**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**

**BRIEF IN OPPOSITION**


DAVID M. LOUIE *
Attorney General
State of Hawaii
GIRARD D. LAU
Solicitor General
CHARLEEN M. AINA
Deputy Attorney General
425 Queen Street
Honolulu, HI 96813
(808) 586-1360
David.M.Louie@hawaii.gov

*Counsel for Respondents*

*Counsel of Record

[Additional Counsel Listed On Inside Cover]


November 16, 2011

ALFRED B. CASTILLO, JR.
County Attorney
County of Kaua'i, Hawaii
JENNIFER S. WINN
Deputy County Attorney
4444 Rice Street
Suite 220
Līhu'e, HI 96766
(808) 241-493

RICHARD B. ROST
Deputy Corporation Counsel
County of Maui, Hawaii
200 South Hight Street
Wailuku, HI 96793
(808) 270-7741

ROBERT CARSON GODBEY
Corporation Counsel
City and County of Honolulu, Hawaii
LEE M. AGSALUD
Deputy Corporation Counsel
842 Bethel Street
2nd Floor
Honolulu, HI 96813
(808) 768-7996

LINCOLN S.T. ASHIDA
Corporation Counsel
County of Hawaii, Hawaii
JOSEPH K. KAMELAMELA
LAUREEN L. MARTIN
Deputy Corporation Counsel
333 Kilauea Avenue
Hilo, HI 96720
(808) 961-8251

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page



STATUTES

## BRIEF IN OPPOSITION

Through this lawsuit, petitioners seek to challenge the homestead lease qualification that Congress required Hawaii to adopt as a condition of admission to the union, and is now embodied in Hawaii's constitution. Petitioners' challenge, however, is not based on any demonstrated desire to acquire a homestead lease, and thereby assume the significant burdens that accompany lessee status. Instead, petitioners claim that the homestead lease qualification injures them as taxpayers, because county tax codes exempt homestead leases from county taxes beyond certain minimum amounts.

Applying state law principles, the Hawaii Supreme Court ruled that petitioners lack standing to attack homestead leases (and related tax exemptions) granted to persons who are willing to accept burdens that petitioners have shown no willingness to accept. That ruling is an independent and adequate state ground for the decision that forecloses review in this Court. It is also correct, even if judged under federal standing principles.

The petition is rife with unfounded attacks on the integrity of the Hawaii Supreme Court, which petitioners accuse of "transparent" "maneuvering" to preserve "a politically popular" program, Pet. 2, 11, 22-23, 29. The reality, however, is that petitioners have identified no concrete, non-speculative injury that they suffer as taxpayers. Their theory of injury in state court—that, but for the homestead lease qualification, they would pay only $100 in property taxes—is utterly implausible. There is no evidence that, if the homestead lease qualification were invalidated, counties would respond by extending the exemption to everyone, thereby decimating this

important revenue source. Petitioners' alternative theory—that the exemption forces them to pay higher taxes—rests on pure political and economic speculation. Thus, even if the Hawaii Supreme Court's standing decision were a proper subject of review by this Court, it would not merit review.

That ruling, moreover, does not foreclose all constitutional challenges to Hawaii's homestead lease qualification, as petitioners repeatedly claim. The Hawaii Supreme Court's reasoning does not foreclose a challenge brought by individuals who demonstrate a desire to obtain homestead leases but are ineligible for them. What is clear, however, is that the momentous question of whether provisions of Hawaii's constitution—and the very terms on which it became a State—are invalid under the Fourteenth Amendment cannot be raised by individuals who have no concrete stake in its resolution.

Indeed, because petitioners lack standing, neither of the state courts addressed the complex and unique historical and legal issues relevant to determining what standard of review should apply to the homestead lease qualification. For that same reason, the record contains none of the factual information relevant to determining whether that qualification satisfies any form of heightened review. This Court should not attempt to resolve these issues on an incomplete legal and factual record, at the behest of individuals who have suffered no concrete injury from the homestead lease qualification and simply seek to air a generalized grievance in their capacity as taxpayers.

