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**IN THE SUPREME COURT OF
THE UNITED STATES**

STATE OF HAWAII, *ET AL.*,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII

AMICUS BRIEF OF THE STATES OF WASHINGTON,
ALABAMA, ALASKA, ARIZONA, COLORADO, FLORIDA,
GEORGIA, IDAHO, INDIANA, IOWA, KENTUCKY,
LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI,
NEBRASKA, NEW HAMPSHIRE, NEW MEXICO,
NORTH DAKOTA, OHIO, OKLAHOMA, OREGON,
PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA,
SOUTH DAKOTA, UTAH, VERMONT, WYOMING, AND
THE COMMONWEALTH OF THE NORTHERN MARIANA
ISLANDS IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI

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QUESTION PRESENTED

In the Joint Resolution To Acknowledge The 100th Anniversary Of The January 17, 1893, Overthrow Of The Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. The question presented is whether this resolution stripped Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—twenty-nine percent of the total land area of the state and almost all the land owned by the state—unless and until it reaches a political settlement with native Hawaiians about the status of that land.

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INTEREST OF THE AMICUS CURIAE STATES

The question presented in this case is whether a federal law stripped the State of Hawaii of the authority to sell, exchange, or transfer land it received from the United States at statehood. The amicus states have a vital interest in this question because every state admitted into the Union since 1802 has received grants of land owned, prior to statehood, by the federal government. *See Andrus v. Utah*, 446 U.S. 500 (1980). These grants of land from the federal government at statehood are part of a "solemn agreement" under which a state is admitted to the Union. *Id.* at 507.

Each Admissions Act or Enabling Act has its own terms, but many of the statehood grants impose trust duties on the recipient state affecting the administration of the lands and funds derived from them. *See Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 460 (1967). The amount of acreage granted to the states is substantial. "Between 1803 and 1962, the United States granted a total of some 330,000,000 acres to the States for all purposes. Of these, some 78,000,000 acres were given in support of common schools." *Id.* 460 n.3 (citing *The Public Lands*, Senate Committee on Interior and Insular Affairs, 88th Cong., 1st Sess., 60 (Comm. Print 1963)).

Management of state lands is a complex undertaking for every amicus state, whether it involves lands owned by the state outright or lands subject to trust duties created at statehood. For example, the amicus State of Washington holds over 2.2 million acres in trust traceable to federal grants

at statehood. This land is held for several trust beneficiaries including common schools, universities, and several charitable, penal, and educational institutions. A sale or transfer of state lands must be consistent with the purposes of any trust obligations imposed. Wash. Rev. Code § 79.17.200(3); Wash. Rev. Code 79.11 (sale procedures). At any given time, state officials are reviewing dozens of land transfers or exchanges, all intended to benefit the citizens of the state generally or the various trusts.¹

In each of the amicus states, state officials similarly ensure that every sale, exchange, or transfer is consistent with the requirements of state laws and any trust obligations. The record in this case describes the complex procedures that the State of Hawaii was required to follow in connection with the sale of its granted lands. App. 18a-21a. A restraint on selling, transferring, or exchanging state land disrupts transactions and derails the years of work and planning that go into land transactions. Such a restraint would cause incalculable harm to a state and to the state citizens who benefit from the use and management of state lands. The amicus states therefore support the petition for certiorari because the decision below held that a federal law caused such harm to a state and its citizens.

¹ In Washington, pending trust land transactions are listed at <http://www.dnr.wa.gov/BusinessPermits/Topics/OtherLandTransactions> (last visited May 30, 2008).

REASONS FOR GRANTING THE PETITION

The Supreme Court of Hawaii misconstrued the 1993 Apology Resolution. Congress adopted the Apology Resolution thirty-four years after Hawaii statehood to offer an apology to “descendents of the aboriginal people” of Hawaii regarding the events that led to the end of the Hawaiian monarchy and establishment of the Territory of Hawaii. See App. 110a. Notwithstanding express language showing that Congress had simply adopted a symbolic apology, the Hawaii court held that the Apology Resolution singled out and diminished the state’s title to lands received at statehood.

