

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 04-15044

JOHN DOE, a minor, by his mother and next friend, Jane Doe

Plaintiff/Appellant

vs.

KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE; and
CONSTANCE H. LAU, NAINOA THOMPSON, DIANE J. PLOTTS, ROBERT
K.U. KIHUNE, and J. DOUGLAS ING, in their capacities as Trustees of the
Kamehameha Schools/Bernice Pauahi Bishop Estate,

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I
CIVIL NO. 03-00316-ACK

APPELLEES' ANSWERING BRIEF

KATHLEEN M. SULLIVAN
559 Nathan Abbott Way
Stanford, California
94305-8610
Telephone: (650) 725-9875
Facsimile: (650) 725-8456
Email:sullivan@law.stanford.edu

BAYS DEAVER LUNG
ROSE & BABA
CRYSTAL K. ROSE
BRUCE D. VOSS
Ali'i Place
1099 Alakea Street, 16th Floor
Honolulu, Hawai'i 96813
Telephone: (808) 523-9000
Facsimile: (808) 533-4184
Email:crose@legalthawaii.com

CADES SCHUTTE LLP
DAVID SCHULMEISTER
KELLY G. LaPORTE
1000 Bishop Street, 12th Floor
Honolulu, Hawai'i
96813-4216
Telephone: (808) 521-9200
Facsimile: (808) 521-9210
Email:dschulmeister@cades.com

Attorneys for Defendants/Appellees

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APPELLEES' ANSWERING BRIEF

STATEMENT OF THE ISSUE

Whether the district court correctly held that 42 U.S.C. § 1981 (“§ 1981”) permits a preference for Native Hawaiians in admission to an entirely private school whose educational programs remedy the effects of historic wrongs against the Native Hawaiian people.

STATEMENT OF THE CASE

At issue in this case is plaintiff’s extraordinary claim that an indisputably remedial use of race by a purely private school violates the Nation’s first civil rights statute – 42 U.S.C. § 1981. This claim would effectively nullify the mission of a universally applauded educational institution that has helped to reverse the near-destruction of a dispossessed indigenous people. It would also be inconsistent with virtually all our jurisprudence that fundamentally distinguishes between private and governmental actors. No court has ever used § 1981 to invalidate such a *remedial* race preference in a purely *private* educational setting. Plaintiff has presented no justification for such a radical departure from existing law.

— The case arises from a challenge to the admissions policy of the Kamehameha Schools (“Kamehameha” or “the Schools”), a purely private educational institution that receives no federal financial assistance. Founded in 1887 by the will of Princess Bernice Pauahi Bishop (“Pauahi”), the great-granddaughter of Hawaiian King Kamehameha I, the Schools aim to reverse through education the devastating effects of Western contact upon the Native Hawaiian population. Since its inception, Kamehameha has given a preference in admissions to Native Hawaiian children.

In June 2003, the plaintiff John Doe, who is not Native Hawaiian, filed this action, alleging that he was denied admission to Kamehameha on account of race in violation of § 1981, and seeking declaratory and injunctive relief. In September 2003, the plaintiff moved for partial summary judgment and the Schools moved for summary judgment. In support of their motion, the Schools filed detailed supporting declarations.¹ The plaintiff did not dispute any of the Schools’ factual submissions, and the district court treated them as conceded by the plaintiff. *See* Excerpts of Record (“ER”) at 101.

¹ Defendants’ concise statement of material facts and supporting declarations are contained in the Supplemental Excerpts of Record (“SER”) and will be cited by reference to the appropriate SER page and the particular document or declaration being cited (*e.g.*, Ing Decl. ¶ 60).

