Indians even though individual members came from different tribes. The Indian Depredations Act of 1891 gave to the Court of Claims jurisdiction over "[a]ll claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for." Act of Mar. 3, 1891, ch. 538, § 1, 26 Stat. 851, 851-852. In *Montoya v. United States*, 180 U.S. 261, 269-270 (1901), this Court held that the statute extended to members of a hostile band of Indians even though the members of that band came from different tribes and did not themselves constitute a new tribe.

attempt to distinguish the situation in Hawaii because of the absence of a political structure resembling that of a tribe should be rejected.

3. This Nation's relationship with Native Alaskans demonstrates that the Indian Commerce Clause applies to all indigenous peoples within the United States

Amici contend that the Indian Commerce Clause should not apply to Native Hawaiians because they comprise many distinct ethnic backgrounds and are culturally and politically distinct from the indigenous people of the rest of the United States. Br. of Mountain States Legal Foundation 26-27. As discussed above, certain heterogeneity in Indian tribes was not uncommon due, in part, to federal efforts to sometimes combine smaller groups of indigenous peoples. *See supra*, at 21. Moreover, the false idea that "Indian" refers to a single, distinct ethnicity was put to rest when Congress concluded that native Alaskan groups fall within the Indian Commerce Clause.

After the United States acquired Alaska from Russia in the 1867 Treaty of Cession, that treaty was construed to give "the Indian tribes of Alaska the same status before the law as those of the United States." *In re Naturalization of Minook*, 2 Alaska 200, 221 (D. Alaska 1904); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 402 (1942 ed.)

[hereinafter Cohen, 1942 *Handbook*].[9] Native Alaskans, however, include Eskimos who are distinct from Alaska's two other native groups, Indians and Aleuts. Cohen, 1942 *Handbook*, *supra*, at 401. The question thus arose whether Eskimos could be subject to the same principles as Indians in the continental United States.

The Department of Interior Solicitor's Office concluded that Eskimos were properly treated as Indians under federal law. In 1932, the Department of Interior Solicitor submitted to Congress an Opinion on the "Status of Alaska Natives." *See* 1 Op. Solicitor on Ind. Affairs 303 (1932). The 1932 Opinion concluded that:

> [I]t is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos and other natives are of Indian origin or not *as they are all wards of the Nation, and their status is in material*

[9] Other decisions from that era analogizing the legal status of Alaska Natives to that of Indians generally include *Nagle v. United States*, 191 F. 141 (1911) (Native Alaskans eligible for General Allotment Act citizenship provision) and *United States v. Berrigan*, 2 Alaska 442 (D. Alaska 1905) (describing the United States' relationship to Native Alaskans as that of "guardian" to "dependent ward" and prohibiting disposition of Native land to non-natives without federal approval).

> *respects similar to that of the Indians of the United States.*

Id. at 310 (emphasis added).

This opinion remains unchallenged. There has never been a suggestion that the exercise of federal power over native Alaskans runs afoul of the Indian Commerce Clause. Rather, this Court in *Alaska v. Native Village of Venetie Tribal Government* recognized Congress' power over Alaska Natives by stating that "[w]hether the concept of Indian country should be modified is a question entirely for Congress." 522 U.S. 520, 534 (1998). Those same principles should apply with equal force to Native Hawaiians.

III. LEGISLATION BASED ON CONGRESS' UNIQUE OBLIGATIONS TO NATIVE HAWAIIANS IS NOT SUBJECT TO HEIGHTENED SCRUTINY

Amici assert that "Indian tribes * * * enjoy a 'unique legal status' under federal law and upon the plenary power of Congress." Br. of Pacific Legal Foundation et al. 24. That assertion by *amici* should be fatal to their equal protection challenge because, as demonstrated above, Congress may treat Native Hawaiians like Indian tribes and such legislation must be reviewed in the same manner as legislation regarding Indian tribes.[10]

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[10] *Amici* suggest that all they seek is equality and that recognizing the rights of indigenous peoples somehow tramples

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Acting pursuant to its authority under the Indian Commerce Clause, Congress has, through extensive legislation and course of dealings, established a "special relationship" with the indigenous peoples of the United States, including Native Hawaiians. *See supra*, at 16-17. This special relationship protects such legislation from the heightened scrutiny that applies to race-based legislation. *See Mancari*, 417 U.S. at 553-554.

A. This Court In *Morton v. Mancari* Held That Preferential Treatment For Indian Tribes Must Not Be Disturbed So Long As It Is Rationally Related To Congress' Unique Obligations To Indians

In *Mancari*, this Court rejected the equal protection challenge of non-Indian employees to the Bureau of Indian Affairs' (BIA) employment preference for Indians, which was authorized by the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. §§ 461-479 (1994). *See Morton v. Mancari*, 417 U.S. at 538-539.

