No. 11-336

In the

Supreme Court of the United States

JOHN M. CORBOY, et al.,
Petitioners,
v.
DAVID M. LOUIE,
ATTORNEY GENERAL OF HAWAII, et al.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Hawaii

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, PROF. PAUL M. SULLIVAN, THE GRASSROOT INSTITUTE OF HAWAII, AND THE GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *Rice v. Cayetano*, 528 U.S. 495 (2000), this Court held that a state classification of voters according to whether they are "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778" was an impermissible racial classification under the Fifteenth Amendment. Respondents have employed the same classification to determine whether a taxpayer is eligible for certain long-term leases that entitle lessees to significant tax exemptions. No equivalent exemption is available to Petitioners because they do not fall within that racial classification.

Petitioners paid their taxes under protest and then sought refunds on the ground that their tax bills resulted from a racial classification inconsistent with the Constitution. The Hawaii courts declined to apply *Rice* or subject the classification to strict scrutiny. The question presented here is:

Whether the Hawaii courts erred in failing to recognize that Petitioners have standing to seek a refund of their own taxes and that the Equal Protection Clause precludes a State or municipality from creating tax exemptions that are available only to members of a certain race.

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INTEREST OF AMICI CURIAE[1]

For 38 years, Pacific Legal Foundation has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Most notably, PLF participated as amicus curiae in support of petitioner in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), and in support of Harold F. Rice in *Rice v. Cayetano*, 528 U.S. 495 (2000). Both cases concerned, to some extent, the Hawaiian Homes Commission Act and Article XII, Section 5, of the Hawaii Constitution which are implicated here. In *Rice*, this Court found that the term "native Hawaiian" is a racial classification, and

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

that a race-based scheme allowing only statutorily defined "Hawaiians" to vote in certain elections violated the Fifteenth Amendment to the United States Constitution.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was created in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files amicus briefs-including in cases implicating the Equal Protection Clause and other issues of racial discrimination, such as *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Paul M. Sullivan practiced law in Hawaii for over 25 years with a career-long interest in civil rights generally and Native Hawaiian issues in particular. He served on the adjunct faculty of the University of Hawaii School of Law from 1998 to 2007 and in 2007 was appointed to the Hawaii State Advisory Committee of the U.S. Commission on Civil Rights. His publications on Native Hawaiian claims to special governmental treatment include *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. Haw. L. Rev. 99 (1998); *Recognizing the Fifth Leg: The "Akaka Bill" Proposal to Create a Native Hawaiian Government in the Wake of Rice v. Cayetano*, 3 Asian-Pac. L. & Pol'y J. 308 (July

2002), *Seeking Better Balance: A Proposal for Reconsideration of the 2006 ABA Resolution on the Akaka Bill*, 10-Jul Haw. B. J. 70 (2006), and *A Very Durable Myth: A Critical Commentary on Jon Van Dyke's Who Owns the Crown Lands of Hawai'i?*, 31 U. Haw. L. Rev. 341 (2008).

The Grassroot Institute of Hawaii (GRIH) is a nonprofit organization that promotes individual liberty, the free market, and limited accountable government. Its purpose is to improve the relationship between the government and the people with the objective of improving the government's effectiveness, the business climate, and in some cases, tradition, to foster an atmosphere in Hawaii that results in maximum personal freedom for every individual. GRIH is an affiliate of State Policy Network and more than 80 similar state think tanks and institutes across America and Europe. Through research papers, policy briefings, commentaries, and conferences, GRIH seeks to educate and inform Hawaii's policymakers, news media, and the general public on the important issues of our time. GRIH also filed a brief amicus curiae in support of petitioner in *Hawaii v. Office of Hawaiian Affairs*.

