

No. 07-\_\_\_\_

---

---

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

---

PETITION FOR A WRIT OF CERTIORARI

---

MARK J. BENNETT,  
*Attorney General*

LISA M. GINOZA  
DOROTHY SELLERS  
WILLIAM J. WYNHOFF  
State of Hawaii  
465 S. King Street  
Suite 300  
Honolulu, HI 96813

SETH P. WAXMAN  
*Counsel of Record*

JONATHAN E. NUECHTERLEIN  
JONATHAN G. CEDARBAUM  
JUDITH E. COLEMAN  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
(202) 663-6000

---

---

## 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 here is whether this symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land—29 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.

## **PARTIES TO THE PROCEEDINGS**

The parties to the proceeding in the Supreme Court of Hawaii were:

Office of Hawaiian Affairs; Rowena Akana, Haunani Apoliona, Dante Carpenter, Donald Cataluna, Linda Dela Cruz, Colette Machado, Boyd P. Mossman, Oswald Stender, and John Waihe'e, IV, in their official capacities as members of the Board of Trustees of the Office of Hawaiian Affairs; Pia Thomas Aluli, Jonathan Kamakawiwo'ole Osorio, Charles Ka'ai'ai, and Keoki Maka Kamaka Ki'ili (Plaintiffs-Appellees); and

Housing and Community Development Corporation of Hawaii (HCDCH); Robert J. Hall, in his capacity as Acting Executive Director of HCDCH; Charles Sted, Chair, Stephanie Aveiro, Francis L. Jung, Charles King, Lillian B. Koller, Betty Lou Larson, Theodore E. Liu, Travis Thompson, Taiaopo, Tuimaleialiifano, Members of the Board of Directors of HCDCH; State of Hawai'i; and Linda Lingle, in her capacity as Governor of the State of Hawaii (Defendants-Appellants).

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
PARTIES TO THE PROCEEDINGS .....	ii
TABLE OF AUTHORITIES .....	v
OPINION BELOW .....	1
JURISDICTION .....	1
STATUTORY PROVISIONS INVOLVED .....	2
STATEMENT .....	2
REASONS FOR GRANTING THE PETI- TION .....	11
I. THE HAWAII SUPREME COURT’S DECISION ERRONEOUSLY REWRITES A FEDERAL ENACTMENT TO BAR THE STATE FROM CONVEYING TITLE TO MORE THAN 1.2 MILLION ACRES OF STATE-OWNED LAND .....	12
A. The Hawaii Supreme Court’s Interpre- tation of the Apology Resolution Con- flicts With the Resolution’s Express Terms .....	12
B. The Doctrine of Constitutional Avoid- ance Requires Reversal .....	15
II. THIS COURT’S REVIEW IS NECESSARY TO RESTORE APPROPRIATE AUTHORITY TO HAWAII’S POLITICAL BRANCHES .....	16
CONCLUSION .....	17
APPENDIX A: Opinion of the Supreme Court of Hawaii, reported at 117 Hawaii 174, 177 P.3d 884 (2008) .....	1a

**TABLE OF CONTENTS—Continued**

	Page
APPENDIX B: Judgment of the Supreme Court of Hawaii, dated March 24, 2008.....	101a
APPENDIX C: Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No 103-150, 107 Stat. 1510 (1993).....	103a
APPENDIX D: Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959).....	113a
APPENDIX E: Opinion of the Circuit Court of the First Circuit of Hawaii, dated December 5, 2002.....	133a

