POSITION STATEMENT OF THE ATTORNEY GENERAL OF THE STATE OF HAWAII

S. 147 (THE "AKAKA BILL") IS CONSTITUTIONAL

I. Introduction

From our Nation's founding, Congress and the Supreme Court have recognized a special obligation to America's first inhabitants and their descendants -- over whose aboriginal homelands the Nation has extended its domain -- and the Court has held that Congress is empowered to honor that obligation as it sees fit. Congress has recognized that this obligation extends not only to the indigenous people of the lower 48 states, but also to Alaska Natives, even though they are historically and culturally distinct from American Indians, and until recently were not formally recognized as "Indian tribes." And Congress has expressly "affirm[ed] the trust relationship between the United States and Native Hawaiians" -- the "indigenous people with a historical continuity to the original inhabitants of [Hawaii] whose society was organized as a Nation prior to . . . 1778." 42 U.S.C. § 11701(1), (13).

Congress is now considering important legislation (S. 147) that would formally recognize the special status of Native Hawaiians already recognized in numerous prior enactments. Congress may honor, and has honored, the special obligation to indigenous Hawaiians, just as Congress and many states have for centuries attempted to do with respect to America's other indigenous people. Indeed, it would be discriminatory to hold that indigenous Hawaiians may -- or, as some have argued, must -- be treated differently from all other indigenous people.

As discussed below, there is no basis in the Constitution to establish such an unequal regime, and to compound the legitimate, congressionally recognized grievances of Hawaiians by according them second-class status among the Nation's indigenous people. We are aware of no court that has ever invalidated Congress's exercise of its plenary power to recognize special trust relationships with indigenous people of America, and there is no reason to believe any court would reach a different result as to Native Hawaiians. 1/

II. Historical Background

To understand why indigenous Hawaiians should be accorded the same treatment as other indigenous peoples, it is helpful to understand their history. While in some respects unique, the history of the indigenous people of Hawaii fits the same basic pattern of events that mark the history of America's other aboriginal people. Westerners "discovered" the land centuries after humans had first arrived there and organized a society; the newcomers asserted or acquired title to the land and displaced the original inhabitants from their homelands; and

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1/ Rice v. Cayetano, 528 U.S. 495 (2000), did not disturb Congress' findings regarding Native Hawaiians or address Congress' power to recognize a Native Hawaiian governing entity or a trust relationship between the United States and Native Hawaiians. That case addressed a different issue -- whether the Fifteenth Amendment barred the State of Hawaii ("State") from limiting to Native Hawaiians the franchise for trustees of the Office of Hawaiian Affairs ("OHA"). The Court held that because OHA is a state agency, and election of its trustees cannot be characterized as "the internal affair of a quasi-sovereign," the Fifteenth Amendment prohibited the challenged franchise restriction (and would have prohibited an equivalent one for tribal Indians). Id. at 522. The Court expressly declined to decide whether Congress has recognized a trust relationship between the United States and Native Hawaiians, and did not address whether Congress has the power to grant such recognition. Id. at 520.

there eventually came an acknowledgment on the part of the new sovereign -- the United States -- that with the exercise of dominion over a land that others had once known as theirs came a special obligation to and relationship with those once-sovereign, indigenous people. Rice, 528 U.S. at 500-08.

It is believed that Hawaii's first inhabitants migrated here from other islands in the South Pacific, or perhaps even from the Americas, more than a millennium ago. See id. at 500; 1 Ralph S. Kuykendall, The Hawaiian Kingdom 3 (1968); Thor Heyerdahl, American Indians in the Pacific 161-68 (1952). They "lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion," and were "organized as a Nation." 42 U.S.C. § 11701(1), (4); accord 20 U.S.C. § 7902(1). The first recorded Western contact with this society occurred in 1778, when Captain James Cook happened upon Islanders whom he and his crew called "Indians." See 1 Kuykendall, supra, at 3-28; Rice, 528 U.S. at 500.

Like the second-comers to the American mainland, Cook and his followers wrought radical changes in the aboriginal society. From 1795 to 1810, Kamehameha I brought the Islands under his control, and established the Kingdom of Hawaii. See id. at 501. Over the following decades, the communal land tenure system was dismantled, and the Islands' four million acres of land divvied up. Id. at 502. The King set aside 1.5 million acres for the Island chiefs and people, known as "Government lands," and kept a million acres for himself and his heirs, known as "Crown lands." The remaining 1.5 million acres were conveyed separately to the Island chiefs. Foreigners not only acquired large tracts of now "private" land, but

gained great economic and political influence; meanwhile, the population and general condition of indigenous Hawaiians declined rapidly. See Neil M. Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848, 848-61 (1975); Lawrence H. Fuchs, Hawaii Pono: A Social History 251 (1961). The United States recognized the Kingdom as a sovereign and independent country, and entered into treaties with it. See Rice, 528 U.S. at 504; Apology Bill, Pub. L. No. 103-150, 107 Stat. 1510, 1510 (1993).

In 1893, the Kingdom was overthrown by American merchants. Rice, 528 U.S. at 504-05. In furtherance of this coup d'etat, the U.S. Minister to Hawaii, John L. Stevens, caused U.S. Marines to land in Honolulu and position themselves near Iolani Palace. This had the desired effect and, on January 17, 1893, Queen Liliuokalani relinquished her authority -- under protest -- to the United States. See id. at 505. The revolutionaries formed the Republic of Hawaii and sought annexation to the United States. Id. But, in Washington, President Cleveland refused to recognize the new Republic, and denounced -- as did Congress a century later -- the role of United States agents in overthrowing the monarchy, which he likened to an " 'act of war, committed . . . without authority of Congress,' " and called a " 'substantial wrong.' " 107 Stat. at 1511 (quoting address); see Rice, 528 U.S. at 505; 42 U.S.C. § 11701(7)-(9).

The Republic claimed title to the Government and Crown lands, without compensating the Queen or anyone else. See Levy, 63 Cal. L. Rev. at 863. On July 7, 1898, the Republic realized its goal of annexation under the Newlands Joint Resolution. See Rice, 528 U.S. at 505. As part of the annexation, the

Republic "ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign," to the United States. 107 Stat. at 1512; see Rice, 528 U.S. at 505. As Congress has recognized, "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States." 107 Stat. at 1512. Indeed, they were given no say in the matter.

