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Recent Developments

RESTORATIVE JUSTICE FOR HAWAI‘I’S[aa1] FIRST PEOPLE: SELECTED AMICUS CURIAE BRIEFS IN DOE V. KAMEHAMEHA SCHOOLS

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BRIEF OF AMICI CURIAE NATIVEHAWAIIAN LEGAL CORPORATION, NATIVEHAWAIIAN BAR ASSOCIATION, AND NA ‘A‘AHUHIWA IN SUPPORT OF PETITION FOR REHEARING

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*223 I. INTEREST OF AMICI CURIAE

Amici, **NativeHawaiian** organizations dedicated to ensuring the continued existence of **Hawaiianrights** and programs, respectfully submit this brief in support of Kamehameha Schools’ Petition for Rehearing En Banc.

NativeHawaiian Legal Corporation is a public interest, non-profit law firm that asserts and defends **NativeHawaiianrights** to lands and resources, beneficiary **rights** under public and private **Hawaiian** trusts, and **rights** to sovereignty and self-determination. **NativeHawaiian** Bar Association is an association of lawyers and legal professionals of **Hawaiian** ancestry that strives for justice and effective legal representation for all people of **Hawaiian** ancestry. Na ‘A‘ahuhiwa is an association of retired **NativeHawaiian** judges organized to advise and advocate on issues affecting **NativeHawaiians** and Hawai‘i.

Amici have a common interest in supporting the legitimate beneficiary structure of the Kamehameha Schools trust. Kamehameha has many programs that serve the entire community, but its **Hawaiian** ancestry preference for admission to the Schools is based on the wishes of Princess Bernice Pauahi Bishop, who created the charitable trust supporting the Schools. This preference also recognizes that the lands of the trust were the lands of the ali‘i (high chiefs) of the Kingdom of Hawai‘i, who understood that they held these lands not in a “fee-simple” Western sense, but as trustees, with a fiduciary obligation to the **Hawaiian** people. See Reppun v. Board of Water Supply, 65 Haw. 531, 548 n.14, 656 P.2d 57, 68-69 n.14 (1982) (ali‘i in ancient **Hawaiian** thought similar to trustee).

Those tracing their genealogy to Hawai‘i’s indigenous people are thus the beneficiaries of these lands in a direct sense and are entitled to a preference for the limited openings at Kamehameha Schools. They have entitlements to the benefits that flow from this charitable trust similar to **rights** of heirs and beneficiaries of any other estate. The majority ruling, if allowed to stand, would have the effect of radically and detrimentally altering the **rights** of these **NativeHawaiian** beneficiaries. Thus Amici urge this Court to grant rehearing en banc and reverse the majority decision of the panel.

II. ARGUMENT

A. THIS COURT SHOULD CONSIDER WHETHER KAMEHAMEHA's ADMISSIONS POLICY RELIES ON A "POLITICAL" OR "RACIAL" CLASSIFICATION

Whether Kamehameha's admissions policy employs a political classification, rather than a racial one, is an issue that is properly before, ***224** and should be considered by, this Court en banc. Kamehameha's Petition for Rehearing, at 7-9, and the Amicus Curiae Memorandum of the State, at 9-12, fully address the issue of whether Kamehameha conceded that its admissions policy was based solely on race and those arguments will not be reiterated here. It is important to note, however, that from the beginning of this lawsuit Kamehameha has argued that the policy does not discriminate on the basis of race. In answer to the complaint, and in the amended answer, Kamehameha admitted the "preference in its admissions policy for children of **Hawaiian** ancestry" but clearly asserted that "its admissions policy does not discriminate on the basis of race." Answer ¶¶ 2, 20 (7/16/03); Amended Answer ¶ ¶ 2, 21 (9/24/03).

Kamehameha has consistently relied on the status of **NativeHawaiians** as indigenous peoples in assessing the validity of the admissions policy. See Petition for Rehearing at 8 n. In the district court and in this Court, Kamehameha relied on Congress's determination that benefits are extended to **NativeHawaiians** not "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." 20 U.S.C. § 75*I*2(12)(B) (education); 25 U.S.C. § 4221 note (housing). See, e.g., Transcript of Argument, 11/4/04, at 30; Mem. in Support of Defendants' Motion for S.J. at 27-28.

Even if Kamehameha had conceded that its admissions policy was a racial classification, "[when an issue or claim is properly before [a] court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991). This Court can, and should, "consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." US. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 447 (1993).