— In November 2003, following oral argument, the district court ruled from the bench that the Schools’ admissions policy (the “Policy” or “Admissions Policy”) was valid under § 1981, and denied the plaintiff’s motion and granted the Schools’ motion for summary judgment. In December 2003, the court issued a 93-page Order elaborating its findings and carefully setting forth its reasons for rejecting the plaintiff’s claims. The district court first rejected the plaintiff’s argument that Kamehameha’s Admissions Policy should be subject to “strict scrutiny,” holding that this standard, which applies to claims against state actors under the Equal Protection Clause and to recipients of federal funds under Title VI of the Civil Rights Act of 1964, does not apply to a § 1981 claim against a purely private party that receives no federal financial assistance. ER at 151-57. The district court held instead that such a § 1981 claim is subject to the far more deferential standard of scrutiny that applies to claims brought under Title VII of the Civil Rights Act of 1964, namely, that race preferences are permitted if they serve a legitimate remedial purpose and are reasonably related to that purpose. *Id.* at 105-06.

The district court then ruled that Kamehameha’s Policy amply satisfies this standard, based on the uncontested facts established in the extensive record. The court found that the Admissions Policy “serves a legitimate remedial purpose by addressing the socioeconomic and educational disadvantages facing Native Hawaiians, producing Native Hawaiian leadership for community involvement,

— and revitalizing Native Hawaiian culture, thereby remedying current manifest imbalances resulting from the influx of western civilization.” ER at 181-82. The court found further that the Policy is reasonably related to that remedial purpose because “at present, the need to provide educational opportunities for Native Hawaiian children far outstrips Kamehameha Schools’ ability to provide those opportunities,” ER at 177, and because “the plan would only last for so long as it took Kamehameha Schools to fulfill its responsibility in attaining the goal of educating Native Hawaiians to overcome . . . manifest . . . socioeconomic and educational imbalances,” ER at 179.

The district court noted that “these manifest imbalances and disadvantages identified by Kamehameha Schools are identical to those recognized by Congress” when it enacted the Native Hawaiian Education Act “and the multitude of other laws for the exclusive benefit of Native Hawaiians.” ER at 168. The court likewise noted that, as recently as 2001, a congressional committee had expressly urged the Kamehameha Schools by name ““to redouble its efforts to educate native Hawaiian children,”” which the court read as evidencing “Congress’s awareness that Kamehameha Schools’ mission coincides with” federal remedial legislation on behalf of Native Hawaiians. ER at 170. Accordingly, the court ruled that the Schools’ Native Hawaiian preference could not be found to violate § 1981.

STATEMENT OF FACTS

As the district court noted, the extensive factual showing made by the Schools below was undisputed by the plaintiff. Accordingly, all the evidence set forth in the declarations submitted by defendants must be taken as true for purposes of this appeal.

A. Historical Context

As the district court emphasized, the Kamehameha Admissions Policy “does not exist in a vacuum, but rather comes intertwined with a set of exceptionally unique historical circumstances.” ER at 108. “Native Hawaiians are a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago,” who traveled immense distances from Polynesia in double-hulled canoes to arrive in Hawai‘i between 0-500 A.D. 2002 Native Hawaiian Education Act, 20 U.S.C. § 7512(1) (Supp. I 2002) (the “2002 NHEA,” appended hereto at A-3) . They established a highly structured and successful civilization, governed by a system of religious law that operated under a communal land tenure system. ER at 13. Following Western contact, the Native Hawaiian population was ravaged by disease brought to the islands by Westerners, and declined from over 300,000 in 1778 to only 22,000 by 1919. *Id.* at 110, 114-15. Weakened by disease and unable to resist the growing Western influence upon Native Hawaiians, the Hawaiian Monarchy was unlawfully overthrown in 1893

with the aid of the United States, and the United States annexed Hawai‘i in 1898. *Id.* at 111-14.

A Western-style school system was imposed upon Native Hawaiians “in an effort to westernize Native Hawaiian society,” eliminating Native Hawaiians’ customary methods of learning and curtailing the transmission of Native Hawaiian culture. *Id.* at 115; SER at 237-38 (Benham Decl. ¶ 39). In 1896, even the use of the Hawaiian language was banned as a method of instruction in the schools, a ban that was lifted only in 1986. ER at 115. A dual-track school system marginalized Native Hawaiians by preparing them only for vocational and low-paying jobs, while Westerners were given academic training and prepared for professional occupations. *Id.*; SER at 233-38, 243 (Benham Decl. ¶¶ 31-39, 46), & at 154, 161-63, 191-93 (Makanani Decl. ¶¶ 19, 34-36, 96-100).