## TABLE OF AUTHORITIES

## CASES

	Page(s)
<i>Ann Arbor Railroad Co. v. United States</i> , 281 U.S. 658 (1930) .....	12
<i>Connecticut National Bank v. Germain</i> , 503 U.S. 249 (1992) .....	15
<i>Coyle v. Smith</i> , 221 U.S. 559 (1911) .....	15
<i>Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate</i> , 470 F.3d 827 (9th Cir. 2006) .....	14
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Building &amp; Construction Trades Council</i> , 485 U.S. 568 (1988) .....	15
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	16
<i>Isaak v. Trumbull Savings &amp; Loan Co.</i> , 169 F.3d 390 (6th Cir. 1999) .....	15
<i>Kosydar v. National Cash Register Co.</i> , 417 U.S. 62 (1974) .....	11
<i>Leo Sheep Co. v. United States</i> , 440 U.S. 668 (1979) .....	11
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983) .....	11
<i>Nebraska Department of Revenue v. Loewen- stein</i> , 513 U.S. 123 (1994).....	12
<i>Office of Hawaiian Affairs v. State</i> , 96 Haw. 388, 31 P.3d 901 (2001) .....	5
<i>Rice v. Cayetano</i> , 528 U.S. 495 (2000) .....	3, 4, 14
<i>Rice v. Cayetano</i> , 941 F. Supp. 1529 (D. Haw. 1996), <i>rev'd on other grounds</i> , 528 U.S. 495 (2000) .....	14

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947) .....	16
<b>CONSTITUTIONAL AND STATUTORY PROVISIONS</b>	
28 U.S.C. § 1257 .....	1
Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4.....	2, 3, 4
Civil Liberties Act of 1988, Pub. L. 100-383, 102 Stat. 903 (codified at 50 U.S.C. § 1989).....	13
The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Over- throw of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993).....	<i>passim</i>
Haw. Const. art. XII, §§ 4-6.....	5
Haw. Rev. Stat.	
ch. 10.....	5
§ 10-2 .....	5
§ 171-13 .....	4
§ 171-18 .....	4
§ 171-41 .....	4
§ 171-42 .....	4
ch. 201G (2001) .....	7
ch. 201H .....	7
ch. 365D.....	7
1980 Haw. Sess. L. Act 273 .....	5
1990 Haw. Sess. L. Act 304 .....	5
1992 Haw. Sess. L. Act 318 .....	8
1993 Haw. Sess. L. Act 354 .....	10

**TABLE OF AUTHORITIES—Continued**

	Page(s)
1997 Haw. Sess. L. Act 329 .....	10
1997 Haw. Sess. L. Act 350 .....	7
2006 Haw. Sess. L. Act 180 .....	7
2007 Haw. Sess. L. Act 249 .....	7

**RULES**

Hawaii Rule of Civil Procedure 54(b).....	9
---	---

**LEGISLATIVE MATERIALS**

S. Rep. No. 103-126 (1993).....	14
139 Cong. Rec.	
S14477 (daily ed. Oct. 27, 1993).....	14
H9627 (daily ed. Nov. 15, 1993) .....	14

**OTHER AUTHORITIES**

Hawaii State Databook, <a href="http://hawaii.gov/dbedt/info/economic/databook/db2006/section05.pdf">http://hawaii.gov/dbedt/info/economic/databook/db2006/section05.pdf</a> .....	3
<a href="http://hawaii.gov/dbedt/gis/maps/state_lands_non-dhhl_statewide.pdf">http://hawaii.gov/dbedt/gis/maps/state_lands_non-dhhl_statewide.pdf</a> .....	3

IN THE  
**Supreme Court of the United States**

---

No. 07-\_\_\_\_

---

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

---

PETITION FOR A WRIT OF CERTIORARI

---

The State of Hawaii petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Hawaii.

**OPINION BELOW**

The decision of the Supreme Court of Hawaii (App. 1a-100a) is published at 117 Haw. 174, 177 P.3d 884 (2008).

**JURISDICTION**

The Hawaii Supreme Court issued its decision on January 31, 2008. The judgment was entered on March 24, 2008. App. 101a. This Court has jurisdiction under 28 U.S.C. § 1257, which authorizes it to review “[f]inal judgments or decrees rendered by the highest court of

a State . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States.”

#### **STATUTORY PROVISIONS INVOLVED**

The Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (the “Apology Resolution”) is reprinted at App. 103a-111a.

The Admission Act of March 18, 1959, Pub. L. No. 86-3, is reprinted at App. 113a-132a.

#### **STATEMENT**

In 1993, Congress marked the 100th anniversary of the overthrow of the Hawaiian monarchy by enacting a joint resolution—the Apology Resolution—that expresses the federal government’s regret for its role in that incident. In this case, the Supreme Court of Hawaii held that this symbolic Resolution tacitly, but materially, impairs the State’s sovereign authority over its own lands. Specifically, the court held that the Resolution should be read to prohibit the State from selling, exchanging, or transferring approximately 1.2 million acres of State land—almost all of the land owned by the State and about 29 percent of the total land area of the State—until it has struck a political settlement with native Hawaiians who assert aboriginal rights to that land.

