PREPARED STATEMENT OF

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Before the

COMMITTEE ON NATURAL RESOURCES

of the

UNITED STATES HOUSE OF REPRESENTATIVES

on

H.R. 2314, "THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2009"

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Mr. Chairman, Ranking Member Hastings, and distinguished Members of the Committee: Thank you for the opportunity and the privilege to testify today on H.R. 2314, "the Native Hawaiian Government Reorganization Act of 2009." My testimony will focus upon the legal issue of Congress' constitutional authority to enact H.R. 2314.

The principal legal question presented by H.R. 2314 is whether Congress has the power to treat Native Hawaiians the way it treats other Native Americans, i.e., American Indians and Native Alaskans. Constitutional text, Supreme Court precedent, and historical events provide the answer: Congress' broad power in regard to Indian tribes allows Congress to recognize Native Hawaiians as having the same sovereign status as the other indigenous peoples of this country.

H.R. 2314 would establish a process by which Native Hawaiians would reconstitute their indigenous government. Before Hawaii became a State, the Kingdom of Hawaii was a sovereign nation recognized as such by the United States. In 1893, American officials and the U.S. military aided the overthrow of the Hawaiian monarchy. A century later, in 1993, Congress formally apologized to the Hawaiian people for the U.S. involvement in this regime change.

Congress has ample authority to assist Native Hawaiians in their effort to reorganize their governing entity. Congress' broadest constitutional power — the power to regulate commerce — specifically encompasses the power to regulate commerce "with the Indian tribes." Based upon the Commerce Clause and other constitutional provisions, the Supreme Court has recognized Congress' plenary power to legislate regarding Indian affairs. As the Supreme Court said in 2004 in the case of United States v. Lara, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.' "

Congress has used that power in the past to restore lost tribal sovereignty. In 1954, Congress terminated the sovereignty of the Menominee Indian tribe in Wisconsin. In 1973, Congress reversed course and enacted the Menominee Restoration Act, which restored sovereignty to the Menominee. Pointing to the Menominee Restoration Act, the Supreme Court in Lara affirmed that the Constitution authorizes Congress "to enact legislation "recogniz[ing] * * * the existence of individual tribes" and "restor[ing] previously extinguished tribal status." H.R. 2314 is patterned after the Menominee Restoration

Act and would do for Native Hawaiians what Congress did for the Menominee.

H.R. 2314 does not run afoul the Supreme Court's 2000 decision in Rice v. Cayetano. In Rice, the Court ruled that the State of Hawaii could not limit the right to vote in a state election to Native Hawaiians. But Rice did not address whether Congress may treat Native Hawaiians as it does other Native Americans. Indeed, the Court in Rice expressly declined to address whether "native Hawaiians have a status like that of Indians in organized tribes" and "whether Congress may treat the Native Hawaiians as it does the Indian tribes."

Some opponents of H.R. 2314 have pointed to Rice in support of an argument that the bill violates equal protection principles. But the Supreme Court has long held that congressional legislation dealing with indigenous groups is political, not racial, in character and therefore is neither discrimination nor unconstitutional.

When Congress enacts laws for indigenous peoples, it does so on a government-to-government basis. Scores of federal laws and regulations exist relating to American Indians, Native Alaskans, and Native Hawaiians, and none has ever been struck down as racially

discriminatory.

Ultimately, a decision by Congress to treat Native Hawaiians like other native groups is a political decision — one that the federal courts are not likely to second guess. In the 1913 case of United States v. Sandoval, which involved the New Mexican Pueblos, the Supreme Court ruled that Congress could treat the Pueblos as Indians, even though their culture and customs differed from that of other Indian tribes. The Court decided that Congress' judgment was not arbitrary and that judicial review should end there. H.R. 2314 passes that legal test.

For the remainder of my prepared statement, I have attached a legal opinion that I co-authored with Viet D. Dinh and Neal K. Katyal for the Office of the Hawaiian Affairs of the State of Hawaii, dated February 26, 2007, and titled "The Authority of Congress to establish a Process for Recognizing a Reconstituted Native Hawaiian Governing Entity." Although that opinion addressed the version of the legislation pending in 2007 — H.R. 505 — the present legislation, H.R. 2314, does not differ in substance from the 2007 version. Therefore, the opinion rendered on H.R. 505 also holds for H.R. 2314.

The Authority of Congress to Establish a Process for Recognizing a Reconstituted Native Hawaiian Governing Entity

Prepared for

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EXECUTIVE SUMMARY

Like the Native American tribes that once covered the continental United States, Native Hawaiians were a sovereign people for hundreds of years until a U.S. military-aided uprising overthrew the recognized Hawaiian monarchy in 1893 and a subsequent government acceded to U.S. annexation. A century later, in 1993, Congress formally apologized to the Hawaiian people for the U.S. involvement in this regime change.

The U.S. Congress is now considering legislation establishing a process by which Native Hawaiians would reconstitute the indigenous government they lost to foreign intervention. The proposed Native Hawaiian Government Reorganization Act of 2007 ("NHGRA"), S. 310/H.R. 505, would establish a commission to certify a roll of Native Hawaiians wishing to participate in the reorganization of the Native Hawaiian governing entity. Those Native Hawaiians would set up an interim governing council, which in turn would hold elections and referenda among Native Hawaiians to draw up governing documents and elect officers for the native government. That entity eventually would be recognized by the United States as a domestic, dependent sovereign government, similar to the government of an Indian tribe.

Congress has the constitutional authority to enact the NHGRA and to recognize a Native Hawaiian governing entity as a dependent sovereign government within the United States – in other words, to treat Native Hawaiians just as it treats Native Americans and Alaska Natives.

First, there is no question that Congress has the power to recognize, and restore the sovereignty of, Native American tribes. The Supreme Court has acknowledged Congress' plenary power – inherent in the Constitution and explicit in the Indian Commerce Clause, art. I, § 8, cl. 3, and Treaty Clause, art. II, § 2, cl. 2 – to legislate regarding Native American affairs, and Congress has used that power to restore the relationship with tribal governments terminated

by the United States. In 1954, Congress terminated the Menominee tribe in Wisconsin. In 1973, Congress enacted a law restoring the federal relationship with the Menominee and assisting in its reorganization. The bill before Congress is patterned after that law and would do for Native Hawaiians what Congress did for the Menominee.

Second, Congress has the power to treat Native Hawaiians just as it treats Native Americans. This is because Congress' decision to treat a group of people as a native group, and to use its broad Indian affairs power to pass legislation regarding that group, is a political decision – one that courts are not likely to second-guess. Indeed, the Supreme Court has said that so long as Congress' decision to treat a native people as a group of Native Americans is not "arbitrary," the courts have no say in the matter. The NHGRA passes that legal test. Furthermore, Congress has long considered Alaska Natives to be Native Americans and recognized Native Alaskan governing bodies, even though Alaska Natives differ from American Indians historically and culturally. The Supreme Court has not questioned Congress' power to do so. If Congress may treat Alaska Natives as a dependent sovereign people, it follows that Congress may do the same for Native Hawaiians.

The principal constitutional objection to the NHGRA – that it impermissibly classifies on the basis of race – fails to recognize that congressional legislation dealing with indigenous groups is political, not racial, in character and therefore is neither discriminatory nor unconstitutional. *Rice* v. *Cayetano*, 528 U.S. 495 (2000), specifically declined to address whether "native Hawaiians have a status like that of Indians in organized tribes" and "whether Congress may treat the native Hawaiians as it does the Indian tribes." *Id*. at 518. On those specific questions posed by the NHGRA, the Court could not be more clear or supportive of

Congressional power to reaffirm the status of Native Hawaiians as an indigenous, self-governing people and reestablish a government-to-government relationship:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

United States v. *Antelope*, 430 U.S. 641, 645 (1977). To be sure, there are non-legal, policy arguments that can be voiced against the NHGRA, but if the Congress of the United States decides that the NHGRA is good policy, we believe that there is no constitutional barrier to Congress' enactment of the legislation.

I. THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT

The stated purpose of the NHGRA is "to provide a process for the reorganization of the single Native Hawaiian governing entity and the reaffirmation of the special political and legal relationship between the United States and that Native Hawaiian governing entity for purposes of continuing a government-to-government relationship." NHGRA § 4(b). To that end, the NHGRA authorizes the Secretary of the Interior to establish a Commission that will certify and maintain a roll of Native Hawaiians wishing to participate in the reorganization of the Native Hawaiian governing entity. *Id*. § 7(b). For the purpose of establishing the roll, the NHGRA defines the term "Native Hawaiian" as:

> (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.

Id. § 3(10).

Through the certification and maintenance of the roll of Native Hawaiians, the Commission will launch the process by which Native Hawaiians will set up a Native Hawaiian Interim Governing Council called for by the NHGRA. *Id*. § 7(c)(2). Native Hawaiians listed on the roll may develop criteria for candidates to be elected to serve on the Council, determine the Council's structure, and elect members of the Council from enrolled Native Hawaiians. *Id*. § 7(c)(2)(A).

The NHGRA provides that the Council may conduct a referendum among enrolled Native Hawaiians "for the purpose of determining the proposed elements of the organic

governing documents of the Native Hawaiian governing entity." *Id*. § 7(c)(2)(B)(iii)(I). Thereafter, the Council may hold elections for the purpose of ratifying the proposed organic governing documents and electing the officers of the Native Hawaiian governing entity. *Id*. § 7(c)(2)(B)(iii)(IV).

II. CONGRESS' AUTHORITY TO ENACT THE NHGRA

Congressional authority to enact S. 310/H.R. 505 encompasses two subordinate questions: First, would Congress have the power to adopt such legislation for members of a Native American tribe in the contiguous 48 states? Second, does such power extend to Native Hawaiians? The answer to both questions is yes.

A. Congress' Broad Power to Deal with Indians Includes the Power to Restore Sovereignty to, and Reorganize the Government of, Indian Tribes.

There is little question that Congress has the power to recognize Indian tribes. As the Supreme Court has explained, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *United States* v. *Lara*, 541 U.S. 193, 200 (2004). *See also South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs"); *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998) (same); 20 U.S.C. § 4101(3) (finding that the Constitution "invests the Congress with plenary power over the field of Indian affairs"). The NHGRA expressly recites and invokes this constitutional authority. *See* NHGRA § 2(1) ("The Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States."); *id*. § 4(a)(3).

This broad congressional power derives from a number of constitutional provisions, including the Indian Commerce Clause, art. I, § 8, cl. 3, which grants Congress the

power to "regulate Commerce * * * with the Indian Tribes," as well as the Treaty Clause, art. II, § 2, cl. 2. *See Lara*, 541 U.S. at 200-201; *Morton* v. *Mancari*, 417 U.S. 535, 552 (1974). The Property Clause, art. IV, § 3, cl. 2, is also a source of congressional authority. *See Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87-88 (1918); *see also Alabama* v. *Texas*, 347 U.S. 272, 273 (1954) (per curiam) ("The power * * * to dispose of any kind of property belonging to the United States is vested in Congress without limitation.") (internal quotation marks omitted). 1/

Congress' legislative authority with respect to Indians also rests in part "upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as 'necessary concomitants of nationality.'" *Lara*, 541 U.S. at 201 (citing, *inter alia*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-322 (1936)). *See also Mancari*, 417 U.S. at 551-552 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").

Plenary congressional authority to recognize Indian tribes extends to the restoration of the federal relationship with Native governments and reorganization of those governments. In *Lara*, the Court held that Congress' broad authority with respect to Indians includes the power to enact legislation designed to "relax restrictions" on "tribal sovereign authority." 541 U.S. at 196, 202. "From the Nation's beginning," the Court said, "Congress' need for such legislative power would have seemed obvious." *Id*. at 202. The Court explained that "the Government's Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the

1/ As discussed herein, *see infra* at 16, Congress in 1921 reserved some 200,000 acres of public land for the benefit of Native Hawaiians. The NHGRA is related to, and would help to realize the purpose of, that exercise of the Property Clause power by commencing a process that would result in the identification of the proper beneficiaries of Congress' 1921 decision.

Nation and those of the tribes changed over time," and "[s]uch major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty." *Id*. The Court noted that today congressional policy "seeks greater tribal autonomy within the framework of a 'government-to-government' relationship with federal agencies." *Id*. (quoting 59 Fed. Reg. 22,951 (1994)).

Of particular significance to the present analysis, the Court in *Lara* specifically recognized Congress' power to *restore* previously extinguished sovereign relations with Indian tribes. The Court observed that "Congress has restored previously extinguished tribal status – by re-recognizing a Tribe whose tribal existence it previously had terminated." *Id*. (citing Congress' restoration of the Menominee tribe in 25 U.S.C. §§ 903-903f). And the Court cited the 1898 annexation of Hawaii as an example of Congress' power "to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State." *Id*. Thus, when it comes to the sovereignty of Indian tribes or other "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 17 (1831), the Constitution does not "prohibit Congress from changing the relevant legal circumstances, *i.e.*, from taking actions that modify or adjust the tribes' status." *Lara*, 541 U.S. at 205. Indeed, the Supreme Court has gone so far as to hold that it is not for the federal judiciary to "*second-guess the political branches' own determinations*" in such circumstances. *Id.* (emphasis added).

United States v. *John*, 437 U.S. 634 (1978), further supports congressional authority to recognize reconstituted tribal governments and to re-establish sovereign relations with them. There, Congress' power to legislate with respect to the Choctaw Indians of Mississippi was challenged on grounds that "since 1830 the Choctaw residing in Mississippi have become fully assimilated into the political and social life of the State" and that "the Federal

Government long ago abandoned its supervisory authority over these Indians." *Id*. at 652. It was thus urged that to "recognize the Choctaws in Mississippi as Indians over whom special federal power may be exercised would be anomalous and arbitrary." *Id*. The Court unanimously rejected the argument. "[W]e do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaw than with the affairs of other Indian groups." *Id*. at 652-653. The "fact that federal supervision over them has not been continuous," according to the Court, does not "destroy[ ] the federal power to deal with them." *Id*. at 653.

Congress exercised this established authority to restore the government-to-government relationship with the Menominee Indian tribe of Wisconsin, s*ee Lara*, 541 U.S. at 203-204, and it can do the same here. Indeed, the NHGRA government reorganization process closely resembles that prescribed by the Menominee Restoration Act, 25 U.S.C. §§ 903-903f.

In 1954, Congress adopted the Menominee Indian Termination Act, 25 U.S.C. §§ 891-902, which terminated the government-to-government relationship with the tribe, ended federal supervision over it, closed its membership roll, and provided that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 407-410 (1968). In 1973, Congress reversed course and adopted the Menominee Restoration Act, which repealed the Termination Act, restored the sovereign relationship with the tribe, reinstated the tribe's rights and privileges under federal law, and reopened its membership roll. 25 U.S.C. §§ 903a(b), 903b(c).