B. Congressional Apology and Remedial Legislation

In numerous enactments, Congress has expressly admitted the United States’ complicity in the unlawful overthrow of the Hawaiian monarchy. ER at 113. Congress has also formally apologized for the overthrow and has recognized that the resulting economic and social changes in Hawai‘i “have been devastating to the population and to the health and well-being of the Hawaiian people.” Pub. L. No. 103-150, 107 Stat. 1510, 1512 (1993) (“1993 Apology Resolution”).²

² Relevant portions of the Apology Resolution and other selected statutes conferring benefits expressly upon Native Hawaiians are set forth in the statutory addendum (“SA”) to this brief.

Congress has also enacted numerous laws seeking to remedy the continuing effects of past wrongs visited on Native Hawaiians, including through a host of express and often exclusive preferences for Native Hawaiians in educational programs. For example, the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130, authorized “supplemental programs to meet the unique educational needs of Native Hawaiians” and federal grants to Native Hawaiian Educational Organizations to help increase educational attainment among Native Hawaiians. 20 U.S.C. §§ 4902-03, 4905 (1988).

Congress again acted to remedy the educational disparities faced by Native Hawaiians in 1994, when it enacted the Native Hawaiian Education Act (NHEA). *See* Pub. L. No. 103-382 § 101, 108 Stat. 3794 (1994), codified at 20 U.S.C. § 7901 *et seq.* Recognizing that Native Hawaiians continue to have disproportionately low levels of educational attainment, *id.* § 7902(17), the NHEA established educational programs reserved expressly for Native Hawaiian students, including financial assistance for pursuing higher education, grants to gifted students in elementary and secondary schools, and funding for special education programs, *id.* §§ 7903-7910.

In 2002, Congress reenacted the NHEA, authorizing a variety of preferential educational programs for Native Hawaiians in recognition that “Native Hawaiian

students continue to begin their school experience lagging behind other students in terms of readiness factors such as vocabulary test scores,” “continue to be underrepresented in institutions of higher education and among adults who have completed four or more years of college,” and “are more likely to be retained in grade level and to be excessively absent in secondary school.” 2002 NHEA § 7512 (16). The educational programs funded by the NHEA are targeted *exclusively* at Native Hawaiians. *See* 20 U.S.C. § 7515(3) (Supp. I 2002).

During Congress’s consideration of the 2002 NHEA, the Report of the House Committee on Education and the Workforce expressly acknowledged and approved the work of Kamehameha Schools in redressing Native Hawaiian educational imbalances:

Unlike other indigenous people, Native Hawaiians have a trust, established by the last Hawaiian Princess, which exists solely to educate native Hawaiian children. . . . *The Committee urges the Trust to redouble its efforts to educate Native Hawaiian children.*

ER at 73, *quoting* H.R. Rep. No. 107-63(I), at 732 (2001) (emphasis added). The district court, while acknowledging that such a committee report is not law, found that “this declaration evidences Congress’s awareness” of Kamehameha’s program and recognition that “Kamehameha Schools’ mission coincides with the goals of the NHEA.” *Id.*

C. Kamehameha Schools

Kamehameha Schools was founded in 1887 under a “charitable testamentary trust established by the last direct descendant of Hawaii’s King Kamehameha I, Princess Bernice Pauahi Bishop, who left her property in trust for a school dedicated to the education and upbringing of Native Hawaiians.” *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). Based on her own experience in receiving an education from missionaries, Pauahi believed “in the saving value of education for her people.” ER at 128. Because her own marriage to Charles Bishop was childless, “her Hawaiian love and desire for children was fulfilled through embracing the children of her people as her own.” *Id.* Pauahi believed that education was the only way for her people to overcome the devastating effects of Westernization and to succeed in the new Western environment thrust upon them. Therefore, she set aside the bulk of her vast estate in trust for the education of Native Hawaiian children. *Id.* at 128-33. Her hope was that the Kamehameha Schools would become a source of education and well-being for the Native Hawaiian people. *Id.*

Since its inception, Kamehameha has given a preference in admission to its campus programs to children of Native Hawaiian ancestry. Kamehameha has done so, consistent with its founding mission, in order to help improve the capability and well-being of the Native Hawaiian people. “[T]he intent of Princess Pauahi . . .

was that preference be given to Native Hawaiians for admittance to the Kamehameha Schools in order that through proper education they might be competitive with newcomers in maintaining their socioeconomic status[and] culture, and participate in the governance of their communities.” *Id.* at 132.