The Goldwater Institute was established in 1988 to advance the non-partisan public policies of limited government, economic freedom, and individual responsibility. A core purpose of the Goldwater Institute is to defend a society in which government is forbidden from distributing benefits or imposing burdens on individuals on the basis of their race or ethnicity. The Institute was a chief proponent of Arizona's Civil Rights Initiative, which was approved by voters in 2010 and amended the Arizona

Constitution to ban race-and gender-based affirmative action in public hiring, contracting, and education. The Goldwater Institute has published extensively on the subject of race preferences. *See*, *e.g.*, Clint Bolick & John Robb, *Dividing Line: Racial Preferences in Arizona* (2007); Mark Flatten, *High Fliers: How Political Insiders Gained an Edge in Sky Harbor Concessions* (2009).

Despite *Rice*, and Justice John Marshall Harlan's admonition one-hundred and fifteen years ago that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), the State of Hawaii continues to treat "native Hawaiians" as a different class among citizens of Hawaii. This practice has spawned numerous lawsuits until finally culminating in the present legal crisis which concerns state and county tax schemes that specifically and undeniably benefit one race over all others. Only this Court can resolve the racial divide confronting Hawaiian citizens because the state supreme court has proven itself completely unwilling to address any issue involving the Hawaii Constitution's favoritism toward native Hawaiians as a race.

This Court announced in *Rice* the unwavering principle that, "[t]he Constitution of the United States . . . has become the heritage of all the citizens of Hawaii." *Rice*, 528 U.S. at 524. Amici urge this Court to grant the petition for writ of certiorari, and ensure that Hawaii, once and for all, is required to abandon its racial classifications and treat its citizens with the equality to which they are entitled under the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The core issue of this case is whether a state and its municipalities may enforce property tax schemes that require some citizens to pay higher taxes because of their race. The State of Hawaii and its four counties allow leaseholders of certain public lands—the Hawaiian ceded lands—to pay little or no property taxes. By definition, only "native Hawaiians," a term held by this Court to be a racial classification, may lease the ceded lands. Thus, the state and county tax structures that afford benefits only to the leaseholders of the ceded lands grant preferences to, and discriminate against, Hawaiian citizens on the basis of their race. The authority for this discriminatory treatment comes from both federal and state laws.

As this Court recognized in *Rice*, 528 U.S. at 505, the Republic of Hawaii ceded all of its former Crown, government, and public lands to the United States upon annexation in 1898. Revenues from the public lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Newlands Resolution, 55 Pub. Res. 55, 30 Stat. 750 (1898); *Rice*, 528 U.S. at 505.

In 1921, Congress enacted the Hawaiian Homes Commission Act (Homestead Act), Pub. L. No. 67-34, 42 Stat. 108 (1921), and designated over 200,000 acres of the ceded lands for exclusive homesteading by native Hawaiians. H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920). The Homestead Act defines the term "native Hawaiian" as any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. Homestead Act § 201(a)(7), Pub. L. No. 67-34, 42 Stat. 108 (1921).

As a condition of becoming the 50th State of the Union in 1959, the United States required Hawaii to adopt the Homestead Act as a provision of its state constitution. Hawaii Statehood Admission Act, Pub. L. No. 86-3, § 4, 73 Stat. 4 (1959). Accordingly, Article XII, Section 2, of the Hawaii Constitution provides:

> The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the *further rehabilitation of the Hawaiian race* shall be faithfully carried out.

Haw. Const. art. XII, § 2 (emphasis added).

The Homestead Act provides for long-term homestead leases—lasting for 99 years and renewable for an additional 100 years—for only $1 per year. Those leases, however, are available only to "native Hawaiian[s]." Homestead Act § 201(a)(7). Other provisions of the Homestead Act reinforce the proscription that only those with a certain amount of "native Hawaiian" blood may benefit from the homestead leases: lessees are prohibited from transferring their leases to persons who are not native Hawaiians, and on a lessee's death only native Hawaiians or close relatives who are at least one-quarter Hawaiian may succeed to the lease. *Id.* §§ 208(5), 209.