Nothing in the Apology Resolution remotely supports that outcome; indeed, the Resolution does not even purport to address Hawaii’s sovereign powers in general or its authority over state lands in particular.

By construing this federal apology to impair Hawaii's sovereign prerogatives, the Hawaii Supreme Court badly misconstrued congressional intent and raised grave federalism concerns. Moreover, by concocting a basis for its decision under *federal law*, the court wholly insulated its highly controversial decision from correction by the state political process. Only this Court can free the State from that misuse of federal law.

1. In 1893, with the involvement of certain United States officials, the Hawaiian monarchy was overthrown. *See generally Rice v. Cayetano*, 528 U.S. 495, 499-506 (2000). The United States annexed Hawaii in 1898, and the interim Hawaiian government ceded 1.8 million acres of former crown, public, and government lands to the federal government. App. 4a. Hawaii became a United States territory in 1900, and it joined the Union in 1959 as the fiftieth state. *Rice*, 528 U.S. at 505.

Under the terms of the statute admitting Hawaii as a state, the federal government granted title to Hawaii to most of the previously ceded lands (keeping some 350,000 acres) and mandated that these ceded lands be held by Hawaii in public trust. App. 113a. Section 5 of the Admission Act provides that these lands, which now total 1.2 million acres,<sup>1</sup> “together with the pro-

---

<sup>1</sup> The land area of the State of Hawaii totals about 6,422.6 square miles, *see* Hawaii State Databook, <http://hawaii.gov/dbedt/info/economic/databook/db2006/section05.pdf>, at tables 5.07 and 5.08, which equals about 4,110,464 acres. Thus, the approximately 1.2 million acres of ceded land at issue here constitutes about 29 percent of the total land area of the State and nearly all of the approximately 1.3 million total acres of land owned by the State. *See* [http://hawaii.gov/dbedt/gis/maps/state\\_lands\\_non-dhhl\\_statewide](http://hawaii.gov/dbedt/gis/maps/state_lands_non-dhhl_statewide)

ceeds from the *sale or other disposition* of [these] lands and the income therefrom,” must be used by the State 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, 1920, as amended, [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.

App. 116a-117a (emphasis added). Section 5(b) of the Admission Act provides that this grant of title to Hawaii was made “in lieu of any and all grants provided for new States by provisions of law other than [the Admission Act], and such grants shall not extend to the State of Hawaii.” App. 115a.

Hawaii state law authorizes the fee simple sale of land owned by the State. *E.g.*, Haw. Rev. Stat. §§ 171-13, 171-41, & 171-42. Hawaii law further provides that “[a]ll funds derived from the sale . . . or other disposition” of the ceded lands transferred by the United States to the State “or acquired in exchange for lands so ceded” shall “be held as a public trust” for the purposes specified in the Admission Act. Haw. Rev. Stat. § 171-18 (originally adopted in 1962 Haw. Sess. L. Act 32).

---

.pdf (excluding 200,000 acres held by the State pursuant to the Hawaiian Homes Commission Act of 1920 and the Admission Act, *see Rice*, 528 U.S. at 507-509).

In 1978, a state constitutional convention established the Office of Hawaiian Affairs (“OHA”) to receive and manage a portion of the income from the ceded lands for the benefit of native Hawaiians (the second of the permitted five purposes). *See* Haw. Const. art. XII, §§ 4-6; Haw. Rev. Stat. ch. 10. Under state law at the time, OHA received 20 percent of all “funds” derived from the ceded lands. 1980 Haw. Sess. L. Act 273, at 525, *abrogated by* 1990 Haw. Sess. L. Act 304, § 3, at 948, Haw. Rev. Stat. § 10-2 (substituting the word “revenue” for “funds”); *see also Office of Hawaiian Affairs v. State*, 96 Haw. 388, 31 P.3d 901 (2001).

2. In 1993, Congress enacted the Apology Resolution and summarized its purpose as follows:

[I]t is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians[.]

App. 109a.

