No. 07-1372

In the

Supreme Court of the United States

HAWAII, et al.,

Petitioners,

v.

OFFICE OF HAWAIIAN AFFAIRS, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Hawaii

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether Congress by the Admission Act and the Apology Resolution, may, without violating the *Fifth Amendment, require or permit the State of* Hawaii, Trustee of the Federally-created Ceded Lands Trust, to discriminate between trust beneficiaries on the basis of race?

2. Whether the State of Hawaii, Trustee of the Ceded Lands Trust, may, without violating the Fourteenth Amendment, discriminate between trust beneficiaries on the basis of race?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

For 35 years, Pacific Legal Foundation has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Most notably, PLF participated as amicus curiae in support of petitioner Harold F. Rice in *Rice v. Cayetano*, 528 U.S. 495 (2000). Both *Rice* and the present case concern Article XII, Section 5, of the Hawaii Constitution, which established the State of Hawaii's Office of Hawaiian Affairs (OHA). In *Rice*, this Court found that the terms "native Hawaiian" and "Hawaiian," as used by OHA, are racial classifications,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

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

and that a race-based scheme that allowed only statutorily defined "Hawaiians" to vote for trustees of OHA was unconstitutional.

Despite *Rice*, and Justice John Marshall Harlan's admonition one-hundred and twelve years ago that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), OHA and the State of Hawaii continue to treat "native Hawaiians" and "Hawaiians" as different classes among citizens of Hawaii. This practice has spawned numerous lawsuits until finally culminating in the present legal crisis in which the State of Hawaii's sovereign authority to manage its land for the good of all of its citizens, has been replaced with a court-imposed duty to hold the land for the benefit of one racial class. Only this Court can extricate Hawaii from its present legal morass, because the decision of the state court below is based upon its tortured interpretation of a United States Congressional Joint Resolution.

This Court announced in *Rice* the unwavering principle that, "[t]he Constitution of the United States . . . has become the heritage of all the citizens of Hawaii." *Rice*, 528 U.S. at 524. PLF files this brief to urge this Court to grant the petition for writ of certiorari, and ensure that Hawaii, once and for all, is required to abandon its racial classifications and treat its citizens with the equality to which they are entitled under the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The core issue of this case is whether a state court interpreting federal law may enjoin the State of Hawaii from exercising its sovereign authority to sell, lease, or rent the "ceded lands" for the benefit of all citizens of the State of Hawaii, pending some resolution, as yet unknowable, of the claims of native Hawaiians to those lands.

As this Court recognized in *Rice*, 528 U.S. at 505, the Republic of Hawaii ceded all of its former Crown, government, and public lands to the United States upon annexation in 1898. Revenues from the public lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Joint Resolution of Congress (Newlands Resolution), J. Res. No. 55, 55th Cong., 30 Stat. 750 (1898); *Rice*, 528 U.S. at 505.

When Hawaii was admitted as the 50th State of the Union in 1959, the United States granted back to Hawaii title to all public lands and public property within the boundaries of the State—the ceded lands—save those which the Federal Government retained for its own use. Pub. L. No. 86-3, §§ 5(b)-(d), 73 Stat. 5 (1959) (Admission Act); *Rice*, 528 U.S. at 507. The lands, and the proceeds and income generated by the ceded lands,

> were to be held "as a public trust" to be "managed and disposed of for one or more of" five purposes: (1) for the support of the public schools and other public educational institutions, (2) for the betterment of the conditions of native Hawaiians, as defined in

> the Hawaiian Homes Commission Act[2], . . . (3) for the development of farm and home ownership on as widespread a basis as possible, (4) for the making of public improvements, and (5) for the provision of lands for public use.

Admission Act § 5(f), 73 Stat. 6; *Rice*, 528 U.S. at 507-08.

