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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in case 07-1372, Hawaii versus the Office of Hawaiian Affairs.

General Bennett.

ORAL ARGUMENT OF GEN. MARK J. BENNETT

ON BEHALF OF THE PETITIONERS

MR. BENNETT: Mr. Chief Justice, and may it please the Court:

A 1993 congressional apology resolution did not alter Hawaii's right to transfer its public lands or repeal, by implication, prior congressional enactments that it extinguish all competing claims to those lands. It was, as its sponsor said at the time, a simple apology, and no more.

The lands in question were the former Crown and government lands of the Kingdom of Hawaii. The Republic of Hawaii was the successor in interest and ownership to those lands and was recognized as such by the United States. The 1898 Newlands Resolution of Annexation recited that the Republic of Hawaii was ceding the absolute fee ownership of those lands to the United States, and that that cession was accepted, ratified and confirmed. Once the United States Congress

1 so acted, all competing claims to title were
2 extinguished, and under precedent going back almost
3 200 years, the determinations by Congress to accept the
4 cession were final and conclusive on any court.

5 JUSTICE STEVENS: Excuse me. Does that
6 proposition settle the question whether your opponents
7 have equitable interest in the lands?

8 MR. BENNETT: Your Honor, what the
9 Respondents have contended from day one in this case is
10 that they have a property right in this -- in the land,
11 and the Newlands Resolution conclusively settled that
12 question. There is no property interest that could have
13 competed with the United States as perfect title. That
14 perfect title was passed to the State of Hawaii in 1959
15 through the 1959 Hawaii Admission Act.

16 JUSTICE KENNEDY: But would the state of
17 Hawaii, under Hawaii law, be entitled to take the
18 position, if it so chose, that as the new owner of the
19 lands, it has a special duty as a trustee that some
20 other owner might not?

21 MR. BENNETT: Your Honor, the Admission Act
22 gives the State the right to manage and dispose of the
23 lands according to State law. So the political branches
24 certainly have the right to decide which lands they are
25 going to use for which of the five purposes --

1 JUSTICE KENNEDY: But then -- then it's just
2 a question of whether the Hawaiian Supreme Court --
3 assuming that it made the decision that I hypothetically
4 stated -- whether the Hawaiian Supreme Court, as opposed
5 to Hawaiian legislature, could make the determination of
6 whether or not there is some special trust obligation
7 imposed on the State of Hawaii by reason of its own
8 duties.

9 MR. BENNETT: But, Your Honor, in this case
10 what Respondents urged was that the Apology Resolution
11 changed the legal landscape and commanded the State to
12 hold these lands possibly in perpetuity without
13 alienation. The Hawaii Supreme Court specifically found
14 that the Apology Resolution dictated the results here,
15 that plaintiffs claims did not even arise until the
16 Apology Resolution was signed into law by President
17 Clinton. In addition, the plaintiffs -- the Respondents
18 urged upon the Hawaii Supreme Court a property right, a
19 property and ownership interest in these lands. Even if
20 --

21 JUSTICE GINSBURG: But, General Bennett, if
22 I understand correctly, looking to your question
23 presented, the only thing before us is the effect of the
24 Apology Resolution. The question presented doesn't say
25 anything about the Admissions Act or the Newlands

1 Resolution. So shouldn't we just stick to the question
2 as you presented it? Whatever the picture is, does the
3 Apology Resolution have any substantive effect?

4 MR. BENNETT: Your Honor, that certainly is
5 one question before the Court, but we believe fairly
6 included in that question is the issue of the nature of
7 the State sovereign authority. The question presented
8 talks about whether the Apology Resolution changed in
9 any way the State's sovereign authority, and that
10 question -- certainly interior and predicate to an
11 intelligent resolution of that question is the nature of
12 the State sovereign.

13 JUSTICE GINSBURG: Why is it necessary? Why
14 isn't it sufficient just to say that this resolution has
15 no substantive effect, period, and then remand to the
16 Hawaii Supreme Court?

17 MR. BENNETT: Because, Your Honor, the
18 Hawaii Supreme Court's decision also rests on a premise
19 foreclosed by Federal law, that is that there are
20 competing claims to title. As late as page 18 of the
21 red brief, Respondents even say now that Native
22 Hawaiians are entitled to these lands as a matter of
23 property law, but they do not say anywhere in the red
24 brief how that property law claim arises or how that
25 property law claim could survive the Newlands

1 Resolution, the Hawaii Organic Act, or the Admission
2 Act.

3 JUSTICE SOUTER: General, the difficulty I
4 have is that not only do they not say, so the Supreme
5 Court of Hawaii didn't say so either. And it seems to
6 me that we would be well advised to make sure that we
7 understand the reasoning of the Supreme Court of Hawaii
8 before we start talking about the relationship between
9 the various Federal statutes and whatever this claim may
10 be. I simply don't understand the claim myself.

11 I do understand your point, because I think
12 this much is clear from the Hawaiian opinion: That they
13 think the Apology Resolution seriously affects the
14 claim. That we can deal with, but once we get out of
15 that, the -- the whole case seems murky to me. Am I
16 missing something?

17 MR. BENNETT: Well, Your Honor, the Hawaii
18 Supreme Court, at page 69a of the appendix for the
19 petition, says that this was a claim seeking an
20 injunction -- injunctive relief with regard to property
21 rights. At page 87a of the petition appendix, the
22 Hawaii Supreme Court said there are questions regarding
23 the title to the State's ceded lands.

24 JUSTICE GINSBURG: There -- there may well
25 be, but then the Hawaii Supreme Court chose its grounds,

1 and it said at one point the resolution dictates the
2 preservation of the ceded lands. At another place it
3 said that Federal law provides the basis for its
4 decision and that State trust law is interwoven with
5 that Federal law. It also said that Federal law grounds
6 the decision and provides the governing legal standards.

7 Now, they could not have been clearer. They
8 repeated at least five times that their decision rested
9 on the resolution, that everything turned on that
10 resolution having substantive effect. That's why they
11 said that their decision was driven by Federal law. And
12 I don't know why we shouldn't take the Hawaii Supreme
13 Court at its word repeated so many times.

14 MR. BENNETT: Well, Your Honor, we believe
15 that Respondents' attempt to trivialize this Court's
16 jurisdiction -- they say, for example, in the brief in
17 opposition that even if this Court were to reverse, the
18 Hawaii Supreme Court will simply reinstate the exact
19 same decision, and presumably they would press upon the
20 court the exact parameters they've pressed for 14 years
21 --

22 JUSTICE GINSBURG: We don't --

23 MR. BENNETT: -- that is --

24 JUSTICE BENNETT: We don't know that for
25 sure. It may well be, but there is a large -- large

1 difference, and if they're relying on Federal ground
2 that insulates them from any checks by the Hawaii
3 polity, but if they are forced to rely on State law,
4 then it's up to the people of Hawaii whether they like
5 it or not. They could change the State statutory law,
6 equitable notion, constitutional law. But by doing what
7 the Hawaii Supreme Court did, they have taken the case
8 out of the realm of State law, subject to the political
9 check, put it on Federal grounds.

10 So I think that that's what -- the issue
11 properly before this Court, and not anything about the
12 interpretation of the Admissions Act, which -- if it's
13 implicit in your question, it's a little hard to see.
14 Ordinarily, if a party wants us to address the effects
15 of a piece of legislation, they will mention that in the
16 question presented.

17 MR. BENNETT: Your Honor, I agree that this
18 decision clearly rests on Federal grounds, but we would
19 also suggest that the question presented talks about
20 whether the State's sovereign authority is stripped, and
21 the State's sovereign authority, we would submit, is
22 clear.

