No. 11-336

IN THE
Supreme Court of the United States

JOHN M. CORBOY, ET AL.,

Petitioners,

v.

DAVID M. LOUIE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Hawaii

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE CENTER FOR EQUAL OPPORTUNITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE CENTER FOR EQUAL OPPORTUNITY FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to this Court's Rule 37.2(b), the Center for Equal Opportunity respectfully moves for leave to file the attached *amicus curiae* brief supporting petitioners.

The Center for Equal Opportunity timely provided noticed to all parties of its intention to file an *amicus curiae* brief and requested their consent to the filing under Rule 37.2(a). Counsel for petitioners, and counsel for respondents State of Hawaii, David M. Louie, and County of Kauai, have consented to the filing of this brief, and their written consent has been lodged with the Court. Counsel for respondents County of Maui, City and County of Honolulu, and County of Hawaii have not consented to the filing of this brief.

This case presents the important question whether the State of Hawaii can discriminate in its assessment of property taxes between "native Hawaiian[s]," defined as a racial group, and other Hawaiians. The Center for Equal Opportunity ("CEO") believes that such a racially discriminatory approach to taxation cannot be reconciled with the Fourteenth Amendment's Equal Protection Clause.

CEO is a nonprofit research and educational organization dedicated to the idea that citizens of all races, colors, and ethnicities should be treated equally. CEO supports colorblind public policies and has previously participated as *amicus curiae* in other cases where state governments have attempted to allocate benefits and burdens based on race, including several cases addressing Hawaii's longstanding efforts to distinguish between "native Hawaiian[s]" and other citizens. *See Rice* v. *Cayetano*, No. 98-818; *Hawaii* v. *Office of Hawaiian Affairs*, No. 07-1372.

CEO's participation in many other challenges to discriminatory state laws provides it with a unique perspective into the issues raised by this case. Its involvement in previous litigation over Hawaii's discrimination, in particular, provides CEO with a profound awareness of the need for this Court's review to make clear that Hawaii is subject to the same rules prohibiting racial discrimination as any other State—and that, as this Court noted in *Rice* v. *Cayetano*, "[t]he Constitution of the United States . . . has become the heritage of *all* the citizens of Hawaii." 528 U.S. 495, 524 (2000) (emphasis added).

CEO respectfully requests that this Court grant its motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted.

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BRIEF OF THE CENTER FOR EQUAL OPPORTUNITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[*]

The Center for Equal Opportunity ("CEO") is a nonprofit research and educational organization dedicated to the idea that citizens of all races, colors, and ethnicities should be treated equally.

CEO supports colorblind public policies. The State of Hawaii, however, has long discriminated among its citizens on the basis of race, extending various benefits only to "native Hawaiian[s]," defined as a racial group, and making those benefits unavailable to other Hawaiians. *See Rice* v. *Cayetano*, 528 U.S. 495, 514-17 (2000). The taxation system at issue in this case, in which only "native Hawaiian[s]" are eligible for a particular tax exemption, continues this practice.

CEO believes that Hawaii's racially discriminatory approach to taxation cannot be reconciled with the Fourteenth Amendment's Equal Protection

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[*] Pursuant to this Court's Rule 37.2(a), *amicus* timely notified all parties of its intention to file this brief. Counsel for petitioners, and counsel for respondents State of Hawaii, David M. Louie, and County of Kauai, have consented to the filing of this brief; counsel for respondents County of Maui, City and County of Honolulu, and County of Hawaii have not consented. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Clause and that this Court's review is warranted to make clear—as the Court did in *Rice*—that Hawaii is subject to the same rules prohibiting racial discrimination as any other State.

SUMMARY OF ARGUMENT

"The Constitution of the United States . . . has become the heritage of *all* the citizens of Hawaii." *Rice* v. *Cayetano*, 528 U.S. 495, 524 (2000) (emphasis added). Ignoring this admonition, the State of Hawaii has exempted from property taxes a category of homestead leases available only to "native Hawaiian[s]"—a category that this Court has already held to be a racial classification. The decision to base tax burdens on race violates the fundamental guarantee of the Equal Protection Clause: "that all persons . . . shall stand equal before the laws of the States." *Strauder* v. *West Virginia*, 100 U.S. 303, 307 (1880).