In 1978, Hawaii amended its Constitution to establish a new state agency, Respondent, Office of Hawaiian Affairs, Haw. Const. art. XII, § 5. OHA's race-conscious mission is "[t]he betterment of conditions of native Hawaiians . . . [and] Hawaiians," Haw. Rev. Stat. Ann. § 10-3 (1993). State law gives OHA broad authority to administer two categories of funds: a 20% share of the revenue from the ceded lands, which OHA is to administer for the betterment of the conditions of native Hawaiians, Haw. Rev. Stat. Ann. § 10-13.5 (1993), and any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" and/or "Hawaiians," Haw. Const. art. XII, § 6. *See generally* Haw. Rev. Stat. Ann. §§ 10-1 to 10-16. The terms

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[2] The Hawaiian Homes Commission Act was created by Congress to set aside over 200,000 acres of ceded lands for exclusive homesteading by native Hawaiians. H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920). As a condition of statehood, the United States required Hawaii to adopt the act as a provision of the state constitution, *see* Haw. Const. art. XI, § 2 (1959) (renumbered art. XII, § 2 (1978)). The Hawaiian Homes Commission Act defines the term "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," HRS, vol. 1 at § 201(7) of the Hawaiian Homes Commission Act. Pub. L. No. 67-34, 42 Stat. 108 (1921).

"native Hawaiians" and "Hawaiians," as used by OHA, are racial classifications. *Rice*, 528 U.S. at 514 ("Ancestry can be a proxy for race. It is that proxy here.").

In 1987, the Legislature of Hawaii identified a critical shortage of affordable housing units available to lower income residents of the state. *Office of Hawaiian Affairs v. Hous. & Cmty. Development Corp. of Hawai'i*, 177 P.3d 884, 897 (Haw. 2008) (*OHA*). The Housing Finance and Development Corporation (HFDC) was established by the State Legislature to, *inter alia*, develop fee simple or leasehold property, construct dwellings thereon, and sell, lease, or rent the property to qualified residents. *Id.* In the same year it was formed, the HFDC identified the Leiali'i parcel in West Maui, part of the ceded lands, as a potential site in need of affordable housing. *Id.* In 1990, after the Leiali'i parcel was reclassified from agricultural to urban use, the HFDC embarked upon a residential housing development project for the parcel, and invested $31 million into the project by 1994. *Id.* at 898.

In 1992, the Hawaii Legislature enacted Act 318 (codified as Haw. Rev. Stat. Ann. § 10-13.6 (1993)), establishing a formula to "pay" OHA for revenues from Leiali'i and another ceded lands parcel. Haw. Rev. Stat. Ann. § 10-13.6(e) (Supp. 2007). According to Act 318's formula, OHA was to be paid 20% of the fair market value of the subject lands. Haw. Rev. Stat. Ann. § 10-13.6(a).

In 1993, Congress passed a Joint Resolution (Apology Resolution) recounting the history of Hawaii in some detail, and offering an apology to the native Hawaiian people for the overthrow of the Kingdom of

Hawaii. Pub. L. No. 103-150, 107 Stat. 1510 (1993); *Rice*, 528 U.S. at 505. As a result of the Apology Resolution, OHA demanded that a disclaimer be included as a part of any acceptance of funds from the sale of Leiali'i parcel to preserve any native Hawaiian claims to ownership of the ceded lands. *OHA*, 177 P.3d at 897. In 1994, HFDC declined to include OHA's requested disclaimer because to do so would place a cloud on the title. *Id.* at 897-98.

OHA and four individual native Hawaiians filed suit against the State of Hawaii and HFDC in 1994, seeking an injunction to prohibit the selling or otherwise transferring to third parties any ceded lands. *Id.* at 891. The trial court denied plaintiffs' claims, *id.* at 899, but the Hawaii Supreme Court reversed, and ordered the trial court to grant an injunction prohibiting the State of Hawaii from selling or otherwise transferring to third parties any ceded lands until the claims of the native Hawaiians to the ceded lands have been resolved. *Id.* at 928.