The Territory of Hawaii was established in 1900. Rice, 528 U.S. at 505. The Organic Act reaffirmed the cession of Government and Crown lands to the United States, and put the lands "in the possession, use, and control of the government of the Territory of Hawaii . . . until otherwise provided for by Congress." Organic Act, § 91, 31 Stat. 141 (1900); see Rice, 528 U.S. at 505. It did not address -- let alone attempt to resolve -- the land claims of indigenous Hawaiians. Hawaii remained a Territory until 1959, when it entered the Union. Id. at 508.

By the time the Stars and Stripes was raised over Hawaii in 1898, the era of treaty-making with the indigenous people of the American continent had come to an end. As a result -- and as is true with respect to Alaska Natives -- the United States never entered into treaties with indigenous Hawaiians after 1898. Similarly, Congress never formally recognized or dealt with Hawaiians as "Indian tribes" under current statutory or executive definitions of that term, or attempted to sequester them on reservations. Yet -- as is true with respect to Alaska Natives -- Congress has in numerous enactments recognized that it has a special relationship

with indigenous Hawaiians that is, for purposes of Congress' constitutional power to deal with "Indian tribes," the same as its relationship with formally recognized tribes. See infra, Section VI.

In 1921 Congress passed the Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108 (1921). The HHCA placed about 200,000 acres of the lands that the Republic ceded to the United States in 1898 under the jurisdiction of the Hawaiian Homes Commission -- an arm of the Territorial Government -- to provide residential and agricultural lots for Native Hawaiians with 50% or more Hawaiian blood. HHCA § 203. Congress found support for the HHCA "in previous enactments granting Indians . . . special privileges in obtaining and using the public lands," H.R. Rep. No. 839, 66th Cong., 2d Sess. 11 (1920), and has since found that the HHCA "affirm[ed] the trust relationship between the United States and the Native Hawaiians." 42 U.S.C. § 11701(13). Accord 20 U.S.C. § 7902(8). 2/

Congress took a more elaborate approach in the Admission Act. First, it conveyed to the State the 200,000 acres of Hawaiian Home Lands set aside for the benefit of the Native Hawaiians under the HHCA and -- "[a]s a compact with the United States relating to the management and disposition of [those] lands" -- required the State to adopt the HHCA as part of its own constitution. Admission

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2/ Testifying in support of the HHCA, Secretary of the Interior Franklin D. Lane analogized Native Hawaiians to American Indians. See Hearings Before the House Committee on the Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii, 66th Cong. 129-30 (1920) (basis for special preference to Native Hawaiians is "an extension of the same idea" relied upon to grant such preferences to American Indians); H.R. Rep. No. 839, supra, at 4 ("the natives of the islands . . . are our wards . . . for whom in a sense we are trustees").

Act, Pub. L. No. 86-3, § 4, 73 Stat. 4, 5 (1959) ("Admission Act"). Second, it conveyed to the State the bulk of the other lands that the Republic ceded to the United States in 1898 (the so-called "section 5(f) lands"), but required the State to hold these lands "as a public trust" for, inter alia, "the betterment of the conditions of native Hawaiians, as defined in the [HHCA], . . . in such a manner as the constitution and laws of . . . [Hawaii] may provide." Admission Act, § 5(b), (f); see Rice, 528 US. at 507-08. Congress left with the federal government the ultimate authority to enforce this trust by authorizing the United States to bring suit against the State for any "breach of [the] trust." Admission Act, § 5(f).

Congress did not stop there. "In recognition of the special relationship which exists between the United States and the Native Hawaiian people, [it] has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities." 20 U.S.C. § 7902(13). Thus, Congress has expressly included Native Hawaiians in scores of statutory programs benefiting indigenous people generally. See 42 U.S.C. § 11701(19)-(20) (listing statutes); 20 U.S.C. § 7902(13)-(16) (same); Jon M. Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale L. & Pol. Rev. 95, 106 n.67 (1998). 3/

In 1993, Congress passed a Joint Resolution signed into law "apologiz[ing] to Native Hawaiians" for the United States' role in the coup, and "the deprivation of the rights of Native Hawaiians to self-determination." 107 Stat. at

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3/ See, e.g., 20 U.S.C. §§ 80q(8), 80q-11; id. §§ 4401, 4441; id. § 7117; id. §§ 7511-17; 25 U.S.C. §§ 2902(1), 2903; id. § 3002; 42 U.S.C. § 254s; id. § 2911a; id. § 3057h; Apology Bill, 107 Stat. at 1513.

1513. The law specifically acknowledged that "the health and well-being of the Native Hawaiian people is intrinsically tied to . . . the land," that land was taken from Hawaiians without their consent or compensation, and that indigenous Hawaiians have "never directly relinquished their claims . . . over their national lands." Id. In other recent acts, Congress has expressly affirmed the "special" -- and "trust" -- relationship between the United States and Hawaiians, and has specifically recognized Hawaiians as "a distinct and unique indigenous people." 42 U.S.C. § 11701(1), (13), (15), (16), (18); accord 20 U.S.C. § 7902(1), (10). For example, when it recently reenacted the Native Hawaiian Education Act ("NHEA"), 115 Stat. 1425, 1934 (2002), 20 U.S.C. §§ 7511-17, Congress stated that "Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship," id. § 7512(12)(B), and expressly found that the "political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives." Id. § 7512(12)(D); accord Hawaiian Homelands Homeownership Act of 2000 ("HHHA"), Pub. L. No. 106-568, § 202(13)(B), 114 Stat. 2872 (2000). 4/

4/ A court would give deference to these Congressional findings. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985). In addition, they are independently supported by the testimony of experts, including in recent and pending litigation. See, e.g., Office of Hawaiian Affairs Defendants' Submission of Corrected Declarations of Davianna Pomaika'i McGregor at 25-38 ("McGregor Decl.") and of Jon K. Matsuoka ("Matsuoka Decl."), Arakaki v. Lingle, U.S. Dist. Ct. for the Dist. of Haw., Civ. No. 01-00139 SOM-KSC (filed May 14, 2003).