23 The United States had perfect title. The
24 State of Hawaii succeeded to the United States perfect
25 title. Respondents do not suggest that anywhere in

1 their pleadings why that is not so, or why they continue
2 to press even with this Court this property right claim
3 to these lands. And so we would suggest that it would
4 be prudent for the Court to address what we believe is
5 the fairly included question of the nature of the
6 State's sovereign authority, especially as it would
7 appear to be entirely not subject to contravention by
8 the Respondents.

9 JUSTICE KENNEDY: Well, I'm not sure it
10 would be prudent when the great bulk of the opinion is
11 based on the Apology Resolution. And I -- I certainly
12 do think you have a powerful argument if the Apology
13 Resolution presents us with a Federal question. But the
14 more far-reaching question -- I just inferred --
15 suggests -- might not even be very specifically within
16 the question presented, and even if it's fairly
17 embraced, you used the word "prudent." It seems prudent
18 for us to confine our decision to the effect of the
19 Apology Resolution and whether or not the Hawaiian
20 Supreme Court got that part of that right.

21 MR. BENNETT: Well, with -- with respect,
22 Your Honor, the Court could limit its ruling, but in a
23 case that has been gone on for 14 years and which, in
24 virtually every pleading, the Respondents have filed
25 they have asserted essentially that the State lacks

1 title to these lands because the United States lacked
2 title, the overthrow of the Kingdom of Hawaii was
3 illegal, and that's the precise reason for 14 years the
4 State has either been through an injunction or, as a
5 practical matter, not been able to alienate its lands,
6 that this Court certainly has the ability for a question
7 that we believe --

8 JUSTICE ALITO: If the Apology Resolution is
9 put aside, I'm not quite sure what is left, other than
10 State-law issues.

11 MR. BENNETT: Well, what's left --

12 JUSTICE ALITO: You could -- would there be
13 anything to prevent the Hawaiian legislature from
14 passing a law that says, we have absolute -- we have
15 title to these lands, but we are going to impose a
16 five-year moratorium on any transfer of these lands
17 because we want to promote a reconciliation process?

18 MR. BENNETT: Your Honor, certainly under
19 the terms of the Admission Act, the authority given the
20 political branches for the management and disposition of
21 the lands is broad and would run up against only the
22 Federal common law of trust that the Ninth Circuit says
23 governs --

24 JUSTICE SOUTER: But that's not what the
25 Hawaiian Supreme Court said. I am reading from page 98a

1 of the petition appendix, the concluding portion of the
2 opinion. "We hold, number one, that the Apology
3 Resolution and related state legislation give rise to
4 the state's fiduciary duty."

5 The only Federal statute mentioned is the
6 Apology Resolution, and the rest of their reasoning
7 seems to rest upon some kind of State equity law or
8 trust law. Now, that trust law may ultimately be
9 inconsistent with prior Federal acts, but the only --
10 the only thing they are disclosing right now is -- aside
11 from the Apology Resolution, seems to be State trust
12 law.

13 MR. BENNETT: Well, Your Honor, the Hawaii
14 Supreme Court did say that this is an injunction based
15 on property rights. The Hawaii Supreme Court did say --

16 JUSTICE SOUTER: But trust law is based on
17 somebody's property rights. We don't know whether they
18 are talking about legal rights or equitable rights, and
19 that's consistent with the statement I just read to you.

20 MR. BENNETT: Well, Your Honor, at page 85-A
21 of the appendix to the petition the Court said that the
22 Congress recognized that native Hawaiians had
23 unrelinquished claims to the ceded lands. And as a
24 result of that recognition the Apology Resolution
25 dictated the entry of this injunction.

1 We believe that clearly that is not so, but
2 that this idea of unrelinquished claims is an
3 unrelinquished property-right claim. This is what was
4 urged upon the Hawaii Supreme Court at every stage.

5 JUSTICE SOUTER: But, General, I think --
6 with respect, I still don't know what the position of
7 the Hawaiian Supreme Court is going to be if this Court
8 rules that the Apology Resolution does not support the
9 proposition that you just read.

10 I don't know whether at that point the
11 Hawaiian Supreme Court is going to say, okay, all we
12 have got left to deal with now is State trust law, or
13 whether they've got to pull another rabbit out of the
14 hat and say, but there is -- there is some kind of -- of
15 prior -- there is some kind of a -- a claim against
16 which prior Federal law could not prevail.

17 I don't know. And I -- that's -- that's why
18 it seems to me, to -- to say the least, imprudent to
19 wade into it at this point. The one thing we know that
20 seems to have been significant to their decision is the
21 Apology Resolution. And I think we would be wise to
22 stick to that.

23 MR. BENNETT: Your Honor, what our response
24 would be is a simple one: That the issue of the State's
25 title would in our view be undisputed. The United

1 States's title is perfect and indisputable, and the
2 State's title is perfect and indisputable. And this
3 Court has said that one of the functions in -- in cases
4 where respondents claim an adequate and independent
5 State-law ground is to remand the case by disabusing the
6 State court of incorrect notions of what Federal law
7 either permits or requires.

8 JUSTICE ALITO: A point on which both you
9 and your adversaries seem to agree is that the Apology
10 Resolution really is not critical to the decision of the
11 Hawaii Supreme Court. Because if you thought that
12 simply taking the Apology Resolution off the books would
13 provide an acceptable outcome from your point of view,
14 you would be happy with our deciding just that narrow
15 question. And your opponent explicitly says that the
16 apology resolution wasn't critical to the decision of
17 the Hawaii Supreme Court; isn't that true?

18 MR. BENNETT: Yes, Your Honor, and they have
19 not asked this court to affirm.

20 JUSTICE ALITO: And isn't it true that you
21 don't think that just saying the Apology Resolution did
22 not change anything would be insufficient?

23 MR. BENNETT: Your Honor, because it seems
24 to us clear that both the respondents and Hawaii Supreme
25 Court believe that there are property-right claims that

1 the Native Hawaiians have. And we believe those
2 property-right claims are clearly inconsistent with
3 Federal law, the Newlands Resolution, and the Admission
4 Act, and that there is no reason for this Court not to
5 reach such a clear claim.

6 JUSTICE BREYER: But they don't say that --
7 there is nothing in the Resolution and nothing in the --
8 does anything in the Court's opinion or the Resolution
9 say that the claims are valid? We all know they have
10 claims. They have been making claims. Is there
11 anything in any document I have that says the claims are
12 valid claims? Maybe they are valid, and maybe they are
13 not.

14 MR. BENNETT: The -- the only thing is the
15 position of the Respondents who assert --

16 JUSTICE BREYER: Of course, they think they
17 are valid.

18 MR. BENNETT: But I mean --

19 JUSTICE BREYER: So -- so since you have
20 normally one group thinks they are valid; another group
21 thinks they are invalid. Well, here we are. Let them
22 fight it out.

23 And all we can say is that this Resolution
24 of the Apology doesn't really say who's right. And if
25 Hawaii wants to give some more money, or whatever they

1 want to do, to the Native Hawaiians, that's their
2 affair. What's the -- what's the problem?

3 MR. BENNETT: Well, Your Honor, it is
4 certainly true that the Apology Resolution does not as
5 Respondents state recognize the validity of any claims,
6 but federal law forecloses the validity of any claims.
7 And we believe that that is a question that is fairly
8 included interior to the question of whether the
9 Resolution stripped Hawaii of its sovereign authority.
10 It's only natural for the Court to declare what we
11 believe is the indisputable proposition that Hawaii's
12 sovereign authority is based on --

13 JUSTICE BREYER: Could the Hawaiian
14 Legislature pass a law saying that the Native Hawaiians
15 have claims? Those claims, because of the Federal 1950
16 -- whatever it is -- are not valid any more. But that
17 was pretty unfair to them. And, therefore, what we
18 think we should do is the following. And then they pass
19 a whole lot of things that they think would be
20 appropriate to do in light of what I just said. What
21 stops that?