The Resolution sets forth a list of historical findings, followed by three sections of operative text. Section 1, titled “Acknowledgment and Apology,” recites that Congress:

(1) . . . acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;

(2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;

(3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;

(4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and

(5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.

App. 109a-110a.

Section 2 of the Apology Resolution defines the term “Native Hawaiian” to include “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.” App. 110a. Section 3 then states:

Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.

App. 111a. Nothing in the Apology Resolution explicitly or implicitly impairs Hawaii’s sovereign right to control or alienate any of the lands it owns.

3. This case began in 1994, shortly after President Clinton signed the Apology Resolution into law. The dispute began over a 500-acre parcel of land in West Maui referred to as the “Leiali’i parcel.” Since 1987, the State’s affordable housing authority, the Housing Finance and Development Corporation (HFDC),<sup>2</sup> had been working to procure the Leiali’i parcel. HFDC sought to turn this land into a residential development because it was located in an area with a “critical shortage” of affordable housing. App. 18a. Home ownership is one of the five explicit purposes for which ceded land (or proceeds from the sale of such land) may be used pursuant to Section 5 of the Admission Act. *See* p. 4, *supra*.

In 1989, HFDC filed a petition with the Land Use Commission to reclassify the parcel from agricultural to urban use. App. 20a. The Commission granted the petition, with respondent OHA’s approval, in 1990. *Id.* For the next four years, OHA and HFDC tried to agree on the compensation due to OHA when the State transferred the land to HFDC. App. 20a-21a. In 1992, the Hawaii legislature established that OHA would receive 20 percent of the fair market value of the land to be

---

<sup>2</sup> In 1997, the Hawaii legislature merged HFDC into the Housing and Community Development Corporation of Hawaii (HCDCH), which is the captioned party in this case. 1997 Haw. Sess. L. Act 350, § 1, at 1010-11, Haw. Rev. Stat. ch. 201G (2001). HFDC was spun off as a separate agency again in 2006. *See* 2006 Haw. Sess. L. Act 180, § 2, at 709; 2007 Haw. Sess. L. Act 249, § 2, at 777-806 (codified at Haw. Rev. Stat. ch. 201H, 356D).

transferred. 1992 Haw. Sess. L. Act 318, at 1016. The parties, however, disputed the parcel's fair market value. While this negotiation continued, HFDC spent \$31 million developing the parcel, including building roads, hooking up utilities, and grading the lots. App. 22a.

After the Apology Resolution was enacted in 1993, OHA demanded, for the first time, that HFDC attach a disclaimer to the Leiali'i transfer stating that the conveyance would not waive or diminish native Hawaiian claims to ownership of the land. App. 21a. HFDC rejected this proposed disclaimer because it obviously would have clouded the title to the land and thus would have undermined the interests of would-be homeowners. *Id.* On November 4, 1994, HFDC purchased the land from the State for consideration of \$1.00 and transmitted a check to OHA for \$5,573,604.40, 20 percent of the fair market value OHA had previously said it would consider accepting. *Id.* OHA refused the check.

4. Respondent OHA filed this suit on November 4, 1994, and the individual plaintiffs (also respondents here) filed a separate suit on July 14, 1995. The cases were consolidated shortly thereafter. Arguing that the Apology Resolution had "changed the legal landscape and had restructured the rights and obligations of the State," App. 27a, respondents requested (1) an injunction prohibiting the State from selling any ceded lands and (2) an injunction barring the sale of the Leiali'i parcel specifically. In the alternative, they requested a declaration that any sale of the lands would violate the state constitution and the federal Admission Act, or would not release or limit the claims of native Hawaiians.

After a bench trial in November and December 2001, the trial court ruled for the State on the grounds of waiver, collateral estoppel, sovereign immunity, ripeness, and the political question doctrine. App. 26a-27a. It also held that the State had the authority to transfer the ceded lands. *Id.* On February 3, 2003, the trial court certified its judgment as final pursuant to Hawaii Rule of Civil Procedure 54(b). Respondents appealed.

5. On January 31, 2008, nearly twenty years after HFDC first filed its petition to reclassify the Leiali'i parcel, the Hawaii Supreme Court issued its decision. The primary question on appeal was “whether, in light of the Apology Resolution, [the] 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.” App. 79a. The court answered that question in the affirmative.