III. Congress Has Plenary Power to Recognize a "Special Trust Relationship" with Any of the Indigenous Peoples of America

Congress has "plenary power over Indian affairs." S. Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998). As explained below, that power extends to Congressional recognition of the United States' special trust relationship with indigenous Hawaiians. The power is, in fact, so broad, that we have been unable to identify any case in which a court declared invalid Congress' exercise of it. See also Felix Cohen, Handbook of Federal Indian Law 3-5 (1982) ("No congressional or executive determination of tribal status has been overturned by the courts . . . .").

"The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." Morton v. Mancari, 417 U.S. 535, 551-52 (1974). It derives from the Indian Commerce Clause (U.S. Const. art. I, § 8, cl. 3), e.g., Alaska v. Native Village of Venetie, 522 U.S. 520, 531 n.6 (1998); the Treaty Clause (U.S. Const. art. II, § 2, cl. 2), e.g., McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); the Property Clause (U.S. Const. art. IV, § 3, cl. 2), e.g., United States v. Kagama, 118 U.S. 375, 379-80 (1886); the Debt Clause (U.S. Const. art. I, § 8, cl. 1), e.g., United States v. Sioux Nation of Indians, 448 U.S. 371, 397 (1980); see Pope v. United States, 323 U.S. 1, 9 (1944); and the Foreign Commerce Clause (U.S. Const. art. I, § 8, cl. 3), which authorizes Congress to legislate on account of the separate "Nation" that Hawaiians comprised both before and after 1778. 42 U.S.C. § 11701(1).

This authority is not limited by the words "Indian tribes" in the Indian Commerce Clause. In empowering Congress with the authority to single out

and deal with the indigenous societies they knew as "Indians" or "tribes," the Framers did not intend to restrict Congress' authority to deal with the extension of sovereignty over indigenous groups of which they may never have heard, but which would pose the same basic issues as the Indians occupying the 1789 frontier. During colonial America, "Indian" was still defined as "[a] native of India." Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789). That is whom Columbus thought he came upon when he discovered America. The Framers -- and generations before them -- of course knew that Columbus had not reached India, but they used "Indian" to refer to "the inhabitants of our Frontiers." Declaration of Independence ¶ 29 (1776). 5/ It is not surprising, then, that Captain Cook and his crew called the Islanders who greeted their ships in 1778 "Indians." 1 Kuykendall, supra, at 14 (quoting officer journal).

The meaning of the word "tribe" also demonstrates that Congress was given broad powers to recognize and deal with all indigenous people that might inhabit the frontiers of the expanding nation. At the founding, "tribe" meant "[a] distinct body of people as divided by family or fortune, or any other characteristic." Sheridan, supra. 6/ That is -- perhaps not coincidentally -- how Congress has

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5/ See also Thomas Jefferson, Notes on the State of Virginia 100 (William Peden ed. 1955) (1789) (referring to Indians as "aboriginal inhabitants of America"); Roger Williams, A Key into the Language of America 84 (1643) (aboriginals were "Natives, Savages, Indians, Wild-men," etc.); The First Three English Books on America 242 (Edward Arber ed. 1835) ("Indians" were " 'all nations of the new founded lands.' ") (quoting Gonzalo Fernandez de Oveido y Valdez, De La Natural Hystoria de Las Indias (1526)).

6/ See II Samuel Johnson, A Dictionary of the English Language (6th ed. 1785) (same); John Walker, A Critical Pronouncing Dictionary and Expositor of the

described Hawaiians, and fittingly so. See 42 U.S.C. § 11701(1); 20 U.S.C. § 7902(1). That "tribe" may mean something else today -- in either legal or lay terms -- should not circumscribe the authority conferred upon Congress to deal with distinct groups of indigenous people by those who ratified the Constitution in 1789.

Congress has historically exercised its Indian affairs power over indigenous people not organized into tribes (at least under then-prevailing definitions), or whose tribal status had been terminated -- and the Supreme Court has upheld that exercise of authority. See Cohen, supra, at 6 ("Congress has created 'consolidated' or 'confederated' tribes consisting of several ethnological tribes, sometimes speaking different languages. . . . Where no formal Indian political organization existed, scattered communities were sometimes united into tribes and chiefs were appointed by United States agents for the purpose of negotiating treaties."). Thus, for most of our history (until 1993), most Alaska Native Villages have not been recognized by the Bureau of Indian Affairs ("BIA") as "Indian tribes," see Hynes v. Grimes Packing Co., 337 U.S. 86, 110 n.32 (1949) ("Indian tribes do not exist in Alaska in the same sense as in [the] continental United States." (quotation marks omitted)); yet the Supreme Court has never questioned Congress' authority to single out and deal with Alaska Natives as such.

English Language (1791) (same); William Perry, The Royal Standard English Dictionary 515 (1788) (defining "tribe" as "a certain generation of people"). These definitions are consistent with the way in which Chief Justice Marshall referred to Indian tribes in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832). He analogized them to "nations" and explained that "[t]he very term 'nation,' so generally applied to [Indian tribes], means 'a people distinct from others.' " Id. at 561. As discussed below, Hawaiians were not only a "Nation," but were and remain a "distinct and unique indigenous people." 42 U.S.C. § 11701(1).

See, e.g., Native Village of Venetie, 522 U.S. at 523-24 (discussing the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-27 ("ANCSA")); see generally David S. Case, Alaska Natives and American Laws 195-222 (1984) (discussing federal programs for Alaska Natives).

The same goes for Congress' efforts with respect to Pueblos. In United States v. Joseph, 94 U.S. 614, 617 (1876), the Supreme Court held that "pueblo Indians, if, indeed, they can be called Indians," could not "be classed with the Indian tribes for whom the intercourse acts were made." Yet in United States v. Sandoval, 231 U.S. 28 (1913), the Court rejected the argument that Congress therefore lacked the authority to deal with Pueblos as Indians or tribes. The Court recognized that Pueblos were different from other Indians -- they were citizens, held title to their lands, and lived in "separate and isolated communities." Id. at 39, 47-48. But "[b]e this as it may," Pueblos "have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." Id. at 39. And -- as long as it "cannot be said to be arbitrary" -- Congress' assertion of such a "guardianship" relationship "must be regarded as both authorized and controlling." Id. at 47.

