

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HAWAII, ET AL., :

4 Petitioners :

5 v. : No. 07-1372

6 OFFICE OF HAWAIIAN :

7 AFFAIRS, ET AL. :

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9 Washington, D.C.

10 Wednesday, February 25, 2009

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:10 a.m.

15 APPEARANCES:

16 MARK J. BENNETT, ESQ., Attorney General, Honolulu, Haw. ;
17 on behalf of the Petitioners.

18 WILLIAM M. JAY, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington,
20 D.C.; on behalf of the United States, as amicus
21 curiae, supporting the Petitioners.

22 KANNON K. SHANMUGAM, ESQ., Washington, D.C., on behalf
23 of the Respondents.

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 07-1372, Hawaii v. The Office of Hawaiian Affairs.

General Bennett.

ORAL ARGUMENT OF MARK J. BENNETT

ON BEHALF OF THE PETITIONERS

MR. BENNETT: Mr. Chief Justice, and may it please the Court:

A 1993 congressional apology resolution did not alter Hawaii's right to transfer its public lands or repeal, by implication, prior congressional enactments that had extinguished all competing claims to those lands. It was, as its sponsor said at the time, a simple apology, and no more.

The lands in question were the former crown and government lands of the Kingdom of Hawaii. The Republic of Hawaii was the successor in interest in ownership to those lands and was recognized as such by the United States. The 1898 Newlands Resolution of Annexation recited that the Republic of Hawaii was ceding the absolute fee ownership of those lands to the United States, and that that cession was accepted, ratified, and confirmed. Once the United States

1 Congress so acted, all competing claims to title were
2 extinguished, and under precedent going back almost
3 200 years, the determinations by Congress to accept the
4 cession were final and conclusive on any court.

5 JUSTICE STEVENS: Excuse me. Does that
6 proposition settle the question whether your opponents
7 had an equitable interest in the lands?

8 MR. BENNETT: Your Honor, what the
9 Respondents have contended from day one of this case is
10 that they have a property right in this -- in the land,
11 and the Newlands Resolution conclusively settled that
12 question. There is no property interest that could have
13 competed with the United States' perfect title. That
14 perfect title was passed to the State of Hawaii in 1959
15 through the 1959 Hawaii Admission Act, which --

16 JUSTICE KENNEDY: But would the State of
17 Hawaii, under Hawaii law, be entitled to take the
18 position, if it so chose, that as the new owner of the
19 lands, it has a special duty as a trustee that some
20 other owner might not?

21 MR. BENNETT: Your Honor, the Admission Act
22 gives the State the right to manage and dispose of the
23 lands according to State law. So the political branches
24 certainly have the right to decide which lands they are
25 going to use for which of the five purposes --

1 JUSTICE KENNEDY: But then -- then it's just
2 a question of whether the Hawaiian Supreme Court --
3 assuming that it made the decision that I hypothetically
4 stated -- whether the Hawaiian Supreme Court, as opposed
5 to the Hawaiian Legislature, could make the
6 determination of whether or not there is some special
7 trust obligation imposed on the State of Hawaii by
8 reason of its own duties.

9 MR. BENNETT: But, Your Honor, in this case
10 what Respondents urged was that the Apology Resolution
11 changed the legal landscape and commanded the State to
12 hold these lands possibly in perpetuity without
13 alienation. The Hawaii Supreme Court specifically found
14 that the Apology Resolution dictated the result here,
15 that plaintiffs claims did not even arise until the
16 Apology Resolution was signed into law by President
17 Clinton. In addition, the plaintiffs -- the Respondents
18 urged upon the Hawaii Supreme Court a property right, a
19 property and ownership interest in these lands. Even if
20 --

21 JUSTICE GINSBURG: But, General Bennett, if
22 I understand correctly, looking to your question
23 presented, the only thing before us is the effect of the
24 Apology Resolution. The question presented doesn't say
25 anything about the Admissions Act or the Newlands

1 Resolution. So shouldn't we just stick to the question
2 as you presented it? Whatever the picture is, does the
3 Apology Resolution have any substantive effect?

4 MR. BENNETT: Your Honor, that certainly is
5 one question before the Court, but we believe fairly
6 included in that question is the issue of the nature of
7 the State's sovereign authority. The question presented
8 talks about whether the Apology Resolution changed in
9 any way the State's sovereign authority, and that
10 question -- certainly anterior and predicate to an
11 intelligent resolution of that question is the nature of
12 the State sovereign.

13 JUSTICE GINSBURG: Why is it necessary? Why
14 isn't it sufficient just to say that this resolution has
15 no substantive effect, period, and then remand to the
16 Hawaii Supreme Court?

17 MR. BENNETT: Because, Your Honor, the
18 Hawaii Supreme Court's decision also rests on a premise
19 foreclosed by Federal law, that is that there are
20 competing claims to title. As late as page 18 of the
21 red brief, Respondents even say now that Native
22 Hawaiians are entitled to these lands as a matter of
23 property law, but they do not say anywhere in the red
24 brief how that property law claim arises or how that
25 property law claim could survive the Newlands

1 Resolution, the Hawaii Organic Act, or the Admission
2 Act.

3 JUSTICE SOUTER: General, the difficulty I
4 have is that not only do they not say so, the Supreme
5 Court of Hawaii didn't say so either. And it seems to
6 me that we would be well advised to make sure that we
7 understand the reasoning of the Supreme Court of Hawaii
8 before we start talking about the relationship between
9 the various Federal statutes and whatever this claim may
10 be. I simply don't understand the claim myself.

11 I do understand your point, because I think
12 this much is clear from the Hawaiian opinion: That they
13 think the Apology Resolution seriously affects the
14 claim. That we can deal with, but once we get out of
15 that, the -- the whole case seems murky to me. Am I
16 missing something?

17 MR. BENNETT: Well, Your Honor, the Hawaii
18 Supreme Court, at page 69a of the appendix for the
19 petition, said that this was a claim seeking an
20 injunction -- injunctive relief with regard to property
21 rights. At page 87a of the petition appendix, the
22 Hawaii Supreme Court said there are questions regarding
23 the title to the State's ceded lands.

24 JUSTICE GINSBURG: There -- there may well
25 be, but then the Hawaii Supreme Court chose its grounds,

1 and it said at one point the resolution dictates the
2 preservation of the ceded lands. At another place it
3 said that Federal law provides the basis for its
4 decision and that State trust law is interwoven with
5 that Federal law. It also said that Federal law grounds
6 the decision and provides the governing legal standard.

7 Now, they could not have been clearer. They
8 repeated at least five times that their decision rested
9 on the resolution, that everything turned on that
10 resolution having substantive effect. That's why they
11 said their decision was driven by Federal law. And I
12 don't know why we shouldn't take the Hawaii Supreme
13 Court at its word repeated so many times.

14 MR. BENNETT: Well, Your Honor, we believe
15 that Respondents' attempt to trivialize this Court's
16 jurisdiction -- they say, for example, in the brief in
17 opposition that even if this Court were to reverse, the
18 Hawaii Supreme Court will simply reinstate the exact
19 same decision, and presumably they would press upon the
20 Court the exact grounds they've pressed for 14 years --

21 JUSTICE GINSBURG: We don't --

22 MR. BENNETT: -- that is --

23 JUSTICE GINSBURG: We don't know that for
24 sure. It may well be, but there is a large -- large
25 difference, and if they're relying on the Federal ground

1 that insulates them from any check by the Hawaii polity,
2 but if they are forced to rely on State law, then it's
3 up to the people of Hawaii whether they like it or not.
4 They could change the State statutory law, equitable
5 notions, constitutional law. But by doing what the
6 Hawaii Supreme Court did, they have taken the case out
7 of the realm of State law, subject to the political
8 check, put it on Federal grounds.