Section 208(8) of the Homestead Act concerns property tax exemptions. That section provides that "an original lessee shall be exempt from all taxes for the first seven years" of the lease. But the four Hawaiian counties implement their own tax

exemptions which are only available to homestead lessees (native Hawaiians), so that these lessees pay little or no property taxes at all. The counties of Maui, Honolulu, and Kaua'i extend the full tax exemption for Hawaiian homestead lessees beyond the seven-year period mandated by Homestead Act § 208(8). Revised Ordinances of Honolulu (ROH) § 8-10.23; Kaua'i County Code (KCC) § 5A-11.23(a); Maui County Code § 3.48.555. The County of Hawai'i only requires that Hawaiian homestead lessees pay a minimum tax of between $25 and $100 after the seven-year exemption period expires. Hawai'i County Code (HCC) § 19-89.

The state and county tax exemptions are "inextricably tied to an ancestral requirement." Appendix A (Opinion of the Supreme Court of Hawaii (Apr. 27, 2011) (Acoba, J., concurring)) to Petition at 62a. The Homestead Act, as incorporated by the Hawaii Constitution, relies upon the same ancestral definition of native Hawaiian that was found to be a racial classification in *Rice*. 528 U.S. at 515. All racial or ethnic classifications imposed by any level of government "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. The state's race-based tax exemptions cannot survive this strict scrutiny level of review.

REASONS FOR GRANTING REVIEW

I

RACE-BASED GOVERNMENT IS IMPERMISSIBLE UNDER CONSTITUTIONAL PRINCIPLES OF EQUAL PROTECTION

Eight years ago, in *Rice*, this Court struck down as unconstitutional a provision in the Hawaii Constitution prohibiting non-"Hawaiian" citizens from voting in a statewide election. At that time, the Court reviewed Hawaii's troubled history of race relations and Justice Kennedy, writing for the majority, provided a sound approach to deal with the realities facing that State:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.[2]

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[2] Hawaiian citizens embraced this heritage. Hawaii was admitted to the Union in 1959 after an overwhelming majority of its residents voted for statehood. The election results from June 27, 1959, show that 94% of voting Hawaii residents favored statehood. Grassroot Institute of Hawaii, 1959 Results of Votes Cast, (continued...)

Rice, 528 U.S. at 524. Justice Kennedy's starting point is just as important today as it was in *Rice*. Once again, Hawaii's history, and the laws that have been passed with good intentions to deal with the struggles of native Hawaiians, require this Court's intervention. For only the principles and mandates of the United States Constitution together with this Court's guidance can disentangle Hawaii from its antiquated race-based laws and restore the ideals of equal protection to state government.

A. "Native Hawaiian" Is a Racial Classification That Cannot Withstand Strict Judicial Scrutiny

Government action dividing people by race is inherently suspect because such classifications "promote notions of racial inferiority and lead to a politics of racial hostility," *Croson*, 488 U.S. at 493, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno*, 509 U.S. 630, 657 (1993), and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting).

The Homestead Act defines "Native Hawaiians" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Section 201(a)(7) of the Homestead Act, Pub. L. No. 67-34, 42 Stat. 108 (1921). This

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[2] (...continued)
available at http://www.grassrootinstitute.org/documents/HawaiiStateHoodVote.pdf (last visited Oct. 10, 2011).

statutory definition of "Native Hawaiian" in the Homestead Act, and as incorporated in the Hawaiian Constitution, has already been determined by this Court to be a racial classification.

In *Rice*, this Court found unconstitutional a race-based scheme that allowed only statutorily defined "Hawaiians" to vote for trustees of the Office of Hawaiian Affairs (OHA), because the statutory definitions of "native Hawaiian" and "Hawaiian"[3] as used by the OHA and by the United States in the Hawaiian Homes Commission Act are racial classifications.

> In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." The very object of the statutory definition in question and of its earlier congressional counterpart in the Hawaiian Homes Commission Act is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.

Rice, 528 U.S. at 515 (citation omitted).

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[3] The term "Hawaiian," as opposed to "native Hawaiian," is defined by state statute as: "[A]ny descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw. Rev. Stat. Ann. § 10-2 (1993).