In United States v. John, 437 U.S. 634 (1978), the Court affirmed Congress' power to subject Indians remaining in Mississippi to different criminal laws -- even if they did not belong to formal tribes in the statutory sense. "Neither the fact that [the Indians] are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." Id. at 653. Nor

did the fact that the Executive had previously taken the position that the Indians could not "be regarded as a tribe." Id. at 650 n.20. See also Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 85, 88 (1977) (upholding Congressional decision to exclude group of Delaware Indians and their descendants from distribution of certain funds, but noting without disapproval a previous enactment in which Congress had included that group even though they were "not a recognized tribal entity, but . . . simply individual Indians with no vested rights in any tribal property"); United States v. McGowan, 302 U.S. at 537 (Congress' authority to single out Indians for special treatment extends to "colony" established for Indians previously "scattered" about Nevada lacking any independent tribal status).

This Congressional power depends not on any particular group's formal designation as a tribe, but derives from the special relationship that the United States has assumed with Native Americans. 7/ Chief Justice Marshall

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7/ Other cases discuss the meaning of the word "tribe" in statutes, see Montoya, 180 U.S. at 264 (discussing statutory definition for purposes of whether Court of Claims had jurisdiction over property disputes between U.S. citizens and Indians); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (addressing whether tribe was subject to equal protection guarantee of the Indian Civil Rights Act), or merely describe particular Indian tribes in other unrelated contexts, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557, 561 (1832) (discussing treatment of Indians under federal statutes in context of limiting state's power to legislate in respect of Indians); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16, 19 (1831) (describing Cherokee nation in context of deciding that it is not a "foreign state" for purposes of Supreme Court jurisdiction over controversies "between a state or citizens thereof and a foreign state"); Native Village of Tyonek v. Puckett, 957 F.2d 631, 635 (9th Cir. 1992) (whether Alaskan village had sovereign immunity); United States v. Kagama, 118 U.S. 375, 383 (1886) (whether federal courts have jurisdiction over murder of one Indian by another on reservation). To the extent that many of these cases preceded the Court's later broad construction of Congress' power in this area, see Sandoval, 231 U.S. at 46 (Congress' power limited only by the condition that it not act "arbitrarily"); Yankton Sioux Tribe, 522 U.S. at 343 (Congress' power is

recognized this relationship in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), when he analogized the relationship between Native Americans and the United States to that of a "ward to his guardian." Id. at 17. In subsequent cases, the Court has acknowledged that this relationship stems in part from the fact that, in expanding westward with the frontier, the Federal Government "took possession of [Indians'] lands, sometimes by force, leaving them . . . needing protection." Bd. of Comm'rs of Creek County v. Seber, 318 U.S. 705, 715 (1943). See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); United States v. Kagama, 118 U.S. at 384. See also Morton v. Ruiz, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions.").

IV. Courts Review an Exercise of Congress' Power to Deal with Native Americans Under a Deferential Standard

"It is for [Congress], and not for the courts," to determine when the United States should assume such a relationship with an indigenous people, and to decide "when the true interests of the Indian require his release from such condition of tutelage." United States v. Candelaria, 271 U.S. 432, 439 (1926) (quotation omitted). Accord United States v. Chavez, 290 U.S. 357, 363 (1933); United States v. Nice, 241 U.S. 591, 597 (1916). Likewise, the Constitution gives Congress -- not the

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"plenary"), of course they should not be construed as narrowing that power. More to the point, these cases do not even purport to limit Congress' constitutional authority to recognize a trust relationship with an Indian tribe. They simply do not address the scope of that power at all.

courts -- authority to acknowledge and extinguish claims based on aboriginal status. Congress may exercise that power based upon its judgment. Even when there is "no legal obligation[ ]" to redress such wrongs, Congress may make such amends as "its judgment dictates." Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 358 (1945) (Jackson, J., concurring). "The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization," and Congress may address such acts "as a matter of grace, not because of legal liability." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281-82 (1955); see Blackfeather v. United States, 190 U.S. 368, 373 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize."). Indeed, many Supreme Court decisions -- including recent ones like Native Village of Venetie, 522 U.S. at 534 -- treat the exercise of Congress' authority over Indian affairs as something at least akin to a "political question." See id. ("Whether the concept of Indian country should be modified is a question entirely for Congress." (emphasis added)).

A court thus would review with great deference Congress' decision to recognize the United States' special trust relationship with Native Hawaiians. As the Court said in Sandoval, "the Constitution expressly authorize[s] Congress to regulate commerce with the Indian tribes," and thus "in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the

courts." 231 U.S. at 45-46 (emphasis added). A court will not strike down such a congressional decision unless it is "arbitrary." Id. at 47. To our knowledge, no court has done so. See also Cohen, supra, at 3-5. As discussed below, Congress' decision to recognize Native Hawaiians as sufficiently similar to Native Americans easily passes this deferential test.

V. The Constitution Does Not Require Congress to Treat Indigenous Hawaiians Differently from Other Indigenous Groups

It would be wrong to relegate Hawaiians to second-class status among America's indigenous people by denying Congress the authority to address the wrongs it and the Supreme Court already have recognized have been inflicted upon Hawaiians. See 107 Stat. at 1511-13; Rice, 528 U.S. at 505-06. Indeed, Congress has expressly found that "[its] authority . . . under the United States Constitution to legislate in matters affecting the aboriginal or indigenous people of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii." 42 U.S.C. § 11701(17) (emphasis supplied). That finding, and the recognition of a Native Hawaiian governing entity proposed in S. 147, more than satisfies the deferential standard set forth in Sandoval, for it is certainly not arbitrary for Congress to conclude that Hawaiians are a "distinctly Indian community."

The Hawaiian people, just like the Indians, are native indigenous people, whose lands were taken "by force, leaving them a . . . people, needing protection against the selfishness of others." Mancari, 417 U.S. at 552. First, it is

beyond serious dispute that Hawaiians are a distinct and indigenous people. 8/ And, as discussed above, Hawaiians had their lands and sovereignty taken from them by force, leaving them vulnerable. See Apology Resolution, 107 Stat. at 1512-73; HHHA § 202(13)(A) (Hawaiians "never relinquished [their] claim to sovereignty or their sovereign lands"); Rice, 528 U.S. at 505.