Consequently, even if not "discretely" identified, the legal question of whether the admissions policy is based on a political or racial classification is "inextricably linked" to the question of liability under 42 U.S.C. § 1981, and thus should be appropriately resolved by this Court in an en banc rehearing. See City of Sherrill. v. Oneida Indian Nation, 125 S. Ct. 1478, 1490 n.8 (2005); see also Ballard v. C.I.R., 125 S. Ct. 1270, 1275 n.2 (2005) (addressing "a question anterior to all other [issues] the parties raised" even though "the parties did not discretely refer to the ground on which our decision rests").

B. KAMEHAMEHA's ADMISSIONS PREFERENCE RELIES ON A "POLITICAL" CLASSIFICATION

Kamehameha's admissions preference is based on a "political" ***225** classification rather than a "racial" one, because the United States has recognized repeatedly that it has a political relationship with and a special trust obligation to **NativeHawaiians** as the indigenous people of Hawai'i.[1] See, e.g., 20 U.S.C. § 7512(12); 42 U.S.C. § 11701(18)-(2). Courts have accepted for decades that preferences for **Native** Americans are subject only to rational-basis judicial scrutiny, because they are based on a "political" classification rather than a "racial" classification. This results from the unique political relationship between the United States and **natives**, even when the **native** groups are defined by genealogy or ancestry. See, e.g., Morton v. Mancari, 417 U.S. 535 (1974); Antoine v. Washington, 420 U.S. 194 (1975); Moe v. Confederated Salish and Kootanai Tribes of Flathead Indian Reservation, 425 U.S. 463 (1976); United States v. Antelope, 430 U.S. 641, 645 (1977). Under this approach, courts review special treatment of **natives** only to determine whether the programs are "tied rationally to the fulfillment of Congress's unique obligation" toward the **native** group. Mancari, 417 U.S. at 555.

This Court recently applied rational-basis review to laws excluding **NativeHawaiians** from applying for federal tribal recognition, explicitly accepting the argument that "the classification is politically based." Kahawaiolaa v. Norton, 386 F.3d 1271, 1278 (9th Cir. 2004). That decision emphasized that Congress was entitled to treat **NativeHawaiians** under separate and distinct legislation because of "the unique history of Hawai'i," Id. at 1281-82, explaining that it was entirely understandable that "Congress has established a program of federal benefits and entitlements for **nativeHawaiians** that is different" from those for other **native** groups. Id. at 1282.

If this Court has concluded that the classification between NativeHawaiians and other Native Americans is a "political" classification and that courts should defer to Congressional determinations regarding the different programs established for different native groups, then it necessarily follows that the admissions policy of a school established when the Kingdom of Hawai'i was a co-equal sovereign of the United States should also be evaluated under rational-basis review applicable to political classifications. The majority opinion however, engaged in no such analysis, summarily concluding that Kamehameha acknowledged the admissions policy to be a racial classification.

Kamehameha may have acknowledged that genealogy or ancestry is a component of the admissions policy, but that is certainly not the same as acknowledging that it utilizes a "racial" classification. Classifications ***226** involving native peoples frequently involve a genealogical, ancestral, or "racial" component, but they are nonetheless characterized as "political."

This judicial acceptance of the "political" classification is best demonstrated by examining Mancari. The Mancari preference was not free of "racial" components, because an individual had to have "one fourth or more degree Indian blood" to qualify for the preference. 417 U.S. at 554, n.24. The Supreme Court was thus dealing with a mixed political/racial category, but it nonetheless concluded that "rational-basis" review should apply because the prominent feature of this category was the "political" relationship between the native people and the United States.

The majority in this case relied heavily on the Indian tribal affiliation noted in the Mancari decision. Slip op. at 8956. But the Supreme Court's decisions after Mancari demonstrate that the Court itself did not view Mancari in the same restrictive light. In Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) and United States v. John, 437 U.S. 634 (1978), the Court upheld, under rational-basis review, benefits and legislation affecting individual Indians not organized into formal tribes.