Kamehameha is an entirely “private entity; it receives no . . . federal funding.” *Id.* at 100. It operates three K-12 campus schools on the Islands of O‘ahu, Hawai‘i, and Maui. In addition, Kamehameha offers a variety of other educational programs, including prenatal care, pre-schools, summer school enrichment programs, post-secondary educational programs, and community outreach programs.

The campus programs have a total enrollment of 4,856 students, with roughly 738 students newly enrolled each year. Because there are approximately 70,000 Native Hawaiian school-age children in Hawai‘i, Native Hawaiian applicants greatly outnumber the available openings, so it is rare that a non-Native Hawaiian is admitted to the campus programs. *See* SER at 490 (Makuakane-Drechsel Decl. ¶ 6). In Kamehameha’s other programs, however, where there are a greater number of available openings, non-Native Hawaiian children are admitted with greater frequency. *Id.* at 493-94 (Makuakane-Drechsel Decl. ¶ 9).

The education offered by the Schools to children of Hawaiian ancestry is a testamentary gift from Princess Pauahi to the children of her people. The Schools

subsidize the vast majority of the costs associated with educating each of the students in the campus programs. SER at 33-34 (Ing Decl. ¶ 24). Tuition, only \$1,784 annually, covers only a small fraction of the approximately \$20,000 it costs per year to educate a child in the campus programs, and 65% of the students receive financial aid relieving them from paying even that amount. *Id.*

D. Kamehameha's Remediation of Ongoing Educational Imbalances

It is undisputed in this case that Native Hawaiians today are among Hawai'i's most disadvantaged residents under virtually every measure of well-being. The poverty rate among Native Hawaiian families is more than twice that of non-Native Hawaiian families, with 14.7% of Native Hawaiian households receiving public assistance, compared to 5.9% of non-Native Hawaiian households. Kanaiaupuni Decl. ¶ 67.

Educational statistics tell a similar story. Nearly 79% of predominantly Native Hawaiian public schools fail the State's minimal educational standards, compared with only 17.4% of other public schools. ER at 116-17, *citing* Kanaiaupuni Decl. ¶¶ 12, 50-55, 115, 130-37 (SER at 297-98, 324-28, 366, 376-81). Native Hawaiian students score the lowest among major ethnic groups on statewide standardized tests, approximately 11% below the State Department of Education ("DOE") average on reading and roughly 14% below the DOE average in math. SER at 376 & 379 (Kanaiaupuni Decl. ¶¶ 130, 134). Native Hawaiian

children are also less likely to graduate from high school on time and are more likely to drop out of school than their non-Native Hawaiian counterparts; only 68.4% of Native Hawaiians in the public school system satisfy graduation requirements compared with 76.6% system-wide. *Id.* at 405 (Kanaiaupuni Decl. ¶ 175).

Native Hawaiians are less likely to go on to higher education and well-paying jobs. In 1990, only 9.1% of Native Hawaiians 25 or older in Hawai‘i had obtained a bachelor’s degree, in contrast with 30.3% of persons of Chinese descent, 25.2% of persons of Japanese descent, and 30.2% of Caucasians. *Id.* at 467-68 (Kanaiaupuni Decl. ¶ 273). Only 22.8% of Native Hawaiians are professionals or managers, compared with 34.2% of non-Native Hawaiians, while 12.1% of Native Hawaiians are low-paid laborers, compared with 8.2% of non-Native Hawaiians. *Id.* at 317-18 (Kanaiaupuni Decl. ¶ 40).