Even today, Native Hawaiians remain remarkably distinct as a people, particularly considering a history characterized by unceasing outside pressure to accommodate European and American interests. See U.S. Dep'ts of Justice & Interior, From Mauka to Makai: The River of Justice Must Flow Freely 4 (Report on the Reconciliation Process Between the Federal Government and Native Hawaiians, Oct. 23, 2000) (finding based on reconciliation process mandated by Public Law Number 103-150 (1993) that "the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions"); OHA v. HCDCH, Civ. No. 94-0-4207 (SSM) (Haw. 1st Cir. Dec. 5, 2002), slip op. at 45 ("The

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8/ See HHHA, § 202(13)(B) (Hawaiians are "the indigenous people of a once sovereign nation"); Rice, 528 U.S. at 500 ("[T]he first Hawaiian people . . . were Polynesians who voyaged from Tahiti and began to settle the islands around A.D. 750. When England's Captain Cook made landfall in Hawaii on his expedition in 1778, the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure of their own."); 107 Stat. at 1512 (referring to "the indigenous Hawaiian people"); Naliielua v. Hawaii, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990) ("Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States."), aff'd, 940 F.2d 1535 (9th Cir. 1991); 20 U.S.C. § 7902(1) ("Native Hawaiians are a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago . . . ."); 42 U.S.C. § 11701(1) (same); McGregor Decl., supra, at 25-38; Matsuoka Decl., supra.

Native Hawaiian People continue to be a unique and distinct people with their own language, social system, ancestral and national lands, customs, practices, and institutions."); 20 U.S.C. § 7512(20) (Native Hawaiians "are determined to preserve, develop, and transmit to future generations their ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions."); McGregor Decl., supra, at 25-38 (generally discussing Native Hawaiians' enduring cultural distinctness and resistance to assimilation, particularly in rural areas); Matsuoka Decl., supra.

In Montoya v. United States, 180 U.S. 261 (1901), the Supreme Court defined "tribe" for statutory purposes as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Id. at 266. That definition did not purport to restrict Congress' constitutional power to recognize an indigenous group; it merely provided a statutory definition of "tribe" that was limited to the purposes of the statute at issue: whether the Court of Claims had jurisdiction over property disputes between U.S. citizens and Indians belonging to "a band, tribe, or nation in amity with the United States." Id. at 264. But a court that applied even this narrow definition would find that Native Hawaiians meet all three of its prongs.

First, because Native Hawaiians are descended from common ancestors who settled the Hawaiian islands centuries before European contact, they are of the same or similar "race," at least as the Court in 1901 would have understood that word. See Rice, 528 U.S. at 514-15 (citing shared "ethnic

backgrounds" and "physical characteristics" of "Native Hawaiians). Second, Native Hawaiians certainly inhabit a particular territory, the Hawaiian Islands. In fact, the territory they inhabit, and the more specific claim they have to particular territory -- the 200,000 acres of Hawaiian Homelands and the 1,800,000 acres of section 5(f) lands -- are more precisely defined than those of many Indian tribes. 9/

Third, Native Hawaiians lived in a self-governing community until Western conquest wrested that community and their sovereignty from them. See 107 Stat. at 1510, 1512 ("prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion"); Rice, 528 U.S. at 500. In recent years the Native Hawaiian community has taken steps to reorganize itself as a sovereign government. 10/ Indeed,

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9/ Cf. Encyclopedia of North American Indians – Cherokee ("At the time of European contact, the Cherokees . . . controlled more than forty thousand square miles of land" in "parts of eight present states"), available at http://college.hmco.com/history/readerscomp/naind/html/na_006500_cherokee.htm; Encyclopedia of North American Indians – Ojibwa (noting that Ojibwas "are spread over a thousand miles of territory" and, although "classed as one people," are "divided into about one hundred separate bands or reservation communities"), available at http://college.hmco.com/history/readerscomp/naind/html/na_026100_ojibwa.htm.

10/ In 1978, the Hawaiian people through a Constitutional Convention created, in OHA, a mechanism for gaining greater political independence and control over their affairs. OHA provided for "accountability, self-determination, methods for self-sufficiency through assets and a land base, and the unification of all native Hawaiian people." I Proceedings of the Const. Convention of Hawaii of 1978 (Stand. Comm. Rep. No. 59) at 646. The Convention recognized "the right of native Hawaiians to govern themselves and their assets," id., and expressly "look[ed] to the precedent of other native peoples" who "have traditionally enjoyed self-determination and self-government . . . . Although no longer possessed of the full attributes of sovereignty, they remain a separate people with the power of

advancing that process is a core purpose of S. 147. See S. 147, 109th Cong. (May 16, 2005), §§ 2(19), 4(b), 7. The Constitution does not limit Congress' Indian affairs power to groups with a particular governmental structure. See Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664 (1979) ("Some bands of Indians, for example, had little or no tribal organization, while others . . . were highly organized" (footnote omitted)); see Cohen, supra, at 6. That is logical, because American conquest and dominion have meant that no Indian tribe remained fully sovereign. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378 n.9 (1st Cir. 1975) ("test of tribal existence" does not turn on "whether a given tribe has retained sovereignty in [an] absolute sense"). Since it is well-accepted that Congress has "plenary authority" to "eliminate the powers of local self-government which the tribes otherwise possess," Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978), it may deal with "Indians upon a tribal basis," even after their "tribal relation[s] ha[ve] been dissolved." Chippewa Indians of Minnesota v. United States, 307 U.S. 1, 4 (1939).