The Court's analysis in *Rice* of the statutory definition of "native Hawaiian" as used in the Hawaii Constitution applies directly to this case. According to *Rice*, "[t]he ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name." 528 U.S. at 517. The Homestead Act, as incorporated by the Hawaii Constitution, relies upon the same ancestral definition of native Hawaiian that was found to be a racial classification in *Rice*. The state and county tax exemptions are thus undeniably and "inextricably tied to an ancestral requirement." Appendix A (Opinion of the Supreme Court of Hawaii (Apr. 27, 2011) (Acoba, J., concurring)) to Petition at 62a. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Such ancestral distinctions as the sort employed by Hawaii under the incorporated Homestead Act "cause[] the same injuries, as laws or statutes that use race by name." *Rice*, 528 U.S. at 517. The very premise by which the state and counties provide property tax exemptions to native Hawaiians is thus suspect and "imperils the public interest." Appendix A (Opinion of the Supreme Court of Hawaii (Apr. 27, 2011) (Acoba, J., concurring)) to Petition at 62a.

B. Government Action Providing for Tax-Exempt Property Leases Based Upon Race Fails Strict Scrutiny

In *Adarand*, 515 U.S. at 223-24, this Court reviewed the history of equal protection jurisprudence and noted three general propositions: First, all racial classifications imposed by the government must first

be met with skepticism, *id.* at 223, because "'[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination,'" *Wygant*, 476 U.S. at 273 (citation omitted) (plurality opinion of Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.); *see also id.* at 523 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect."); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (citation omitted) ("[R]acial classifications [are] 'constitutionally suspect.'").

The second principle is that all racial classifications are reviewed under strict scrutiny, regardless of the race that is benefitted or burdened. *Adarand*, 515 U.S. at 224 (citing *Croson*, 488 U.S. at 494 (plurality opinion); *id.* at 520 (Scalia, J., concurring in judgment)); *see also Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.). Finally, the third proposition is one of congruence, *Adarand*, 515 U.S. at 224, in that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *see also Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

These three propositions led this Court to conclude that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. Under strict scrutiny, racial or ethnic classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227.

The Homestead Act was enacted ninety-one years ago. Congress enacted the Act after holding hearings and determining that some Hawaiians required rehabilitation. *Ahuna v. Dep't of Hawaiian Home Lands of the State of Hawaii*, 640 P.2d 1161, 1167 (Haw. 1982). But reliance only upon findings from 1920 and before cannot provide a "strong basis in evidence" to support remedial action ninety years later. No evidence of specific instances of discrimination in modern times, showing present patterns of deliberate exclusion of native Hawaiians, were presented to any of the state courts below to justify the state's current race-based grant of homestead lessees, or tax exemptions.[4]

To satisfy the compelling interest requirement, the state and federal governments may not rely on historical or societal discrimination against native Hawaiians. *See Croson*, 488 U.S. at 499 (stating that the "sorry history" of discrimination against African-Americans is insufficient to justify racial classifications in contracting); *id.* at 505 (societal discrimination may not serve as the basis for racial preferences). Amorphous claims of discrimination in particular

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[4] Moreover, even were there any claims of discriminatory treatment of native Hawaiians, such claims would have to be viewed with the understanding that there is no ethnic majority in Hawaii. Native Hawaiians, Japanese, and whites are the three biggest ethnic groups in Hawaii, each constituting between 19% and 23% of the population. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 550 n.54 (1996) (citing Hawaii Dep't of Health, Health Surveillance Survey, Report for Years 1989-1992, at A-66 (1996) (calculating Hawaii's population as 19.5% Native Hawaiian—defined as having any native blood—23% Caucasian, 20% Japanese, 10.5% Filipino, 4.5% Chinese, and 22.5% "others")).

industries or spheres may not form the factual predicate necessary for race-based remedies. *Id.* at 499. States must identify discrimination with some specificity before using race-conscious relief. *Id.* at 504. No specific instances of discrimination have been offered by the state or counties to justify their race-based tax schemes.

A narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship of the stated numerical goals to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Adarand*, 515 U.S. at 238-39; *Croson*, 488 U.S. at 506; *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion).

The essence of the narrowly tailored inquiry is the notion that explicitly racial preferences must be only a "last resort" option. *See Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he strict scrutiny standard . . . forbids the use even of narrowly drawn racial classifications except as a last resort."). There was no inquiry at any of the proceedings below as to whether Hawaii has considered race-neutral alternatives to the tax exemptions and found that they would not achieve the program's remedial purpose. Nor did the tax court or state supreme court determine whether the tax exemptions excluded those who, though native Hawaiian, "ha[d not] suffered from the effects of past discrimination." *Id.* at 508.

A race-preference program must be temporary and may remain in effect only so long as necessary to remedy the discrimination at which it is aimed. *Paradise*, 480 U.S. at 178-79 (plurality opinion). Here the provisions for race-based homestead leases and at least seven years of tax exemption per lease are enshrined forever in the state's constitution. The counties extend the tax exemption, or impose a *de minimis* tax, for the duration of the ninety-nine year lease. The tax exemptions do not meet the narrow tailoring standards. There is no procedure for the state or counties to determine if the remedial race-conscious homestead leases or tax-exemptions are still necessary to remedy discrimination.

C. Determining Who Should Be Classified as a Native Hawaiian or Non-Native Hawaiian Is Offensive to Our Constitutional Ideals of Equal Protection

That state and county governments must separate the citizens of Hawaii into native Hawaiian versus non-native Hawaiian racial classifications provides another reason why this Court should grant the petition and reverse the state court. Government determinations of who is, and who isn't, a member of some chosen race is divisive, and deeply offensive to our Country's notions of equality. *Cf. Plessy*, 163 U.S. at 552 ("Under the allegations of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race."). As Justice Stevens has emphasized, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove*, 448

U.S. at 534 n.5 (Stevens, J., dissenting). Chief Justice Roberts, when faced with having to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district, sadly observed, "It is a sordid business, this divvying us up by race." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring).

This case exemplifies this concern: both the federal government and the State of Hawaii have enacted numerous laws with varying definitions based on percentages of Hawaiian ancestry for the purposes of determining eligibility for preferences. State and federal laws define Hawaiians differently based upon some "blood quotient" in order to bestow preferential treatment.

Who should be considered a Hawaiian?[5] Because there is no single Hawaiian tribe or nation that can make this determination, the state and federal governments have answered this question with arbitrary distinctions. The Department of Hawaiian Home Lands follows the Homestead Act to define "native Hawaiian" as any descendant of not less than one-half of the blood of the races inhabiting the

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[5] The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has five races; Keane following Linnaeus, four; Deniker, twenty-nine. The explanation probably is that "the innumerable varieties of mankind run into one another by insensible degrees," and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.

United States v. Bhagat Singh Thind, 261 U.S. 204, 212 (1923) (footnotes omitted).

Hawaiian Islands previous to 1778. State of Hawaii Office of Hawaiian Affairs, Native Hawaiian Data Book—1998, Definitions of Race at 600-01 (1998) (Native Hawaiian Data Book) (citing Homestead Act); *but see Bhagat Singh Thind*, 261 U.S. at 211 (classifying Polynesians, including native Hawaiians, as Caucasian).[6] But a homestead lease successor (spouse or child) may be only one-quarter "Hawaiian." Homestead Act § 209. Members of the Hawaiian Homes Commission "shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. *Id.* § 202.

The State of Hawaii's Office of Hawaiian Affairs defines "Native Hawaiian" (with a capital "N") as a person of Hawaiian ancestry, regardless of blood quantum; and a "native Hawaiian" (with a lower case "n") refers to those with 50% or more Hawaiian blood. Native Hawaiian Data Book, Definitions of Race at 600-01.