The Menominee Restoration Act established a process for reconstituting the Menominee tribal leadership and organic documents under the direction of the Secretary of the Interior. The Restoration Act directed the Secretary (a) to announce the date of a general council

meeting of the tribe to nominate candidates for election to a newly-created, nine-member Menominee Restoration Committee; (b) to hold an election to select the members of the Committee; and (c) to approve the Committee so elected if the Restoration Act's nomination and election requirements were met. *Id.* § 903b(a). Just so with S. 310/H.R. 505. The NHGRA authorizes the Secretary of the Interior to establish a Commission that will prepare and maintain a roll of Native Hawaiians wishing to participate in the reorganization of the Native Hawaiian governing entity. NHGRA § 7(b). The legislation also provides for the establishment of a Native Hawaiian Interim Governing Council. *Id.* § 7(c)(2). Native Hawaiians listed on the roll may develop criteria for candidates to be elected to serve on the Council; determine the Council's structure; and elect members of the Council from enrolled Native Hawaiians. *Id.* § 7(c)(2)(A).

The Menominee Restoration Act provided that, following the election of the Menominee Restoration Committee, and at the Committee's request, the Secretary was to conduct an election "for the purpose of determining the tribe's constitution and bylaws." 25 U.S.C. § 903c(a). After the adoption of such documents, the Committee was to hold an election "for the purpose of determining the individuals who will serve as tribal officials as provided in the tribal constitution and bylaws." *Id.* § 903c(c). Likewise, the NHGRA provides that the Native Hawaiian Interim Governing Council may conduct a referendum among enrolled Native Hawaiians "for the purpose of determining the proposed elements of the organic governing documents of the Native Hawaiian governing entity." NHGRA § 7(c)(2)(B)(iii)(I). Thereafter, the Council may hold elections for the purpose of ratifying the proposed organic governing documents and electing the officers of the Native Hawaiian governing entity. *Id.* § 7(c)(2)(B)(iii)(IV).

The courts have approved the process set forth in the Menominee Restoration Act to restore sovereignty to the Menominee Indians. *See Lara*, 541 U.S. at 203 (citing the Restoration Act as an example where Congress "restored previously extinguished tribal rights"); *United States* v. *Long*, 324 F.3d 475, 483 (7th Cir. 2003) (concluding that Congress had the power to "restor[e] to the Menominee the inherent sovereign power that it took from them in 1954"), *cert. denied*, 540 U.S. 822 (2003). The teachings of these cases would apply to validate the similar process set forth in NHGRA.

B. Congress' Power to Enact Special Legislation with Respect to Indians Extends to Native Hawaiians.

The inquiry, therefore, turns to whether Congress has the same authority to deal with Native Hawaiians as it does with other Native Americans in the contiguous 48 states. Congress has determined – and would determine again in passing the NHGRA – that it has such authority. *See* 42 U.S.C. § 11701(17) ("The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii."); NHGRA § 4(a)(3) (finding that "Congress possesses the authority under the Constitution, including but not limited to Article I, section 8, clause 3, to enact legislation to address the conditions of Native Hawaiians").

We conclude that courts will likely affirm these assertions of congressional authority. 2/ As we explain below, court review of congressional decisions recognizing native groups *qua* native groups is extraordinarily deferential: The courts may interfere with such a

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2/ The Supreme Court has not decided this question. Rather, its last pronouncement on the issue, in *Rice* v. *Cayetano*, expressly declined to answer whether "native Hawaiians have a status like that of Indians in organized tribes" and "whether Congress may treat the native Hawaiians as it does the Indian tribes." 528 U.S. at 518. *See infra* at 24-25.

determination only if it is "arbitrary." And a congressional decision through the NHGRA to recognize Native Hawaiians in the same way it has recognized other indigenous groups cannot fairly be said to be arbitrary. To the contrary, it is supported not just by extensive congressional fact-finding (which standing alone would suffice to insulate the statute from court review for arbitrariness), but also by numerous other factors, including the parallels between the United States' historical treatment of Native Hawaiians and its treatment of other Native Americans.

i. Courts review a congressional decision to recognize a native group only for arbitrariness.

Under *United States* v. *Sandoval,* 231 U.S. 28 (1913), Congress has the authority to recognize and deal with native groups pursuant to its Indian affairs power, and courts possess only a very limited role in reviewing the exercise of such congressional authority. In *Sandoval*, the Supreme Court rejected the argument that Congress lacked authority to treat the Pueblos of New Mexico as Indians and that the Pueblos were "beyond the range of congressional power under the Constitution." *Id*. at 49.

The Court first observed:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States * * * the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.

Id. at 45-46. The Court went on to say that, although "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe," nevertheless, "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." *Id*. at 46.

Applying those principles, the Supreme Court concluded that Congress' "assertion of guardianship over [the Pueblos] cannot be said to be arbitrary, but must be regarded as both authorized and controlling." *Id*. at 47. And the Court so held even though the Pueblos differed (in the Court's view) in some respects from other Indians: They were not "nomadic in their inclinations"; they were "disposed to peace"; they "liv[ed] in separate and isolated communities"; their lands were "held in communal, fee-simple ownership under grants from the King of Spain"; and they possibly had become citizens of the United States. *Id*. at 39.

Sandoval thus holds, first, that Congress, in exercising its constitutional authority to deal with Indian tribes, may determine whether a "community or body of people" is amenable to that authority, and, second, that unless Congress acts "arbitrarily," courts do not second-guess Congress' determination. The courts have employed this approach in a number of other cases. *See United States* v. *Holliday*, 3 Wall. 407, 419 (1866) ("If by [the political branches] those Indians are recognized as a tribe, this court must do the same."); *Long*, 324 F.3d at 482 ("[W]hile we assume that Congress neither can nor would confer the status of a tribe onto a random group of people, we have no doubt about congressional power to recognize an ancient group of people for what they are."). 3/

ii. Congress' determination that Native Hawaiians are amenable to its constitutional authority over native groups is amply supported and cannot fairly be deemed arbitrary.

The language of the NHGRA contains a congressional determination that Native Hawaiians are amenable to its plenary authority over native groups. *See*, *e.g.*, NHGRA § 4(a)(3). It cannot be said that this determination is an arbitrary exercise of Congress' power to recognize

3/ *See also Lara*, 541 U.S. at 205 (federal judiciary should not "second-guess the political branches' own determinations" with respect to "the metes and bounds of tribal autonomy"); *United States* v. *McGowan*, 302 U.S. 535, 538 (1938) ("Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out").

and deal with this Nation's native peoples. This is so for at least four reasons, explained in more detail below: First, Congress has made extensive findings of fact, both in the NHGRA and other legislation, that support its determination. Second, Congress has long treated Native Hawaiians like other Native Americans, and no Act of Congress doing so has been struck down by the courts. Third, Native Hawaiians bear striking similarities to Alaska Natives, the latter of whom are treated by Congress as Native Americans. And finally, Congress has recognized that the United States owes moral obligations to Native Hawaiians; such obligations constitute an implicit basis for congressional power to legislate as to indigenous peoples.

Congress' findings as to Native Hawaiians, and Native Hawaiian history, preclude a claim of arbitrariness.

The NHGRA expressly finds that Native Hawaiians "are indigenous, native people of the United States," NHGRA § 2(2); that the United States recognized Hawaii's sovereignty prior to 1893, *id.* § 2(4); that the United States participated in the overthrow of the Hawaiian government in 1893, *id.*§ 2(13); and that "the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands," *id.* The statute further finds that that Native Hawaiians continue to reside on native lands set aside for them by the U.S. government, "to maintain other distinctly native areas in Hawaii," and "to maintain their separate identity as a single distinct native community through cultural, social, and political institutions," *id.* §§ 2(7), 2(11), 2(15); *see also* U.S. Department of Justice & U.S. Department of the Interior, *From Mauka to Makai: The River of Justice Must Flow Freely*, Report on the Reconciliation Process Between the Federal Government and Native Hawaiians at 4 (Oct. 23, 2000) (hereinafter "*The Reconciliation Report*") (finding 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").