This is similar to Congress' approach to Alaska Natives. In ANCSA Congress gave Alaska Natives fee ownership over certain aboriginal lands -- rather

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regulation over their internal and social problems." I Proceedings, supra (Comm. of the Whole Rep. No. 13) at 1018. "The establishment of the Office of Hawaiian Affairs," the Convention explained, "is intended to grant similar rights to Hawaiians." Id. Congress has recognized that the "constitution and statutes of the State of Hawaii . . . acknowledge the distinct land rights of the Native Hawaiian people as beneficiaries of the public lands trust," and "reaffirm and protect the unique right of the Native Hawaiian people to practice and perpetuate their cultural and religious customs, beliefs, practices, and language." 42 U.S.C. § 11701(3)(B); see 20 U.S.C. § 7902(21).

than subjecting such lands to the federal superintendence that denotes "Indian country" -- but Congress has continued the federal guardianship over Alaska Natives in other respects. See Native Village of Venetie, 522 U.S. at 533-34. With respect to Hawaii, Congress has recognized that the once-sovereign Hawaiians were deprived of their right to self-determination. It may constitutionally determine, as it has in the past and as S. 147 would continue to do, that they should remain subject to a special relationship with the United States.

It would be perverse for a court to hold that Congress was precluded from exercising its authority to recognize Native Hawaiians as having a status similar to Native Americans and Alaska Natives on the grounds that the conquest of Native Hawaiians was so complete that they ceased to be a self-governing community. See Rice, 528 U.S. at 524 ("the culture and way of life of [the Hawaiian] people [were] all but engulfed by a history beyond their control"). In its Supreme Court amicus brief in Rice, the United States agreed with us on this point: "It would be extraordinarily ironic if the very reasons that the United States has a trust responsibility to the indigenous people of Hawaii served as an obstacle to the fulfillment of that responsibility. Fortunately, the Constitution is not so self-defeating. Congress may fulfill its trust responsibilities to indigenous peoples, whether or not they currently have a tribal government as such." Brief for the United States as Amicus Curiae, Rice v. Cayetano, 1999 WL 569475, at *18 (1999). Indeed, it is precisely those indigenous groups that have lost their sovereignty and the means to govern themselves for whom the United States acquires a heightened trust responsibility. See Seber, 318 U.S. at 715 (once the United States overcame

the Indians and took possession of their lands, it "assumed the duty of furnishing . . . protection, and with it the authority to do all that was required to perform that obligation"); Sandoval, 231 U.S. at 45-46 (United States has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities"); Kagama, 118 U.S. at 384 (through its course of dealings with Indian Tribes, the United States acquired a "duty of protection" for the "remnants" of once sovereign nations).

Indeed, Native Village of Tyonek v. Puckett, 957 F.2d 631 (9th Cir. 1992), although not directly pertinent to the question of Congress' power to recognize a special trust relationship, is instructive on this issue. There, an Alaskan village argued that it was a tribe for purposes of sovereign immunity. That question did not give the court occasion to address whether Congress had the power to recognize the village as a tribe. Rather, the court merely noted "certain factors that may be considered in determining whether an Alaskan village constitutes a tribe" and stated that "we have required that the group claiming tribal status show that they are 'the modern-day successors' to a historical sovereign entity that exercised at least the minimal functions of a governing body." Id. at 635 (citation omitted). Nonetheless, Native Hawaiians satisfy even that differently geared test because, as a group, they are the "modern-day successors" to the sovereign Hawaiian Kingdom. And, to the extent that the Hawaiian people today do not exercise "functions of a governing body," that is no accident -- it is so precisely because their sovereignty was destroyed by the forced act of annexation perpetrated by the United States a century ago. See 107 Stat. at 1511; 42 U.S.C. § 11701(7)-(9).

For these reasons, Congress' recognition of the wrongs inflicted upon Hawaiians, see Apology Bill; 42 U.S.C. § 11701(8)-(11), and efforts to redress such wrongs -- including by according Hawaiians the same special treatment accorded American Indians -- are a constitutional and honorable attempt to do "what in the conditions of this twentieth century is the decent thing." Northwestern Bands of Shoshone Indians, 324 U.S. at 355 (Jackson, J., concurring).

That Congress granted indigenous Hawaiians citizenship and subjected them to the same laws as other citizens does not alter the special legal and political status that Hawaiians occupy under federal law. Congress treated Alaska Natives in a similar fashion, see Metlakatla Indian Cmty. v. Egan, 369 U.S. at 51, and "the extension of citizenship status to Indians does not, in itself, end the powers given to Congress to deal with them." John, 437 U.S. at 653-54; see Nice, 241 U.S. at 598 ("Citizenship is not incompatible with tribal existence or continued guardianship . . . ."). If it did, Congress would not have the power to deal with any Indians, because all of them were granted citizenship in 1924. See Act of June 2, 1924, ch. 233, 43 Stat. 253.

The fact that since 1778 Hawaiian society has included nonindigenous people also does not defeat Congress' plenary power to recognize a special trust relationship with Native Hawaiians. Cf. United States v. S. Dakota, 665 F.2d 837, 841 (8th Cir. 1981) (housing project was a "dependent Indian community" within meaning of federal statute although residents included non-Indians, had "social and economic connections" with the city, and relied on the city for all vital services); United States v. Mound, 477 F. Supp. 156, 159 (D.S.D. 1979) (similar);

Encyclopedia of North American Indians – Osage (noting presence of "many non-Indians" living "among the Osages before the tribal lands were allotted in 1906"), available at http://college.hmco.com/history/readerscomp/naind/html/na_026800_osage.htm. It would be a gross distortion of the policy underlying the American trust responsibility to bar Congress from recognizing a trust relationship with an indigenous group on the ground that the group was too open and inclusive, while permitting such recognition with respect to more exclusive, discriminatory societies. Further, participation of non-Hawaiians in the government of the Hawaiian Kingdom was a direct result of pressure and conquest by Europeans and Americans. See Rice, 528 U.S. at 504 ("the United States and European powers made constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general" and "Westerners forced the resignation of the Prime Minister" in 1887); id. at 504-05 (describing coup); 107 Stat. at 1511 (same). The unfortunate history of Western influence over the sovereign affairs of the Hawaiians heightens, rather than lessens, Congress's trust obligation.