9 So I think that that's what -- the issue
10 properly before this Court, and not anything about the
11 interpretation of the Admissions Act, which -- if it's
12 implicit in your question, it's a little hard to see.
13 Ordinarily, if a party wants us to address the effect of
14 a piece of legislation, they will mention that in the
15 question presented.

16 MR. BENNETT: Your Honor, I agree that this
17 decision clearly rests on Federal grounds, but we would
18 also suggest that the question presented talks about
19 whether the State's sovereign authority is stripped, and
20 the State's sovereign authority, we would submit, is
21 clear.

22 The United States had perfect title. The
23 State of Hawaii succeeded to the United States' perfect
24 title. Respondents do not suggest anywhere in their
25 pleadings why that is not so, or why they continue to

1 press even with this Court this property right claim to
2 these lands. And so we would suggest that it would be
3 prudent for the Court to address what we believe is the
4 fairly included question of the nature of the State's
5 sovereign authority, especially as it would appear to be
6 entirely not subject to contravention by the Respondents
7 --

8 JUSTICE KENNEDY: Well, I'm not sure it
9 would be prudent when the great bulk of the opinion is
10 based on the Apology Resolution. And I -- I certainly
11 do think you have a powerful argument that the Apology
12 Resolution presents us with a Federal question. But the
13 more far-reaching question, as Justice Ginsburg
14 suggests, might not even be very specifically within the
15 question presented, and even if it's fairly embraced,
16 you used the word "prudent." It seems prudent for us to
17 confine our decision to the effect of the Apology
18 Resolution and whether or not the Hawaiian Supreme Court
19 got that part of it right.

20 MR. BENNETT: Well, with -- with respect,
21 Your Honor, the Court certainly could limit its ruling,
22 but in a case that has gone on for 14 years and which,
23 in virtually every pleading, the Respondents have filed
24 they have asserted essentially that the State lacks
25 title to these lands because the United States lacked

1 title, the overthrow of the Kingdom of Hawaii was
2 illegal, and that that's the precise reason for 14 years
3 the State has either been through an injunction or, as a
4 practical matter, not been able to alienate its lands,
5 that this Court certainly has the ability for a question
6 that we believe --

7 JUSTICE ALITO: If the Apology Resolution is
8 put aside, I'm not quite sure what is left, other than
9 State-law issues.

10 MR. BENNETT: Well, what's left --

11 JUSTICE ALITO: You could -- would there be
12 anything to prevent the Hawaiian Legislature from
13 passing a law that says, we have absolute -- we have
14 title to these lands, but we are going to impose a
15 five-year moratorium on any transfer of the lands
16 because we want to promote a reconciliation process?

17 MR. BENNETT: Your Honor, certainly under
18 the terms of the Admission Act, the authority given the
19 political branches for the management and disposition of
20 the lands is broad and would run up against only the
21 Federal common law of trust that the Ninth Circuit says
22 governs --

23 JUSTICE SOUTER: But that's not what the
24 Hawaiian Supreme Court said, and I'm reading from page
25 98a of the petition appendix, the concluding portion of

1 the opinion. "We hold that: (1) the Apology Resolution
2 and related State legislation, give rise to the State's
3 fiduciary duty."

4 The only Federal statute mentioned is the
5 Apology Resolution, and the rest of their reasoning
6 seems to rest upon some kind of State equity law or
7 trust law. Now, that trust law may ultimately be
8 inconsistent with prior Federal acts, but the only --
9 the only thing they are disclosing right now is -- aside
10 from the Apology Resolution, seems to be State trust
11 law.

12 MR. BENNETT: Well, Your Honor, the Hawaii
13 Supreme Court did say that this is an injunction based
14 on property rights. The Hawaii Supreme Court did say --

15 JUSTICE SOUTER: But trust law is based on
16 somebody's property rights. We don't know whether they
17 are talking about legal rights or equitable rights, and
18 that's consistent with the statement I just read to you.

19 MR. BENNETT: Well, Your Honor, at page 85a
20 of the appendix to the petition, the court said that the
21 Congress recognized that Native Hawaiians had
22 unrelinquished claims to the ceded lands, and as a
23 result of that recognition, the Apology Resolution
24 dictated the entry of this injunction.

25 We believe that clearly that's not so, but

1 that this idea of unrelinquished claims is an
2 unrelinquished property right claim. This is what was
3 urged upon the Hawaii Supreme Court at every stage.

4 JUSTICE SOUTER: But, General, I think --
5 with respect, I still don't know what the position of
6 the Hawaiian Supreme Court is going to be if this Court
7 rules that the Apology Resolution does not support the
8 proposition that you just read.

9 I don't know whether at that point the
10 Hawaiian Supreme Court is going to say, okay, all we've
11 got left to deal with now is State trust law, or whether
12 they've got to pull another rabbit out of the hat and
13 say, but there is -- there is some kind of prior --
14 there is some kind of a -- a claim against which prior
15 Federal law could not prevail.

16 I don't know. And I -- that's -- that's why
17 it seems to me, to say the least, imprudent to wade into
18 it at this point. The one thing we know that seems to
19 have been significant to their decision is the Apology
20 Resolution. And I think we would be wise to stick to
21 that.

22 MR. BENNETT: Your Honor, what our response
23 would be is a simple one: That the issue of the State's
24 title would in our view be undisputed. The United
25 States' title was perfect and indisputable. The State's

1 title is perfect and indisputable. And this Court has
2 said that one of the functions in -- in cases where
3 respondents claim an adequate and independent State-law
4 ground is to remand the case by disabusing the State
5 court of incorrect notions of what Federal law either
6 permits or requires.

7 JUSTICE ALITO: A point on which both you
8 and your adversaries seem to agree is that the Apology
9 Resolution really is not critical to the decision of the
10 Hawaii Supreme Court. Because if you thought that
11 simply taking the Apology Resolution off the books would
12 provide an acceptable outcome from your point of view,
13 you would be happy with our deciding just that narrow
14 question. And your opponent explicitly says that the
15 Apology Resolution wasn't critical to the decision of
16 the Hawaii Supreme Court. Isn't that true?

17 MR. BENNETT: Yes, Your Honor, and they have
18 not asked this Court to affirm.

19 JUSTICE ALITO: And isn't it true that you
20 don't think that just saying the Apology Resolution did
21 not change anything would be insufficient?

22 MR. BENNETT: Your Honor, because it seems
23 to us clear that both the Respondents and the Hawaii
24 Supreme Court believe that there are property right
25 claims that Native Hawaiians have, we believe those

1 property right claims are clearly inconsistent with
2 Federal law, the Newlands Resolution, and the Admission
3 Act, and that there is no reason for this Court not to
4 reach such a clear claim.

5 JUSTICE BREYER: But they don't say the -- I
6 mean, nothing in the resolution and nothing in the --
7 does anything in the court's opinion or the resolution
8 say that the claims are valid? We all know they have
9 claims. They have been making claims. Is there
10 anything in any document I have that says the claims are
11 valid claims? Maybe they are valid, and maybe they are
12 not.

13 MR. BENNETT: The -- the only thing is the
14 position of the Respondents, who assert --

15 JUSTICE BREYER: Of course, they think they
16 are valid.

17 (Laughter.)

18 JUSTICE BREYER: But I mean -- so -- so
19 since you have normally one group thinks they are valid;
20 another group thinks they are invalid. Well, here we
21 are. Let them fight it out.

22 MR. BENNETT: Well, Your Honor --

23 JUSTICE BREYER: And all we can say is that
24 this Resolution of the Apology doesn't really say who's
25 right. And if Hawaii wants to give some more money, or

1 whatever they want to do, to the Native Hawaiians,
2 that's their affair. What's the -- what's the problem?