Finally, the NHGRA finds that Native Hawaiians through the present day have maintained a link to the Native Hawaiians who exercised sovereign authority in the past. *See id*. § 2(22)(A) ("Native Hawaiians have a cultural, historic, and land-based link to the aboriginal, indigenous, native people who exercised sovereignty over the Hawaiian Islands"); *id*. § 2(22)(B).

These findings all support the conclusion that Native Hawaiians, and the Native Hawaiian experience, are similar to other Native Americans in important ways. Indeed, the NHGRA reflects some of Congress' prior determinations that Native Hawaiians are like other Native Americans. *See* NHGRA § 2(2) (finding that Native Hawaiians "are indigenous, native people of the United States"); *id*. § 2(20)(B) (Congress "has identified Native Hawaiians as a distinct group of indigenous, native people of the United States within the scope of its authority under the Constitution, and has enacted scores of statutes on their behalf"); *id*. § 4(a)(1); Native American Languages Act, 25 U.S.C. § 2902(1) ("The term 'Native American' means an Indian, Native Hawaiian, or Native American Pacific Islander"); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (declaring it to be the policy of the United States "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians"); 42 U.S.C. § 11701(1) (finding that "Native Hawaiians comprise a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778").

These extensive factual findings are crucial because they render implausible any argument that Congress' decision to treat Native Hawaiians like other Native Americans is without a rational basis. Like in *Sandoval*, whatever differences there may be between Native Hawaiians and other Native Americans, it cannot be said in light of Congress' findings that it is

"bring[ing] a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe." 231 U.S. at 46. There is nothing arbitrary about such a legislative choice; it reflects a long pattern of Congress' dealings with Native Hawaiians.

Native Hawaiian history confirms that the congressional determination in the NHGRA is both supportable and supported. Although unique in some respects, the Native Hawaiian story is in other ways very similar to the story of all Native Americans. By the time Captain Cook, the first white traveler to Hawaii, "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. They had well-established traditions and customs and practiced a polytheistic religion." *Rice*, 528 U.S. at 500. Hawaiian society, the Court noted, was one "with its own identity, its own cohesive forces, its own history." *Id*. As late as 1810, "the islands were united as one kingdom under the leadership of an admired figure in Hawaiian history, Kamehameha I." *Id*. at 501.

During the 19th century, the United States established a government-to-government relationship with the Kingdom of Hawaii. Between 1826 and 1887, the two nations executed a number of treaties and conventions. *See id*. at 504. But in 1893, "a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with the United States Armed Forces, replaced the monarchy [of Queen Liliuokalani] with a provisional government." *Id*. at 505. In 1894, the U.S.-created provisional government then established the Republic of Hawaii. *See id*. In 1898, President McKinley signed the Newlands Resolution, which annexed Hawaii as a U.S. territory. *See id*.; *Territory of Hawaii* v. *Mankichi*, 190 U.S. 197, 209-211 (1903) (discussing the annexation of Hawaii)*; Lara*, 541 U.S. at 203-204 (citing the annexation of Hawaii as an example of Congress'

adjustment of the autonomous status of a dependent sovereign). Under the Newlands Resolution, the Republic of Hawaii ceded all public lands to the United States, and the revenue from such lands was to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Rice*, 528 U.S. at 505.

In 1921, concerned about the deteriorating conditions of the Native Hawaiian people, Congress passed the Hawaiian Homes Commission Act, "which set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians." *Id*. at 507. In 1959, Hawaii became the 50th State of the United States. In connection with its admission to the Union, Hawaii agreed to adopt the Hawaiian Homes Commission Act as part of the Hawaii Constitution, and the United States adopted legislation transferring title to some 1.4 million acres of public lands in Hawaii to the new State, which lands and the revenues they generated were by law to be held "as a public trust" for, among other purposes, "the betterment of the conditions of Native Hawaiians." *Id*. (quoting Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 5, 6).

In 1993, a century after the Kingdom of Hawaii was replaced with the active involvement of the U.S. Minister and the American military, "Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the native Hawaiian people." *Id.* at 505; s*ee* Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). In the Apology Resolution, Congress both "acknowledge[d] the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people" and issued a formal apology to Native Hawaiians "for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination." *Id*. §§ 1, 3, 107 Stat. 1513.

In short, the story of the Native Hawaiian people is the story of an indigenous people having a distinct culture, religion, and government. Contact with the West led to a period of government-to-government treaty making with the United States; the involvement of the U.S. government in overthrowing the Native Hawaiian government; the establishment of the public trust relationship between the U.S. government and Native Hawaiians; and, finally, political union with the United States. Given the parallels between the history of Native Hawaiians and other Native Americans, Congress has ample basis to conclude that its power to deal with the Native Hawaiian community is coterminous with its power to deal with American Indian tribes. *Cf*. *Long*, 324 F.3d at 482 ("This case does not involve a people unknown to history before Congress intervened. * * * [W]e have no doubt about congressional power to recognize an ancient group of people for what they are.").

Congress' long history of treating Native Hawaiians, and Alaska Natives, like Native Americans further supports its determination in the NHGRA.

Congress' authority to treat Native Hawaiians like American Indians is further supported by the numerous statutes Congress has enacted doing just that. *See*, *e.g.*, Hawaiian Homes Commission Act, 42 Stat. 108 (1921); Native Hawaiian Education Act, 20 U.S.C. §§ 7511-7517; Native Hawaiian Health Care Act, 42 U.S.C. § 11701(19) (noting Congress' "enactment of federal laws which extend to the Hawaiian people the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities"); *see also* Statement of U.S. Representative Ed Case, Hearing Before the Senate Committee on Indian Affairs on S. 147, the Native Hawaiian Government Reorganization Act, at 2-3 (March 1, 2005) ("[O]ver 160 federal statutes have enacted programs to better the conditions of Native Hawaiians in areas such as Hawaiian homelands, health, education and economic development, all exercises of Congress' plenary authority under our U.S. Constitution to address the conditions of

indigenous peoples.") (prepared text) (hereinafter, "Senate Indian Affairs Committee Hearing on S. 147"); *cf.* Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). 4/ For example, The Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130, authorized "supplemental programs to meet the unique educational needs of Native Hawaiians" and federal grants to Native Hawaiian Educational Organizations to help increase educational attainment among Native Hawaiians. 20 U. S. C. §§ 4902-03, 4905 (1988). The Hawaiian Homelands Homeownership Act of 2000 provides governmental loan guarantees "to Native Hawaiian families who otherwise could not acquire housing financing." Pub. L. No. 106-569, §§ 511-14, 114 Stat. 2944, 2966-67, 2990 (2000). Congress has also enacted legislation authorizing employment preferences for Native Hawaiians. *See, e. g.*, 1995 Department of Defense Appropriations Act, Pub. L. No. 103-335, 108 Stat. 2599, 2652 (1994) ("In entering into contracts with private entities to carry out environmental restoration and remediation of Kaho'olawe Island * * * the Secretary of the Navy shall * * * give especial preference to businesses owned by Native Hawaiians."). *See also* Drug Abuse Prevention, Treatment and Rehabilitation Act, 21 U.S.C. § 1177(d) (involving grant applications aimed at combating drug abuse and providing: "The Secretary shall encourage the submission of and give special consideration to applications under this section to programs and projects aimed at underserved populations such as racial and ethnic minorities, Native Americans (including Native Hawaiians and Native American Pacific Islanders), youth, the elderly, women,

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4/ In *Ahuna v. Department of Hawaiian Home Lands*, 640 P.2d 1161 (Hawaii 1982), the Hawaii Supreme Court assessed the trust responsibilities that the Hawaiian Homes Commission owes to "native Hawaiians." The court specifically relied on federal Indian law principles regarding lands set aside by Congress in trust for the benefit of native Americans. The court reasoned that "[e]ssentially, we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans." *Id.* at 1169.