In its campus programs, Kamehameha seeks to remedy the educational disadvantages of Native Hawaiians by increasing their test scores, receipt of college and advanced degrees, and attainment of professional and leadership positions, and by restoring living traditions of Native Hawaiian culture, language and identity. ER at 133-34, *quoting* Ing Decl. ¶ 60 (SER at 55-56).

Kamehameha has had considerable success in reaching its objectives, with Kamehameha seniors “consistently outperform[ing] both national norms and state

averages on the SAT I verbal and math tests,” *id.* at 134, *quoting* Kanaiaupuni Decl. ¶ 170 (SER at 402), and an overwhelming majority of Kamehameha graduates attending a four-year college, *id.* at 135, *citing* Kanaiaupuni Decl. ¶ 176 (SER at 405), with many becoming leaders in the State of Hawai‘i and the Native Hawaiian community thereafter, *id.*, *relying upon* Ing Decl. ¶¶ 66-68 (SER at 59-61).

Despite these successes, with only 738 admissions to its campus programs per year, Kamehameha is still able to educate only a small percentage of the 70,000 Native Hawaiian school-age children in Hawai‘i. *Id.* at 135-36, *relying upon* Makuakane-Drechsel Decl. ¶¶ 3, 6 (SER at 488-90). Accordingly, after a comprehensive review of the admissions preference for Native Hawaiians in 2002, the Board of Trustees determined that the preference remains necessary for the accomplishment of the Schools’ mission. The trustees urged, however, that “Kamehameha review the policy on a periodic basis for consistency with the Schools’ overall mission and objectives.” SER at 65-66 (Ing Decl. ¶¶ 75-76).

Based on this uncontested factual record, the district court concluded that Kamehameha’s Policy serves a legitimate remedial purpose, is reasonably related to that purpose, and therefore is valid under 42 U.S.C. § 1981.

SUMMARY OF ARGUMENT

Plaintiff concedes the devastating history of Native Hawaiians attributable to the conquest of Hawai‘i by Westerners and its annexation by the United States. He concedes that the effect of that conquest was to jeopardize not only the culture and society of Native Hawaiians but also their well-being. He concedes that these effects continue to the present. And he concedes that the Kamehameha Schools provide a uniquely successful approach to remedying these egregious problems.

The plaintiff insists nonetheless that the Schools’ preference for Native Hawaiians in admissions is forbidden by § 1981. He argues that all race preferences must fall by the same sword, no matter how remedial, how effective, and how private. But this is not and has never been the law.

To the contrary, not all race-based contracts are prohibited by § 1981, even when entered into by public actors. *See Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (noting that “[n]ot every decision influenced by race is equally objectionable”). In cases involving purely *private* entities like the Kamehameha Schools, even greater leeway is allowed for race preferences that remedy demonstrated effects of past discrimination.

The appropriate standard of review here is not strict scrutiny, as the plaintiff incorrectly asserts, for that standard is confined to review of race preferences by government or those private entities that, unlike Kamehameha, benefit from federal

financial assistance. The correct standard instead, as the district court rightly found, requires only that a private school's preferential admissions policy have a reasonable relationship to a legitimate remedial purpose. As the district court likewise correctly found, that standard is amply satisfied by the uncontested record below.

This is especially so because Kamehameha's remedial efforts in educating Native Hawaiians are materially identical to similar remedial preferences repeatedly enacted by Congress. Indeed, a congressional committee singled out Kamehameha's preferential programs for explicit praise as recently as 2001. It is inconceivable that that same Congress that has formally apologized for the past wrongs done to the Native Hawaiian people, and created numerous remedial programs targeted exclusively at Native Hawaiians under federal law, would view § 1981 as barring the very same remedial practices by a private school that is so effectively promoting the federal policy of reconciliation with Native Hawaiians and assisting in salvaging their heritage and livelihood from near destruction.