3 MR. BENNETT: Well, Your Honor, it is
4 certainly true that the Apology Resolution does not, as
5 Respondents state, recognize the validity of any claims,
6 but Federal law forecloses the validity of any claims.
7 And we believe that that is a question that is fairly
8 included anterior to the question of whether the
9 resolution stripped Hawaii of its sovereign authority.
10 It is only natural for the Court to declare what we
11 believe is the indisputable proposition that Hawaii's
12 sovereign authority is based on --

13 JUSTICE BREYER: Could the Hawaiian
14 Legislature pass a law saying the Native Hawaiians had
15 claims? Those claims, because of the Federal 1950 --
16 whatever it is -- are not valid anymore. But that was
17 pretty unfair to them, and, therefore, what we think we
18 should do is the following. And then they pass a whole
19 lot of things that they think would be appropriate to do
20 in light of what I just said. What stops that?

21 MR. BENNETT: Your Honor, the -- the
22 legislature has wide discretion in managing and
23 disposing of the assets of the State.

24 JUSTICE GINSBURG: And the legislature, if
25 it wanted to -- as I understand the Admission Act, it

1 lists five purposes; it says any one purpose. And the
2 legislature, if it so chose, could say, we want this
3 property -- the proceeds from this property to be for
4 the exclusive betterment of the conditions of the Native
5 Hawaiians. They could -- it would be up to the
6 legislature to give it all to the Native Hawaiians,
7 wouldn't it?

8 MR. BENNETT: That would not violate the
9 Admission Act, Your Honor.

10 JUSTICE SCALIA: That -- that would not?

11 MR. BENNETT: That would not.

12 JUSTICE SCALIA: Would it violate the
13 Admission Act if the legislature did not -- said -- said
14 we are giving it to them because we want to, because we
15 think it's a good idea. No, we are giving it to them
16 because we think they have a right to it.

17 MR. BENNETT: Your Honor --

18 JUSTICE SCALIA: And we feel that we must
19 give it to them because it's theirs.

20 MR. BENNETT: Your Honor, if the --

21 JUSTICE SCALIA: Would that violate the
22 Admission Act?

23 MR. BENNETT: If the legislature believed
24 that it bettered the condition of Native Hawaiians to
25 provide proceeds from land to the Native Hawaiians, the

1 Admission Act gives them that ability to do it.

2 JUSTICE SCALIA: Did you answer my question
3 just then?

4 MR. BENNETT: Yes. I'd -- I'd like to --

5 JUSTICE SCALIA: Please, let me put my
6 question again. Let's assume that the legislature does
7 not say, we want to give it to the Native Hawaiians
8 because we like the Native Hawaiians or because we think
9 they deserve it; but, rather, we think we have to give
10 it to the Native Hawaiians because it's theirs.

11 MR. BENNETT: I think that would be contrary
12 to Federal law, Your Honor.

13 JUSTICE SCALIA: I think it would be.

14 MR. BENNETT: Your Honor, if I -- if I may
15 reserve the remainder of my time for rebuttal.

16 CHIEF JUSTICE ROBERTS: Thank you, General.
17 Mr. Jay.

18 ORAL ARGUMENT OF WILLIAM M. JAY

19 ON BEHALF OF THE UNITED STATES,

20 AS AMICUS CURIAE,

21 SUPPORTING THE PETITIONERS

22 MR. JAY: Mr. Chief Justice, and may it
23 please the Court:

24 Three binding Federal laws make clear that
25 the State of Hawaii has absolute fee title to the lands

1 in the Federal trust. It also has the power to sell
2 those lands for the purposes Congress set out in the
3 trust instrument.

4 CHIEF JUSTICE ROBERTS: What do you think on
5 the question-presented issue? Are all of the Federal
6 laws on which the Hawaii Supreme Court relied to say
7 there was a cloud on the title before the court?

8 MR. JAY: We think that they have been in
9 the case from the beginning. They're -- they were
10 clearly pressed in the State supreme court. And we
11 think they are fairly encompassed in the question
12 presented partly because, as General Bennett said, the
13 -- the question's reference to the State's sovereign
14 authority, which necessarily includes consideration of
15 the act which made Hawaii a sovereign State, the
16 Admissions Act, is -- is a necessary antecedent to
17 resolution of that question.

18 But also because the Admission -- the
19 Apology Resolution, itself, in the preamble on which the
20 Respondents rely extensively, goes into great detail
21 about the Newlands Resolution and the cession of
22 absolute fee and ownership by the Republic of Hawaii to
23 the United States.

24 JUSTICE ALITO: Well, I don't see what those
25 -- where those laws get us. The -- the argument that is

1 made on the other side is that the Native Hawaiians have
2 a moral claim to these lands, not that they have a
3 property right claim to the land.

4 And if the State of Hawaii, acting through
5 any branch of its government -- and that's not a matter
6 of concern to us -- says they have a moral claim to the
7 land and, therefore, there should not be any land
8 transfers for some period of time, what's inconsistent
9 with Federal law in their doing that?

10 MR. JAY: Let me answer that in two steps,
11 Justice Alito. The first step is that the State supreme
12 court's permanent injunction, although Respondents are
13 now saying that the claims on which -- the
14 unrelinquished claims on which it is based are moral in
15 nature -- the permanent injunction is a legal obligation
16 and enforceable by contempt. And so the State -- the
17 State supreme court, by effectively locking up the lands
18 for an indeterminate period of time, has treated them as
19 -- as legally valid and has entered relief that is legal
20 in nature.

21 JUSTICE SCALIA: Is -- is it the function of
22 the Hawaiian Supreme Court to declare moral obligations?

23 MR. JAY: Well, Justice --

24 JUSTICE SCALIA: Would there be any problem
25 -- certainly there is none if the legislature deems

1 there to be a moral obligation and gives the land away
2 on that basis. But do you -- do you think there --
3 there might be some democracy problem if -- if the
4 Supreme Court of Hawaii goes around pronouncing moral
5 obligations and giving away land on that basis?

6 MR. JAY: Well, Justice Scalia, that gets to
7 the second half of my answer to Justice Alito as well,
8 which is that the State supreme court is not free, as a
9 matter of State trust law or otherwise, to formulate
10 obligations that don't relate to the State's obligation
11 as trustee of the Federal trust --

12 JUSTICE STEVENS: -- isn't it perfectly
13 clear that's a question of State law?

14 MR. JAY: I don't think so, Justice Stevens,
15 because that State law has to comply with the
16 limitations set out in section 5(f) of the Admissions
17 Act. To be sure, the political branches operating as
18 trustee of the trust have broad discretion to allocate
19 lands within and among the five purposes set out in
20 section 5(f).

21 But what the -- what the State can't do and
22 what in particular the State courts can't do in the name
23 of formulating State trust law is to rely on
24 considerations that are altogether outside the trust.
25 And in this case, any consideration of the

1 unrelinquished claims of the Native Hawaiians would not
2 -- would not be based on their status as one of the
3 beneficiaries of the trust, but on their --

4 JUSTICE STEVENS: Let me just -- are you
5 saying that the State court couldn't do it, but the
6 legislature could?

7 MR. JAY: I'm saying that the -- no,
8 Justice Stevens. The -- the State court can't rely,
9 nor, I think, could the State legislature --

10 JUSTICE STEVENS: Could the legislature do
11 it?

12 MR. JAY: The legislature could determine
13 that the wisest use of the lands today, the way that
14 would best further -- promote the welfare of Native
15 Hawaiians today would be not to sell it. The
16 legislature certainly could do that, and it could enact
17 a moratorium that was consistent with that view.

18 But what it can't do is treat it -- and this
19 is the question Justice Scalia asked at the end of
20 General Bennett's presentation -- what the State is not
21 free to do is, based on the claims by Native Hawaiians,
22 not as beneficiaries of the section 5(f) trust, but
23 based on considerations that arose before the Admissions
24 Act was ever enacted, based on -- based on their status
25 as competing claimants to the title of the land, give

1 them an equitable, moral, or otherwise claim to lock up
2 the use of the land.