handicapped individuals, and families of drug abusers."); Workforce Investment Act of 1998, 29 U.S.C. § 2911(a) ("The purpose of this section is to support employment and training activities for Indian, Alaska Native, and Native Hawaiian individuals"); American Indian Religious Freedom Act, 42 U.S.C. § 1996 ("it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."); Native American Programs Act of 1974, 42 U.S.C. §§ 2991-92, 2991a (including Native Hawaiians in a variety of Native American financial and cultural benefit programs: "The purpose of this subchapter is to promote the goal of economic and social self-sufficiency for American Indians, Native Hawaiians, other Native American Pacific Islanders (including American Samoan Natives), and Alaska Natives."); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, 42 U.S.C. § 4577(c)(4) (giving preference to grant applications aimed at combating drug abuse: "The Secretary shall encourage the submission of and give special consideration to applications under this section for programs and projects aimed at underserved populations such as racial and ethnic minorities, Native Americans (including Native Hawaiians and Native American Pacific Islanders), youth, the elderly, women, handicapped individuals, public inebriates, and families of alcoholics."); 20 U.S.C. § 4441 (providing funding for Native Hawaiian arts and cultural development); Older Americans Act of 1965, 42 U.S.C. § 3001 et seq., 45 C.F.R. § 1328.1 (2004) (establishing a "program * * * to meet the unique needs and circumstances of Older Hawaiian

Natives"). No court has struck down any of these numerous legislative actions as unconstitutional. 5/

That Congress has power to enact such special legislation for Native Hawaiians is made still clearer by congressional action dealing with Alaska Natives, who – like Native Hawaiians – differ from American Indian tribes anthropologically, historically, and culturally. In 1971, Congress adopted the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1629h, which is predicated on the view that congressional power to deal with Alaska Natives is coterminous with its plenary authority relating to American Indian tribes. *See* 43 U.S.C. § 1601(a) (finding a need for settlement of all claims "by Natives and Native groups of Alaska"); *id*. § 1602(b) (defining "Native" as a U.S. citizen "who is a person of one-fourth degree of more Alaska Indian * * * Eskimo, or Aleut blood, or combination thereof."); *id*. § 1604(a) (directing the Secretary of the Interior to prepare a roll of all Alaskan Natives). The Supreme Court has never questioned the authority of Congress to enact such legislation. *See Native Village of Venetie*, *supra*; *Morton* v. *Ruiz*, 415 U.S. 199, 212 (1974) (quoting passage of Brief for Petitioner the Secretary of the Interior referring to "Indians in Alaska and Oklahoma"); *see also Pence* v. *Kleppe*, 529 F.2d 135, 138 n.5 (9th Cir. 1976) (when the term "Indians" appears in federal statutes, that word "as applied in Alaska, includes Aleuts and Eskimos"). If Congress has authority to enact special legislation dealing with Alaska Natives, it follows that Congress has the same authority with respect to Native Hawaiians.

5/ The vast number of federal and state programs that could be called into question by a ruling against the NHGRA renders even smaller the chance of a successful court challenge. It is not a persuasive answer to claim that all of these statutes, too, are unconstitutional. "Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established." *Close* v. *Glenwood Cemetery*, 107 U.S. 466, 475 (1883); *see also Reno* v. *Condon*, 528 U.S. 141, 148 (2000).

The U.S. government's complicity in overthrowing the Hawaiian Kingdom reinforces Congress' moral and legal authority to enact the NHGRA.

Finally, Congress could easily conclude that its moral and legal authority to establish a process for the reorganization of the Native Hawaiian governing entity also derives from the role played by the United States – in particular U.S. Minister John Stevens, aided by American military forces – in bringing a forcible end to the Kingdom of Hawaii in 1893.

As Congress recounted in the Apology Resolution, Stevens in January 1893 "conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii." 107 Stat. 1510. In pursuit of that objective, Stevens "and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaii nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government." *Id*. *See also* S. Rep. No. 108-85, 108th Cong., 2d Sess. 11 (2003) (on Stevens' orders, "American soldiers marched through Honolulu, to a building known as Ali'iolani Hale, located near both the government building and the palace"); *Rice*, 528 U.S. at 504-505. The next day, the Queen issued a statement indicating that she would yield her authority "to the superior force of the United States of America whose Minister Plenipotentary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu." 107 Stat. 1511. The United States, quite simply, effected regime change in Hawaii because "without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms." *Id*. On December 18, 1893, President Cleveland described the Queen's overthrow "as an 'act of war,'

committed with the participation of a diplomatic representative of the United States and without the authority of Congress." *Id*.

Given the role of United States agents in the overthrow of the Kingdom of Hawaii, Congress could conclude that its "unique obligation toward the Indians," *Mancari*, 417 U.S. at 555, extends to Native Hawaiians. Congress' power to enact special legislation dealing with native people of America is derived from the Constitution "both explicitly and implicitly." *Id*. at 551. *See Lara*, 541 U.S. at 201 (to the extent that, through the late 19th Century, Indian affairs were a feature of American military and foreign policy, "Congress' legislative authority would rest in part * * * upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government"). The Supreme Court has explained that the United States has a special obligation toward the Native Americans – a native people who were overcome by force – and that this obligation carries with it the authority to legislate with the welfare of Native Americans in mind. As the Court said in *Board of County Commissioners of Creek County* v. *Seber*, 318 U.S. 705 (1943):

> From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. 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 and their own improvidence. 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 * * *.

Id. at 715 (citation omitted).

In the case of Native Hawaiians, the maneuverings of the U.S. Minister and the expression of U.S. military force contributed to the overthrow of the Kingdom of Hawaii and the ouster of her Queen. The events of 1893 cannot be undone; but their import extends to this day, imbuing Congress with a special obligation and the inherent authority to restore some semblance of the self-determination then stripped from Native Hawaiians. Certainly it cannot be said that Congress' conclusion to this effect would be arbitrary. In the words of Justice Jackson,

> The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing.

Northwestern Bands of Shoshone Indians v. *United States*, 324 U.S. 335, 355 (1945) (concurring opinion). 6/

III. OBJECTIONS TO THE NHGRA

In 2005, hearings on a previous incarnation of the NHGRA drew several speakers who objected to the legislation on constitutional grounds. We have considered these objections and do not believe they would be persuasive to a court considering the NHGRA's lawfulness.

6/ NHGRA opponents have argued that the "Republic of Hawaii," which succeeded the Kingdom of Hawaii after Queen Liliuokalani was overthrown, extinguished native Hawaiians' claims to tribal status, and that as a result there was no Native Hawaiian sovereignty at the time of U.S. annexation. But this argument relies on the notion that the United States did not play a role in the Queen's ouster, and that the Republic of Hawaii was a legitimate government. Congress has explicitly found to the contrary, *see*, *e.g.*, Apology Resolution, and that congressional finding is due substantial deference from the courts.

A. As an Exercise of Congress' Indian Affairs Powers, the NHGRA Is Not an Impermissible Classification Violative of Equal Protection.

The principal constitutional objection to the NHGRA – that it classifies U.S. citizens on the basis of race, in violation of the constitutional guarantee of equal protection – would depart from long-standing precedent with respect to both Native Americans and equal protection.

Those who level this objection have cited *Rice* v. *Cayetano, supra*, for support. But *Rice* is inapposite for two reasons: (1) It did not concern Congress' special powers to employ political classifications when dealing with Native Americans but rather concerned a state legislative determination; and (2) it was limited to the unique 15th Amendment voting context.