The federal government, through the Hawaiian Homes Commission Act of 1920, the Admission Act of 1959, and the Apology Resolution; and the State of Hawaii through its Constitution provision creating OHA and its implementing statutes, instituted racial classifications by introducing and defining the terms "native Hawaiian" and "Hawaiian." This Court should grant the petition to hold that any claim to ceded lands derived from language in the Apology Resolution or Admission Act, or any other legislation purporting to grant preferences based upon the terms "native Hawaiian" or "Hawaiian", is presumptively invalid. Those terms were determined in *Rice* to be racial classifications and government actions relying on those

classifications must be subjected to strict judicial scrutiny.

Furthermore, the Apology Resolution is purposefully void of any language amending or rescinding the Admission Act, because congressional intent reveals that the resolution was not intended to change any existing laws. This Court must determine whether the state court had authority to divest Hawaii of its sovereign powers by requiring the state to hold the ceded lands for the benefit of one racial class in possible perpetuity.

REASONS FOR GRANTING REVIEW

I

RACE-BASED GOVERNMENT IS IMPERMISSIBLE UNDER CONSTITUTIONAL PRINCIPLES OF EQUAL PROTECTION

Eight years ago, in *Rice*, this Court struck down as unconstitutional a provision in the Hawaii Constitution prohibiting non-"Hawaiian" citizens from voting in a statewide election. At that time, the Court reviewed Hawaii's troubled history of race relations and Justice Kennedy, writing for the majority, provided a sound approach to deal with the realities facing that State:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always,

> seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

Rice, 528 U.S. at 524. Justice Kennedy's starting point is just as important today as it was in *Rice*. Once again, Hawaii's history, and the laws that have been passed with good intentions to deal with the struggles of native Hawaiians, require this Court's attention. For only the mandates of the United States Constitution together with this Court's guidance can disentangle Hawaii from its race-based laws and restore the ideals of equal protection to state government.

A. This Court Already Held in *Rice* That "Native Hawaiians" and "Hawaiians" Are Racial Classifications

Government action dividing people by race is inherently suspect because such classifications "promote notions of racial inferiority and lead to a politics of racial hostility," *Croson*, 488 U.S. at 493, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno*, 509 U.S. 630, 657 (1993), and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting).

If, as the Hawaii Supreme Court held, the Apology Resolution requires the State of Hawaii to prefer one group—defined by quantum of the "correct" blood or

ancestry—over other beneficiaries of the ceded lands trust, it violates the Equal Protection Clause. Implicitly relying on racial classifications without undertaking equal protection review, the Hawaii Supreme Court determined that native Hawaiians have a legal claim to ceded lands. The state court held that the State of Hawaii may not sell, exchange, or transfer 1.2 million acres of state land—the ceded lands—unless and until it reaches as-yet-undefined political resolution with native Hawaiians. *OHA*, 177 P.3d at 905. In other words, the State of Hawaii must manage virtually all state-owned land for the benefit of a single class defined by race, and not for the benefit of all of the citizens of Hawaii who are the beneficiaries of the ceded lands trust.

The statutory definitions of "Native Hawaiian"[3] and "Hawaiian,"[4] as used by OHA and by the United States in the Hawaiian Homes Commission Act, have

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[3] The statute defines "Native Hawaiians" as follows:

> "Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

Haw. Rev. Stat. Ann. § 10-2 (1993).

[4] The term "Hawaiian" is defined by state statute as:

> "Hawaiian" means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

Haw. Rev. Stat. Ann. § 10-2 (1993).

already been determined by this Court to be racial classifications. When it analyzed a Hawaiian-only voting requirement in *Rice*, this Court found that the statutory definitions were race-based definitions. *Rice*, 528 U.S. at 515 ("The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.").

Despite *Rice*, Respondent OHA continues to rely upon the same racial classifications to provide special programs and preferential treatment based upon race. Review is needed because the state court below endorsed those racial classifications and agreed that "native Hawaiians," as that term applies to OHA, are beneficiaries of the ceded land trust:

> As native Hawaiians, the individual plaintiffs are clearly beneficiaries of the ceded lands trust. Additionally, OHA, which is charged "with managing proceeds derived from the ceded lands and designated for the benefit of native Hawaiians," can be said to be representing the interests of the native Hawaiian beneficiaries to the ceded lands trust.