There is no justification for Hawaii's discriminatory approach to taxation. Yet the Hawaii Supreme Court concluded that petitioners lacked standing under state law to challenge the tax exemption because they did not also seek to obtain a homestead lease for which they were concededly ineligible, thus purportedly avoiding the need to resolve petitioners' claims. The state court's decision does not, however, prevent *this* Court from addressing the merits—both because the standing decision is interwoven with issues of federal law, and because a state court cannot refuse on state-law grounds to remedy constitutional violations properly before it.

"Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). This Court's review is warranted to ensure that the same rule applies in Hawaii.

ARGUMENT

I. HAWAII'S IMPOSITION OF DISCRIMINATORY TAX BURDENS BASED ON RACE WARRANTS THIS COURT'S REVIEW.

The Hawaiian Homes Commission Act ("HHCA") provides for long-term homestead leases that can be held only by "native Hawaiian[s]"—a term expressly defined in terms of an individual's percentage of the "blood of the races inhabiting the Hawaiian Islands previous to 1778." Pub. L. No. 67-34, § 201(a)(7), 42 Stat. 108 (1921). This discrimination in the availability of homestead leases is itself a serious equal protection problem, and Hawaii has elected to compound the problem by exempting those leases from all or most property taxes. *See* Pet. App. 12a n.11, 14a n.12 (citing relevant code provisions from each county in Hawaii).

Petitioners and others who are ineligible for homestead leases because of their race are required to pay additional property taxes compared to "native Hawaiian" leaseholders. Because Hawaii's system of property taxation thus discriminates against petitioners, and in favor of "native Hawaiian[s]," based solely on their race, it cannot survive scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

This Court has previously rejected Hawaii's efforts to provide racially discriminatory benefits to its "native Hawaiian" citizens. *See*, *e.g.*, *Rice* v. *Cayetano*, 528 U.S. 495, 514-17 (2000). Yet that discrimination continues undeterred. This Court's review is warranted to put an end—once and for all—to Hawaii's attempts to divide its citizens into "competing racial factions." *Shaw* v. *Reno*, 509 U.S. 630, 657 (1993); *see also Parents Involved in Cmty. Schools* v.

Seattle School Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

A. The "central mandate" of the Equal Protection Clause is "racial neutrality in governmental decisionmaking." *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995). Outside of discrete, narrowly limited areas where the Court has deemed countervailing interests to be sufficiently weighty, the Court has repeatedly invoked the Fourteenth Amendment to "prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw*, 509 U.S. at 642. Such discrimination is "by [its] very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943).

The Court has explained, moreover, that discrimination "because of . . . ancestry or ethnic characteristics" is itself "racial discrimination." *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987). Indeed, "[o]ne of the principal reasons *race* is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by *ancestry* instead of by his or her own merit and essential qualities." *Rice*, 528 U.S. at 517 (emphases added). Thus, a statute that imposes discriminatory benefits or burdens based on an individual's ancestry as a "proxy for race" (*id.* at 514) is, like any other racial classification, subject to the "most searching judicial inquiry," *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 236 (1995), and invalid absent "extraordinary justification," *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 272 (1979).

These basic principles of constitutional law are sufficient to resolve this case. Hawaii's taxation sys-

tem discriminates, on its face, between "native Hawaiian[s]" and others. As this Court recognized, the definition of this term—tied, as it is, to the "blood of the races"—"use[s] ancestry as a racial definition and for a racial purpose." *Rice*, 528 U.S. at 515. There is, however, no argument that "compelling" interests support the imposition of *tax burdens* based on race. *Parents Involved*, 551 U.S. at 720-22. This Court should grant review to invalidate such a transparently unconstitutional system of taxation.

B. In the courts below, respondents attempted to defend Hawaii's discriminatory taxation system by invoking *Morton* v. *Mancari*, 417 U.S. 535 (1974), which permitted the federal government to provide employment preferences at the Bureau of Indian Affairs to members of Indian tribes. *Mancari*, however, has no bearing on this case.

The Court explained in *Mancari* that "special treatment" of tribal Indians is permitted so long as it "can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians." 417 U.S at 555. By recognizing that the "obligation" to members of Indian tribes is "unique," the plain terms of the *Mancari* decision preclude extending the same "special treatment" to other groups.