First, in *Rice*, the Court held that the Fifteenth Amendment to the Constitution did not allow the State of Hawaii to limit to Native Hawaiians eligibility to vote in elections to choose trustees for the Office of Hawaiian Affairs, a *state* governmental agency. *See Rice*, 528 U.S. at 523-524. In this instance, by contrast, the reorganized Native Hawaiian governing entity will be neither a United States nor a state governmental body, but rather the governing entity of a sovereign native people. Because the NHGRA is an exercise of Congress' Indian affairs powers, the legislation is "political rather than racial in nature," *Mancari*, 417 U.S. at 553 n.24, and under well-settled precedent it does not violate the Constitution's equal protection guarantees. As the Court explained:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians. * * * Federal regulation of Indian tribes * * * is governance of once-sovereign political communities; it is not to be

> viewed as legislation of a " 'racial' group consisting of Indians * * * ." *Morton* v. *Mancari*, *supra*, at 553 n.24.

United States v. *Antelope*, 430 U.S. at 645-646 (footnote omitted); s*ee also Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979) ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.") (quoting *Mancari*, 417 U.S. at 551-552). In short, *Rice* simply has no application here. *See Kahawaiolaa* v. *Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("*Rice* does not bear on the instant case because * * * [w]hile Congress may not authorize special treatment for a class of tribal Indians in a state election, Congress certainly has the authority to single out 'a constituency of tribal Indians' in legislation 'dealing with Indian tribes and reservations.'") (quoting *Rice*, 528 U.S. at 519-20). 7/

7/ The Ninth Circuit recently described a special relationship between Congress and the Hawaiians in *Doe* v. *Kamehameha Schools*, 470 F.3d 827 (9th Cir. 2006):

> Beginning as early as 1920, Congress recognized that a special relationship existed between the United States and Hawaii. *See* Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (1921) (designating approximately 200,000 acres of ceded public lands to Native Hawaiians for homesteading). Over the years, Congress has reaffirmed the unique relationship that the United States has with Hawaii, as a result of the American involvement in the overthrow of the Hawaiian monarchy. *See, e.g.*, 20 U.S.C. § 7512(12), (13) (Native Hawaiian Education Act, 2002); 42 U.S.C. § 11701(13), (14), (19), (20) (Native Hawaiian Health Care Act of 1988).

Id. at 847-48. The Ninth Circuit also recently pointed out that Congress has repeatedly singled out Native Hawaiians to provide them with special benefits:

> Congress has relied on the special relationship that the United States has with Native Hawaiians to provide specifically for their welfare in a number of different contexts. For example, in 1987, Congress amended the Native American Programs Act of 1974, Pub.L. No. 100-175, § 506, 101 Stat. 926 (1987), to provide federal funds for a state agency or "community-based Native Hawaiian organization" to "make loans to Native Hawaiian organizations and to individual Native Hawaiians for the purpose of promoting economic development in the

In *Mancari*, the Supreme Court rejected the claim that an Act of Congress according an employment preference for qualified Indians in the Bureau of Indian Affairs violated the Due Process Clause and federal anti-discrimination provisions. The Court explained that "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment." 417 U.S. at 554 (citing cases involving, *inter alia*, the grant of tax immunity and tribal court jurisdiction). The Court laid down the following rule with respect to Congress' special treatment of Indians: "As 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*. Clearly, and as explained above, the NHGRA can be "rationally tied" to Congress' discharge of its duty with respect to the native people of Hawaii. As such, it does not violate equal protection principles.

A more subtle variation of the objection is that because the NHGRA does not immediately result in recognition of a sovereign Native Hawaiian entity, the "race-based" classifications Congress makes now – before that entity is reconstituted – violate equal protection principles. This argument, albeit clever, ignores the fact that in passing the NHGRA, Congress would be finding (as it has before) that Native Hawaiians are, and have been, an indigenous political entity analogous to American Indian tribes, and that they never ceased to retain elements of their political and cultural unity. *See, e.g.*, NHGRA §§ 2(13), 2(15), 2(22). The NHGRA simply reflects Congress' determination that such an entity already exists – the

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> state of Hawaii." A year later, Congress enacted the Native Hawaiian Health Care Act of 1988, Pub.L. No. 100-579, § 11703(a), 102 Stat. 2916 (1988), "for the purpose of providing comprehensive health promotion and disease prevention services as well as primary health services to Native Hawaiians."

Id. at 848.

legislation declares, it does not create. As a result, Native Hawaiians are deemed a political unit even before formal recognition of their sovereignty, and the lines drawn by Congress in the NHGRA are not racial at all, but instead fall within Congress' plenary power as to indigenous peoples. *See Mancari*, 417 U.S. at 551-552. 8/

To be sure, Justice Breyer's separate concurrence in *Rice* suggested that there is a limit to how attenuated a purported tribal member's connection to the tribe may be. *See* 528 U.S. at 527. However, to overread this point as an objection to the NHGRA would be to confuse the limited power other bodies – agencies, states, and courts – have as to Indian affairs with the robust plenary power enjoyed by Congress. Justice Breyer, writing for himself and Justice Souter, noted only that while "a Native American tribe has broad authority to define its membership, [t]here must * * * be some limit on what is reasonable, *at the least when a State (which is not itself a tribe) creates the definition.*" *Rice*, 528 U.S. at 527 (Breyer, J., concurring) (citation omitted) (emphasis added). He rightly makes no mention of a *congressional* definition, or of a constitutional limit on congressional power. *Rice* involved state, not congressional, action, and as cases such as *Mancari* reflect, Congress has far more latitude when dealing with Native Americans than do the states. *See Rice*, 528 U.S. at 520 ("OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations."); *id.* at 522 ("[T]he elections for OHA trustee are elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment applies. To

8/ The *Mancari* principle can apply as fully with respect to indigenous groups not currently recognized as sovereign as it does with respect to indigenous groups already so recognized. If that were not so, then the congressional power to recognize and restore sovereignty to tribes – affirmed by the Supreme Court in *Lara*, 541 U.S. 193 – could not exist; such congressional restoration would by definition violate equal protection principles.

extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs").

Second, *Rice* dealt exclusively with the Fifteenth Amendment and voting restrictions. Nowhere did it mention the equal protection clause. Only the dissents mentioned the Fourteenth Amendment. *See id.* at 528-28 (Stevens, J., dissenting); *id.* at 548 (Ginsburg, J., dissenting). By contrast, the majority decision consistently referenced the Fifteenth Amendment's unique history and requirements. *See, e.g., id.* at 512 (discussing concern about giving "the emancipated slaves the right to vote"). It is doubtful that the rigid rules applied to voting would translate directly into the Fourteenth Amendment context, which is by its nature more flexible. *E.g., Hayden v. Pataki*, 449 F.3d 305, 351-352 (2d Cir. 2006) ("The text and the legislative history of the Fifteenth Amendment demonstrate that it did not simply mimic § 2 of the Fourteenth Amendment, but, instead, broke new ground by instituting a ban on any disenfranchisement based on race."). 9/

9/ Opponents of the legislation also have relied on yet another constitutional provision, arguing that a congressional grant of superior political rights to Native Hawaiians would violate Art. I, sec. 9, which forbids the creation of a hereditary aristocracy. This argument is baseless. Apart from the absurdity of characterizing Native Hawaiians as "noble" after the enactment of the NHGRA (as opposed to simply being partially restored to their preexisting condition), no court has ever relied on Art. I, sec. 9's "title of nobility" clause to strike down any enactment of Congress – indeed, it appears that no court has ever relied on the clause for any holding whatsoever. In any event, a congressional finding that Native Hawaiians are an indigenous group analogous to Native American tribes would bring the NHGRA within Congress' plenary authority to legislate with regard to Native Americans, and as a result the "superior" rights granted to Native Hawaiians by the NHGRA would be no different, as a constitutional matter, from the "superior" rights granted to other American Indian groups. As discussed above, such groups' status as political entities removes congressional enactments about them from the strict scrutiny given racial classifications under traditional equal protection analysis. *See Mancari*, 417 U.S. at 551-552. There is no reason why the analysis should proceed differently under any other constitutional equality guarantee. *See Zobel* v. *Williams*, 457 U.S. 55, 70 n.3 (1982) (Brennan, J., concurring) (comparing the Fourteenth Amendment to Art. I, sec. 9).