22 MR. BENNETT: Your Honor, the -- legislature
23 has wide discretion in managing and disposing of the
24 assets.

25 JUSTICE GINSBURG: And the legislature, if

1 they had wanted to -- as I understand the Admission Act,
2 it lists five purposes to any one purpose. And the
3 legislature, if it so chose, could say, we want this
4 property -- the proceeds from this property to be for
5 the exclusive betterment of the conditions of the Native
6 Hawaiians. They could. It would be up to the
7 legislature to give it all to the Native Hawaiians.

8 MR. BENNETT: That would not violate the
9 Admission Act, Your Honor.

10 JUSTICE SCALIA: That -- that would not?

11 MR. BENNETT: That would not.

12 JUSTICE SCALIA: Would it violate the
13 Admission Act if the legislature had not said -- said we
14 are giving it to them because we want to, because we
15 think it's a good idea. No, we are giving it to them
16 because we think they have a right to it.

17 MR. BENNETT: Your Honor-

18 JUSTICE SCALIA: And we feel that we must
19 give it to them because it's theirs.

20 MR. BENNETT: Your Honor, the --

21 JUSTICE SCALIA: Would that violate the
22 Admission Act?

23 MR. BENNETT: The legislature believed that
24 it bettered the condition of Native Hawaiians to provide
25 proceeds from land to the Native Hawaiians. The

1 Admission Act gives them that ability to do it.

2 JUSTICE SCALIA: Did you answer my question
3 just then?

4 MR. BENNETT: Yes. I'd -- I'd like to --

5 JUSTICE SCALIA: Please, let me put my
6 question again. Let's assume that the legislature does
7 not say, we want to give it to the Native Hawaiians
8 because we like the Native Hawaiians or because we think
9 they deserve it; but, rather, we think we have to give
10 it to the Native Hawaiians because it's theirs.

11 MR. BENNETT: I think that would be contrary
12 to Federal law, Your Honor.

13 JUSTICE SCALIA: I think it would be.

14 MR. BENNETT: Your Honor, if I -- if I may
15 reserve the remainder of my time for rebuttal.

16 CHIEF JUSTICE ROBERTS: Thank you, General.
17 Mr. Jay.

18 ORAL ARGUMENT OF WILLIAM M. JAY

19 ON BEHALF OF THE UNITED STATES,

20 AS AMICUS CURIAE,

21 SUPPORTING THE PETITIONERS

22 MR. JAY: Mr. Chief Justice, and may it
23 please the Court:

24 Three binding Federal laws make clear that
25 the State of Hawaii has absolute fee title to the lands

1 in the Federal trust and also has the power to sell
2 those lands for the purposes Congress set out in the
3 trust instrument.

4 CHIEF JUSTICE ROBERTS: What do you think on
5 the question-presented issue? Are all of the Federal
6 laws on which the Hawaii Supreme Court relied to say
7 there was a cloud on the title before the court.

8 MR. JAY: We think that they have been in
9 the case from the beginning, and they -- they were
10 clearly pressed in the State supreme court. And we
11 think they are fairly encompassed in the question
12 presented partly because, as General Bennett said, the
13 -- the questions referenced to the State's sovereign
14 authority, which necessarily includes consideration of
15 the act which made Hawaii a sovereign state, the
16 Admissions Act, is -- is a necessary antecedent to the
17 resolution of that question.

18 But also the admission in the Apology
19 Resolution, itself, in the preamble on which the
20 Respondents rely extensively goes into great detail
21 about the Newlands Resolution and the cession of
22 absolute fee and ownership by the Republic of Hawaii to
23 the United States.

24 JUSTICE ALITO: Well, I don't see where this
25 law -- where those laws get us. The -- the argument

1 that is made on the other side is that the Native
2 Hawaiians have a moral claim to these lands, not that
3 they have a property-right claim to the lands.

4 And if the State of Hawaii, acting through
5 any branch of its government -- and that is not a matter
6 of concern to us -- says they have a moral claim to the
7 land and, therefore, there should not be any land
8 transfers for some period of time, what's inconsistent
9 with Federal law in their doing that?

10 MR. JAY: Let me answer that in two steps,
11 Justice Alito. The first step is that the State's
12 supreme court permanent injunction, although Respondents
13 are now saying that the claims on which -- the claims on
14 which -- they state are moral in nature, but a permanent
15 injunction is a legal obligation and enforceable by
16 contempt.

17 So the State supreme court, by effectively
18 locking up the lands for an indeterminate period of
19 time, has treated them as -- as legally valid and has
20 entered relief that is legal in nature.

21 JUSTICE SCALIA: Is -- is it the function of
22 the Hawaiian Supreme Court to declare moral obligations?

23 MR. JAY: Well, Justice --

24 JUSTICE SCALIA: Would there be any problem
25 -- certainly there is noted the legislature deems there

1 to be a moral obligation and gives the land away on that
2 basis. But do you -- do you think there -- there might
3 be some democracy problem if -- if the Supreme Court of
4 Hawaii goes around pronouncing moral obligations and --
5 and giving away land on that basis?

6 MR. JAY: Well, Justice Scalia I guess the
7 second half to my answer to Justice Alito as well, which
8 is that the State supreme court is not free as a matter
9 of State trust law or otherwise to formulate obligations
10 that don't relate to the State's obligation as trustee
11 of the Federal trust --

12 JUSTICE STEVENS: But isn't it perfectly
13 clear that's a question of State law?

14 MR. JAY: I don't think so, Justice Stevens,
15 because that State law has to comply with the
16 limitations set out in section 5(f) of the Admissions
17 Act. To be sure, the political branches operating as
18 trustee of the trust have broad discretion to allocate
19 lands within and among the five purposes set out in
20 section 5(f).

21 But what the State can't do and what in
22 particular the State courts can't do in the name of
23 formulating State trust law is to rely on considerations
24 that are all together outside the trust. In this case,
25 any consideration of the unrelinquished claims of the

1 Native Hawaiians would not be based on their status as
2 one of the beneficiaries of the trust.

3 JUSTICE STEVENS: Are you saying that the
4 State court couldn't do it but the legislature could?

5 MR. JAY: I'm saying the -- the -- no,
6 Justice Stevens. The State court can't rely, nor, I
7 think, could the State legislature --

8 JUSTICE STEVENS: Could the legislature do
9 it?

10 MR. JAY: The legislature could determine
11 that the wisest use of the lands today, the way that
12 would best further -- promote the welfare of Native
13 Hawaiians today would be not to sell it. The
14 legislature certainly could do that and then could enact
15 a moratorium that was consistent with that view.

16 But what it can't do is treat it -- and this
17 is the question Justice Scalia asked at the end of
18 General Bennett's presentation -- what the State is not
19 free to do is, based on claims by Native Hawaiians, not
20 as beneficiaries of the section 5(f) trust, but based on
21 considerations that arose before the Admissions Act was
22 ever enacted, based on -- based on their status as
23 competing claimants to the title of the land, give them
24 an equitable, moral, or otherwise claim to lock up the
25 use of the land.

1 The theory that the Respondents advanced in
2 the state Supreme Court under the name of trust law is
3 that a trustee may not, in furtherance of a trust,
4 engage in an illegal act. And that is on Joint Appendix
5 141A to 143A and other places in the record. And the
6 illegal act they contemplate is the continued ownership
7 of the lands by the State of Hawaii. So, the State
8 cannot, in ostensible furtherance of the federal trust,
9 rely on State law principles that presume the illegality
10 of the federal trust or the illegality --

11 JUSTICE STEVENS: The State power -- the
12 State legislative power to act depends on the validity
13 of its reasoning.