## BACKGROUND

Homestead leases were created by the Hawaiian Homes Commission Act, Act of July 9, 1921 (HHCA),

ch. 42, 42 Stat. 108. The HHCA reflects Congress's attempt to redress various societal ills that grew out of Hawaii's complex history with western society following the arrival of Captain Cook there in 1778. See generally *Rice* v. *Cayetano*, 528 U.S. 495, 499-507 (2000). Part of that history involved the overthrow of the Hawaiian monarchy with the active assistance of the United States minister to the Kingdom of Hawaii. See *id.* at 504-05. The republic that succeeded the monarchy later ceded 1.8 million acres of crown, government, and public lands of the Kingdom of Hawaii to the United States without the consent of, or compensation to, the Native Hawaiian people. See *id.* at 505; Pet. App. 7a.

The HHCA was adopted after Hawaii became a U.S. territory, and mandated that approximately 200,000 acres of these "ceded lands" be set aside for long-term leasing by "native Hawaiians." They are defined by the HHCA as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian islands previous to 1778." HHCA, § 201(a)(7), 42 Stat. at 108. The leases cost $1 per year, last 99 years, *id.* § 208, 42 Stat. at 111[1], and originally were exempted from taxes by the HHCA for five years. *Id.*[2] In exchange for these benefits, lessees are subject to a variety of burdens. These include restrictions on the total size of the leasehold and the size of the residence lot; a prohibition on sub-letting; and an obligation to comply with any

---

[1] This section was amended to include a one-time right to renew for an additional 100 years. 1990 Haw. Sess. Laws Act 305, sec. 1, § 208(2).

[2] The exemption period later was lengthened to seven years. Act of Aug. 12, 1958, Pub. L. No. 85-710, sec. 1, § 208(8), 72 Stat. 706, 706.

conditions adopted by the Department of Hawaiian Homelands (DHHL). *Id.* §§ 207, 208, 42 Stat. at 110-11. There are also severe restrictions on the alienability of the property, including prohibitions on the transfer to anyone who is not a native Hawaiian; a requirement that even transfers to native Hawaiians be approved by the DHHL; and detailed restrictions on who may inherit the property interest. *Id.* §§ 208, 209, 42 Stat. at 111.

In admitting it to the Union, Congress required Hawaii to adopt the HHCA as part of its constitution. See Act of Mar. 18, 1959, Pub. L. No. 86-3, § 4, 73 Stat. 4, 5 (1959). Congress also barred Hawaii from changing the qualifications of homestead lessees without the consent of the United States. *Id.* Hawaii complied with these and other requirements pertaining to the Hawaiian home lands.

As petitioners note, several counties in Hawaii exempt homestead leases from real property taxes beyond the seven years specified in the HHCA, except for certain minimum amounts that range from $25 to $150. See Pet. App. 13a-15a nn.11&12. Several years ago, petitioners paid their county taxes, but asked for refunds reflecting the difference between the full amount of the tax assessment and the amount they would have owed if they were homestead lessees. After these requests were denied, petitioners brought suit seeking the same relief.

Applying state law, the Hawaii Supreme Court held that petitioners lacked standing to pursue their challenge. It ruled that, in the absence of any evidence that petitioners were interested in participating in the homestead lease program, their allegations failed to "establish[] what specific and personal interest has been affected," and instead "merely invite this court to infer that [petitioners], or at least

some of them, were actually affected." Pet. App. 50a (quotation marks and alteration omitted). "Without more, [petitioners] are merely airing a political or intellectual grievance, which the tax appeal court lacked jurisdiction to address." *Id.* (quotation marks, alteration, and citation omitted).

## REASONS TO DENY THE PETITION

1. The Hawaii Supreme Court's conclusion that petitioners lacked standing in their capacity as taxpayers is an independent and adequate state ground for the decision that forecloses review in this Court. That ruling is also plainly correct and otherwise does not warrant this Court's review. Petitioners' efforts to show otherwise are unavailing.

a. In the state courts, petitioners claimed that, but for the homestead lease qualification, they would pay only a minimum property tax (*e.g.*, $100 in Honolulu), and thus they suffered injury in the amount of all taxes that they paid above this minimum. This theory of injury follows from the relief they sought—*i.e.*, a refund that would give them precisely the same benefit as the tax exemption afforded to homestead lessees in their respective counties. Petitioners now deem it so self-evident that they have "standing to seek a refund of their own tax payments," Pet. 2; see also *id.* at i (Question Presented), that they offer no explanation for why the refund amount they sought reflects the measure of any injury they actually suffered. In fact, no such explanation is possible.