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on the rights of others. Not only has Congress rejected this view, but so too does the rest of the world. On September 13, 2007, the United Nation's General Assembly, by a vote of 143 in favor, 4 opposed, and 11 abstaining, adopted the Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/61/L.67 and Add. 1 (Sept. 13, 2007), affirming the sovereign rights of indigenous peoples.

The Court rejected the notion that the preference was granted to "Indians * * * as a discrete racial group" subject to strict scrutiny. *Id.* at 554. Rather, the Court noted that the preference was applied to "members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Ibid.* Accordingly, the Court held that, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555.

The Court recognized two constitutional bases for this result. First, the Constitution "singles Indians out as a proper subject for separate legislation," in article I, section 8, clause 3, which provides Congress with the power to "regulate Commerce * * * with the Indian Tribes." *Id.* at 552. Second, the federal government made treaties with the tribes under article II, section 2, clause 2. *See id.* This Court explained that the United States' special relationship with Indians was derived from the Nation's seizure of their lands and the resulting devastation to their civilizations, which then led the United States to "assume[ ] the duty" of providing certain protections and obligations to the Indian tribes. *Id.* at 552. This history recited by the *Mancari* Court applies with similar force to the history that befell Native Hawaiians and which Congress today seeks to

redress as part of its own particular unique obligations to Native Hawaiians.[11]

B. This Court's Precedent Demonstrates That *Morton v. Mancari* Applies To Legislation Involving Indians Who Are Not Members Of A Federally Recognized Tribe

Amici contend that the *Mancari* decision is inapplicable to programs that benefit Native Hawaiians who are not part of a recognized tribe because the BIA preference at issue in *Mancari* was limited to members of a federally recognized Indian tribe, *Mancari*, 417 U.S. at 553 n.24. *See* Br. of Pacific Legal Foundation 26-27, 30-33; Br. of Mountain States Legal Foundation 10-12. This is not so. This Court's longstanding precedent demonstrates that Indians maintain their special relationship with the United States even when they are not members of a federally recognized Indian tribe.

[11] Federal authority to deal with Indian tribes can be properly delegated to the States by Congress, *see Yakima Indian Nation*, 439 U.S. at 470-471, as is the case for some matters with respect to Hawaii.

1. Members of tribes whose government-to-government relationship with the United States has been terminated continue to hold special rights based upon their status as Indians

In *Menominee Tribe v. United States*, 391 U.S. 404, 412-413 (1968), this Court upheld a decision by the Court of Claims that the Menominee Tribe possessed hunting and fishing rights under the 1854 Wolf River Treaty, and that those treaty rights were not abrogated by the Menominee Indian Termination Act of 1954. Treaty rights are one of the clearest manifestations of the special relationship between the United States and Indian tribes. Yet, notwithstanding the congressional termination of the government-to-government relationship between the Menominee Tribe and the United States, the Menominee Tribe continued to possess its treaty rights. *See ibid.*; *see also Kimball v. Callahan*, 493 F.2d 564, 567-569 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (relying on *Menominee* to uphold the hunting and fishing rights of the Klamath Tribe, whose government-to-government relationship had also been terminated).

Likewise, in the Alabama-Coushatta Termination Act, 25 U.S.C. §§ 721-728 (1994), Congress provided for termination of the trust relationship between the tribe and the United States, but further provided: "That after [August 23, 1954] such Indians shall be eligible for admission, on the same terms that apply

to other Indians, to hospitals and schools maintained by the United States." 25 U.S.C. § 722. Numerous other federal statutes that confer benefits on Native Americans also provide that terminated tribes fall within these statutes' scope. *See, e.g.*, Indian Health Care Improvement Act, 25 U.S.C. §§ 1601, 1603(c); Native American Languages Act, 25 U.S.C. § 2902(1)-(2).

2. This Court has upheld the application of federal Indian law to Indians who do not belong to any federally-recognized Indian tribe

Contrary to *amici*'s claims, on numerous occasions this Court has sustained congressional decisionmaking as to whether federal laws should apply only to federally recognized Indian tribes or some more broadly defined group of indigenous peoples.

This Court in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. at 75, held that it was within Congress' discretion and it was not for the courts in an equal protection challenge, to determine whether certain benefits should apply only to federally recognized Indian tribes or a broader group of indigenous peoples. In *Weeks*, a group of Indians who were not members of any tribe brought an equal protection challenge to a congressional distribution scheme excluding them from sharing in an award from the Indian Claims Commission. Applying *Mancari*, this Court held that Congress' "legislative

judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'" *Id.* at 85 (*quoting Mancari*, 417 U.S. at 555). The Court explained that Congress' decision to exclude the nonmembers—in part due to problems Congress anticipated might occur with a wider distribution based upon its prior experiences—satisfied that rationality requirement. *Id.* at 86-88. The Court, however, indicated that the equal protection component of the Due Process Clause of the Fifth Amendment also would "not preclude Congress from revising the distribution scheme to include the" excluded Indians who were not part of a federally recognized tribe. *Id.* at 90.[12]