3 The -- the theory that the Respondents
4 advanced in the State supreme court under the name of
5 trust law is that a trustee may not, in furtherance of a
6 trust, engage in an illegal act. And that's on Joint
7 Appendix 141a to 143a and other places in the record.
8 And the illegal act that they contemplate is the
9 continued ownership of the lands by the State of Hawaii.
10 So, the State cannot, in -- in ostensible furtherance of
11 the federal trust, rely on State law principles that
12 presume the illegality of the federal trust or the
13 illegality --

14 JUSTICE STEVENS: The State power -- the
15 State legislative power to act depends on the validity
16 of its reasoning.

17 MR. JAY: Well, Justice Stevens, the
18 State -- the State is given authority to act for
19 particular purposes. And so, the purpose of the -- of
20 the -- for which the State acts is necessarily relevant.
21 The State can't act for a purpose that is not --

22 JUSTICE ALITO: What if it's the State's
23 position --

24 MR. JAY: It's a State --

25 JUSTICE ALITO: -- that it's -- it is

1 imposing a moratorium on land transfers because it
2 thinks this is the best way to promote the interests of
3 the Native Hawaiians, and part of their thinking is that
4 there was an inequity done when absolute title was
5 transferred to the United States and then to the State
6 of Hawaii? Would that be a violation of Federal law?

7 MR. JAY: Well, I think, Justice Alito, that
8 if the State made that determination with respect to the
9 classic Native Hawaiians who are defined in the
10 Admission Act as -- as one of the present-day
11 beneficiaries of the trust, and determined that it
12 was -- that that was the best way to act for the
13 betterment of Native Hawaiians, which is a permissible
14 trust purpose, that that would be permissible.

15 But for the State to -- to act on
16 considerations that are wholly extrinsic to the trust,
17 to treat the Native -- the claims of Native Hawaiians as
18 valid, even though they are -- and to assume a duty to
19 the Native Hawaiians that has nothing to do with the
20 State's obligations as trustee of the section 5(f)
21 trust, we think that would be impermissible.

22 JUSTICE SOUTER: But that doesn't seem to be
23 what the Supreme Court of Hawaii has done. The Supreme
24 Court of Hawaii, in effect, has said the land is tied up
25 until these people who are currently negotiating, the

1 State, the Native Hawaiians and -- what is it, the
2 United Church of Christ, all come to a -- in effect, a
3 resolution and a reconciliation.

4 Whatever that means, it does not sound to me
5 as though it is the recognition of a legal title claim
6 or indeed the validity, so far as courts are concerned
7 with validity, of any claim the Native Hawaiians are
8 making. They are just saying, no more land transfers
9 until these people sit down and make up their
10 differences.

11 Isn't that all the court is saying at this
12 point?

13 MR. JAY: Well, the court said,
14 Justice Souter, that there is a fiduciary obligation not
15 to make these land transfers at any time until this
16 indeterminate point in the future at which
17 reconciliation is achieved.

18 But to say -- to say that that -- that they
19 are not thereby pronouncing on the validity of the title
20 -- I think that's inconsistent with the Newlands
21 Resolution.

22 JUSTICE SOUTER: But doesn't -- isn't the
23 fact that you and I are having this exchange a pretty
24 good indication that we don't know what they -- they
25 meant exactly by that? The only thing that we can be

1 sure of is that that thought the Apology Resolution had
2 some legal significance. They said, you know, it's
3 required after the Apology Resolution.

4 We can say you are right or you are wrong,
5 and I think we know what -- what we are talking about.
6 But to go beyond that, it seems to me, that we are
7 wading into an argument that you and I can't settle
8 here.

9 MR. JAY: Well, I wholly agree,
10 Justice Souter, that the State supreme court thought the
11 Apology Resolution had significance and that the Apology
12 Resolution --

13 JUSTICE GINSBURG: More than --

14 MR. JAY: -- dictated the injunction.

15 JUSTICE GINSBURG: More than significance.
16 I am reading the sentence that immediately follows the
17 one that General Bennett brought to our attention on
18 page 85a. It says, "Accordingly, the Apology Resolution
19 dictates that the ceded lands should be preserved
20 pending a reconciliation between the United States and
21 the native Hawaiian people."

22 It is very clear language -- "dictates."
23 And that's why I am really puzzled how this Court has
24 any business wading into any other question other than
25 telling the Hawaii Supreme Court either their right

1 about what the resolution dictates or they are wrong,
2 and that they are wrong because it's a nice apology, but
3 it's without substantive effect.

4 MR. JAY: Well, I certainly agree,
5 Justice Ginsburg, that the State supreme court thought
6 the Apology Resolution dictated the entry of the
7 injunction, and the -- also on page 85a, the State
8 supreme court says that the Apology Resolution gives
9 rise to the -- to a fiduciary duty to Native Hawaiians.

10 And it is -- it is that principle that the
11 State supreme court was able to find a fiduciary duty
12 and impose it on the State's trusteeship obligation,
13 even though that -- that fiduciary duty arises outside
14 the section 5(f) trust. And that is why we think that
15 the scope of the State -- of the State's obligation as
16 trustee is within the Court's review at this stage.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr. Jay.

18 MR. JAY: Thank you, Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: Mr. Shanmugam.

20 ORAL ARGUMENT OF KANNON K. SHANMUGAM

21 ON BEHALF OF THE RESPONDENTS

22 MR. SHANMUGAM: Thank you,
23 Mr. Chief Justice, and may it please the Court:

24 The only issue properly presented in this
25 case is whether the Hawaii Supreme Court concluded that

1 the Apology Resolution created an affirmative federal
2 obligation not to sell ceded lands. In our view, it did
3 not.

4 The Hawaii Supreme Court held only that the
5 sale of ceded lands would breach the State's fiduciary
6 duty to Native Hawaiians under State law. And it relied
7 on the Apology Resolution only for its recognition that
8 Native Hawaiians have claims to the ceded lands that are
9 currently being addressed through the political process.

10 CHIEF JUSTICE ROBERTS: So, they relied on
11 Federal law to create a fiduciary obligation. So if we
12 think that Federal law did not create a fiduciary
13 obligation, what should we do?

14 MR. SHANMUGAM: Then the Court should vacate
15 and remand. But we believe that the better
16 interpretation of the Hawaii Supreme Court's opinion is
17 that it believed that the source of the fiduciary duty
18 at issue was State law and not Federal law. To be
19 sure --

20 CHIEF JUSTICE ROBERTS: All Federal law?
21 All Federal law? In other words, not simply the Apology
22 Resolution but the other Federal provisions?

23 MR. SHANMUGAM: As the source for fiduciary
24 duty?

25 CHIEF JUSTICE ROBERTS: Do you think

1 those -- yes.

2 MR. SHANMUGAM: The source for the fiduciary
3 duty, according to the Hawaii Supreme Court, was State
4 law. To the extent that the Hawaii Supreme Court relied
5 on --

6 JUSTICE SOUTER: Mr. Shanmugam, on page 99,
7 the State supreme court is saying, inasmuch as the
8 Apology Resolution and related State legislation give
9 rise to a fiduciary duty. They are saying the Apology
10 Resolution did so, too, not only State law.

11 MR. SHANMUGAM: They did say at various
12 points in the opinion that the Apology Resolution,
13 together with State law, gave rise to the fiduciary
14 duty.

15 But I think that if one looks at the
16 critical portion of the Hawaii Supreme Court's opinion,
17 on pages 31a to 32a, where the Hawaii Supreme Court
18 actually discusses the relevance of the Apology
19 Resolution, the court makes clear that it is relying on
20 it only for the acknowledgment that Native Hawaiians
21 have unresolved claims, and --

22 JUSTICE GINSBURG: Then how to you explain
23 the language, just over and over again -- I won't repeat
24 it -- but they said this resolution of ours is dictated
25 by, compelled by, the Apology Resolution? Without the

1 Apology Resolution, it would be an entirely different
2 case. And now you seem to be taking what the Hawaii
3 Supreme Court put as the necessary link, the Apology
4 Resolution -- before that this would have been
5 impossible -- and you are treating it now as sort of
6 window dressing, icing on the cake, really didn't
7 matter.