ARGUMENT

Plaintiff maintains that Kamehameha's preference for Native Hawaiians in its admissions decisions is illegal under § 1981 because it allegedly does not meet the strict scrutiny that applies to public institutions challenged under the Equal

Protection Clause. He thus would have this Court impose constitutional limitations upon a purely private actor that receives no federal funds—a novel contention with grave and sweeping implications for a wide range of other private institutions. Applying to all private actors the strict limitations on *governmental* action imposed by the Constitution would obliterate the long-held understanding that wholly private actors have more flexibility than the government to take creative steps to redress racial imbalances.

Fortunately, no such broad consequences need be considered here, for the district court's decision rejecting the plaintiff's argument is a narrow one that correctly applies settled legal principles to a policy arising from unique historical circumstances. The decision below correctly held that a § 1981 challenge to a *private remedial* race preference is subject only to the deferential Title VII standard of review, not the strict scrutiny that applies in equal protection or Title VI challenges. The decision below also correctly interpreted § 1981 so as to reconcile that statute with the numerous other enactments of Congress that establish remedial educational preferences for Native Hawaiians similar to those provided by Kamehameha Schools.

I. PRIVATE RACE PREFERENCES ARE PERMISSIBLE UNDER § 1981 IF THEY ARE REASONABLY RELATED TO A LEGITIMATE REMEDIAL PURPOSE

A. Strict Scrutiny Applies to Race Preferences by Government Actors and Recipients of Federal Funds, Not Those of Purely Private Entities

Plaintiff seeks to dramatically rewrite § 1981 law by having this Court apply strict scrutiny to a remedial race preference in admissions by a purely private school that receives no federal financial assistance. There is no precedent or justification for this novel proposition. No court has ever applied strict scrutiny in such a setting. To the contrary, as detailed below in Part I.B, this Court, like all courts of appeals adjudicating similar claims, has applied a deferential reasonable relationship test to remedial race preferences by private actors, both under Title VII of the Civil Rights Act of 1964 and under § 1981.

The reason for this longstanding more permissive approach to *private* remedial race preferences is straightforward: Constitutional restraints on state action are greater than statutory restraints on private conduct because governmental power has a unique capacity to harm and its abuses can inflict far greater injury than purely private action. As this Court recently reiterated, “The United States Constitution protects individual rights only from *government* action, not from *private* action. Only when the *government* is responsible for the plaintiff’s complaints are individual constitutional rights implicated.” *Single*

“*Moms, Inc. v. Montana Power Co.*, 331 F.3d 743, 746-47 (9th Cir. 2003); *see also* *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (“private action is immune from the restrictions of the Fourteenth Amendment,” and there is an “essential dichotomy . . . between deprivation by the State . . . and private conduct . . .”). This distinction “preserv[es] an area of individual freedom by limiting the reach of federal law.” *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001). Failure to appreciate this distinction “ignores the fundamental difference between volitional private behavior and the exercise of coercion by the State.” *Johnson v. Transportation Agency*, 480 U.S. 616, 630 (1987).

Because this case involves no constitutional claim, no government conduct and no federal funds, the allegations are “in the area of private discrimination, to which the ordinance of the Constitution does not directly extend.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989). In this setting, the court’s “role is limited to interpreting what Congress may do and has done.” *Id.* Thus, the constitutional standard of strict scrutiny may be applied to § 1981 claims against private parties *if and only if* Congress so intended.

The plaintiff fails to offer any evidence of such congressional intent. Neither the text nor the history of § 1981, either in its original enactment or its reenactment in 1991, reveals any congressional intent to subject § 1981 claims

— against race preferences by private parties to strict scrutiny. Lacking any such relevant legislative history, the plaintiff seeks to analogize congressional intent regarding § 1981 to congressional intent regarding Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, which prohibits race discrimination by entities that receive federal financial assistance. Appellant’s Br. at 16 & 23.

But this attempted analogy to Title VI is wholly misguided. The reason that Title VI claims are subject to the constitutional standard of strict scrutiny is that they involve the use of federal money. As the Court made clear in *Regents of the University of California v. Bakke*, Title VI was intentionally designed by Congress to ensure that federal funds are spent in accordance with the Constitution, and thus reflects the “incorporation of a constitutional standard into Title VI.” 438 U.S. 265, 286 (1978) (opinion of Powell, J.); *see id.* at 285-87.