A full refund of all property taxes above the amount paid by homestead lessees is *not* the relief that would necessarily, or even likely, flow from invalidation of an allegedly impermissible tax break for lessees. To the contrary, according to petitioners, homestead lessees paid 5.5% of the average amount of real

property tax assessments in Honolulu for year 2009-2010.[3] It is thus wholly implausible—indeed, inconceivable—that, if the homestead lessee exemption were declared unconstitutional, Honolulu County would respond by *extending* the exemption to everyone, thereby reducing its property tax revenues by 94.5%. Thus, any claim that, but for the tax benefit afforded to some native Hawaiians, petitioners would have paid only $100 in annual real property taxes rests on utterly implausible speculation about how their respective counties might react to invalidation of the homestead tax exemption.

Presumably recognizing this, petitioners suggest another theory of injury—*i.e.*, that they have been forced to "bear disproportionate tax burdens." Pet. 11; see also *id.* at 24. The existence and amount of any such incremental tax increase, however, is also a matter of pure political and economic conjecture. The state offered evidence showing that homestead lessees have "very low household incomes adjusted for household size." State of Hawaii's and Attorney General's Mot. for Summ. J. 8 ("Summ. J. Mot.") (quotation marks omitted). It is thus possible that petitioners would have borne the same tax burden if the counties had used an exemption based on household income instead of homesteader status. Alternatively, invalidation of the native Hawaiian homestead lease qualification could result in non-native Hawaiians other than petitioners obtaining such leases (because petitioners may not qualify under the new criteria and/or are unwilling to accept the burdens of the leases). Accordingly, the counties

---

[3] *See* Pet. 6 (asserting that the average residential real property tax assessment for Honolulu is $1817, but homestead lessees pay only $100, or 5.5% of that average amount).

would retain the tax exemptions (in exchange for whatever burdens lessees are required to accept) and petitioners would not benefit at all in their capacity as taxpayers.

In all events, petitioners' assertion of "real-world injur[ies]," Pet. 22, lacks any basis in the record. There is no evidence showing that, if homestead lessees had paid higher taxes, petitioners would have paid lower ones. The Hawaii Supreme Court made clear, moreover, that, under the logic of its decision in *Mottl* v. *Miyahira*, 23 P.3d 716 (Haw. 2001), unsubstantiated assumptions are insufficient to establish injury in fact. See Pet. App. 47a-48a (noting that, in *Mottl*, it rejected an unsupported assumption that a loss of $6 million in an organization's budget "'must have some negative effect on'" its operations and employees, and instead required proof of a "'specific and personal injury'" flowing from that budgetary loss (emphasis omitted) (quoting *Mottl*, 23 P.3d at 729-30)).

Thus, there was more than "'fair support,'" Pet. 23, for the Hawaii Supreme Court's conclusion that, in the absence of any evidence that petitioners wished to participate in the homestead program, their asserted injuries rested on speculation. Far from being "a transparent attempt to avoid vindicating petitioners' federal rights," *id.*, the holding that petitioners lack standing is demonstrably correct. And while petitioners claim that there is "nothing other than the decision below to suggest that Hawaii standing law forecloses petitioners' challenge, *id.* at 25, that decision is fully consistent with the state court's prior standing ruling in *Mottl*.

Nor is it true that the decision lacks "fair support" because it "rests on [the] demonstrably false premise … that petitioners asked for something (in-

clusion in the lease program) that they quite plainly did not [seek]." Pet. 24. In fact, the decision rests on the exact opposite premise—*i.e.* that petitioners lack standing because they *failed* to request inclusion in the lease program or to establish that they had any interest in participating in it. See Pet. App. 49a. Indeed, it is difficult to understand how petitioners can make this "false premise" claim, since they elsewhere criticize the Hawaii Supreme Court for *requiring* evidence of their interest in participating in a lease program for which they were ineligible. See Pet. 3, 11, 22.