The court first construed the text of the Apology Resolution to recognize the “unrelinquished claims” that native Hawaiians have asserted in the lands at issue. App. 32a. From this, the court inferred that the Apology Resolution subjects the State to a new and specific fiduciary duty to preserve the lands until some undefined future date. The court found support for this interpretation in Congress’s statement that it intended “to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.” *Id.* (quoting 107 Stat. at 1513) (emphasis omitted). On these grounds, the court enjoined the State from transferring any of the ceded lands, including the Leiali'i parcel, “pending a reconciliation between the United States and the native Hawaiian people” and “until the claims of the native Hawaiians to the ceded lands have been resolved.” App. 85a, 100a. It did not

set out a standard for determining what type or extent of “reconciliation” would be sufficient to warrant lifting the injunction. It held only that “injunctive relief is proper pending final resolution of native Hawaiian claims through the political process.” Pet. App. 98a.

The Hawaii Supreme Court repeatedly stressed that its decision rested primarily on its construction of the federal Apology Resolution. *See* App. 26a (“At the heart of the plaintiffs’ claims . . . is the Apology Resolution.”); App. 79a (“The primary question . . . is whether, in light of the Apology Resolution, this court should issue an injunction.”) (emphasis omitted); App. 85a (“[T]he language of the Apology Resolution itself supports the issuance of an injunction.”); App. 85a (“[T]he Apology Resolution dictates that the ceded lands should be preserved.”). Indeed, the court held that “it was not until at least November 23, 1993, when the Apology Resolution was signed into law by President Clinton, that the plaintiffs [respondents here] had knowledge, actual or constructive, of the existence of” a cause of action. App. 58a-59a (citation and internal punctuation omitted). The court invoked state-law provisions as well, but only as ancillary support for its judgment. *See* App. 35a-39a.<sup>3</sup> This Court has jurisdiction over this case because, at a minimum, this “state court decision fairly appears to rest primarily on fed-

---

<sup>3</sup> It referred principally to 1993 legislation stating that the overthrow of the monarchy was illegal, 1993 Haw. Sess. L. Act 354, § 1, at 999-1000, and to 1997 legislation recognizing legislative intent “to continue [the] momentum” toward permanent reconciliation,” 1997 Haw. Sess. L. Act 329, § 1, at 956. Neither of these provisions bars the sale of ceded lands, and neither amends or abrogates the substantive Hawaii law that specifically *allows* the State to sell the ceded lands it owns. *See* p. 4, *supra*.

eral law, or to be interwoven with the federal law, and . . . the adequacy and independence of any possible state law ground is not clear from the face of the opinion.” *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

#### REASONS FOR GRANTING THE PETITION

The decision below holds that Congress dramatically but silently abrogated key land rights—essential to the sovereignty of any State—that Hawaii explicitly received when it was admitted to the Union in 1959. That perplexing decision is as important as it is wrong and warrants this Court’s review.

First, the practical impact of this decision is enormous: it bars the State from prudently managing, for the benefit of all citizens of Hawaii, more than 1.2 million acres of State-owned land—29 per cent of the total land area of the State and almost all the land owned by the State. *See, e.g., Leo Sheep Co. v. United States*, 440 U.S. 668, 678 (1979) (granting certiorari to decide statutory interpretation question affecting property rights to millions of acres of Western land). Second, by construing this congressional enactment as an impairment of the State’s sovereign authority over its land, the decision raises serious federalism concerns. *See, e.g., Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974) (granting certiorari where the case presented “important questions touching the accommodation of state and federal interests under the Constitution”). Third, by basing its decision primarily on federal law, the Hawaii Supreme Court improperly insulated its decision from any state-level political check. Only this Court can correct that problem by enforcing a proper interpretation of federal law.