Weeks involved a statute distributing assets to the heirs of two recognized tribes, but the heirs receiving benefits did not themselves have to be tribal members. 430 U.S. at 82, n.l4. Without making any special comment on the fact that benefits went to nontribally-affiliated individuals, the majority opined that Congress was free to "expand a class of tribal beneficiaries entitled to share in royalties from tribal lands." Id. at 84. The John decision ignored the supposedly crucial distinction between tribal and nontribal Indians, applying rational-basis review to Congressional action establishing separate criminal laws for Mississippi nontribal Indians who were a mere "remnant of a larger group of Indians" that had moved to Oklahoma. 437 U.S. at 653.

This Court applied the Mancari rational-basis standard in Alaska Chapter, Associated General Contractors v. Pierce, 694 F.2d 1162 (9th Cir. 1982), in upholding a Congressional program allowing preferences to all "Indian organizations and Indian-owned economic enterprises" (without regard to tribal membership) bidding on HUD contracts.

Based on these long-established precedents, the Kamehameha admissions preference must be viewed as one that utilizes a "political" rather than a "racial" classification, not implicating 42 U.S.C. § 1981.

C. CONGRESS HAS RECOGNIZED THE UNIQUE STATUS OF NATIVEHAWAIIANS AND 42 U.S.C. § 1981 SHOULD BE HARMONIZED WITH CONGRESSIONAL POLICY

Judge Graber's dissent points out that the 1866 Civil Rights Act was enacted while "the Hawaiian Islands were still a sovereign kingdom," Slip op. at 8963, and that when Congress reenacted this statute in 1991 it was ***227** cognizant of the laws enacted in the interim, including Congress's explicit approval of the important role Kamehameha has played in educating Hawaiian children and protecting Hawaiian culture. Id. at 8964. She explained, "the inescapable conclusion from the statutory context is that in 1991 Congress intended that a preference for NativeHawaiians, in Hawaii, by a NativeHawaiian organization, located on the Hawaiian monarchy's ancestral lands, be upheld because it furthers the urgent need for better education of NativeHawaiians." Id. at 8966. (emphasis added).

The majority, however, dismissed the importance of the many statutes Congress has passed recognizing the special trust relationship between **NativeHawaiians** and the U.S. Id. at 8953; id. n.10. The majority recognized that its duty was to interpret "what Congress may do and has done," id. at 8953, but it nonetheless refused to do just that. Even while acknowledging the many Congressional preferential enactments for **NativeHawaiians**, id. at 8957-60,[2] the majority refused to recognize their legal significance.

Although Congress has chosen to treat **NativeHawaiians** differently from other **Native** Americans, Congress has clearly determined that separate and preferential programs for **NativeHawaiians** are consistent with their "unique status as an indigenous people of a once sovereign nation." 20 U.S.C. § 7512(12)(B). In accord with that determination, Congress recently established the Office of **NativeHawaiian** Relations within the Secretary of Interior's office to implement the "special legal relationship between the **NativeHawaiian** people and the United States" and "continue the process of reconciliation with the **NativeHawaiian** people." Consolidated Appropriations Act of 2004, 118 Stat. 3, div. H, § 148 (2004).

Had the majority been willing to interpret "what Congress may do and has done," it should have harmonized Congressional policy recognizing the political status of the **NativeHawaiian** people with 42 U.S.C. §1981 and upheld Kamehameha's admissions policy.

III. CONCLUSION

For the foregoing reasons, this court should grant the Petition for Rehearing En Banc and reverse the majority decision of the three-judge panel.

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Footnotes

aa1 English and **Hawaiian** are the official languages of Hawai'i. Haw. Const. art. XV, § 4; Haw. Rev. Stat. § 5-6.5 (2006). In the **Hawaiian** language, an 'okina or glottal stop is considered a consonant; this consonant is part of the word Hawai'i, meaning both the island of the Hawai'i and the group of islands. Mary Kawena Pukui & Samuel H. Elbert, **Hawaiian** Dictionary xvii, 62 (rev. & enlarged ed. 1986). In this article, the authors have chosen to be consistent with **Hawaiian** language practice by including the glottal stop in the word Hawai'i.

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1 There is no question that **NativeHawaiians** are indigenous people. The Supreme Court in Rice v. Cayetano, 528 U.S. 495 (2000), acknowledged repeatedly that **NativeHawaiians** are indigenous people by referring to them as "the **native** population," id. at 506, and "the **nativeHawaiian** population," id. at 507.

2 Indeed, the majority noted, "Congress has asserted that the United States has a political relationship with, and a special trust obligation to, **nativeHawaiians** as the indigenous people of Hawai'i." Slip op. at 8959-60.