OHA, 177 P.3d at 905 (citations omitted). Thus, the very premise of Respondents' lawsuit, that native Hawaiians are beneficiaries of the ceded lands trust, and thus have a race-based legal right to the ceded lands, was recognized and approved by the state court without conducting any equal protection analysis.

B. Government Action Providing for Race-Based Claims to the Ceded Lands Fails Strict Scrutiny

In *Adarand*, 515 U.S. at 223-24, this Court reviewed the history of equal protection jurisprudence and noted three general propositions:

First, all racial classifications imposed by the government must first be met with skepticism, *id.* at 223, because" '[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination,' " *Wygant*, 476 U.S. at 273 (citation omitted) (plurality opinion of Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C. J.); *see also id.* at 523 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) ("[R]acial classifications [are] 'constitutionally suspect.' "); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people.").

The second principle is that all racial classifications are reviewed under strict scrutiny, regardless of the race that is benefitted or burdened. *Adarand*, 515 U.S. at 224 (citing *Croson*, 488 U.S. at 494 (plurality opinion); *id.* at 520 (Scalia, J., concurring in judgment)); *see also Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.).

Finally, the third proposition is one of congruence, *Adarand*, 515 U.S. at 224, in that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v.*

Valeo, 424 U.S. 1, 93 (1976); *see also Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

These three propositions led this Court to conclude that

> all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Adarand, 515 U.S. at 227. Thus, strict scrutiny must be applied to resolve whether race-based claims to the ceded lands are constitutional.

In the decision below, the Supreme Court of Hawaii based its holding on the Apology Resolution and did not consider whether the Resolution or the court's own holding offended equal protection principles. *OHA*, 177 P.3d at 920

> 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.

When a state governmental entity, such as OHA, seeks to justify race-based remedies to cure the effects of past discrimination, the Court does not accept the government's mere assertion that the remedial action

is required. *Miller v. Johnson*, 515 U.S. 900, 922 (1995). Rather, the Court insists on a strong basis in evidence of the harm being remedied. *Id.*

The Apology Resolution enumerates wrongs committed against the native people of Hawaii by agents and citizens of the United States leading to the overthrow of the Kingdom of Hawaii and its eventual annexation. Pub. L No. 103-150, 107 Stat. 1510 (1993). However, past societal discrimination alone cannot serve as the basis for rigid racial preferences. *Croson*, 488 U.S. at 505. States must identify the discrimination with some specificity before using race-conscious relief. *Id.* at 504. No specific instances of discrimination were documented before the court below.

Even if the Apology Resolution provided sufficient evidence of a compelling interest, the court below did not consider whether claims to the ceded lands, including claims to portions of revenues from the sale, lease, or rent from the ceded lands is a narrowly tailored remedy for individual discrimination. Respondents must show that preferential treatment afforded to native Hawaiians is not simply a product of "administrative convenience" in grouping together all native Hawaiians. *Cf. Croson*, 488 U.S. at 508.

"The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501. Here, the state court below failed to conduct an equal protection analysis, and thus gave blind deference to the use of racial classifications.

C. Determining Who Should Be Classified as a "Native Hawaiian" or "Hawaiian" Is Repugnant to Our Constitutional Ideals of Equal Protection

The differing definitions of "Native Hawaiian" and "Hawaiian" provide another reason why this Court should grant the petition and reverse the state court. Determining who is, and who isn't, a member of some chosen race is divisive and offensive to our Country's notions of equality. *Cf. Plessy*, 163 U.S. at 552 ("Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race."). As Justice Stevens has emphasized, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove*, 448 U.S. at 535 n.5 (Stevens, J., dissenting).