Moreover, the hiring preferences at issue in *Mancari* were granted to Indians "as members of quasi-sovereign tribal entities." 417 U.S. at 554. The Court upheld those preferences only as "furthering Indian self-government." *Id.* at 550; *see also id.* at 541 ("The purpose of these preferences . . . has been to give Indians a greater participation in their own self-government . . . ."). And it specifically noted that the preferences "appl[y] only to members of 'federally recognized' tribes" rather than more generally

to any "individuals who are racially . . . classified as 'Indians.'" *Id.* at 553 n.24. For this reason, the Court noted, "the preference is political rather than racial in nature." *Ibid.*

In contrast to *Mancari*, "native Hawaiian[s]" are not—and cannot become—a federally recognized Indian tribe. *See*, *e.g. Price* v. *Hawaii*, 764 F.2d 623, 626-28 (9th Cir. 1985). Nor do "native Hawaiian[s]" have quasi-sovereign status; to the contrary, this Court has specifically rejected Hawaii's attempt to permit only "native Hawaiian[s]" to vote for board members of the Office of Hawaiian Affairs. *See Rice*, 528 U.S. at 520. Hawaii's decision to permit tax exemptions for "native Hawaiian[s]" that are unavailable to other citizens is thus an impermissible "racial" preference, not a "political" one. *Mancari*, 417 U.S. at 553 n.24; *see also Rice*, 528 U.S. at 515 ("native Hawaiian" is a "racial definition"). There is no basis for concluding that *Mancari*'s narrow rule salvages Hawaii's otherwise-unconstitutional taxation regime.

II. THE STATE COURT'S RESOLUTION OF THIS CASE ON "STANDING" GROUNDS DOES NOT PREVENT THIS COURT FROM ADJUDICATING PETITIONERS' CONSTITUTIONAL CLAIMS.

The Hawaii Supreme Court did not reach the merits of petitioners' constitutional claims. Avoiding the inevitable conclusion that the State's discriminatory system of taxation cannot be reconciled with the Equal Protection Clause, the state court instead purported to resolve the case on "standing" grounds as a matter of state law: Because petitioners had not alleged that they were "interested in participating in the homestead lease program," the court concluded that they had not established the requisite injury-in-fact. Pet. App. 49a. This decision, which prevents

petitioners from challenging the discriminatory imposition of taxes because they do not also seek to participate in Hawaii's discriminatory lease program, cannot deprive the Court of jurisdiction.

This case is not the first time the Court has confronted whether decisions upholding Hawaiian racial preferences are insulated from further review because they rest on purported state-law grounds. *See Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1442-43 (2009). But just as this Court did not "need [to] tarry long to reject" the jurisdictional argument in *Office of Hawaiian Affairs*, *id.* at 1442, it can similarly make short work of any argument that the Hawaii Supreme Court's decision in this case rests on an adequate and independent state ground. The state court's "standing" decision does not prevent this Court from addressing petitioners' constitutional claims—and invalidating Hawaii's attempt to impose disparate taxation based on race.

A. This Court has jurisdiction to review a state-court decision rejecting a federal claim on state grounds where the "decision fairly appears . . . to be interwoven with the federal law." *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983); *see also*, *e.g.*, *Office of Hawaiian Affairs*, 129 S. Ct. at 1442. That is precisely the case here: Although the Hawaii Supreme Court purported to reject petitioners' equal protection arguments for lack of standing under state law, that decision stems from its (mis-)understanding of the nature of petitioners' federal arguments—and is, at a minimum, "interwoven with the federal law."