This latter criticism, moreover, is equally unfounded. In *Cayetano*, Harold Rice was just as categorically ineligible to cast a vote in the elections to decide the membership of the Office of Hawaiian Affairs as petitioners are to be lessees. Yet he sought and was denied the right to do so, thereby establishing his standing to challenge the voter qualifications for such elections. See 528 U.S. at 510.

Here, the Hawaii Supreme Court did not even require petitioners to apply for a homestead lease, as petitioners repeatedly claim, see Pet. 3, 11, 22. It simply required evidence that petitioners actually desired to participate in the homestead lease program. Pet. App. 49a & n.31. Although this evidentiary burden is slight, it is not a meaningless formality. As discussed above, homestead leases are not unalloyed blessings. With their undeniable benefits come equally undeniable burdens and restrictions. In the absence of any evidence that petitioners were willing to accept the bitter with the sweet, they cannot claim to suffer injury from their ineligibility for such leases. Put differently, petitioners lack standing to attack the native Hawaiian qualification for receiving a homestead lease (and related exemp-

tions) granted to persons who are willing to accept restrictions and burdens that petitioners have shown no willingness to accept. In the absence of any such showing, petitioners are simply airing a generalized grievance—namely, that native Hawaiian homestead lessees not be granted tax exemptions, whether or not those exemptions injure petitioners in any way.

b. Petitioners also argue that the Hawaii Supreme Court's standing decision is not an independent and adequate state ground because it is inextricably intertwined with the merits. This is so, they claim, because the state court "implicit[ly] assum[ed] that the tax benefits are awarded on the basis of 'lessee status,' not on the basis of race," and "this is just another way of embracing the erroneous merits argument that a transparent proxy for race (here, lessee status) is the real determining factor and would thus have to be the source of the petitioners' asserted injury." Pet. 22. This claim is baseless.

First, the Hawaii Supreme Court plainly did not suggest that "lessee status" was the real source of petitioners' injury. To the contrary, it recognized that the alleged source of petitioners' injury was "the HHCA's native Hawaiian qualification for homestead lessees," Pet. App. 40a; see also *id.* at 41a. That qualification is not a proxy for something else; it is the classification petitioners deem unconstitutional.

Second, the state court's standing decision in no way rests on any merits arguments. The Hawaii Supreme Court did not find that petitioners lack standing because the native Hawaiian qualification is (or is not) racial. Nor did it deny standing because that classification does (or does not) satisfy any particular level of constitutional scrutiny. Instead, it recognized that, absent evidence that petitioners wished to acquire homestead leases, any claim that

the lease program (and related tax exemptions for homestead lessees) caused petitioners to pay higher property taxes rests on speculation, which makes the dispute non-justiciable.

Thus, this case does not involve a situation in which the state court's ruling is "based on an 'antecedent ruling'—whether implicit or explicit—'on federal law.'" Pet. 21. Cf. *Ake* v. *Oklahoma*, 470 U.S. 68, 74-75 (1985) (because federal constitutional errors could not be waived under state procedural rules, finding of waiver necessarily depended on finding that there was no constitutional error); *Xerox Corp.* v. *Cnty. of Harris, Tex.*, 459 U.S. 145, 149 (1982) (predicate to state court judgment in favor of taxing authority was conclusion that taxes were constitutional, and the state court had "so held"). Nor is it a case in which the state court expressly upheld a state law against a federal constitutional challenge and, in the course of doing so, relied on a theory that was itself inconsistent with the federal right at issue. See *Abie State Bank* v. *Bryan*, 282 U.S. 765, 776-77 (1931) (theory that banks were estopped from raising takings challenge because they had complied with, and advertised the benefits of, state banking law was not an independent and adequate nonfederal ground because it conflicted with the federal principle that "compliance with [a] regulation does not forfeit the right of protest when the regulation becomes intolerable").