Similarly, the fact that Native Hawaiians are dispersed throughout the Hawaiian Islands does not make them any less eligible for special recognition by Congress than Indian tribes who may be confined to smaller geographic areas. See United States v. Pelican, 232 U.S. 442, 450 (1914) ("[T]he territorial jurisdiction of the United States [does not] depend upon the size of the particular areas which are held for Federal purposes." (citation omitted)). The Islands comprise an area that is no more than one-fifth the size of the aboriginal lands of other groups that Congress has recognized as tribes. Compare State of Hawaii Data Book: A

Statistical Abstract 1993-1994 (total land area of the eight inhabited major Islands is 4.1 million acres), with United States v. Dann, 865 F.2d 1528, 1534 (9th Cir. 1989) (noting that aboriginal Western Shoshone land comprised 22 million acres in Nevada) and Encyclopedia of North American Indians – Cherokee, supra (forty thousand square miles). Further, many tribes are confined to a smaller area only because the United States government required them to live on reservations. Concentration on a reservation is not a prerequisite to Congressional recognition of an indigenous group's special status in relation to the United States, particularly where the group shares a common language, history and culture. See United States v. Wright, 53 F.2d 300, 306 (4th Cir. 1931) ("The fact that the Eastern Band of Cherokee Indians had surrendered the right of their tribal lands, had separated themselves from their tribe, and had become subject to the laws of North Carolina, did not destroy the right or duty of guardianship on the part of the federal government."). And the fact that many Native Hawaiians are integrated in their communities and have leadership roles as citizens or public officials does not set them apart from, for example, many Alaska Natives. See Metlakatla Indian Community, 369 U.S. at 50-51 (describing how the "Indians of southeastern Alaska . . . have very substantially adopted and been adopted by the white man's civilization").

Congress' power in this regard also is not defeated by the breadth or narrowness of the definition of "Native Hawaiian" used prior to recognition, in

S. 147, of the Native Hawaiian governing entity. 11/ Other federal legislation -- including, but by no means limited to, the numerous statutes that include "Hawaiians" among the indigenous groups benefited -- recognizes the special status of lineal descendants of indigenous people without a blood quantum requirement. See, e.g., Weeks, 430 U.S. at 88 (citing federal statute distributing funds to "all lineal descendants of the tribe as it existed in 1818"); Thomas v. United States, 180 F.3d 662, 665 (7th Cir. 1999) (noting proposal in tribal election to "redefin[e] tribal membership in terms of lineal descendancy rather than blood quantums"); Loudner v. United States, 108 F.3d 896, 901 (8th Cir. 1997) (because the "trust relationship extends not only to Indian Tribes as governmental units, but to tribal members living collectively or individually, on or off the reservation," United States had trust responsibility to lineal descendants of tribe (internal punctuation and citation omitted)). Clearly, then, this definition is within Congress' "plenary" power to decide which groups to recognize as dependent tribes. See Sandoval, 417 U.S. at 46. In any event, the pre-recognition definition has little practical consequence in S. 147, because the legislation provides that the Native Hawaiians themselves, like

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11/ S. 147 defines "Native Hawaiian" to mean "(i) an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who -- (I) resided in the islands that now comprise the State of Hawaii on or before January 1, 1893, and (II) occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii; or (ii) an individual who is 1 of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) or a direct lineal descendant of that individual." S. 147 § 3(10)(A).

virtually every Indian tribe, will define membership in their group for themselves. See S. 147 § 7(c)(2) and (4). 12/

All these reasons help to explain why courts consistently recognize that indigenous Hawaiians are entitled to the same treatment under federal law as the Nation's other indigenous people. See Ahuna v. Dep't of Hawaiian Home Lands, 640 P.2d 1161, 1169 (Haw. 1982); Naliielua, 795 F. Supp. at 1012-13; Pai 'Ohana v. United States, 875 F. Supp. 680, 697 n.35 (D. Haw. 1995), aff'd, 76 F.3d 280 (9th Cir. 1996). They also explain why Congress has reached the same conclusion in dozens of enactments spanning several presidential administrations. That conclusion, and the steps S. 147 would legislate to effectuate Congress' decision, lie comfortably within the broad scope of Congress' power to regulate Indian affairs.

12/ Although Justice Breyer's concurring opinion in Rice questioned whether a state may define tribal membership as broadly as Hawaii defines "Hawaiian," Rice, 528 U.S. at 526 (Breyer, J., concurring), he also stated that a tribe defining its own membership would have more latitude because "a Native American tribe has broad authority to define its membership." Id. Further, S. 147 limits Native Hawaiian status to descendants of "indigenous, native people" who resided in Hawaii as of January 1, 1893, see S. 147 § 3(10)(A), bringing the definition into line with definitions established by federally recognized tribes that include as members those descended from tribal members as of a date approximately that distant in the past. See, e.g., Rice, 528 U.S. at 526 (Breyer, J., concurring) (citing Choctaw tribal definition that includes "persons on final rolls approved in 1906 and their lineal descendants" (citation omitted)); Encyclopedia of North American Indians – Cherokee, supra, ("Membership in the Cherokee Nation of Oklahoma requires proof of descent from an ancestor on the 1906 Dawes Commission roll. There is no minimum blood quantum requirement."). That is, in fact, the apparent intent of S. 147, which refers to the descendants of aboriginal Native Hawaiians who "resided in the islands . . . on or before January 1, 1893." S. 147 § 3(10)(A).

VI. Existing Federal Statutes that Benefit Native Hawaiians Give Effect to the Special Relationship with Native Hawaiians and Are Constitutional

In fulfillment of the United States' special obligation to indigenous Hawaiians, during the past 80 years Congress already has enacted numerous statutes that provide assistance to Native Hawaiians in areas such as education, health, housing and labor. Those statutes constitute an appropriate exercise of Congress' power to discharge the responsibility it has assumed for the well-being of the nation's indigenous people. As the Supreme Court has held, extending benefits to native groups in this way is not racial discrimination -- to the contrary, it would be discriminatory to deny to Hawaiians the same consideration the Constitution affords to every other indigenous American group.