Strict scrutiny of Title VI claims against private actors thus ensures that the *government* does not participate in race discrimination through public funding. As the Supreme Court has explained, “Title VI was an exercise of federal power ‘over a matter in which the Federal Government was already directly involved,’ since Congress ‘was legislating to assure federal funds would not be used in an improper manner.’” *Johnson*, 480 U.S. at 628 n.6 (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979)). Applying strict scrutiny in Title VI cases

thus implements clear congressional intent to prevent government from doing indirectly with taxpayers' money what it may not do directly.

In contrast, Title VII of the Civil Rights Act, unlike Title VI, “was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments.” *Weber*, 443 U.S. at 206 n.6. Just one year after *Bakke* read Congress to have intended strict scrutiny of Title VI claims, the Supreme Court in *Weber* exhaustively canvassed the legislative history of Title VII and came to a very different conclusion: “Title VII and Title VI . . . cannot be read *in pari materia*.” *Id.* *Weber* accordingly upheld a private remedial affirmative action plan upon deferential scrutiny, and the circuit courts, interpreting Title VII in accordance with *Weber*, have consistently read it to allow private employers wide leeway to engage in race-based remedies. *See Johnson*, 480 U.S. at 630 n.8 (noting Congress’s “desire to preserve a relatively large domain for voluntary employer action”). As detailed in Part I.B, *infra*, the courts of appeals have applied the same deferential standard to race preferences by private parties under § 1981.

Lacking any evidence of congressional intent to apply strict scrutiny to remedial private race preferences under § 1981, the plaintiff seeks support for his novel strict scrutiny argument in sentence fragments from several Supreme Court decisions not directly on point. These efforts are unavailing.

First, the plaintiff cites two brief comments in last Term's Supreme Court decisions concerning the admissions policies of the University of Michigan and its law school, where the Court ruled the same way on the equal protection and § 1981 claims in each case. *See* Appellant's Br. at 12, citing *Grutter v. Bollinger*, 539 U.S. at 343-44 (upholding race preferences in public law school admissions under both equal protection and § 1981), and *Gratz v. Bollinger*, 539 U.S. 244, 275-76 & n.23 (2003) (invalidating more rigid race preferences in public university's undergraduate admissions under both equal protection and § 1981). The plaintiff suggests that these isolated statements overturn *sub silentio* decades of settled law and somehow impose strict scrutiny on race preferences by purely private actors.

This reading is untenable. Both *Grutter* and *Gratz* involved public, not private institutions. The Court's opinions focused almost entirely on the constitutional equal protection issues, and addressed the plaintiffs' Title VI and § 1981 claims only in passing at the end of each opinion. As the Supreme Court has repeatedly admonished, isolated statements in its opinions should not be read out of context, and conclusory statements in a case not directly applicable should not be read as overruling prior rulings more directly on point. *See United States v. Sharpe*, 470 U.S. 675, 694 n.6 (1985) (Marshall, J., concurring in judgment) ("Legal reasoning hardly consists of finding isolated sentences in

— wholly different contexts and using them to overrule *sub silentio* prior holdings.”); see also *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 98-99 (1998); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (the “Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions”); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974).

In any event, whatever the standard of scrutiny the Court applied under § 1981 to race preferences by *public* actors in the Michigan cases, that standard has no bearing on a race preference by a *private* entity such as the one at issue here. It is hardly surprising that in the Michigan cases, the Court held a race preference deemed valid under the Equal Protection Clause also valid under § 1981, and a race preference deemed invalid under the Equal Protection Clause also invalid under § 1981. In the context of a joint constitutional and statutory challenge to a *public* university’s practices, there would have been little point in holding the § 1981 claim to a lower standard of review, since the application of strict scrutiny under the constitutional claim would have rendered such a ruling superfluous. The Michigan decisions, however, say nothing about the applicable standard in a § 1981 action against a *private* defendant. That issue was not presented in *Grutter* or *Gratz*, and the Court did not purport to address it.