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[6] The word "Caucasian" is in scarcely better repute. It is at best a conventional term, with an altogether fortuitous origin, which, under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example, (The World's Peoples, 24, 28, 307, *et seq.*), it includes not only the Hindu but some of the Polynesians, (that is the Maori, Tahitians, Samoans, Hawaiians and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black. We venture to think that the average well-informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.

Bhagat Singh Thind, 261 U.S. at 211 (footnotes omitted).

There is no rhyme or reason to any of these classifications; the artificial approach used by state and federal authorities only perpetuates and increases racial division. It has also spawned seemingly endless litigation, with the courts forced to undertake the distinctly suspect task of verifying racial bona fides and determining who properly qualifies as a "Hawaiian," and whether such classifications are proper. *See*, *e.g.*, *Day v. Apoliona*, 496 F.3d 1027, 1028-29 (9th Cir. 2007) (plaintiffs who claimed at least 50% bloodline asserted exclusive control over state programs to benefit "Hawaiians," currently open to anyone with one drop of Hawaiian blood); *Arakaki v. Hawaii*, 314 F.3d 1091, 1095 (9th Cir. 2002) (limiting candidates for OHA trusteeship to those of Hawaiian ancestry unconstitutional); *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 829 (9th Cir. 2006) (non-Hawaiian student challenged school's policy of giving preference to students of native Hawaiian ancestry). It is anathema for courts interpreting the Equal Protection Clause to be determining racial taxonomies for the purpose of granting preferences based solely on membership in the defined category.

II

ONLY THIS COURT CAN RESOLVE WHETHER HAWAII'S RACE-CONSCIOUS TAX EXEMPTION SCHEMES ARE UNCONSTITUTIONAL

As this Court held in *Rice*, the Constitution of the United States has become the chosen heritage of all citizens of Hawaii. 528 U.S. at 524. This heritage includes the Declaration of Independence, 1 Stat. 1 (1776), which declares, "We hold these truths to be

self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable Rights; that among these are life, liberty, and the pursuit of happiness." This heritage also includes the Fifth Amendment to the Constitution, which provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law," U.S. Const. amend. V.; and the Equal Protection Clause, which mandates that, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The state courts below either ignored or avoided these profound truths and mandates.

As long ago as 1896, this Court declared the principle "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race." *Bolling*, 347 U.S. at 499 (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896)). The core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions. *Croson*, 488 U.S. at 495. Where the government proposes to ensure participation of "some specified percentage of a particular group merely because of its race," such a preferential purpose must be rejected as facially invalid. *Bakke*, 438 U.S. at 307 (plurality opinion). Accordingly, all racial classifications by any level of government are "inherently suspect," *Adarand*, 515 U.S. at 223 (citation omitted), and "presumptively invalid." *Shaw*, 509 U.S. at 643 (citation omitted).

The state tax appeal court shirked its strict scrutiny responsibility and deferred to the state's

position that Petitioners were denied the tax exemption simply because they were not homestead lessee holders—although such leases are only granted to Hawaiians who are "any descendant of not less than one-half of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Petition at 8. The Hawaii Supreme Court affirmed by similarly rejecting the strict scrutiny standard and deferring to the state's argument that Petitioners lacked standing because they had not applied for the homestead leases—leases for which they are ineligible solely because of their race. *Id.* at 9. Thus, the state courts have refused to honor Hawaii's chosen heritage requiring the protection of Petitioners' fundamental right to be treated equal under the law. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145 (1994) ("Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system.").

Over a century ago, Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy*, 163 U.S. at 559 (dissenting opinion). The state courts below disregarded these words, which "now are understood to state a commitment to the law's neutrality where the rights of persons are at stake." *Romer v. Evans*, 517 U.S. 620, 623 (1996). The Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment specifically enforce this principle and no state court should have the power to ignore the Constitution to guarantee one race favored status over another.

CONCLUSION

For the foregoing reasons, Amici Curiae Pacific Legal Foundation, Cato Institute, Prof. Paul M. Sullivan, the Grassroot Institute of Hawaii, and the Goldwater Institute respectfully request that this Court grant the petition for writ of certiorari.

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Respectfully submitted,

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