- I. THE HAWAII SUPREME COURT’S DECISION ERRONEOUSLY REWRITES A FEDERAL ENACTMENT TO BAR THE STATE FROM CONVEYING TITLE TO MORE THAN 1.2 MILLION ACRES OF STATE-OWNED LAND**
- A. The Hawaii Supreme Court’s Interpretation Of The Apology Resolution Conflicts With The Resolution’s Express Terms**

The Apology Resolution acknowledges the mistreatment native Hawaiians suffered as a result of the 1893 overthrow and recognizes a federal commitment to reconciliation. But the Resolution does not mandate, justify, or even contemplate the imposition of new limits on Hawaii’s sovereign authority to sell, exchange, or transfer its lands for any of the purposes identified in the Admission Act. The Hawaii Supreme Court thus had no coherent basis for invoking this federal provision to abrogate the State’s core sovereign authority over its own lands.

Interpretation of the Apology Resolution begins with its text. *See, e.g., Nebraska Dep’t of Revenue v. Loewenstein*, 513 U.S. 123, 128 (1994); *Ann Arbor R.R. Co. v. United States*, 281 U.S. 658, 666 (1930) (interpreting a joint resolution under the standard rules of statutory construction). After a succession of “whereas” clauses, which recite the relevant history, the Resolution contains seven operative paragraphs. The first five, which comprise Section 1, list the elements of Congress’s “acknowledgment and apology” to “Native Hawaiians.” Then, in one paragraph apiece, Section 2 defines “Native Hawaiians,” and Section 3 provides a savings clause for “settlement of claims” against the United States.

All told, the Resolution serves two purposes: “To *acknowledge* the 100th anniversary of the January 17,

1893 overthrow of the Kingdom of Hawaii, and *to offer an apology* to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.” App. 103a (emphasis added). The Resolution does not address the State’s trust obligations, let alone restrict the State’s preexisting and explicit authority to transfer land out of the trust—and to dispose of “the proceeds from the sale” of such land—in accordance with any of the five purposes set forth in the Admission Act. App. 116a. Indeed, nothing in the Resolution alters *any* of the State’s legal rights or obligations in any respect.

The Section 3 disclaimer does not somehow draw that conclusion into question, as the Hawaii Supreme Court appeared to believe; instead, the disclaimer *confirms* that conclusion. In its entirety, Section 3 states: “Nothing in [the Resolution] is intended to serve as a settlement of any claims against the United States.” At most, this savings clause ensures that claimants against the United States will be no *worse off* after the Resolution is enacted than they were before. The Hawaii Supreme Court, however, held that this savings clause unequivocally *requires* “the future settlement of the plaintiffs’ unrelinquished claims” to the land. App. 34a. But the savings clause says no such thing: it simply preserves the status quo. If Congress had intended to alter substantive rights, it would have done so explicitly in the text of Resolution—as it has done in other “apology” enactments. *See, e.g.*, Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. § 1989) (acknowledging and apologizing “for the evacuation, relocation and internment” of Japanese citizens during World War II and providing restitution to interned Japanese-Americans and Alaskan Aleuts).

Finally, if there were any doubt that the Apology Resolution leaves substantive rights unaltered, that doubt would be dispelled by the Resolution's legislative history and subsequent judicial interpretation. For example, the Senate Report accompanying the Resolution states emphatically that this enactment "will not result in any changes in existing law." See S. Rep. No. 103-126, at 35 (1993); see also 139 Cong. Rec. S14477, S14482 (daily ed. Oct. 27, 1993) (remarks of Sen. Inouye) ("[T]his is a simple resolution of apology, to recognize the facts as they were 100 years ago."); 139 Cong. Rec. H9627, H9630 (daily ed. Nov. 15, 1993) (statement of Rep. Abercrombie) (similar). And, until the Hawaii Supreme Court's decision here, every court that had addressed that question had agreed with that basic proposition. See *Rice v. Cayetano*, 941 F. Supp. 1529, 1546 n.24 (D. Haw. 1996) ("[The Apology Resolution] did not create any substantive rights . . . . The Apology Bill creates no specific Native Hawaiian rights."), *rev'd on other grounds*, 528 U.S. 495 (2000); *Office of Hawaiian Affairs v. Housing Fin. & Dev. Corp.*, Trial Ct. Decision, App. 175a ("[B]y its terms, the 1993 Apology Resolution does not . . . itself create a claim, right or cause of action."); see also *Rice v. Cayetano*, 528 U.S. 495, 505 (2000) (referring to the Resolution as only an acknowledgment and apology); *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (en banc) (same).