14 MR. JAY: Well, Justice Stevens, the
15 State -- the State has given authority to act for
16 particular purposes. And so, the purpose of the -- of
17 the -- for which the State acts is necessarily relevant.
18 The State can't act for a purpose that is not --

19 JUSTICE ALITO: What is the position that
20 it's -- it is imposing a moratorium on land transfers
21 because it thinks this is the best way to promote the
22 interests of the Native Hawaiians, and part of their
23 thinking is that there was an inequity done when
24 absolute title was transferred to the United States and
25 then to the State of Hawaii? Would that be a violation

1 of federal law?

2 MR. JAY: I think, Justice Alito, that if
3 the state made that determination with respect to the
4 classic Native Hawaiians who are defined in the
5 Admissions Act as -- as one of the present day
6 beneficiaries of the trust, and determined that it
7 was -- that that was the best way to act for the
8 betterment of Native Hawaiians, which is a permissible
9 trust purpose, that that would be permissible.

10 But for the State to act on considerations
11 that are wholly extrinsic to the trust, to treat the
12 native -- the claims of Native Hawaiians as valid, even
13 though they are -- and to assume a duty to the Native
14 Hawaiians that has nothing to do with the State's
15 obligations as trustee of the section 5(f) trust, we
16 think that would be impermissible.

17 JUSTICE SOUTER: But that doesn't seem to be
18 what the Supreme Court of Hawaii has done. The Supreme
19 Court of Hawaii, in effect, has said the land is tied up
20 until these people who are currently negotiating, the
21 State, the Native Hawaiians and -- what is it, the
22 United Church of Christ, all come to a -- in effect, a
23 resolution and a reconciliation.

24 Whatever that means, it does not sound to me
25 as though it is the recognition of a legal title claim

1 or indeed the validity so far as courts are concerned
2 with validity of any claim the Native Hawaiians are
3 making. They are just saying, no more land transfers
4 until these people sit down and make up their
5 differences.

6 Isn't that all the court is saying at this
7 point?

8 MR. JAY: Well, the court said,
9 Justice Souter, that there is a fiduciary obligation not
10 to make these land transfers at any time until this
11 indeterminate point in the future which reconciliation
12 is achieved.

13 But to say -- to say that that -- that they
14 are not thereby pronouncing on the validity of the
15 title, I think that is inconsistent with the Newlands
16 Resolution.

17 JUSTICE SOUTER: Isn't the fact that you and
18 I are having this exchange a pretty good indication that
19 we don't know what they meant exactly by that? The only
20 thing we can be sure of is that that thought the Apology
21 Resolution had some legal significance. They said, you
22 know, it's required after the Apology Resolution.

23 We can say you are right or you are wrong,
24 and I think we know what -- what we are talking about.
25 But to go beyond that, it seems to me, that we are

1 wading into an argument that you and I can't settle
2 here.

3 MR. JAY: Well, I wholly agree,
4 Justice Souter, that the State supreme court thought
5 that the Apology Resolution had significance and that
6 the Apology Resolution --

7 JUSTICE GINSBURG: More than significance.
8 I am reading the sentence that immediately follows the
9 one that General Bennett brought to our attention on
10 page 85A. It says, "Accordingly, the Apology Resolution
11 dictates that the ceded lands should be preserved
12 pending a reconciliation between the United States and
13 the Native Hawaiian people."

14 It is very fear language, dictates. And
15 that's why I am really puzzled as how this Court has any
16 business wading into any question other than telling the
17 Hawaii Supreme Court either their right about what the
18 resolution dictates or they are wrong, and they are
19 wrong because it's a nice apology but it's without
20 substantive effect.

21 MR. JAY: Well, I certainly agree,
22 Justice Ginsburg, that the State supreme court thought
23 the Apology Resolution dictated the entry of the
24 injunction, and the -- also on page 85A the State
25 supreme court says that the Apology Resolution gives

1 rises to the -- to a fiduciary duty to Native Hawaiians.

2 And it is -- it is that principle that the
3 State supreme court was able to find a fiduciary duty
4 and impose it on the State's trusteeship obligation,
5 even though that fiduciary duty arises outside the
6 section 5(f) trust. And that is why we think that the
7 scope of the State -- of the State's obligation as
8 trustee is within the Court's review at this stage.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr. Jay.

10 MR. JAY: Thank you, Mr. Chief justice.

11 CHIEF JUSTICE ROBERTS: Mr. Shanmugam?

12 ORAL ARGUMENT OF KANNON K. SHANMUGAM

13 ON BEHALF OF THE RESPONDENTS

14 MR. SHANMUGAM: Thank you,
15 Mr. Chief Justice, and may it please the Court:

16 The only issue properly presented in this
17 case is whether the Hawaii Supreme Court concluded that
18 the Apology Resolution created an affirmative federal
19 obligation not to sell ceded land. In our view, it did
20 not.

21 The Hawaii Supreme Court held only that the
22 sale of ceded lands would breach the State's fiduciary
23 duty to Native Hawaiians under State law. And it relied
24 on the Apology Resolution only for its recognition that
25 Native Hawaiians have claims to the ceded lands that are

1 currently being addressed through the political process.

2 CHIEF JUSTICE ROBERTS: So, they relied on
3 federal law to create the fiduciary obligation. So if
4 we think that federal law did not create the fiduciary
5 obligation, what should we do?

6 MR. SHANMUGAM: Then the Court should vacate
7 and remand. But we believe the better interpretation of
8 the Hawaii Supreme Court's opinion is that it believed
9 that the source of the fiduciary duty at issue was State
10 law and not Federal law. To be sure --

11 CHIEF JUSTICE ROBERTS: All Federal law?
12 All Federal law? In other words, not simply the Apology
13 Resolution but the other Federal provisions?

14 MR. SHANMUGAM: As the source for fiduciary
15 duty?

16 CHIEF JUSTICE ROBERTS: Do you think
17 those -- yes.

18 MR. SHANMUGAM: The source for the fiduciary
19 duty, according to the Hawaii Supreme Court, was State
20 law. To the extent that the Hawaii Supreme Court --

21 JUSTICE SOUTER: Mr. Shanmugam, on page 99,
22 the State supreme court is saying, inasmuch as the
23 Apology Resolution and related State legislation give
24 rise to a fiduciary duty. They are saying the Apology
25 Resolution did so, too, not only State law.

1 MR. SHANMUGAM: They did say at various
2 points in the opinion that the Apology Resolution,
3 together with State law, gave rise to the fiduciary
4 duty.

5 But I think that if one looks at the
6 critical portion of the Hawaii Supreme Court's opinion
7 on pages 31A to 32A, where the Hawaii Supreme Court
8 actually discusses the relevance of the Apology
9 Resolution, the Court makes clear that it is relying on
10 it only for the acknowledgment that Native Hawaiians
11 have unresolved claims.

12 JUSTICE GINSBURG: Then how to you explain
13 the language, over and over again, I won't repeat it,
14 but they said this resolution of ours is dictated by,
15 compelled by, the Apology Resolution? Without the
16 Apology Resolution it would be an entirely different
17 case. And now you seem to be taking what the Hawaii
18 Supreme Court put as the necessary link, the Apology
19 Resolution, before that this would have been impossible,
20 and you are treating it now as sort of window dressing,
21 icing on the cake, really didn't matter.

22 But we would disrespect the Hawaii Supreme
23 Court if we didn't take them at their word and say --
24 using words such as "dictated," "compelled." You -- you
25 are treating this as sort of just part of the

1 atmosphere.