8 But we would disrespect the Hawaii Supreme
9 Court if we didn't take them at their word and say --
10 using words such as "dictated," "compelled." You -- you
11 are treating this as sort of just part of the
12 atmosphere.

13 MR. SHANMUGAM: Well, it was more than mere
14 window dressing, Justice Ginsburg. The Apology
15 Resolution really did confirm the factual predicate for
16 Respondent's State law claims. And I do mean to
17 emphasize that these have been State law claims from the
18 outset. If you take a look at the original complaint in
19 this case, which is found in the Joint Appendix at pages
20 34a to 36a, the only source of law on which we rely for
21 the counts at issue here was article 12, section 4 --

22 JUSTICE GINSBURG: That's what you relied on
23 --

24 MR. SHANMUGAM: -- of the Hawaii
25 Constitution.

1 JUSTICE GINSBURG: -- but it's not what the
2 Hawaii Supreme Court relied on, and I would repeat the
3 point I made in the prior argument: What's worrisome
4 about this is they are fastening on a piece of Federal
5 legislation and say, we are compelled to do this because
6 of Federal law. What that does is it removes it from
7 the Hawaii political process.

8 If they left Federal law out of it, and they
9 said truly this decision rests on State law, we think
10 that the title belongs with the Native Hawaiians, then
11 they have to answer to the polity. And here the Hawaii
12 Supreme Court insulates themselves by using the Federal
13 law as a crutch.

14 MR. SHANMUGAM: Let me -- let me be clear
15 about this, Justice Ginsburg, if the Hawaii Supreme
16 Court's opinion is read to construe the Apology
17 Resolution as creating some affirmative duty or
18 obligation as a matter of Federal law, we agree that
19 that would be erroneous. And if the Court --

20 JUSTICE KENNEDY: Would you agree that there
21 would be a Federal question if the Hawaiian Supreme
22 Court said the Apology Resolution dictates our result?

23 MR. SHANMUGAM: No, because we believe that
24 read in context, Justice Kennedy, that that statement is
25 consistent with our theory of the Hawaii Supreme Court's

1 reliance on the Apology Resolution.

2 JUSTICE SCALIA: Well, why doesn't the
3 Hawaii Supreme Court's reliance upon Hawaiian law to
4 establish that there is some property right on the part
5 of these Native Hawaiians -- why doesn't that conflict
6 with Federal law?

7 MR. SHANMUGAM: The Hawaii Supreme Court
8 relied on Hawaii law only for the existence of a
9 fiduciary duty, and that fiduciary duty has repeatedly
10 been recognized by the Hawaii Supreme Court. That duty
11 gives Native Hawaiians an equitable or a beneficial
12 interest in these lands.

13 JUSTICE SCALIA: I don't care what you call
14 it; it's a property interest.

15 MR. SHANMUGAM: Well --

16 JUSTICE SCALIA: As I read the Federal law,
17 it extinguished all property rights in these lands; the
18 lands were transferred to the Federal Government; and
19 the Federal Government transferred them in absolute fee
20 without any encumbrances to the State of Hawaii. Now,
21 if you are telling me the Hawaii Supreme Court is now
22 finding as a matter of State law that there is a
23 property interest on the part of the Native Hawaiians --
24 I don't care what you call it, equitable or whatever --
25 it seems to me that is in flat contradiction of Federal

1 law, and probably is an issue that we ought to address
2 in this opinion.

3 MR. SHANMUGAM: There are two separate
4 issues, Justice Scalia. The first is what was the
5 source for the injunction in this case. And the source
6 of the injunction was Respondents' instant claims for
7 breach of fiduciary duty.

8 Now, to be sure, we were arguing that there
9 would be a breach of the fiduciary duty to Native
10 Hawaiians precisely because Native Hawaiians have
11 underlying claims to the lands. And it's those
12 underlying claims that trigger all of these additional
13 Federal issues that Petitioners are now seeking to
14 inject into the case.

15 But I think that the critical point for
16 purposes of this Court's review at this stage is that in
17 the Hawaii Supreme Court, we freely and repeatedly
18 conceded that any underlying claims to the ceded lands
19 would be nonjusticiable. That much was clear as a
20 matter of State law.

21 JUSTICE BREYER: You concede -- you concede
22 that the Apology Resolution does not say that the
23 Hawaiian people's claims are valid.

24 MR. SHANMUGAM: The Apology Resolution --

25 JUSTICE BREYER: Does it say that? Yes or

1 no?

2 MR. SHANMUGAM: -- does not directly speak
3 to the merits of any underlying claims, whether --

4 JUSTICE BREYER: All right, so if that's so
5 --

6 MR. SHANMUGAM: -- or otherwise.

7 JUSTICE BREYER: -- do you object to a
8 three-sentence per curiam opinion in this case where we
9 say, to the extent that the Hawaii Supreme Court could
10 be read to suggest that the Apology Resolution either
11 resolved or cast a cloud, legally speaking, on the title
12 of the trust land, or suggested in any way that land be
13 enjoined -- the sale be enjoined, the court made a
14 mistake; and insofar as it is resting on State law,
15 that's up to them.

16 MR. SHANMUGAM: I -- I think so, with one
17 caveat and I don't mean to quibble --

18 CHIEF JUSTICE ROBERTS: Do you think you
19 would -- you would object to that?

20 MR. SHANMUGAM: I think we would acquiesce
21 in that with one small quibble, which is that I think
22 that the issue that is being debated here is not whether
23 the Hawaii Supreme Court relied on the Apology
24 Resolution as creating some cloud on title. Precisely
25 because we conceded below that the underlying claims

1 were nonjusticiable, the Hawaii Supreme Court did not
2 opine on the merits of those underlying claims. The
3 only issue is whether the Hawaii Supreme Court believed
4 that the Apology Resolution created a fiduciary
5 obligation to essentially preserve and protect the ceded
6 lands, until those underlying --

7 JUSTICE BREYER: How could it have done
8 that? I mean, I didn't see anything in here that
9 suggests anything like that. That's to suggest that the
10 Apology Resolution created an obligation on the part of
11 the State courts to enjoin sales until everything was
12 worked out. Now, I have read this Apology Resolution
13 about six times, and I certainly didn't see anything
14 like that. Where does it say --

15 MR. SHANMUGAM: Yes. And we agree that the
16 Apology Resolution cannot be read to create some
17 affirmative duty not to sell the ceded lands, but --

18 JUSTICE BREYER: You agree that the Apology
19 Resolution does not say who's right about the claim?

20 MR. SHANMUGAM: No. There are various --
21 there are various findings in the Apology Resolution
22 that could potentially be relevant to the ultimate
23 disposition of the land.

24 JUSTICE BREYER: Like what?

25 MR. SHANMUGAM: It is, after all,

1 significant that Congress --

2 JUSTICE BREYER: What?

3 MR. SHANMUGAM: Congress expressed its
4 support for the reconciliation process, Justice Breyer,
5 and that would provide an obvious boost in the Hawaii
6 Legislature for the ultimate resolution of those claims.
7 And it's really for that reason, to get back to
8 Justice Ginsburg's question, and we feel it's important.

9 JUSTICE GINSBURG: If -- if you took Federal
10 law, the Apology Resolution, out of the picture, the
11 Hawaii Supreme Court could reach the result that it
12 reached, and then we might have questions about its
13 consistency with the Admissions Act and the Newlands
14 Resolution. But, as Justice Breyer said, if we disabuse
15 them of the notion that there is any Federal compulsion
16 here, then the rest is to be sorted out. We wouldn't
17 have to say that they have a good claim under State law,
18 just not address it.