Finally, in connection with any discussion of the equal protection implications of the NHGRA, it should be noted that the equality of treatment, under federal law, between Native Hawaiians and other native groups is one of the purposes and justifications for the NHGRA. Native Hawaiians have been denied some of the self-governance authority long established for other indigenous populations in the United States. As Governor Lingle testified to Congress,

> The United States is inhabited by three indigenous peoples – American Indians, Native Alaskans and Native Hawaiians. * * * Congress has given two of these three populations full self-governance rights. * * * To withhold recognition of the Native Hawaiian people therefore amounts to discrimination since it would continue to treat the nation's three groups of indigenous people differently. * * * [T]oday there is no one governmental entity able to speak for or represent Native Hawaiians. The [NHGRA] would finally allow the process to begin that would bring equal treatment to the Native Hawaiian people.

Testimony of Linda Lingle, Governor of the State of Hawaii, Senate Indian Affairs Committee Hearing on S. 147, at 2 (March 1, 2005) (prepared text). *See also* Statement of Sen. Byron Dorgan, Vice Chairman, Senate Indian Affairs Committee Hearing on S. 147, at 1 (March 1, 2005) ("[T]hrough this bill, the Native Hawaiian people simply seek a status under Federal law that is equal to that of America's other Native peoples – American Indians and Alaska Natives.") (prepared text); Haunani Apoliona, Chairperson, Board of Trustees, Office of Hawaiian Affairs, Senate Indian Affairs Committee Hearing on S. 147, at 2 (March 1, 2005) ("In this legislation, as Hawaiians, we seek only what long ago was granted this nation's other indigenous peoples.") (prepared text).

B. The Fact that Native Hawaiians Allowed Foreigners Into Their Society Prior to 1893 Has No Bearing on the Analysis.

Opponents of the legislation also have argued that Congress cannot recognize Native Hawaiians as a sovereign people because they did not enjoy such a status even before

1893. In support of this argument, they have said, among other things, that (1) Native Hawaiian society was multiracial and whites held high-ranking positions in Queen Liliuokalani's government, and (2) the Hawaiian government was a monarchy and thus sovereignty did not rest with the people.

We do not believe this argument carries much constitutional weight. First, the fact that Hawaii was a monarchy prior to U.S. annexation is irrelevant to the analysis. The American Indian and Alaska Native groups that have been recognized as dependent sovereigns had a wide range of political structures prior to the arrival of whites, and that fact has never been deemed to have any bearing on congressional power to recognize their sovereignty or tribal status. *See, e.g., Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 & n.5 (1979) ("[S]ome bands of Indians * * * had little or no tribal organization * * *. Indeed, the record shows that the territorial officials who negotiated the treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties."). Congress is certainly well within its powers to determine that the situation of Native Hawaiians parallels those of other federally recognized tribes.

Second, the fact that Native Hawaiians invited foreigners into their midst prior to 1893 is equally irrelevant to their inherent sovereignty *vel non*. Taken to its logical endpoint, this argument suggests that any sovereign political group that permits outsiders into its ranks surrenders its sovereignty; this clearly cannot be. It would be a perversion of the United States' trust responsibility toward indigenous people to punish a group for having been too inclusive when settlers arrived, while rewarding those who were exclusive or discriminatory. In any event, participation of non-Hawaiians in the Hawaiian monarchical government was at least in

part the result of direct pressure by Europeans and Americans who sought increased influence over Hawaiian affairs. *See Rice*, 528 U.S. at 504. It would be equally perverse to find that this pressure – which led to the overthrow of the Native Hawaiian monarch – negates the possibility of a sovereign Native Hawaiian government going forward.

Opponents of the legislation also have advanced a related argument: They have said that because foreigners were part of the Hawaiian polity in 1893, there was never a solely Native Hawaiian entity of the sort that would be reconstituted by the NHGRA – in other words, that if one were to accurately reconstitute the Hawaiian sovereign, one would have to include lineal direct descendants of non-indigenous Hawaiian natives, over whom Congress has no Indian affairs power. The flaw in this argument is that it discounts both the realities of Hawaiian history and the great deference paid to congressional line-drawing in the Indian affairs arena.

Under *Sandoval*, *supra*, Congress has extraordinarily broad authority to decide who falls within its Indian affairs power; the logical concomitant of this authority is the power to decide who falls *outside* the groups it chooses to recognize. For this reason, a congressional decision on how to define "Native Hawaiian" would be reviewable only for arbitrariness. The NHGRA's approach cannot be said to run afoul of this highly deferential standard. As the Supreme Court has noted, much of the nineteenth century foreign presence in Hawaii – both within Hawaiian government and in the broader polity – was unwanted and in fact actively resisted by Native Hawaiians. *See Rice*, 528 U.S. at 504 (finding that there was "an anti-Western, pro-native bloc" in the Hawaiian government, that in 1887 Westerners "forced * * * the adoption of a new Constitution" that gave the franchise to non-Hawaiians, and that the U.S.-led 1893 uprising was triggered in part by the queen's attempt to promulgate a new constitution again limiting the franchise to Hawaiians). Furthermore, Congress has long distinguished between

indigenous Hawaiians and others who may have lived in the Hawaiian Islands at the time of annexation. *See* Hawaiian Homes Commission Act §§ 201, 203 (setting aside land to provide lots to Native Hawaiians with 50 percent or more Hawaiian blood). With all of these facts in mind, Congress supportably could find that an initial definition of "Native Hawaiian" as limited to those with some Hawaiian blood is appropriate. 10/

NHGRA opponents have made one additional argument aimed at pre-statehood days: They say that Native Hawaiians' failure to preserve their polity through some sort of treaty or other formal recognition at the time of annexation (or later, at the time Hawaii joined the Union) waives any claim of revival now. But the lack of a treaty recognizing Native Hawaiian sovereignty at the time of annexation is immaterial for several reasons. First, the argument is ahistorical: The 1898 annexation post-dated the era when the United States signed treaties with native groups. *See Lara*, 541 U.S. at 201 ("[I] n 1871 Congress ended the practice of entering into treaties with the Indian tribes") (citing 25 U.S.C. § 71). This change in U.S. policy did not alter the sovereignty of native groups. *Cf. id.* (noting that 25 U.S.C. § 71 " 'in no way affected Congress' plenary powers to legislate on problems of Indians.' ") (quoting *Antoine* v. *Washington*, 420 U.S. 194, 203 (1975)). Second, yet again, it would be perverse to punish an indigenous group precisely because it had been so thoroughly removed from power in its own land that it did not have the means to win concessions from the annexing entity. And third, as a factual matter, there *were* concessions made by the United States analogous to the treaties signed with American Indian groups. *See* Hawaiian Homes Commission Act, *supra*.

10/ In any event, of course, the congressional definition is preliminary – it defines only the roll of those who may participate in reconstituting the Native Hawaiian entity. Congress could rationally conclude that the initial definition of "Native Hawaiian" should be limited to indigenous Hawaiians and their descendants, while leaving the subsequent dependent sovereign entity some leeway to later determine – just as virtually every Native American tribe determines for itself – who else (if anyone) should be included in its ranks.