2 MR. SHANMUGAM: Well, it was more than mere
3 window dressing, Justice Ginsburg. The apology
4 resolution really did confirm the factual predicate for
5 Respondent's State law claim. And I do mean to
6 emphasize that these have been State law claims from the
7 outset. If you take a look at the original complaint in
8 this case, which is found in the Joint Appendix at pages
9 34a to 36a, the only source of law on which we rely for
10 the counts at issue here was article 12, section 4 --

11 JUSTICE GINSBURG: That's what you relied on
12 but it's not what the Hawaii Supreme Court relied on,
13 and I would repeat the point I made in the prior
14 argument: what's worrisome about this is they are
15 fastening on a piece of Federal legislation and said, we
16 are compelled to do this because of Federal law. What
17 that does is it removes it from the Hawaii political
18 process.

19 If they left Federal law out of it, and they
20 said truly this decision rests on State law, we think
21 that the title belongs with the Native Hawaiians, then
22 they have to answer to the policy; and here the Hawaii
23 Supreme Court insulates themselves by using the Federal
24 law as a crutch.

25 MR. SHANMUGAM: Let me -- let me be clear

1 about this, Justice Ginsburg, if the Hawaii Supreme
2 Court's opinion is read to construe the Apology
3 Resolution as creating some affirmative duty or
4 obligation as a matter of Federal law, we agree that
5 that would be erroneous. And if the Court --

6 JUSTICE KENNEDY: Would you agree that there
7 would be a Federal question if the Hawaiian Supreme
8 Court said the Apology Resolution dictates our results?

9 MR. SHANMUGAM: No, because we believe that
10 read in context, Justice Kennedy, that that statement is
11 consistent with our theory of the Hawaii Supreme Court's
12 reliance on the Apology Resolution. So --

13 JUSTICE SCALIA: Why doesn't the Hawaii
14 Supreme Court's reliance upon Hawaiian law to establish
15 that there is some property right on the part of these
16 native Hawaiians -- why doesn't that conflict with
17 Federal law?

18 MR. SHANMUGAM: The Hawaii Supreme Court
19 relied on Hawaii law only for the existence of the
20 fiduciary duty and that fiduciary duty has repeatedly
21 been recognized by the Hawaii Supreme Court. That duty
22 gives Native Hawaiians an equitable or beneficial
23 interest in the plan.

24 JUSTICE SCALIA: I don't care what you call
25 it; it's a property interest.

1 MR. SHANMUGAM: Well --

2 JUSTICE SCALIA: As I read the Federal law,
3 it extinguished all property rights in these lands; the
4 lands were transferred to the Federal Government; and
5 the Federal Government transferred them in absolute fee
6 without any encumbrances to the State of Hawaii. Now if
7 you are telling me the Hawaii Supreme Court is now
8 finding as a matter of State law that there is a
9 property interest on the part of the Native Hawaiians --
10 I don't care what you call it, equitable or whatever --
11 it seems to me that is flat contradiction of Federal
12 law, and probably is an issue that we ought to address
13 in this opinion.

14 MR. SHANMUGAM: There are two separate
15 issues, Justice Scalia. The first is what was the
16 source for the injunction in this case. And the source
17 of the injunction was Respondent's instant claim for
18 breach of fiduciary duty. Now to be sure, we were
19 arguing that there would be a breach of the fiduciary
20 duty to Native Hawaiians precisely because Native
21 Hawaiians have underlying claim to the land. It's those
22 underlying claims that trigger all of these additional
23 Federal issues that Petitioners are now seeking to
24 inject into the case.

25 But I think that the critical point for

1 purposes of this Court's review at this stage is that in
2 the Hawaii Supreme Court, we freely and repeatedly
3 conceded that any underlying claims to ceded lands would
4 be nonjusticiable. That much was clear as a matter of
5 State law.

6 JUSTICE BREYER: You concede -- you concede
7 that the Apology Resolution does not say that the
8 Hawaiian people's claims are valid.

9 MR. SHANMUGAM: The Apology Resolution --

10 JUSTICE BREYER: Does it say that? Yes or
11 no.

12 MR. SHANMUGAM: -- does not directly speak
13 to the merits of any underlying claims.

14 JUSTICE BREYER: Okay, so if that's so, do
15 you object to a three-sentence pro curiam opinion in
16 this case where we say, to the extent that the Hawaiian
17 Supreme Court could be read to suggest that the Apology
18 Resolution either resolved or cast a cloud, legally
19 speaking, on the title of the trust land, or suggested
20 in any way that land be enjoined -- the sale be
21 enjoined, the Court made a mistake; and insofar as it is
22 resting on State law, that's up to them.

23 MR. SHANMUGAM: I -- I think so, with one
24 caveat and I don't mean to quibble --

25 JUSTICE BREYER: Do you think your draft --

1 CHIEF JUSTICE ROBERTS: You would object to
2 that?

3 MR. SHANMUGAM: I think we would acquiesce
4 in that with one small quibble, which is that I think
5 the issue being debated here is not whether the Hawaii
6 Supreme Court relied on the Apology Resolution as
7 creating some cloud on title. Precisely because we
8 conceded below that the underlying claims were
9 nonjusticiable, the Hawaii Supreme Court did not opine
10 on the merits of those underlying claims. The only
11 issue is whether the Hawaii Supreme Court believed that
12 the Apology Resolution created a fiduciary obligation to
13 essentially preserve and protect the ceded lands, until
14 those underlying --

15 JUSTICE BREYER: How could it have done
16 that? I mean, I didn't see anything in here that
17 suggests anything like that. That is to suggest that
18 the Apology Resolution created an obligation on the part
19 of the State courts to enjoin sales until everything was
20 worked out. Now I have read this Apology Resolution
21 about six times, and I certainly didn't see anything
22 like that.

23 MR. SHANMUGAM: Yes. And we agree that the
24 Apology Resolution could not be read to create some
25 affirmative duty not to sell the ceded lands.

1 JUSTICE BREYER: You agree that the Apology
2 Resolution does not say who's right about the claim?

3 MR. SHANMUGAM: No. There are various --ere
4 are various findings in the Apology Resolution that
5 could potentially be relevant to the ultimate
6 disposition of the land.

7 JUSTICE BREYER: Like what?

8 MR. SHANMUGAM: It is, after all,
9 significant that Congress --

10 JUSTICE BREYER: What?

11 MR. SHANMUGAM: Congress expressed its
12 support for the reconciliation process, Justice Breyer,
13 and that would provide an obvious boost in the Hawaii
14 legislature for the ultimate resolution of those claims;
15 and it's really for that reason, to get back to
16 Justice Ginsburg's question, and we feel it's important--

17 JUSTICE GINSBURG: If -- if you took Federal
18 law, the Apology Resolution, out of the picture, the
19 Hawaii Supreme Court could reach the result that it
20 reached and then we might have questions about its
21 consistency with the Admissions Act and the Newlands
22 Resolution; but as Justice Breyer said, if we disabuse
23 them of the notion that there is any Federal compulsion
24 here, then the rest is to be sorted out. We wouldn't
25 have to say that they have a claim under State law, just

1 not address it.

2 MR. SHANMUGAM: Yes. I think that's it.

3 JUSTICE GINSBURG: And the political process
4 question I think is really bothersome, that the Hawaii
5 Supreme Court chose to use this Federal crutch. It
6 seems a very weak reed.

7 MR. SHANMUGAM: And it's for that reason,
8 Justice Ginsburg, that we freely concede that if the
9 Hawaii Supreme Court had relied on the Apology
10 Resolution as creating some Federal duty, that would be
11 problematic. That would be not --

12 CHIEF JUSTICE ROBERTS: What about the
13 Newlands Resolution and Admission Act and the Organic
14 Law, do you acknowledge that if the Hawaii Supreme Court
15 relied on those, that also would be inappropriate?