19 MR. SHANMUGAM: Yes. I think that's it.

20 JUSTICE GINSBURG: And the political process
21 question I think is really bothersome, that the Hawaii
22 Supreme Court chose to use this Federal crutch. It
23 seems a very weak reed.

24 MR. SHANMUGAM: And it's for that reason,
25 Justice Ginsburg, that we freely concede that if the

1 Hawaii Supreme Court had relied on the Apology
2 Resolution as creating some Federal duty, that would be
3 problematic.

4 CHIEF JUSTICE ROBERTS: What about the --

5 MR. SHANMUGAM: We certainly do not --

6 CHIEF JUSTICE ROBERTS: What about the
7 Newlands Resolution, the Admission Act, and the Organic
8 Law? Do you acknowledge that if the Hawaii Supreme
9 Court relied on those, that also would be inappropriate?

10 MR. SHANMUGAM: Well, it's hard to say
11 because it would depend on how they relied on them, but
12 I think that the critical point --

13 CHIEF JUSTICE ROBERTS: They relied on them
14 the same way you say they relied on the Apology
15 Resolution, to give rise to a fiduciary duty under State
16 law.

17 MR. SHANMUGAM: Well, I don't think that
18 those Federal acts could be read as creating a fiduciary
19 duty not to sell the ceded lands. So I think I would
20 concede that that would be problematic as well. But I
21 think that the question before the Court according to
22 Petitioners is whether an injunction, even if that
23 injunction were framed solely in terms of State law,
24 might itself contravene the Newlands Resolution by
25 virtue of --

1 CHIEF JUSTICE ROBERTS: So you would have no
2 -- just to carry on the opinion-drafting process, you
3 would have no objection to an opinion that said no
4 source of Federal law gave rise to a duty under State
5 law, fiduciary or otherwise; that any further
6 proceedings on remand should be based solely on State
7 law?

8 MR. SHANMUGAM: Well, I think that that is
9 right in the sense that we certainly think that the
10 Hawaii Supreme Court in the first place intended to rely
11 on a State law of fiduciary duty. And we would
12 certainly have no problem with and indeed would welcome
13 a remand that afforded the Hawaii Supreme Court the
14 opportunity to do what we think they did in the first
15 place --

16 JUSTICE SCALIA: What if they do nothing at
17 all? Could I get back to Justice Breyer's
18 three-sentence per curiam, where we just say to the
19 extent that the Supreme Court of Hawaii relied upon the
20 Apology Resolution as creating any -- any property
21 entitlement in the Hawaiians, it was in error. Okay, we
22 send it back to the Hawaiian Supreme Court, and the
23 Hawaii Supreme Court smiles and doesn't do a blessed
24 thing, leaves -- leaves the injunction against any
25 distribution of the land in effect. What -- what

1 happens then?

2 MR. SHANMUGAM: Well, I don't think they
3 would do that, Justice Scalia.

4 JUSTICE SCALIA: You don't?

5 MR. SHANMUGAM: On remand, I think that they
6 would consider the issue of whether the injunction could
7 be grounded on State law, which after all was the basis
8 of our complaint from day one in this case. And there
9 is certainly language --

10 JUSTICE SCALIA: Not if we said "to the
11 extent that." I mean, if we said it's -- it's grounded
12 on the proposition that the Apology Resolution creates
13 property rights and that's wrong, then they'd have to do
14 something.

15 MR. SHANMUGAM: Well, presumably --

16 JUSTICE SCALIA: But if we just said, to the
17 extent that it may be grounded on that, we take no
18 position on whether it's grounded on that or not --

19 MR. SHANMUGAM: Presumably, Justice
20 Scalia --

21 JUSTICE SCALIA. -- why would that require
22 any action on their part?

23 MR. SHANMUGAM: If the Court were to write
24 that opinion, I assume that the last line of the opinion
25 would be to vacate and remand, and that would eliminate

1 the injunction, and so the Hawaii Supreme Court would
2 have the case once again; and at that point the Hawaii
3 Supreme Court could clarify that the source of the
4 fiduciary duty at issue was State law. And --

5 CHIEF JUSTICE ROBERTS: No, but it's not
6 simply a question of the source of the fiduciary duty.
7 It -- presumably, in the course of saying what the
8 Apology Resolution, the Newlands Act, the Organic Act,
9 and the Admission Act had to say, we may well say
10 something to the effect that, because it conveyed
11 perfect title, it's inconsistent with the cloud of that
12 title, under a fiduciary obligation created by State law
13 or anything else.

14 MR. SHANMUGAM: And if the Hawaii Supreme
15 Court on remand, Mr. Chief Justice, addressed the merits
16 of any underlying legal claims, then this Court could
17 review the decision, and at that point it might have
18 some sense of, for instance, what those legal claims
19 actually are.

20 CHIEF JUSTICE ROBERTS: But if we told them
21 that these various Federal resolutions, including the
22 Apology Resolution, conveyed title to the State in a
23 particular way that precluded the burdening of the
24 State's title on the basis of Federal law, then they
25 would have to find a basis under State law that was not

1 inconsistent with the Federal law's conveying of perfect
2 title.

3 MR. SHANMUGAM: Well, that is presumably
4 always true, but, you know, I think for purposes of the
5 current posture of the case, Mr. Chief Justice, the only
6 Federal issue that is before the Court is the question
7 of whether the Apology Resolution was the source of the
8 underlying obligation.

9 JUSTICE GINSBURG: And do you think --

10 MR. SHANMUGAM: Petitioners did not --

11 JUSTICE GINSBURG: Do you think that that
12 resolution is distinguishable in any way from the
13 apology that the United States made to the people of
14 Japanese ancestry who were interned after World War II?
15 The United States did say -- what was -- I think it was
16 an executive order by President Ford, but it was in no
17 uncertain terms, stated that the United States made a
18 dreadful error, there was never basis for rounding those
19 people up and putting them in interment camps.

20 Did -- is there any difference? And that,
21 as I understand it, had no substantive effect until
22 Congress passed legislation providing for compensation.

23 MR. SHANMUGAM: The -- the Apology
24 Resolution in this case does not speak directly to the
25 merits of any underlying claims. What it does do is

1 recognize that the overthrow of the Kingdom of Hawaii
2 was illegal, apologized for the Federal Government's
3 involvement in that overthrow, and, in the operative
4 provisions of the resolution, expresses support for the
5 reconciliation process. And it is that expression of
6 support on which the Hawaii Supreme Court critically
7 relied here in informing its application of State law.

8 JUSTICE BREYER: So if I said that just in
9 the opinion and said just what you said, and nothing
10 else about the resolution, say we don't see any other
11 way in which the resolution could have supported this,
12 would that -- is that okay with you?

13 MR. SHANMUGAM: Yes, that would be okay,
14 Justice Breyer, and I do think that it would be
15 important for this Court to make clear that to the
16 extent that the Hawaii Supreme Court, in any subsequent
17 remand, relies on the Apology Resolution only for what
18 are essentially factual findings, its acknowledgment
19 that Native Hawaiians have unrelinquished claims, which
20 is undoubtedly true as a factual matter -- I don't hear
21 Petitioners to suggest otherwise -- and its recognition
22 that there is an ongoing reconciliation process, that is
23 entirely proper. And the Hawaii Supreme Court --

24 CHIEF JUSTICE ROBERTS: But then it would
25 also have to just -- the opinion we're drafting would go

1 further, I suppose, and since we are interpreting all
2 these Federal provisions, it may not be sufficient to
3 say that it did not create this obligation and the
4 Hawaiian Supreme Court was wrong to do that, but that it
5 precluded the creation under State law of this type of
6 obligation.

7 MR. SHANMUGAM: Well, that is essentially --

8 CHIEF JUSTICE ROBERTS: And if the Hawaiian
9 Supreme Court wants to create, under State law, a
10 particular type of fiduciary obligation grounded on the
11 status of the land prior to admission, then it has to
12 run -- under the Supremacy Clause, it has to be
13 consistent with the Federal provisions.