Because federal legislation for the benefit of Native Hawaiians fulfills the United States' trust obligation to a group with which Congress has determined the United States has a special trust obligation, a court would review these laws under the standard set forth in Morton v. Mancari, supra. In Mancari, the Court upheld a preference for members of an Indian tribe because its purpose was "to further the Government's trust obligation toward the Indian tribes." 417 U.S. at 541-42. The Court held that such legislation should not be subject to the same level of scrutiny under the Fifth Amendment Due Process Clause as a racial classification because of "the unique legal status of Indian tribes under federal law" and Congress' "plenary" power to legislate on their behalf. Id. at 551. As the Court explained:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others . . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . .

Id. at 552 (quoting Seber, 318 U.S. at 715). Because "[l]iterally every piece of legislation dealing with Indian tribes" provides "special treatment" to Indians, the Court noted that "[i]f these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." Id.

The Court thus held that the program at issue, an employment preference for Indians at the BIA, "does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference." Id. at 553. In such cases, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." Id. at 555.

Because the deferential "tied rationally" standard in Mancari is a consequence of Congress' "plenary" power under the Indian Commerce Clause and other constitutional provisions to deal with "Indian tribes," id. at 551-52, courts apply the Mancari standard to legislation dealing with any "Indian tribe" as that term is broadly understood under the Indian Commerce Clause. See Alaska

Chapter, Assoc. Gen. Contractors of America, Inc. v. Pierce, 694 F.2d 1162, 1168 (9th Cir. 1982) (holding Mancari standard applied where beneficiaries of statute included Alaska natives). As explained above, the Constitution vests Congress with virtually unreviewable power to recognize a special relationship with any of the indigenous people that inhabited the American frontier, regardless of when the frontier was encountered. That constitutional power extends to all non-"arbitrary" congressional recognition of distinctly Indian communities, Sandoval, 231 U.S. at 47, and is not limited by fluctuating criteria for formal recognition as a tribe. See supra, Section III.

In its enactments, Congress could not have been more clear that the government's special obligations to Native Hawaiians place legislation benefiting that group squarely within the reach of the Mancari standard. Specifically, Congress has expressly found that a "special relationship . . . exists between the United States and the Native Hawaiian people." See, e.g., 20 U.S.C. § 7902(13); id. § 7902(14) (same), and recently wrote into law that Hawaiians have a "unique status as [a] people . . . to whom the United States has established a trust relationship." HHHA, § 202(13)(B).

If, after these pronouncements, any doubt could have remained about the applicability of the Mancari standard to Native Hawaiians, Congress removed all doubt in its most recent enactments. In those recent statutes, Congress explicitly stated that "Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people . . . as to whom the United States has established a trust relationship." HHHA,

§ 202(13)(B). Further, perhaps mindful of Mancari's observation that the classification there was "political," not racial, Congress expressly stated that "the political status of Native Hawaiians is comparable to that of American Indians." HHHA, § 202(13)(D); see 20 U.S.C. § 7512(12)(B) ("Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship"). In addition, Congress expressly equated its relationship with native Hawaiians and its relationship with Indian tribes. 25 U.S.C. § 3010 ("This chapter reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations . . ."); 20 U.S.C. § 7512(12)(D) (the "political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives"). 13/ As these enactments show, for over eighty years Congress consistently has recognized that the United States has

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13/ This recognition is not new. It dates back to the early years of Hawaii's status as a territory. Thus, the HHCA in 1921 "affirm[ed] the trust relationship between the United States and the Native Hawaiians." 42 U.S.C. § 11701(13); see Ahuna v. Dep't of Haw. Home Lands, 640 P.2d 1161, 1168 (Haw. 1982) (in the HHCA, "the federal government . . . undert[ook] a trust obligation benefiting the aboriginal people"); see also H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920) (creating Hawaiian home lands because "the natives of the islands who are our wards . . . and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty"). And the Admission Act conveyed federal ceded lands to Hawaii to hold "as a public trust" for, among other things, "the betterment of the conditions of native Hawaiians." Admission Act § 5(f); see Keaukaha—Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467, 1471 (9th Cir. 1984) ("The Admission Act clearly mandates establishment of a trust for the betterment of native Hawaiians."); Price v. Akaka, 3 F.3d 1220, 1225 (9th Cir. 1993) (same); 42 U.S.C. § 11701(16) (same).

the kind of relationship with Native Hawaiians that fits squarely within the Mancari doctrine.

Under Mancari, the standard for reviewing legislation that benefits an indigenous group with which the government has recognized a "trust obligation" is quite different than the standard for reviewing alleged race discrimination under the Constitution. Such legislation will be upheld if it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Mancari, 471 U.S. at 555. Congress' enactments benefiting Native Hawaiians plainly meet that standard.

The federal statutes that extend benefits to Native Hawaiians address, among other things, the educational, health, housing, labor and other social, economic and cultural needs of that community. 14/ See 20 U.S.C. § 7902(14) (identifying areas of legislation). As Congress has found, Hawaiians as a group, like many Indians, continue to lag far behind the rest of the population in these areas. Certainly, there is no basis for disputing the Congressional findings supporting rationality of these measures. And this is precisely the kind of beneficial legislation that fulfills Congress' obligation to honor its "special relationship" with indigenous groups. See Mancari, 417 U.S. at 552 (the United States left Indians "an uneducated, helpless and dependent people, needing

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14/ See, e.g., Admission Act § 5(f), 73 Stat. 4; HHCA, 42 Stat. 108 ; HHHA, 114 Stat. 2872; 20 U.S.C. § 7901 et seq.; 42 U.S.C. § 11701 et seq.; 20 U.S.C. § 4441; id. § 7118; 42 U.S.C.§ 254s; id. § 3057 et seq. See also 42 U.S.C. § 2991 et seq.; id. § 1996; 20 U.S.C. § 80q et seq.; 25 U.S.C. § 3001 et seq.; 16 U.S.C. § 470 et seq.; 25 U.S.C. § 2901 et seq.; 42 U.S.C. §3011.

protection against the selfishness of others" and assumed the duty "to do all that was required to perform the obligation" (internal quotation marks and citation omitted)); Pierce, 694 F.2d at 1167-68 (Mancari applies to legislation reaching a "broad[ ]" range of benefits). Accordingly, a court reviewing any of the numerous federal statutes that provide benefits to Native Hawaiians would easily find that they are constitutional because they are "tied rationally" to the special obligation Congress has recognized it has toward that group.