16 MR. SHANMUGAM: Well, it's hard to say
17 because it would depend on how they relied on them, but
18 I think that the critical point --

19 CHIEF JUSTICE ROBERTS: They relied on them
20 the same way you say they relied on the Apology
21 Resolution, to give rise to a fiduciary responsibility
22 under State law.

23 MR. SHANMUGAM: Well, I don't think that a
24 Federal act could be read as creating a fiduciary duty
25 not to sell the ceded lands. So I think I would concede

1 that that would be problematic as well. But I think
2 that the question before the Court according to
3 Petitioners is whether an injunction, even if that
4 injunction were framed solely in terms of State law,
5 might itself contravene the Newlands Resolution by
6 virtue of --

7 CHIEF JUSTICE ROBERTS: So you would have no
8 -- just to carry on the opinion-drafting process, you
9 would have no objection to an opinion that said no
10 source of Federal law gave rise to a duty under State
11 law, fiduciary or otherwise; that any further
12 proceedings on remand should be based solely on State
13 law?

14 MR. SHANMUGAM: Well, I think that that is
15 right in the sense that we certainly think that the
16 Hawaii Supreme Court in the first place intended to rely
17 on a State law of fiduciary duty. And we would
18 certainly have no problem with and indeed would welcome
19 a remand that afforded the Hawaii Supreme Court an
20 opportunity to do what we think they did in the first
21 place.

22 JUSTICE SCALIA: They do nothing at all?
23 Could I get back to Justice Breyer's three-sentence pro
24 curiam, where we just say to the extent that the Supreme
25 Court of Hawaii relied upon the Apology Resolution as

1 creating any -- any property entitlement in the
2 Hawaiians, it was in error. Okay, we send it back to
3 the Hawaiian Supreme Court and the Hawaii Supreme Court
4 smiles, and doesn't do a blessed thing. Leaves --
5 leaves the injunction against any distribution of the
6 land in effect. What -- what happens then?

7 MR. SHANMUGAM: Well, I don't think they
8 would do that, Justice Scalia.

9 JUSTICE SCALIA: You don't?

10 MR. SHANMUGAM: On remand, I think that they
11 would consider the issue of whether the injunction could
12 be granted on State law, which after all was the basis
13 of our complaint from day one in this case. And there
14 is certainly language --

15 JUSTICE SCALIA: Not if we said "to the
16 extent that." I mean, if we said it is -- it's grounded
17 on the proposition that the Apology Resolution creates
18 property rights, and that's wrong; then they have to do
19 something.

20 MR. SHANMUGAM: Well, presumably --

21 JUSTICE SCALIA: To the extent that it may
22 be grounded on that, we take no position on whether it's
23 grounded on that or not --

24 MR. SHANMUGAM: Presumably, Justice
25 Scalia --

1 JUSTICE SCALIA. -- why would that require
2 any action on their part?

3 MR. SHANMUGAM: If the Court were to write
4 that opinion, I assume the last line of the opinion
5 would be to vacate and remand, and that would eliminate
6 the injunction and so the Hawaii Supreme Court would
7 have the case once again; and at that point the Hawaii
8 Supreme Court could clarify that the source of fiduciary
9 duty at issue was State law.

10 CHIEF JUSTICE ROBERTS: It's not simply a
11 question of the source of the fiduciary duty. It,
12 presumably, in the course of saying what the Apology
13 Resolution, the Newlands Act, the Organic Act, and the
14 Admission Act had to say, we may well say something to
15 the effect that, because it conveyed perfect title, it's
16 inconsistent with the cloud of that title, under a
17 fiduciary obligation created by State law or anything
18 else.

19 MR. SHANMUGAM: And if the Hawaii Supreme
20 Court on remand, Mr. Chief Justice, addressed the merits
21 of any underlying legal claims, then the Court could
22 review the decision, and at that point it might have a
23 sense of, for instance, what those legal claims actually
24 are.

25 CHIEF JUSTICE ROBERTS: But if we told them

1 that these various Federal resolutions, including the
2 Apology Resolution, conveyed title to the State in a
3 particular way that precluded the burdening of the
4 State's title on the basis of Federal law, then they
5 would have to find a basis under State law that was not
6 inconsistent with the Federal law's conveying of perfect
7 title.

8 MR. SHANMUGAM: Well, that is presumably
9 always true, but, you know, I think for purposes of the
10 current posture of the current case, Mr. Chief Justice,
11 the only Federal issue that is before the Court is the
12 question of whether the Apology Resolution was the
13 source of the underlying obligation.

14 JUSTICE GINSBURG: And do you think --

15 MR. SHANMUGAM: Petitioners did not --

16 JUSTICE GINSBURG: Do you think that that
17 resolution is distinguishable in any way from the
18 apology that the United States made to the people of
19 Japanese ancestry who were interned after World War II?
20 The United States did say -- it was -- I think it was an
21 executive order by President Ford that, in no uncertain
22 terms, stated that the United States made a dreadful
23 error and there was never reason for rounding these
24 people up and putting them in interment camps.

25 Did -- is there any difference? And that,

1 as I understand it, had no substantive effect until
2 Congress passed legislation providing for compensation.

3 MR. SHANMUGAM: The -- the Apology
4 Resolution in this case does not speak directly to the
5 merits of any underlying claims. What does do is
6 recognize that the overthrow of the Kingdom of Hawaii
7 was illegal, apologized for the Federal Government's
8 involvement in that overthrow, and, in the operative
9 provision of the resolution, expresses support for the
10 reconciliation process. And it is that expression of
11 support on which the Hawaii Supreme Court critically
12 relied here in informing its application of State law.

13 JUSTICE BREYER: If I said that -- just in
14 the opinion -- and said just what you said, and nothing
15 else about the resolution, say we don't see any other
16 way in which the resolution could have supported this,
17 would that -- is that okay with you?

18 MR. SHANMUGAM: Yes, that would be okay,
19 Justice Breyer, and I do think that it would be
20 important for this Court to make clear that to the
21 extent that the Hawaii Supreme Court, in any subsequent
22 remand, relies on the Apology Resolution only for what
23 are essentially factual findings, its acknowledgment
24 that Native Hawaiians have unrelinquished claims, which
25 is undoubtedly true as a factual matter -- I don't hear

1 petitioners to suggest otherwise -- and its recognition
2 that there is an ongoing reconciliation process, that is
3 entirely proper. And the --

4 CHIEF JUSTICE ROBERTS: But then it would
5 also have to just -- the opinion we're drafting would go
6 further, I suppose, and since we are interpreting all
7 these Federal provisions, it may not be sufficient to
8 say that it did not create this obligation and the
9 Hawaiian Supreme Court was wrong to do that, but that it
10 precluded the creation under State law of this type of
11 obligation.

12 MR. SHANMUGAM: Well, that --

13 CHIEF JUSTICE ROBERTS: And if the Hawaiian
14 Supreme Court wants to create, under State law, a
15 particular type of fiduciary obligation grounded on the
16 status of the land prior to admission, then it has to
17 run -- under the Supremacy Clause, it has to be
18 consistent with the Federal provisions.

19 MR. SHANMUGAM: But the Hawaii Supreme
20 Court, in the opinion under review, did not ground that
21 duty on any judgment about the validity of the original
22 conveyance of title --

23 CHIEF JUSTICE ROBERTS: No, I'm not saying
24 they did. That's the first question. I'm not saying
25 they grounded it on Federal law; I'm saying we would

1 have to determine whether Federal law precluded the
2 grounding of the fiduciary duty under the status of the
3 land prior to admission.