Finally, this is not a case like *Liner* v. *Jafco, Inc.*, 375 U.S. 301 (1964), where state *judicial action* was the source of an asserted violation of federal rights. In *Liner*, a state court enjoined labor picketing notwithstanding a claim that federal law preempted state court jurisdiction, and the state appellate court endorsed the injunction but dismissed the appeal as

moot. *Id.* at 302-04. Because the "fundamental question [was] whether the [state] courts had any power whatever to adjudicate the dispute," *id.* at 306, a ruling that the preemption challenge had become moot on appeal was part and parcel of that same fundamental question of state judicial power, and could not preclude this Court's review of that question.[4] Here, the source of petitioners' federal claim is not any exercise of state judicial power, but the native Hawaiian qualification set forth in the HHCA. The Hawaii Supreme Court's standing ruling is thus wholly independent of the merits of petitioners' equal protection challenge to that statutory qualification.

2. Because the ruling that petitioners lack standing is an independent and adequate state ground of decision, it forecloses review by this Court. It is nevertheless worth noting, however, that the ruling is fully consistent with this Court's own approach to challenges brought by taxpayers to allegedly unconstitutional tax benefits received by others. In fact, just this past Term, this Court relied on strikingly similar reasoning to conclude that taxpayers lacked standing to mount an Establishment Clause challenge to a state tuition tax credit that benefited private religious schools.

---

[4] Petitioners' reliance on *Costarelli* v. *Massachusetts*, 421 U.S. 193 (1975) (per curiam), is even more misplaced. There, the state courts rendered no justiciability ruling, and this Court found that it lacked jurisdiction. Moreover, the claim asserted was whether a state denied the right to jury trial by conducting criminal bench trials that could be vacated by an appeal to another court, where jury trials were authorized. The question whether this appeal procedure "'cured' or 'mooted' [the] federal constitutional claim" was part and parcel of the question whether the two-tiered system was constitutional in the first place. *Id.* at 197.

In *Arizona Christian School Tuition Organization* v. *Winn*, 131 S. Ct. 1436 (2011), this Court explained that "claims of taxpayer standing rest on unjustifiable economic and political speculation." *Id.* at 1443. When a government "declines to impose a tax, its budget does not necessarily suffer." *Id.* And "[d]ifficulties persist even if one assumes that an expenditure or tax benefit depletes the government's coffers." *Id.* at 1444. A finding of injury requires a court to "speculate that elected officials [have] increase[d] a taxpayer-plaintiff's tax bill to make up a deficit"; conversely, a finding of redressability requires it to "assume that, were the remedy the taxpayers seek to be allowed, legislators will pass along the supposed increased revenue in the form of tax reductions." *Id.* (quotation marks omitted).

These are precisely the assumptions petitioners rely on here. See *supra* at 5-7; see also Pet. 24 (petitioners' "injury is plainly redresssable by either removing the exemption or providing an equivalent exemption"). Yet as this Court stressed, "[i]t would be pure speculation to conclude that an injunction against a government … tax benefit would result in any actual tax relief for a taxpayer-plaintiff." 131 S. Ct. at 1444 (quotation marks omitted). Just like the Hawaii Supreme Court, therefore, this Court concluded that the taxpayer-plaintiffs lacked standing because (like petitioners here) they had not established that invalidation of the tax benefit "would prompt [state] legislators to pass along the supposed increased revenue in the form of tax reductions" to the plaintiffs, and had failed to show "that higher taxes … result from the" challenged tax benefit. *Id.* (quotation marks omitted). Thus, the very logic that, according to petitioners, would be "laughed out of

court" in other settings, Pet. 2, has been expressly endorsed by this Court.[5]

Similarly, petitioners scoff at the notion that they must show some interest in participating in a program for which they are ineligible in order to show harm from a tax exemption afforded to participants in that program. Yet, in *Allen* v. *Wright*, 468 U.S. 737 (1984), this Court stressed that the parents of African-American students who challenged the government's grant of tax exemptions to racially discriminatory schools had not "allege[d] that their children have been the victims of discriminatory

---

[5] Ignoring this directly relevant case, petitioners claim that *Lawrence* v. *State Tax Commission*, 286 U.S. 276 (1932), permits them to challenge a tax exemption for others even where invalidation of the exemption would not affect petitioners' own tax burden. Pet. 21-22. But in *Lawrence*, the taxpayer was injured because he was taxed on *business* income under a law that "exempt[ed] corporations, which were his *competitors*, from a tax on income derived from like activities." *See* 286 U.S. at 279 (emphasis added). *See also Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 524-25 & n.3 (1959) (resident business had standing to challenge law exempting foreign corporation doing business within state from tax levied on personal property used in business in the State). Because petitioners do not allege any competitive injury to their businesses from the homestead lease exemption, *Lawrence* and *Bowers* are wholly inapposite here.