Finally, it is unclear why a failure to recognize Native Hawaiians at the time of Hawaiian statehood should have any effect on congressional power to recognize them now; this argument, like many of those above, appears grounded in an improperly cramped view of congressional authority as to native groups. But in any event, it is simply inaccurate to say no steps were taken in 1959 to recognize the separate existence of a Native Hawaiian people. As noted *supra* at 16, Hawaii agreed in connection with its admission to the Union to adopt the Hawaiian Homes Commission Act as part of the Hawaii Constitution. Furthermore, the United States transferred title to some 1.4 million acres of public lands in Hawaii to the new State as a public trust for the betterment of "Native Hawaiians." Admission Act § 5(f). These actions constitute the sort of recognition of a continuing indigenous corpus that NHGRA opponents wrongly claim was lacking.

C. The Claim that Congress Can Only Recognize a Native Group that Has Had a "Continuous" Governmental Structure is Incorrect as a Matter of Constitutional Law.

NHGRA opponents also have argued that Congress cannot recognize Native Hawaiians as a sovereign indigenous people because they have not existed as a coherent "tribe" on a consistent basis since Hawaii's annexation; this argument sometimes relies on the proposition that Congress may not recognize a tribe unless its existence has been "continuous." This objection suffers from numerous fundamental flaws. In our judgment, it would not carry the day in any challenge to the NHGRA's constitutionality.

i. The supposed "continuity" rule does not bind Congress.

First, and most importantly, congressional power to recognize Indian tribes is not hamstrung by a "continuity" rule or any similar requirement. The "continuity" rule cited by opponents of the legislation is drawn in the main from Department of the Interior regulations that

govern when *that agency* will recognize an Indian tribe pursuant to its delegated power. *See* 25 C.F.R. § 83.1 *et seq.* But these regulations govern nothing more than the scope of the agency's power, and they in no way mean Congress' authority is similarly cabined. To the contrary, Congress has plenary power to establish the criteria for recognizing a tribe; it may delegate this authority to the executive branch at its discretion, and the executive branch restricts its agency decision-makers by means of regulations they are bound to follow. *See Miami Nation* v. *United States Dep't of Interior*, 255 F.3d 342, 345 (7th Cir. 2001). In other words, the reservoir of authority lies in Congress. The Agent (an executive agency) cannot tell the Principal (Congress) what recognition criteria to employ.

This structural arrangement, in turn, governs the shape of judicial review. As Judge Posner has explained, it means that a decision recognizing a tribe is reviewable by the courts *only* if it was made by an agency within the agency's regulatory framework; in that circumstance, the decision is "within the scope of the Administrative Procedure Act" and therefore within the competence of the courts. *Id.* at 348. Otherwise, the decision "has traditionally been held to be a political one not subject to judicial review." *Id.* at 347 (quoting William C. Canby, Jr., *American Indian Law in a Nutshell* 5 (3d ed. 1998)). 11/

Like the Department of the Interior, some courts have employed a "continuity" requirement when examining whether a group of Native Americans qualifies as the successor of an earlier tribe for purposes of exercising treaty rights. *See, e.g., United States* v. *Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981) ("*Washington I*"). Again, however, the courts do so only as

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11/ In any event, reliance on these regulations is misplaced because they are expressly inapplicable to Native Hawaiians. *See* 25 C.F.R. § 83.3(a) ("This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department."); *id.* § 83.1 (defining continental United States to mean "the contiguous 48 states and Alaska").

a default rule in the face of congressional silence about a tribe's qualifications; if Congress has chosen to recognize (or decline to recognize) a tribe, the courts defer to that decision, recognizing Congress' far greater authority in the arena. *See United States* v. *Washington*, 394 F.3d 1152, 1158 (9th Cir. 2005) ("*Washington II*") (noting "the traditional deference that the federal courts pay to the political branches in determining whether a group of Indians constitutes a tribe"); Canby, *American Indian Law in a Nutshell* 6 ("Once granted, * * * the recognition will bind the courts until it is removed by the Executive or Congress."); *Holliday*, 3 Wall. at 419 ("If by [the political branches] those Indians are recognized as a tribe, this court must do the same."). In short, the courts uniformly have recognized that "Congress has the power, both directly and by delegation to the President, to establish the criteria for recognizing a tribe." *Miami Nation*, 255 F.3d at 345.

ii. Even if a "continuity" rule applied, Native Hawaiians would meet it.

The "continuity" rule does not limit congressional power to recognize a Native Hawaiian sovereign entity. However, even assuming that it did, Native Hawaiians would be able to meet its mandate.

Courts that use a "continuity" rule in the absence of congressional direction have explained that it is not absolute – that is, it does not require that a native group have maintained a robust political structure no matter the circumstances. To the contrary, these courts sensibly have recognized that native groups often were subject to intense pressure – military, economic, and otherwise – to abandon their lands and submit to Western governments. They therefore hold that *any modern tribal vestige demonstrating that assimilation is not complete* suffices to meet the continuity test. As the *Washington I* court wrote:

> [C]hanges in tribal policy and organization attributable to adaptation do not destroy tribal status. Over a century, change in any community is

> essential if the community is to survive. Indian tribes in modern America have had to adjust to life under the influence of a dominant non-Indian culture. * * * A degree of assimilation is inevitable under these circumstances and does not entail the abandonment of distinct Indian communities.

641 F.2d at 1373. Therefore, only when assimilation is "complete" do those purporting to be the tribe lose their claim to tribal rights. *Id.*; *see also Native Village of Venetie I.R.A. Council* v. *State of Alaska*, 944 F.2d 548, 557 (9th Cir. 1991) ("[A] relationship * * * must be established, but some connection beyond total assimilation is generally sufficient."). Further, the courts "have been particularly sympathetic to changes wrought as a result of dominion by non-natives." *Id.* The relaxed construction of the "continuity" rule in this circumstance reflects the principle that "if a group of Indians has a set of legal rights by virtue of its status as a tribe, then it ought not to lose those rights absent a voluntary decision made by the tribe * * *." *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575, 586 (1st Cir. 1979).

If such a continuity test applied here, it would be met on the strength of Congress' findings of fact. As discussed above, Congress has determined – both in the NHGRA and elsewhere – that Hawaiians have indeed maintained elements of their political and cultural structure in the years since Hawaiian annexation. *See, e.g.*, NHGRA § 2(9) ("Native Hawaiians have continuously sought access to the ceded lands in order to establish and maintain native settlements and distinct native communities"); *id.* § 2(11) ("Native Hawaiians continue to maintain other distinctly native areas in Hawaii"); *id.* § 2(15) ("Native Hawaiians have continued to maintain their separate identity as a single distinct native community through cultural, social, and political institutions"); *see also The Reconciliation Report* at 4 (noting that native Hawaiian people "continue to maintain a distinct community and certain governmental structures"). This, combined with the fact (found by Congress) that the United States played a role in the ouster of

the Hawaiian government, *see* Apology Resolution, *supra*, and the fact (also found by Congress) that "the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands," NHGRA § 2(13), brings Native Hawaiians within the relaxed "continuity" requirement established by such cases as *Washington I*. 12/

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The Supreme Court has confirmed that Congress has broad, plenary constitutional authority to recognize indigenous governments and to help restore the federal relationship with indigenous governments overtly terminated or effectively decimated in earlier eras. *See Lara*, 541 U.S. at 203 (affirming that the Constitution authorizes Congress to enact legislation "recogniz[ing] * * * the existence of individual tribes" and "restor[ing] previously extinguished tribal status"). That authority extends to the Native Hawaiian people and permits Congress to adopt the NHGRA, which would recognize the Native Hawaiian governing entity and initiate a process for its restoration.

12/ Furthermore, that many native Hawaiians are integrated into multiracial communities does not set them apart from Alaska Natives, who have been similarly assimilated and whose dependent sovereignty has nonetheless been recognized by Congress. *See Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 50-51 (1962) (describing how the "Indians of southeastern Alaska * * * have very substantially adopted and been adopted by the white man's civilization").

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