Similarly, in *United States v. John*, 437 U.S. 634 (1978), this Court overturned a state law conviction and held that the State of Mississippi had no jurisdiction on certain tribal lands to prosecute the alleged criminal activity. Mississippi had asserted that the state law conviction should stand because, in the State's view, the Mississippi Choctaws were not subject to the Indian Reorganization Act of 1934 so that their lands were not Indian country. *Id.* at 649. The Court rejected this argument. Notwithstanding Mississippi's contention that the federal government

[12] Significantly, the distribution scheme did include some Indians who were only "closely affiliated with," *id.* at 86, or "clearly identified with," *id.* at 89 n.22, a tribe but not members of the tribe.

had abandoned through neglect its claim to expressly legislate toward the Indians that no longer were part of an Indian tribe, the Court explained that the Indian Reorganization Act defined "Indians" to include "all other persons of one-half or more Indian blood" even if not members of a recognized tribe. *Id.* at 650. "Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." *Id.* at 653 (citation omitted).

Menominee, *Weeks*, and *John* reject the proposition that Congress' power under the Indian Commerce Clause depends on the existence of a federally-recognized tribe. Congress in fact legislates today generally as to indigenous peoples without regard to tribal status. *See, e.g.*, National Housing Act, 12 U.S.C. §§ 1701, 1715z-13a(1)-(3); Indian Health Care Improvement Act, 25 U.S.C. §§ 1601, 1603(c); Indian Land Consolidation Act, 25 U.S.C. § 2201(2); Indian Civil Rights Act, 25 U.S.C. § 1301(4).

C. Even If This Court Were To Somehow Conclude That The Apology Resolution Benefits Native Hawaiians, That Statute Must Be Sustained Under *Morton v. Mancari*

As the above precedent demonstrates, if the Apology Resolution were somehow construed to give

some benefit in the ceded lands to Native Hawaiians (although it clearly does not, *see supra,* at 8-9) and the injunction here did something more than merely preserve the *status quo*, it is properly subject to the *Mancari* standard of review. The resolution would survive any equal protection challenge so long as it is "tied rationally to the fulfillment of Congress' unique obligation" toward the native peoples. The goal of assisting indigenous peoples to reconstitute their sovereign governments has been an unassailable legitimate government purpose recognized by Congress for decades. *See, e.g.*, IRA, 25 U.S.C. §§ 461-479. Indeed, this Court's past recognition of Congress' authority to permit remnants of tribes to establish their own sovereignty is clear precedent for federal authority to deal with Native Hawaiians who likewise seek to reestablish their sovereignty. *John,* 437 U.S. at 650 n.20.

In the instant case, there can be no dispute that the Apology Resolution satisfies the deferential *Mancari* analysis. As both Congress and the court below recognized, monetary reparations for the loss of ceded lands would be insufficient because "'[t]he health and well-being of the [n]ative [H]awaiian people is intrinsically tied to *their deep feelings and attachment to the land*.'" Pet. App. 89a (quoting Pub. L. No. 103-150, 107 Stat. 1510) (emphasis added). Accordingly, the obligation to protect the ceded lands for Native Hawaiians is necessary due to "the cultural importance of the land to Native Hawaiians," *id.* at 88a, and would be tied rationally to Native

Hawaiian interests in maintaining their unique culture and reconstituting their sovereignty. *Mancari*, 417 U.S. at 555.

Indeed, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), demonstrates the solid ground upon which the state court decision resides. As this Court recognized in that case, a Pueblo could enjoin the United States from disposing of its lands as public lands of the United States. The Court held that Congress' obligation to prescribe for the Pueblo's benefit and protection precluded the disposal of the lands because it "would not be an exercise of guardianship, but an act of confiscation." *Id.* at 113. Should the Apology Resolution be construed to confer a benefit in the ceded lands to Native Hawaiians, the decision would legitimately rest upon Congress' unique relationship with Native Hawaiians and its determined obligation toward that people.

For this reason, reliance by certain *amici* on *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), is misplaced. Br. of Mountain States Legal Foundation 22. Nothing in *Adarand* demonstrates that a general rule that strict scrutiny applies to race-based classifications obviates any of Congress' centuries-old obligations to Indians, as *amici* contend. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"). And the Apology Resolution—even if it could be construed to confer a benefit on Native Hawaiians—is not a generalized race-based preference; rather, the provision was

designed to ensure that the cultural identity and sovereign rights of Native Hawaiians are preserved.

CONCLUSION

This Court should dismiss the writ of *certiorari* for lack of jurisdiction and not reach the equal protection issue inappropriately raised by *amici*, but if the Court were to address that issue, the Court should find that Congress' authority under the Indian Commerce Clause applies to Native Hawaiians and should affirm the judgment of the Supreme Court of Hawaii.

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JANUARY 29, 2009