4 MR. SHANMUGAM: But I do think,
5 Mr. Chief Justice, that that is an entirely discrete
6 question from the question presented, and it's entirely
7 discrete precisely because this argument concerning the
8 Newlands Resolution could have arisen, even if the
9 injunction were, as we believe it was, unambiguously
10 based solely on State law with nary a reference to the
11 Apology Resolution.

12 JUSTICE GINSBURG: The Native Hawaiians --

13 MR. SHANMUGAM: And it is precisely --

14 JUSTICE GINSBURG: The Native Hawaiians --
15 they do get 20 percent of the proceeds, correct?

16 MR. SHANMUGAM: That's correct.

17 JUSTICE GINSBURG: And what -- that comes
18 out of Hawaii legislation?

19 MR. SHANMUGAM: Yes, that's right. It comes
20 out of -- I think it's Hawaii statute 10-13.5, and as a
21 matter of State law they get 20 percent of the revenue
22 from the ceded-lands trust, though the amount of that
23 revenue has itself been the subject of protracted and
24 unresolved litigation.

25 JUSTICE GINSBURG: The -- the \$5.5 million

1 figure, is that the subject of litigation?

2 MR. SHANMUGAM: The valuation of the
3 Leiali'i parcel was challenged in this litigation, and
4 it remains pending before the trial court.

5 But, I think, more broadly the important
6 point is that to the extent that the injunction in this
7 case was based on the lack of resolution of underlying
8 claims in the State political process, the Hawaii
9 legislature could readily resolve those claims without
10 in any way casting any doubt on the validity of the
11 original conveyance of lands to the Federal Government.

12 JUSTICE BREYER: It also, I guess, has a --
13 there -- in the Admission Resolution, it set up a trust.
14 They hold it in trust, and there are five purposes in
15 the trust, and only one of those relates to the Native
16 Hawaiians. Now, I know from the newspapers -- I don't
17 know the merits of it -- but the trust that has been set
18 up is the subject of controversy continuously.

19 So what I don't see -- and I hope we don't
20 have to get into this -- is what the relation between
21 the trust principles as enacted in the legislature is
22 and the trust principles set forth in the Admissions
23 Resolution. Is there any law going to anything like
24 that?

25 MR. SHANMUGAM: Well, now -- but let me say

1 something about that, because you think that it is
2 relevant to our interpretation of the Hawaii Supreme
3 Court's opinion. What State of Hawaii did, with article
4 12, section 4 of the Hawaii Constitution, was
5 essentially to say that, while the State does have some
6 discretion to use the assets in the section 5(f)
7 ceded-lands trust for any of the stated purposes, the
8 State owes a particularly high duty to Native Hawaiians.

9 The Hawaii Supreme Court has so construed
10 article 12, section 4, in other cases involving the
11 ceded-lands trust. And, at page 39a of its opinion in
12 this case, the Hawaii Supreme Court plainly relied on
13 that provision as a source of its fiduciary duty, the
14 fiduciary duty that we believe was at issue in this
15 case. The opinion does not cite that provision in so
16 many words, but it refers to the Hawaii Constitution in
17 a case construing that provision.

18 JUSTICE SCALIA: Is the court the trustee?

19 MR. SHANMUGAM: The State is the trustee.

20 JUSTICE SCALIA: The State is the trustee.

21 So I assume it would be up to the State officers to
22 decide to what extent the obligation to the Hawaiians,
23 among the five obligations, should be given precedence.
24 Is the Supreme Court of Hawaii directing the State
25 officers to give it precedence?

1 MR. SHANMUGAM: Well, article 12, section 4,
2 we would respectfully submit, Justice Scalia -- it does
3 place Native Hawaiians in something of a privileged
4 position vis-a-vis the other beneficiaries. And in
5 construing article 12, section 4, the Hawaii Supreme
6 Court was doing, albeit in a somewhat unusual context,
7 what courts do every day, which is essentially to
8 evaluate whether the trustee is acting consistent with
9 the trustee's obligations under the terms of the trust.

10 JUSTICE SCALIA: And saying that the trustee
11 must direct it primarily to -- to that among the five
12 ends.

13 MR. SHANMUGAM: All that the Hawaii Supreme
14 Court said was, in light of the very realistic prospect
15 that lands may be returned to Native Hawaiians as part
16 of the reconciliation process that Congress recognized
17 in the Apology Resolution, it would constitute a breach
18 of fiduciary duty to sell those lands for another trust
19 purpose, for the simple reason that once those lands are
20 gone, they are gone forever. And that is entirely
21 consistent with the general principle of trust law, that
22 a trustee in exercising its discretion --

23 JUSTICE SCALIA: And all this comes from the
24 fact that Congress made reference to and approved a
25 so-called reconciliation process?

1 MR. SHANMUGAM: Well, Congress did support
2 that --

3 JUSTICE SCALIA: So in -- in perpetuum, this
4 land can't be transferred because Congress approved the
5 this reconciliation process?

6 MR. SHANMUGAM: Only until the claims of the
7 Native Hawaiians are resolved. And what is clear --

8 JUSTICE SCALIA: I see.

9 MR. SHANMUGAM: -- regardless of the degree
10 of the reliance on the Apology Resolution, Justice
11 Scalia, is that the Hawaii legislature has substantial
12 discretion to act and to act in a way that essentially
13 vacates the terms of the injunction. So if the Hawaii
14 legislature either says, we're going to reach a
15 definitive solution of the underlying claims of the
16 Native Hawaiians by giving them land or additional
17 monetary compensation, or the Hawaii Supreme Court
18 determines that --

19 JUSTICE SCALIA: Or denying it to them?

20 MR. SHANMUGAM: Or denying it to them. Then
21 presumably, according to the terms of the injunction, it
22 would no longer have any force. So the Hawaii
23 Legislature remains empowered to act in such a way as to
24 get out from under the terms of the injunction to the
25 extent they are restrictive.

1 I would note, however, parenthetically, that
2 immediately after this litigation was commenced the
3 Hawaii Department of Land and Natural Resources imposed
4 a unilateral moratorium on the sale of ceded lands.
5 That moratorium, as an executive matter, has remained in
6 effect during the 14-year pendency of this litigation
7 even during the considerable period between the trial
8 court's ruling in favor of the Petitioners and Hawaii
9 Supreme Court's ruling in our favor.

10 So there doesn't seem to be any great
11 impetus on the part of the State to sell the ceded
12 lands. Indeed, Governor Lingle, one of the Petitioners
13 in this case, has recently and repeatedly made
14 statements to the effect that the State has no intention
15 to sell ceded lands.

16 And if that is really the State's position
17 -- and I would be very interested in my friend's,
18 General Bennett's, views on the matter, then it would
19 seem that there really is no case or controversy before
20 this Court at all. Because if the State has no
21 intention to sell ceded lands and the sale of ceded
22 lands was the instigating event for this litigation,
23 there would not necessarily be any real dispute between
24 the parties.

25 I -- I want to say just, you know, one more

1 word --

2 CHIEF JUSTICE ROBERTS: So the decision of
3 the Hawaii Supreme Court would then be vacated.

4 MR. SHANMUGAM: The petition would be
5 dismissed under Munnsingwear.

6 CHIEF JUSTICE ROBERTS: Under Munnsingwear.

7 MR. SHANMUGAM: Yes.

8 CHIEF JUSTICE ROBERTS: Well, what is --

9 MR. SHANMUGAM: If there is, in fact,
10 mootness. And if there were -- if the State -- if the
11 State had not intention to sell ceded lands, presumably
12 the underlying dispute would be moot.