14 MR. SHANMUGAM: But the Hawaii Supreme
15 Court, in the opinion under review, did not ground that
16 duty on any judgment about the validity of the original
17 conveyance of title. They grounded it --

18 CHIEF JUSTICE ROBERTS: No, I'm not saying
19 they did. That's the first question. I'm not saying
20 they grounded it on Federal law; I'm saying we would
21 have to determine whether Federal law precluded the
22 grounding of a fiduciary duty under the status of the
23 land prior to admission.

24 MR. SHANMUGAM: But I do think,
25 Mr. Chief Justice, that that is an entirely discrete

1 question from the question presented, and it's entirely
2 discrete precisely because this argument concerning the
3 Newlands Resolution could have arisen, even if the
4 injunction were, as we believe it was, unambiguously
5 based solely on State law with nary a reference to the
6 Apology Resolution.

7 JUSTICE GINSBURG: The Native Hawaiians --

8 MR. SHANMUGAM: And it is precisely --

9 JUSTICE GINSBURG: The Native Hawaiians --
10 they do get 20 percent of the proceeds, correct?

11 MR. SHANMUGAM: That's correct.

12 JUSTICE GINSBURG: And what -- that comes
13 out of Hawaii legislation?

14 MR. SHANMUGAM: Yes, that's right. It comes
15 out of -- I think it's Hawaii Revised Statute 10-13.5,
16 and as a matter of State law they get 20 percent of the
17 revenue from the ceded-lands trust, though the amount of
18 that revenue has itself been the subject of protracted
19 and unresolved litigation.

20 JUSTICE GINSBURG: The -- the \$5.5 million
21 figure, is that the subject of litigation?

22 MR. SHANMUGAM: The valuation of the
23 Leiali'i parcel was challenged in this litigation, and
24 it remains pending before the trial court.

25 But, I think, more broadly the important

1 point is that to the extent that the injunction in this
2 case was based on the lack of resolution of underlying
3 claims in the State political process, the Hawaii
4 Legislature could readily resolve those claims without
5 in any way casting any doubt on the validity of the
6 original conveyance of lands to the Federal Government.

7 JUSTICE BREYER: It also, I guess, has a --
8 there -- in the Admission Resolution, it set up a trust.
9 They hold it in trust, and there are five purposes in
10 the trust, and only one of those relates to the Native
11 Hawaiians. Now, I know from the newspapers -- I don't
12 know the merits of it -- but the trust that has been set
13 up is the subject of controversy continuously.

14 So what I don't see -- and I hope we don't
15 have to get into this -- is what the relation between
16 the trust principles as enacted in the legislature is
17 and the trust principles set forth in the Admissions
18 Resolution. Is there any law going to anything like
19 that?

20 MR. SHANMUGAM: Well, no -- but let me say
21 something about that, because I do think that it is
22 relevant to our interpretation of the Hawaii Supreme
23 Court's opinion. What the State of Hawaii did with
24 article 12, section 4 of the Hawaii Constitution was
25 essentially to say that, while the State does have some

1 discretion to use the assets in the section 5(f)
2 ceded-lands trust for any of the stated purposes, the
3 State owes a particularly high duty to Native Hawaiians.

4 The Hawaii Supreme Court has so construed
5 article 12, section 4 in other cases involving the
6 ceded-lands trust. And, at page 39a of its opinion in
7 this case, the Hawaii Supreme Court plainly relied on
8 that provision as a source of its fiduciary duty, the
9 fiduciary duty that we believe was at issue in this
10 case. The opinion does not cite that provision in so
11 many words, but it refers to the Hawaii Constitution in
12 a case construing that provision.

13 JUSTICE SCALIA: Is the court the trustee?

14 MR. SHANMUGAM: The State is the trustee.

15 JUSTICE SCALIA: The State is the trustee.
16 So I assume it would be up to the State officers to
17 decide to what extent the obligation to the Hawaiians,
18 among the five obligations, should be given precedence.
19 Is the Supreme Court of Hawaii directing the State
20 officers to give it precedence?

21 MR. SHANMUGAM: Well, article 12, section 4,
22 we would respectfully submit, Justice Scalia, does place
23 Native Hawaiians in something of a privileged position
24 vis-a-vis the other beneficiaries. And in construing
25 article 12, section 4, the Hawaii Supreme Court was

1 doing, albeit in a somewhat unusual context, what courts
2 do every day, which is essentially to evaluate whether
3 the trustee is acting consistent with the trustee's
4 obligations under the terms of the trust.

5 JUSTICE SCALIA: And saying that the trustee
6 must direct it primarily to -- to that among the five
7 ends.

8 MR. SHANMUGAM: All that the Hawaii Supreme
9 Court said was, in light of the very realistic prospect
10 that lands may be returned to Native Hawaiians as part
11 of the reconciliation process that Congress recognized
12 in the Apology Resolution, it would constitute a breach
13 of fiduciary duty to sell those lands for another trust
14 purpose, for the simple reason that once those lands are
15 gone, they are gone forever. And that is entirely
16 consistent with the general principle of trust law, that
17 a trustee in exercising its discretion --

18 JUSTICE SCALIA: And all this comes from the
19 fact that Congress made reference to and approved a
20 so-called reconciliation process?

21 MR. SHANMUGAM: Well, Congress did support
22 that --

23 JUSTICE SCALIA: So in -- in perpetuum, this
24 land can't be transferred because Congress approved the
25 this reconciliation process?

1 MR. SHANMUGAM: Only until the claims of the
2 Native Hawaiians are resolved. And what is clear --

3 JUSTICE SCALIA: I see.

4 MR. SHANMUGAM: -- regardless of the degree
5 of reliance upon the Apology Resolution, Justice Scalia,
6 is that the Hawaii Legislature has substantial
7 discretion to act and to act in a way that essentially
8 vacates the terms of the injunction. So if the Hawaii
9 Legislature either says, we're going to reach a
10 definitive resolution of the underlying claims of Native
11 Hawaiians by giving them land or additional monetary
12 compensation, or the Hawaii Supreme Court determines
13 that --

14 JUSTICE SCALIA: Or denying it to them?

15 MR. SHANMUGAM: Or denying it to them. Then
16 presumably, according to the terms of the injunction, it
17 would no longer have any force. So the Hawaii
18 Legislature remains empowered to act in such a way as to
19 get out from under the terms of the injunction to the
20 extent they are restrictive.

21 I would note, however, parenthetically, that
22 immediately after this litigation was commenced the
23 Hawaii Department of Land and Natural Resources imposed
24 a unilateral moratorium on the sale of ceded lands.
25 That moratorium, as an executive matter, has remained in

1 effect during the 14-year pendency of this litigation,
2 even during the considerable period between the trial
3 court's ruling in favor of Petitioners and the Hawaii
4 Supreme Court's ruling in our favor.

5 So there doesn't seem to be any great
6 impetus on the part of the State to sell ceded lands.
7 Indeed, Governor Lingle, one of the Petitioners in this
8 case, has recently and repeatedly made statements to the
9 effect that the State has no intention to sell ceded
10 lands.

11 And if that is really the State's position
12 -- and I would be very interested in my friend General
13 Bennett's views on the matter -- then it would seem that
14 there really is no case or controversy before this Court
15 at all. Because if the State has no intention to sell
16 ceded lands and the sale of ceded lands was the
17 instigating event for this litigation, there would not
18 necessarily be any real dispute between the parties.

19 I -- I want to say just, you know, one more
20 word --

21 CHIEF JUSTICE ROBERTS: So the decision of
22 the Hawaii Supreme Court would then be vacated?

23 MR. SHANMUGAM: The petition would be
24 dismissed under Munsingwear.

25 CHIEF JUSTICE ROBERTS: Under Munsingwear.

1 MR. SHANMUGAM: Yes.

2 CHIEF JUSTICE ROBERTS: Well, what's --

3 MR. SHANMUGAM: If there is, in fact,
4 mootness. And if there were -- if the State -- if the
5 State had not intention to sell ceded lands, presumably
6 the underlying dispute would be moot.