In short, by construing this Resolution to undercut substantive rights and curtail the State's sovereign authority over its lands, the Hawaii Supreme Court violated every court's duty when construing federal law to "presume that a legislature says in a statute what it means and means in a statute what it says there."

*Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

**B. The Doctrine Of Constitutional Avoidance Requires Reversal**

It is a “cardinal principle” of statutory interpretation that, when Congress’s intent is ambiguous, courts should construe statutes to avoid interpretations that would raise “grave and doubtful constitutional questions.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, even if Congress’s intent were ambiguous, the Apology Resolution should be construed to leave the State’s sovereign authority over its lands intact, because otherwise—under the Hawaii Supreme Court’s interpretation—the Resolution would raise grave federalism concerns.

The Hawaii court triggered these concerns by interpreting the Apology Resolution to abrogate the State’s sovereign power—explicitly granted by Congress “in lieu of any and all grants provided for new States” (*see* p. 4, *supra*)—to manage and sell or exchange its own public lands within the broad limits set forth in the Admission Act. *See Coyle v. Smith*, 221 U.S. 559, 578 (1911) (striking down federal legislation dictating location of state capital as violation of state’s “jurisdictional sovereignty”); *see also Isaak v. Trumbull Sav. & Loan Co.*, 169 F.3d 390, 397 (6th Cir. 1999). (“Property is not merely the ownership and possession of land . . . . It also embraces the unrestricted right to use, enjoy and dispose of lands . . . . Anything [that] destroys any of these elements of property, to that extent destroys the property itself.”). The Constitution preserves the states’ “substantial” sovereign powers, “powers with which Congress does not readily inter-

fere.” *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). No federal law should be construed to pre-empt these sovereign powers unless, at a minimum, Congress makes that purpose “clear and manifest.” *Gregory*, 501 U.S. at 461 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Though the Apology Resolution contains no such clear statement, the Hawaii Supreme Court found that Congress intended not just to regulate, but to eliminate, the State’s preexisting and explicit right to transfer, exchange, or sell these lands for the benefit of all the people of Hawaii in accord with the purposes set forth in the Admission Act. The court thereby abandoned its obligation to “assume that Congress does not exercise lightly” its limited powers to legislate in areas traditionally reserved to the States. *Gregory*, 501 U.S. at 460. This Court should grant review to free Hawaii from this groundless but very substantial impairment of its sovereign authority.

## **II. THIS COURT’S REVIEW IS NECESSARY TO RESTORE APPROPRIATE AUTHORITY TO HAWAII’S POLITICAL BRANCHES**

If the Hawaii Supreme Court had based its highly controversial decision solely on state law rather than primarily on federal law, the State’s political branches could have revisited the merits of that decision and potentially overruled it. By basing its decision on federal law, however, the Hawaii Supreme Court effectively insulated its decision from any political check at the state level, because the court’s interpretation of the federal Apology Resolution would trump any new state legislation to restore the State’s land-transfer authority. Only this Court can correct that misuse of federal law to hamstring the State’s political process.

It is also entirely unclear when the Hawaii Supreme Court will conclude that its current injunction will be lifted. The court has indicated that the injunction will remain until there has been a “final resolution” of native Hawaiian claims. App. 97a-98a. But it has not articulated what would constitute a “final resolution” of these claims, how far that resolution should reach substantively, and how the legislature will know when it has satisfied the court’s demands. The court alone has retained for itself the power to determine when reconciliation is complete.

Absent review by this Court, this injunction will continue to hold the State hostage to the Hawaii Supreme Court’s deeply flawed analysis of federal law. The error and the injury in this case are unmistakable, and only this Court has the power to correct them. It should exercise that power.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK J. BENNETT,  
*Attorney General*  
LISA M. GINOZA  
DOROTHY SELLERS  
WILLIAM J. WYNHOFF  
State of Hawaii  
465 S. King Street  
Suite 300  
Honolulu, HI 96813

SETH P. WAXMAN  
*Counsel of Record*  
JONATHAN E. NUECHTERLEIN  
JONATHAN G. CEDARBAUM  
JUDITH E. COLEMAN  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
(202) 663-6000

APRIL 2008