The Hawaii court found a substantive effect on the state’s lands by concluding that the Apology Resolution “recognized that the native Hawaiian people have unrelinquished claims *over the ceded lands . . .*” App. 32a (emphasis added). Based on this premise, the court held that the Apology Resolutions required the State of Hawaii to hold its state lands as a “*foundation* (or starting point) for reconciliation” of the native Hawaiian claims. App. 33a. The Hawaii court ruling affects 1.2 million acres granted to the state by the Hawaii Admission Act—all the state lands subject to the trust created by the Admissions Act for the benefit of all of Hawaii’s citizens. See generally *Rice v. Cayetano*, 528 U.S. 495, 525 (2000) (Breyer, J., concurring) (“The Act specifies that the land is to be used for the education of, the developments of homes and farms for, the making of public improvements for, and public use by, *all* of Hawaii’s citizens, as well as for the betterment of those who are ‘native.’”).

The twenty-nine amicus states and commonwealth ask the Court to grant the petition for two reasons. First, the rule of law adopted by the Hawaii court conflicts with this Court's holdings regarding lands granted to the states. This Court's decisions recognize that land cannot be taken from a state after it is granted at statehood. The Hawaii court's ruling to the contrary is inconsistent with the plan of federalism in the Constitution. Second, the case involves a gross misapplication of federal law to impair the title to the majority of the land owned by a sovereign state. A question of federal law of the magnitude presented by this case concerning the legal interests of a sovereign state in its state lands merits the attention of this Court.

A. The Hawaii Court Decision Impairing Title To State Lands Conflicts With Rulings Of This Court And With Principles Of Federalism

By concluding that the 1993 Apology Resolution restrained the State of Hawaii from conveying state-owned property, the Hawaii court announced a rule of law that conflicts with this Court's rulings that Congress cannot reclaim lands after the lands are granted to the state. Moreover, this direct impact on a state's title to land conflicts with the plan of federalism in such a stark and fundamental way that the Hawaii court should have held that the Apology Resolution did not intend to impair the state's title. *See Edward J. DeBartolo Corp. v Florida Gulf Coast Bldg. & Constr. Trades Coun.*, 485 U.S. 568, 575 (1988) (statutes should be construed to avoid serious constitutional questions).

1. Congress Cannot Strip A State Of Title To Granted Lands

Under the rule of law adopted by the Hawaii court, a post-statehood act of Congress has diminished a state's title to lands bestowed by the federal government at statehood. This interpretation of the 1993 Apology Resolution conflicts with this Court's recognition that "Congress cannot, after statehood, reserve or convey submerged lands that 'ha[ve] already been bestowed' upon a State." *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001) (alteration in original) (recognizing that both the majority and dissenting justices agree with this principle).

The Hawaii court's ruling that the Apology Resolution created a restraint on the state's power to sell, convey, and transfer its property also conflicts with this Court's longstanding recognition that the specific enumeration of the purposes for which lands are granted in the Enabling Act for a state "is necessarily exclusive of any other purpose[.]" *Ervien v. United States*, 251 U.S. 41, 47 (1919); *Lassen*, 385 U.S. at 467 (applying this principle from *Ervien*). In both *Ervien* and *Lassen*, the Court held that when lands are granted subject to enumerated terms, the state must comply with those terms and that those terms are exclusive of inconsistent purposes engrafted by the states. It makes little sense to say that the specific enumeration of conditions in the grant restricts a state from changing the purposes of a grant, but that the federal government can change the terms of the grant and thereby diminish the

state's title to its lands. *See also Wilcox v. Jackson ex dem. McConnell*, 38 U.S. (13 Pet.) 498, 517 (1839) (Once the United States grants property to a state, "then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.").

The amicus states do not dispute the broad legislative powers of Congress. The 1993 Apology Resolution, however, is a symbolic statement concerning historic events. It is not general legislation that applies broadly to state property. *See Case v. Bowles*, 327 U.S. 92, 100 (1945) (lands granted to the states are not immune from general legislative powers of Congress). There is no precedent supporting the notion that Congress may single out lands previously granted to a state and impress upon them legal rights in favor of others.