The Hawaii Supreme Court began its standing analysis with the assertion that petitioners' "challenge to the HHCA tax exemption is, in essence, a challenge to the HHCA's native Hawaiian qualifica-

tion for homestead leases." Pet. App. 40a. The remainder of its analysis followed from this assertion. Because "the tax exemption provision of the HHCA provides a tax exemption for 'original lessee[s]' and not specifically [for] native Hawaiians," the court continued, petitioners' "allegations concerning the constitutionality of the tax exemption challenge those provisions of the HHCA that set forth the lease eligibility requirements." *Id.* at 41a. The court therefore "construe[d] [petitioners'] challenge to the tax exemption afforded to homestead lessees as a challenge to those lease eligibility provisions." *Ibid.*

Having so "construe[d]" the federal claims being asserted, the Hawaii Supreme Court held that petitioners lacked standing because they are not "interested in participating in the homestead lease program." Pet. App. 49a. But the court's decision that petitioners were *actually* challenging the lease eligibility requirements, rather than the tax exemption itself, was a determination of federal rather than state law: The Hawaii Supreme Court reached that conclusion based on its view regarding the appropriate subject of an equal protection challenge in this case.

The Hawaii Supreme Court was mistaken in attempting to separate the tax exemption from the lease eligibility requirements: Regardless of whether petitioners seek to participate in the homestead lease program, the fact remains that Hawaii's system of taxation imposes discriminatory taxes based on race, and petitioners are entitled to challenge that denial of the "right to equal treatment." *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946). Indeed, petitioners would be entitled to pursue that claim even if the appropriate remedy would be elimination of the homestead lease program altogether—

in which case *no one* would benefit from the tax exemption. *See*, *e.g.*, *Allegheny Pittsburgh Coal Co.* v. *County Comm'n of Webster County*, 488 U.S. 336, 346 (1989).

In any event, this Court's jurisdiction does not depend on whether the Hawaii Supreme Court correctly understood the nature of petitioners' constitutional claims. Instead, it is sufficient that the standing decision rests exclusively on—and thus is "interwoven with"—the state court's view of the necessarily federal merits. This Court accordingly has jurisdiction to address petitioners' claims.

B. Even if the Hawaii Supreme Court's decision had rested *exclusively* on state grounds, however, that still would not deprive this Court of jurisdiction to reach the merits of petitioners' arguments. To the contrary, the "purported non-federal ground put forward by the state court for its refusal to decide the constitutional question" is "unsubstantial and illusory." *Lawrence* v. *State Tax Comm'n of Miss.*, 286 U.S. 276, 282-83 (1932).

As this Court emphasized in *Lawrence*, "the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked." 286 U.S. at 282. Particularly in cases like this one, where the plaintiff challenges a State's taxation system as discriminatory, "his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked." *Ibid.* (citations omitted).

Consistent with this view, the Court has not hesitated to reach the merits of federal challenges to discriminatory state taxes even where, as here, the state court had purported to reject those challenges for lack of standing. In *Allied Stores of Ohio, Inc.* v. *Bowers*, for instance, the plaintiff taxpayer alleged that Ohio had violated the Equal Protection Clause by exempting from taxation certain stored merchandise "'belonging to a nonresident.'" 358 U.S. 522, 523 (1959) (quoting Ohio Rev. Code § 5701.08(A) (1953)). The Ohio Supreme Court concluded that the plaintiff lacked standing because, as a resident of Ohio, it "would not be entitled to any relief" even if it prevailed: striking the exemption for *nonresidents* would not lower the plaintiff's own taxes. *Allied Stores of Ohio, Inc.* v. *Bowers*, 140 N.E.2d 411, 415 (Ohio 1957). This Court nonetheless reached the merits of the plaintiff's claim. Because the issue "[w]hether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law," the Court explained, "this Court must determine for itself the sufficiency of the allegations displaying the right or defense" regardless of "the view taken of them by the state court." *Allied Stores*, 358 U.S. at 525 (quoting *First Nat'l Bank of Guthrie Ctr.* v. *Anderson*, 269 U.S. 341, 346 (1926)) (internal quotation marks omitted); *see also*, *e.g.*, *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 (1964) (reviewing federal preemption claim despite state-court mootness determination because "the [state] courts have in substance and effect denied a federal right").

As in *Allied Stores*, this Court should "determine for itself" whether Hawaii's discriminatory system of taxation is inconsistent with the Constitution's guarantee of equal protection, 358 U.S. at 525, and it is

not foreclosed from doing so because the Hawaii Supreme Court "refus[ed] to decide" that argument on its merits, *Lawrence*, 286 U.S. at 282. The fact that the court below went to such great lengths to avoid reaching petitioners' constitutional claim is a reason to grant—not deny—review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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