So too is *Allegheny Pittsburgh Coal Co.* v. *County Commission of Webster County*, 488 U.S. 336 (1989), cited by *amicus* Center for Equal Opportunity (at 8-9), though not petitioners. That case did not involve any exemption, but rather a claim that a property tax applicable to all was administered in a grossly inequitable way. The state court did not rule that petitioners lacked standing, but addressed the merits, ruling that the assessment method was constitutional and that petitioners remedy was to seek to have the assessments of other taxpayers raised. 488 U.S. at 342.

exclusion from the schools whose exemptions they challenge as unlawful," and had "not alleged at any stage of th[e] litigation" that they wished to apply for admission to these schools. *Id.* at 745-46. The children of these taxpayers were no less "ineligible" for admission to schools that discriminated on the basis of race than petitioners are ineligible for homestead lease. Yet this Court recognized that the taxpayers' lack of interest in their children's admission was relevant to their standing to challenge tax exemptions that benefitted others.

3. In a last ditch effort to escape the standing decision, petitioners contend that respondents "*conceded* that petitioners had standing to challenge the tax exemption," and that the Hawaii Supreme Court should have "assume[d] the existence of standing based on the parties' agreement." Pet. 24-25. But respondents conceded only that petitioners had "'general standing to challenge the fact that the homesteader gets the exemption and the non homesteader doesn't.'" Pet. App. 33a. As petitioners well understood, this was *not* a concession that they had standing to challenge the homestead qualification as a racial classification. Instead, respondents made perfectly clear that the homestead qualification of the HHCA was "'the key'" to petitioners' claim of racial discrimination "'and because they don't want homestead [status] *they have no right and standing to challenge the qualification*.'" *Id.* at 32a-33a (emphasis added).

Thus, respondents conceded only that petitioners had standing to challenge the facially *neutral* distinction that the county tax codes themselves drew between homesteaders and non-homesteaders. But petitioners lacked standing to challenge the qualification that governed homesteader status, because

they had not sought that status. There was no "agreement," therefore, from which the Hawaii Supreme Court could properly assume that the homestead lease qualification itself had caused petitioners any concrete, non-speculative injury. And, plainly this is a fact-bound dispute that does not warrant this Court's attention.

4. Finally, the Hawaii Supreme Court's decision does not foreclose review of an equal protection challenge to the homestead lease qualification in the future. Review of that challenge now, however, is not only foreclosed by the independent and adequate state law ground of decision, it would be imprudent given the deficiencies in the record caused by petitioners' lack of standing.

Petitioners repeatedly accuse the Hawaii Supreme Court of acting disingenuously to preserve a politically popular program. Yet the court's decision provides a clear roadmap for bringing a justiciable challenge to the homestead lease qualification. A would-be challenger need not make "a facially plausible claim" to lessee status under HHCA. Pet. 22. Instead, he or she simply needs to demonstrate an actual interest in becoming a lessee. See Pet. App. 49a. That ruling makes clear that the state court has not adopted a state-law requirement that, in conjunction with the Anti-Tax Injunction Act, frustrates this Court's ability to address the constitutionality of the native Hawaiian qualification.

Conversely, however, petitioners seek review by this Court of a unique and complex legal issue where the record is devoid of relevant facts and the state courts have not opined on the central issues of law. In moving for summary judgment, respondents explained that, because petitioners lacked standing to challenge the homestead lease qualification itself, the

only challenge they could bring was to the facially neutral distinction drawn in the tax codes between homestead lessees and non-homestead lessees—a challenge unquestionably governed by rational basis review. See Summ. J. Mot. 3-5. Respondents explained that, if the court were to decide that the tax exemption involves a "racial classification that [petitioners] have standing to attack," respondents would "file a subsequent and different summary judgment motion—and a much more legally complex one—arguing" that the standard of review should be derived from *Morton* v. *Mancari*, 417 U.S. 535 (1974). Summ. J. Mot. 1. Respondents "would then demonstrate that the tax exemptions satisfy that … standard." *Id.*

In light of the disposition of the case in the state courts, respondents never needed to provide an in-depth historical and legal analysis addressing the appropriate standard of review. Nor were they required to submit any factual evidence to show why that standard is met. As a consequence, the state courts did not address these issues.