7 JUSTICE SCALIA: I don't quite understand.
8 You mean -- you mean a Federal court can enjoin the sale
9 of my house, and there's nothing I can do about it
10 inasmuch as I do not have any present intention of
11 selling my house --

12 MR. SHANMUGAM: Well, if --

13 JUSTICE SCALIA: -- except to live under
14 that injunction?

15 MR. SHANMUGAM: If a Federal court enjoined
16 you from selling your house without any underlying legal
17 authority for doing so, presumably that injunction would
18 be invalid. But the critical point here --

19 JUSTICE SCALIA: No, no. You -- you say
20 there is no controversy, so I -- I cannot get its
21 validity adjudicated, right?

22 MR. SHANMUGAM: Well, here the lawsuit was
23 commenced by Respondents, because Respondents believed
24 that the State was going to imminently sell the Leiali'i
25 parcel. That was the triggering event for this

1 litigation.

2 It now appears at -- at least possible that
3 the State has no intention to sell even that parcel, and
4 if that were true --

5 JUSTICE SCALIA: I don't think that -- I
6 don't think that the State has to have an immediate
7 intention to sell any particular piece of land in order
8 to object to an injunction against any sale of land by
9 the State in the future. I -- I don't think it has to
10 wait until it -- it wants to sell a particular plot.

11 MR. SHANMUGAM: Well, it just -- it merely
12 suggests that the -- that there is no longer an
13 underlying dispute, Justice Scalia. Because, again --

14 JUSTICE SCALIA: Yes, there is. The State
15 says, I am free to sell the land, and -- and the court
16 says, no, you are not. Isn't that a dispute?

17 MR. SHANMUGAM: Well, I -- I think that
18 there is -- you know, there was a case or controversy as
19 this case came to the Court in the Article III sense
20 precisely because there was a dispute between the
21 parties about --

22 JUSTICE KENNEDY: Your whole case rests on a
23 cloud on title in favor of your clients. But you ignore
24 the cloud on title that has been entered against the
25 State.

1 MR. SHANMUGAM: Well, first of all, our
2 whole theory has never been that there is a cloud on
3 title. Now, to be sure, we have maintained at various
4 points in this litigation that Native Hawaiians do have
5 potentially valid legal claims, as well as moral and
6 political claims, to the underlying lands.

7 But we have never argued that the injunction
8 in this case should be based on some assessment of the
9 existence or validity of legal claims. To the contrary,
10 we have consistently taken the position -- and this is
11 clear from our briefs before the Hawaii Supreme Court --
12 that any such underlying claims would be nonjusticiable.

13 And for that reason all that we were seeking
14 was an injunction to protect these lands until those
15 claims could be resolved through the political process.
16 That was all that we were conceding below, and the
17 Hawaii Legislature again could readily resolve those
18 underlying claims without in any way casting doubt on
19 the validity of the Newlands Resolution or any other
20 Federal enactment that purports to recognize absolute
21 title --

22 JUSTICE GINSBURG: Can I --

23 MR. SHANMUGAM: -- in the ceded lands.

24 JUSTICE GINSBURG: Can I go back to your --
25 your suggestion that this is a moot case because the

1 government -- because the -- the governor agrees with
2 your position. But wasn't a lot of money already sunk
3 into developing this area of Maui for desperately needed
4 housing?

5 MR. SHANMUGAM: A lot of money was sunk into
6 this parcel, at least according to the record below.
7 And the State would remain free at a minimum to proceed
8 with the development by simply entering into long-term
9 leases instead of the sale of these parcels of land.
10 Indeed, there appears to be some suggestion that that is
11 what the State would do in the event that this Court
12 does not vacate the injunction.

13 And so -- and, indeed, in the State of
14 Hawaii it is not uncommon for land to be transferred by
15 means of such long-term leases. So it isn't as if the
16 State would be barred from engaging in any development
17 whatsoever. The terms of the injunction simply prohibit
18 the sale of these lands.

19 And, again, the State executive has been
20 operating under an effective moratorium on the sale of
21 ceded lands of its own volition during the pendency of
22 this litigation, which suggests at a minimum, regardless
23 of the jurisdictional implications, that there is no
24 great burden on the State from this injunction, which,
25 again, by its terms lasts only as long as the State

1 legislature acts.

2 And I would add one additional point on that
3 score, which is that to the extent that we believe that
4 the Hawaii Supreme Court's decision rested on a
5 fiduciary duty under State law, the State would, of
6 course, be free to amend its constitution in order to
7 make clear that the State's fiduciary duty to Native
8 Hawaiians does not run to the extent of requiring this
9 injunction. But this -- there has been no effort to do
10 that, and I would submit that, as a political matter, it
11 would be highly unlikely.

12 JUSTICE SCALIA: Mr. Shanmugam, you -- you
13 didn't raise in -- in your opposition to the petition
14 the -- the question of mootness.

15 MR. SHANMUGAM: Well, the governor's
16 statements about the lack of an intention to sell ceded
17 lands were only made literally in the days before we
18 filed our brief. We do refer to them in a footnote in
19 our merits brief, and I think that that would be
20 sufficient to preserve the issue --

21 JUSTICE SCALIA: Well, you don't have to
22 preserve it. I mean, it's -- it's an issue of Article
23 III jurisdiction, so we'd have to look into it on our --
24 on our own. But it does suggest that it is not a very
25 strong string to your bow, if I may put it that way.

1 MR. SHANMUGAM: Well, I would submit that
2 even if the Court does not believe that this rises to
3 the level of jurisdictional import, that it is at least
4 significant in assessing the -- the substantiality of
5 the burden on the State. That the State through its
6 highest representative appears to be suggesting that the
7 State has no present need to alienate any of these
8 lands.

9 CHIEF JUSTICE ROBERTS: Mr. Shanmugam, just
10 as a matter of curiosity, do you know what percentage of
11 the Hawaiian population is comprised of Native
12 Hawaiians?

13 MR. SHANMUGAM: I think the most recent
14 figures from the 2000 census are that there are
15 something like 1.2 million people in the State of
16 Hawaii. And of that number something like 240,000
17 identify themselves as Native Hawaiians in the way that
18 that phrase is currently defined under State law.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 General Bennett, you have a minute
22 remaining.

23 REBUTTAL ARGUMENT OF MARK J. BENNETT

24 ON BEHALF OF THE PETITIONERS

25 MR. BENNETT: Thank you, Your Honor.

1 It is undisputed that Respondents asserted a
2 property-interest claim; that any property-interest
3 claim is in flat contradiction with Federal law; that
4 the State has perfect title to these lands; and that
5 there is no possible reason why this Court should not
6 disabuse the State court of the incorrect notion that
7 the State lacks perfect title.

8 On the mootness issue, the ASARCO versus
9 Kadish case makes clear that the injunction that has
10 been entered is a present injury. But, in addition, the
11 governor, who does not control all of the State lands --
12 there are a variety of independent agencies that do --
13 talked about sale but not transfer or exchange, which
14 are other things that are forbidden by this court's --
15 the State court's -- injunction. But ASARCO clearly
16 sets out that we have an injury.

17 But, again, what -- the basis of the State
18 court's decision is a property right interest. It is
19 now undisputed by counsel that such a property right
20 interest is absolutely inconsistent with Federal law,
21 and there is no reason why in this 14-year-old
22 litigation this Court should not make clear the simple
23 and undisputed fact that, pursuant to the Newlands
24 Resolution, the Organic Act, and the Admission Act, that
25 the State has perfect title.

1 CHIEF JUSTICE ROBERTS: Thank you, General.
2 The case is submitted.

3 (Whereupon, at 11:10 a.m., the case in the
4 above-entitled matter was submitted.)

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