13 JUSTICE SCALIA: I don't quite understand.
14 You mean -- you mean a Federal court can enjoin the sale
15 of my house, and there is nothing I can do about it
16 inasmuch as I do not have any present intention of
17 selling my house --

18 MR. SHANMUGAM: Well, if --

19 JUSTICE SCALIA: -- except to live under
20 that injunction.

21 MR. SHANMUGAM: If a Federal court enjoins
22 you from selling your house without any underlying legal
23 authority for doing so, presumably that injunction would
24 be invalid. But the critical point here --

25 JUSTICE SCALIA: You -- you say there is no

1 controversy, so I -- I cannot get its validity
2 adjudicated, right?

3 MR. SHANMUGAM: Well, here the lawsuit was
4 commenced by Respondents, because Respondents believed
5 that the State was going to imminently sell the Leiali'i
6 parcel. That was the triggering event for this
7 litigation.

8 It now appears at -- at least possible that
9 the State has no intention to sell even that parcel. If
10 that was true --

11 JUSTICE SCALIA: I don't think that -- I
12 don't think that the State has to have an immediate
13 intention to sell any particular piece of land in order
14 to object to an injunction against any sale of land by
15 the State in the future. I -- I don't think it has to
16 wait until it -- it wants to sell a particular plot.

17 MR. SHANMUGAM: Well, it just -- it merely
18 suggests that the -- that there is no longer an
19 underlying dispute, Justice Scalia. Because, again --

20 JUSTICE SCALIA: But there is. The State
21 says that I am free to sell the land, and -- and the
22 Court says, no, you are not. Isn't that a dispute?

23 MR. SHANMUGAM: Well, I -- I think that
24 there is -- you know, that there was a case or
25 controversy as this case came to the Court in the

1 Article III sense precisely because there was a dispute
2 between the parties about --

3 JUSTICE KENNEDY: Your whole case rests on a
4 cloud on the title in favor of your clients. But you --
5 you ignore the cloud on the title that has been entered
6 against the State.

7 MR. SHANMUGAM: Well, first of all, our
8 whole theory has never been that there is a cloud on the
9 title. To be sure, we have maintained at various points
10 in this litigation that Native Hawaiians do have
11 potentially valid legal claims, as well as moral and
12 political claims, to the underlying land.

13 But we have never argued that the injunction
14 in this case should be based on some assessment of the
15 existence or validity of legal claims. To the contrary,
16 we have consistently taken the position -- and this is
17 clear from our briefs in support of the Hawaii Supreme
18 Court -- that any such underlying claims would be
19 nonjusticiable.

20 And for that reason all we were seeking was
21 an injunction to protect these lands until those claims
22 could be resolved through the political process. That
23 was all we were conceding below, and the Hawaii
24 Legislature again could readily resolve those underlying
25 claims without in any way casting doubt on the validity

1 of the Newlands Resolution or any other Federal
2 enactment that purports to recognize absolute title --

3 JUSTICE GINSBURG: Can I --

4 MR. SHANMUGAM: -- to ceded lands.

5 JUSTICE GINSBURG: Can I go back to your --
6 your suggestion that this is a moot case because the
7 government -- because the -- the governor agrees with
8 your position. But wasn't a lot of money already sunk
9 into developing this area of Maui for desperately needed
10 housing?

11 MR. SHANMUGAM: A lot of money was sunk into
12 this parcel, at least according to the record below.
13 And the State would remain free at a minimum to proceed
14 with the development by simply entering into long-term
15 leases instead of the sale of these parcels of land.
16 Indeed, that appears to be some suggestion that that is
17 what the State would do in the event that this Court
18 does not vacate the injunction.

19 And so -- and, indeed, in the State of
20 Hawaii it is not uncommon for land to be transferred by
21 means of such long-term leases. So it isn't as if the
22 State would be barred from engaging in any development
23 whatsoever. The terms of the injunction simply prohibit
24 the sale of these lands.

25 And, again, the State's executive has been

1 operating under an effective moratorium on the sale of
2 ceded lands of its own volition during the pendency of
3 this litigation, which suggests at a minimum, regardless
4 of the jurisdictional implications, that there is no
5 great burden on the State from this injunction, which,
6 again, by its terms lasts only as long as the State
7 legislature acts.

8 And I would add one additional point on that
9 score, which is that to the extent that we believe that
10 the Hawaii Supreme Court's decision rested on a
11 fiduciary duty under State law, the State would, of
12 course, be free to amend its constitution in order to
13 make clear that the State's fiduciary duty to Native
14 Hawaiians does not run to the extent of requiring this
15 injunction. But this -- there has been no effort to do
16 that, and I would submit, as a political matter, it
17 would be highly unlikely.

18 JUSTICE SCALIA: Mr. Shanmugam, you -- you
19 didn't raise in -- in your opposition to the petition
20 the -- the question of mootness.

21 MR. SHANMUGAM: Well, the governor's
22 statements about the lack of an intention to sell ceded
23 lands were only made literally in the days before we
24 filed our brief. We do refer to them in a footnote in
25 our merits brief, and I think that that would be

1 sufficient to preserve the issue.

2 JUSTICE SCALIA: Well, you don't have to
3 preserve it. I mean it's -- it's an issue of Article
4 III jurisdiction, so we would have to look into it on
5 our -- on our own. But it does suggest that it is not a
6 very strong string to your bow, if I may put it that
7 way.

8 MR. SHANMUGAM: Well, I would submit that
9 even if the Court does not believe that this rises to
10 the level of jurisdictional import, that it is at least
11 significant in assessing the substantiality of the
12 burden on the State. That the State through its highest
13 representative appears to be suggesting that the State
14 has no present need to alienate any of these lands.

15 CHIEF JUSTICE ROBERTS: Mr. Shanmugam, just
16 as a matter of curiosity, do you know what percentage of
17 the Hawaiian population is comprised of Native
18 Hawaiians?

19 MR. SHANMUGAM: I think the most recent
20 figures from the 2000 census are that there are
21 something like 1.2 million people in the State of
22 Hawaii. And of that number something like 240,000
23 identify themselves as Native Hawaiians in the way that
24 that phrase is currently defined under State law.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 General Bennett, you have a minute remaining.

3 REBUTTAL ARGUMENT OF GEN. MARK J. BENNETT

4 ON BEHALF OF THE PETITIONERS

5 MR. BENNETT: Thank you, Your Honor.

6 It is undisputed that Respondents asserted a
7 property-interest claim. That any property-interest
8 claim is, in fact, inconsistent with Federal law. That
9 the State has perfect title to these lands, and that
10 there is no possible reason why this Court should not
11 disabuse the State court of the incorrect notion that
12 the State lacks perfect title.

13 On the mootness issue, the ASARCO versus
14 Kadish case makes clear that the injunction that has
15 been entered is a present injury. But, in addition, the
16 governor, who does not control all of the State lands --
17 there are a variety of independent agencies that do --
18 talked about sale but not transfer or exchange, which
19 are other things that are forbidden by this court's --
20 the State court's -- injunction. But ASARCO clearly
21 sets out that we have an injury.

22 But, again, what -- the basis of the State
23 court's decision is a property-right interest. It is
24 now undisputed by counsel that such a property-right
25 interest is absolutely inconsistent with Federal law,

1 and there is no reason why in this 14-year-old
2 litigation this Court should not make clear the simple
3 and undisputed fact that, pursuant to the Newlands
4 Resolution, the Organic Act and the Admission Act, that
5 the State has perfect title.

6 CHIEF JUSTICE ROBERTS: Thank you, general.
7 The case is submitted.

8 (Whereupon, at 11:10 a.m., the case in the
9 above-entitled matter was submitted.)

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