This case exemplifies this concern: both the Federal government and the State of Hawaii have enacted numerous laws with varying definitions based on percentage of Hawaiian ancestry for the purposes of determining eligibility for preferences. This race-centric approach only perpetuates and increases racial divisions. It has also spawned seemingly endless litigation, with the courts forced to undertake the distinctly suspect task of verifying racial bona fides and who properly qualifies as a "Hawaiian," and whether such classifications are proper. *See, e.g., Day v. Apoliona,* 505 F.3d 963 (9th Cir. 2007) (plaintiffs who claimed at least 50% bloodline asserted exclusive control over state programs to benefit "Hawaiians," currently open to anyone with one drop of Hawaiian

blood); *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (limiting candidates for OHA trusteeship to those of Hawaiian ancestry unconstitutional); *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (non-Hawaiian student challenged school's policy of giving preference to students of native Hawaiian ancestry).

II

ONLY THIS COURT CAN RESOLVE WHETHER THE APOLOGY RESOLUTION AMENDS OR RESCINDS FEDERAL LAW

A careful reading of Section 5(f) of the Admission Act does not distinguish native Hawaiians as being the sole beneficiaries of the ceded lands, nor does it require Hawaii to use the ceded lands for the betterment of native Hawaiians at all. Instead, it spells out five possible uses for the public lands, without providing that any portion of those lands or the proceeds thereof must be set aside exclusively for the benefit of racial Hawaiians. Admission Act § 5(f), 73 Stat. 6; *Rice*, 528 U.S. at 508. Even when the ceded lands were first annexed by the United States in 1898, they were committed to use for the benefit of all inhabitants of Hawaii, regardless of race. *See* Newlands Resolution, 30 Stat. 750 (Revenues from ceded lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.").

The court below, relying on the Apology Resolution, is prohibiting Hawaii from selling or leasing its public lands until the federal government reaches a political settlement with native Hawaiians

over the ceded lands. In effect, the Apology Resolution has been interpreted by a state court in a manner that amends the Admission Act by placing the interests of one racial class above the interests of all other racial groups in Hawaii in regard to the ceded lands. Only this Court can resolve whether the 1993 Joint Resolution of Congress, intended only as a symbolic apology, supersedes existing law and thus violates equal protection under the Fifth Amendment.

In 1993, both houses of Congress passed the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii (Apology Resolution). Pub. L. No. 103-150, 107 Stat. 1510. The resolution contains no express language recognizing, identifying, or creating a legal right by native Hawaiians, or any other group defined by race or ancestry, to any of the ceded lands. To the contrary, the Apology Resolution expressly provides that the resolution may not serve as a settlement of any claims against the United States. *Id.* § 3. In addition, the Apology Resolution provides no command or direction to any federal or State of Hawaii agency as to any general or specific implementing action. The Apology Resolution does not even mention or reference the Admission Act at all.

Nevertheless, the Hawaii Supreme Court interpreted the Apology Resolution to mean that "Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands." *OHA*, 177 P.3d at 901. But that contention is belied by the remarks by the senior senator from Hawaii, Senator Inouye, who said, "This resolution does not touch upon the Hawaiian homelands . . . . It is a simple apology." 103 Cong.

Rec. S14482 (daily ed. Oct. 27, 1993) (statement of Senator Inouye). The court below also ignored the Senate Committee on Indian Affairs, which reported that the Apology Resolution would "not result in any changes in existing law." S. Rep. No. 103-126, at 35 (1993).

No state court should have the power to remove a state's sovereign authority provided to it by the United States Congress. The Admission Act of 1959 provides the State of Hawaii with the express authority to sell or otherwise dispose of the ceded lands. The 1993 Apology Resolution does not contain any language amending, altering, modifying, or rescinding the Admission Act. And Senate Report No. 103-126 concluded that the Apology Resolution would not result in any change in laws. But without this Court's review, Hawaii's sovereign authority under the Admission Act is suspended indefinitely by the ruling of the Hawaii Supreme Court.

CONCLUSION

For the foregoing reasons, Amicus Curiae Pacific Legal Foundation respectfully requests that this Court grant the writ of certiorari.

DATED: June, 2008.

Respectfully submitted,

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