Petitioners now blithely assert that the "merits of [their] constitutional argument do not present a difficult question," Pet. 18, and they purport to dispose of the relevance of *Mancari* in a scant two-page discussion, *id.* at 16-18. But this facile treatment is belied by petitioners' own concession that "numerous lower courts have recognized the importance of *Mancari*, but have applied varied analyses of the case." *Id.* at 19-20 (citing cases). More importantly this Court recognized in *Cayetano* that the question whether Congress "has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve

that status" are "questions of considerable moment and difficulty." 528 U.S. at 518. The Court "stay[ed] far off that difficult terrain" in *Cayetano* by limiting its decision to whether Congress had the power to "authorize a State to create a voting scheme" that restricted who could vote for public officials. *Id.* at 519; see also *id.* at 520 ("[i]t does not follow from *Mancari* … that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens"); *id.* at 521 ("[t]he validity of the voting restriction is the only question before us").

This case, of course, does not involve voting rights or restrictions. It involves a type of preference (albeit one with significant strings attached) akin to the preferences in hiring and promotion at issue in *Mancari*. Congress, moreover, plainly had authority to adopt those preferences, just as it had authority to enact the preferences at issue in *Mancari*. And while native Hawaiians do not share the *exact same* historical relationship with the United States as do Indian tribes, Pet. 17, the complex historical relationship between the United States and Hawaii contains the central elements of a special trust relationship akin to that between the nation and Indian tribes. These include a history of plenary congressional authority over the Hawaiian people following annexation of the Islands; the seizure, without compensation, of native Hawaiian lands; Congress' subsequent cession of many of those lands to be held in trust for the benefit of native Hawaiians; and its decision to lease some of those ceded lands to native Hawaiians alone. Moreover, Congress required Hawaii to embody that lease program in the state constitution as a condition of admission to the union.

In short, a thorough assessment of the constitutional ramifications of Hawaii's complex history with the United States is a significant and momentous undertaking. It should not occur for the very first time in this Court, without the benefit of any prior analysis by the state court intimately familiar with that history. Nor should a determination of whether the state can satisfy the appropriate standard of review occur for the first time in this Court, on an incomplete factual record. Any assessment of the constitutional validity of provisions in the Hawaii constitution—and the very terms on which it became a state—should await a future case, brought by an individual who is actually injured by the homestead lease program and whose concrete stake in the proper resolution of the issue ensures a full adversarial presentation of all relevant issues.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID M. LOUIE*
Attorney General
State of Hawaii
GIRARD D. LAU
Solicitor General
CHARLEEN M. AINA
Deputy Attorney General
425 Queen Street
Honolulu, HI 96813
(808) 586-1360
David.M.Louie@hawaii.gov

ALFRED B. CASTILLO, JR.
County Attorney
County of Kaua'i
JENNIFER S. WINN
Deputy County Attorney
4444 Rice Street
Suite 220
Līhu'e, HI 96766
(808) 241-493

ROBERT CARSON GODBEY
Corporation Counsel
City and County of Honolulu
LEE M. AGSALUD
Deputy Corporation Counsel
842 Bethel Street
2nd Floor
Honolulu, HI 96813
(808) 768-7996

RICHARD B. ROST
Deputy Corporation Counsel
County of Maui
200 South Hight Street
Wailuku, HI 96793
(808) 270-7741

LINCOLN S.T. ASHIDA
Corporation Counsel
County of Hawaii
JOSEPH K. KAMELAMELA
LAUREEN L. MARTIN
Deputy Corporation Counsel
333 Kilauea Avenue
Hilo, HI 96720
(808) 961-8251

*Counsel for Respondents*

November 16, 2011 * Counsel of Record