2. The Hawaii Court Ruling Conflicts With Principles Of Federalism

Under the Hawaii court's ruling, the Apology Resolution affects a fundamental attribute of the state's title to its lands. *See United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (property includes the rights "to possess, use and dispose"); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (an interest in real property is taken when a law eliminates all right to devise the property). By concluding that the Apology Resolution directly affects the state's power to convey and transfer state lands, the Hawaii court has adopted a construction of a federal law inconsistent with the plan of federalism.

A state's ability to survive as a sovereign state is seriously undermined if the title to its lands can be singled out and impaired by the federal government. A federal law that revokes or diminishes a state's title to lands bestowed at statehood would cause enormous impacts to a state's financial and governmental integrity. If federal law could strip a state of the title to its lands, then the state could be severely damaged. Such authority and consequences are inconsistent with the constitutional principles that the states are admitted on an equal footing with "parity as respects political standing and sovereignty." *United States v. Texas*, 339 U.S. 707, 716 (1950).

The Court has previously held that a state's sovereign interest in its lands ensures sovereign immunity from suit in federal court to quiet title to such lands. See *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (Idaho's sovereign interests in state lands and waters precludes a federal court from examining a dispute over title to its submerged lands, absent a waiver of the state's Eleventh Amendment immunity). Just as the states have not consented to suit in federal court to quiet title to state lands, the plan of federalism does not allow federal law to diminish or strip the states of title to lands granted at statehood.

The rule adopted by the Hawaii court also runs afoul of the principle that while Congress may legislate, "it may not conscript State governments as its agents." *New York v. United States*, 505 U.S. 144 (1992). The Supreme Court of Hawaii has concluded

that the 1993 Apology Resolution conscripted state lands for the purpose of future negotiations over native Hawaiian claims. This undermines the federalism structure of the Constitution and with it the liberty of the citizens of the sovereign states.

“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.” *New York*, 505 U.S. at 181.

The Court should therefore grant the petition because the rule of law adopted in Hawaii is contrary to the plan of federalism and undermines the sovereignty of the states.

B. The Petition Presents An Issue Involving A Substantial And Continuing Impact On A Sovereign State's Land

The question presented by the petition involves a matter of substantial importance because of the severe consequences of the ruling on the fundamental property and sovereignty interests of the states. The Supreme Court of Hawaii's interpretation of the 1993 Apology Resolution affects the title to over one million acres granted to Hawaii by the federal government under section 5(b) of the Admissions Act. App. 115a. The ruling thus restrains almost all of the land granted to a sovereign state at statehood. Further, the ruling

applies to twenty-nine percent of the land in the entire state.

The importance of the issue presented here is analogous to *Andrus v. Utah*, 446 U.S. 500 (1980), where the Court granted certiorari “[b]ecause the dispute between the parties involves a significant issue regarding the disposition of vast amounts of [state] public lands” *Id.* at 506. It is also similar to *Lassen*, where the Court granted certiorari “because of the importance of the issues presented both to the United States and to the States which have received such lands.” *Lassen*, 385 U.S. at 461; *see also* n.5 (citing a number of amicus states urging certiorari). Finally, the importance of the question is analogous to *United States v. Coleman*, 390 U.S. 599 (1968), where the Court reviewed a decision by the Ninth Circuit construing the scope of rights to take certain mining patents and the public land: “We granted the Government’s petition for certiorari because of the importance of the decision to the utilization of the public lands.” *Id.* at 601.

The Hawaii court ruling affects state lands on a scale comparable to these previous cases. And, the importance of the question presented is magnified because the ruling affects Hawaii’s public lands for the indefinite future. There can be no certainty that a reconciliation process will ever resolve the disputes and claims connected with the United States admitting Hawaii and its people as a sovereign state.

Finally, certiorari will provide significant guidance regarding the legal consequence of the 1993 Apology Resolution and the import of a congressional

resolution that acknowledges historic events and offers a broad and symbolic apology.

CONCLUSION

The petition should be granted and the decision below should be reversed.

RESPECTFULLY SUBMITTED.

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