— Looking even further afield to support his claim that strict scrutiny applies to private race preferences under § 1981, the plaintiff appeals to the Court’s statement in *Johnson v. Transportation Agency* that “the same Title VII principles [are] to be applied to governmental and private employers alike.” Appellant’s Br. at 19 (citing 480 U.S. at 628 n.6). But plaintiff would turn *Johnson*, a decision *upholding* a gender preference in public employment, on its head. He neglects to mention that the Court made that statement in the course of emphasizing that a public employer challenged under Title VII is subject to the same *lesser* standard applicable to private employers, *not* to the stricter constitutional standard unsuccessfully advocated by Justice Scalia in dissent, *see* 480 U.S. at 669 (Scalia, J., dissenting). *Johnson* cannot possibly be read, as plaintiff suggests, as a precedent for *raising* the standard of scrutiny of private race preferences to the constitutional standard applicable to public actors. The Court has never retreated from the deferential Title VII standard of review even for race preferences by public actors, much less private race preferences. And as the next section makes clear, that same deferential standard has been uniformly applied to claims against race preferences by private entities under § 1981.

B. Section 1981 Suits Against Purely Private Parties Are Governed by the Title VII Standard, Which Permits Race Preferences That Are Reasonably Related to a Legitimate Remedial Purpose

Rather than strict scrutiny, the district court below correctly applied the deferential standard of review applicable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* That standard allows an employer to rebut a prima facie showing that it has taken race into account by “articulat[ing] a nondiscriminatory rationale for its decision,” such as “an affirmative action plan.” *Johnson*, 480 U.S. at 626; *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002) (once plaintiff establishes a prima facie case, “the burden . . . shifts to the [defendant] to articulate some legitimate, nondiscriminatory reason for the challenged action”). Such a justification need not advance a compelling interest by the least restrictive means.

That same lesser Title VII standard applies to private race preferences under § 1981. As the Supreme Court explained in *Patterson v. McLean Credit Union*, Title VII is an “analogous area[] of the civil rights law” to § 1981 and this same “scheme of proof . . . should apply to claims of racial discrimination under § 1981.” 491 U.S. at 186. *Patterson* described the standard for § 1981 claims as the same previously articulated by the Court in the Title VII context

—namely, that a defendant can rebut a prima facie showing of discrimination by showing “a legitimate nondiscriminatory reason” such as an affirmative action plan. *Id.* at 187. The courts of appeals have reached the same conclusion, consistently applying the Title VII standard to actions against race preferences by private parties brought under § 1981.

As explained in *Setser v. Novack Inv. Co.*, 657 F.2d 962, 965-68 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981), courts have repeatedly subjected race preferences to the same deferential standard of review under both § 1981 and Title VII in order to preserve the congressional policy of encouraging voluntary affirmative action approved in *Weber*: “To open the door for such plans under title VII and close it under section 1981 would make little sense” because it “would bar a remedy Congress left within the discretion of private employers when it passed title VII.” *Id.* at 967. Accordingly, *Setser* stated, “in fashioning a substantive body of law under section 1981 the courts should . . . look to the principles of law created under title VII for direction.” *Id.* (quoting *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976)).

This Court, “agree[ing] with the Eighth Circuit’s analysis in *Setser*,” has adopted that court’s description of the standard applicable in both Title VII and § 1981 cases — namely, that an employer may defend a racial preference plan

11 by demonstrating that there is a racial imbalance and that its plan “is reasonably related to the plan’s remedial purpose” of correcting the imbalance. *Johnson v. Transportation Agency*, 770 F.2d 752, 755 n.2 (9th Cir. 1984) (quoting *Setser*, 657 F.2d at 968), *aff’d*, 480 U.S. 616 (1987); *see also, e.g., Manatt v. Bank of Am.*, 339 F.3d 792, 797 (9th Cir. 2003) (“those legal principles guiding a court in a Title VII dispute apply with equal force in a § 1981 action”); *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1233 n.7 (9th Cir. 1984) (“A plaintiff must meet the same standards in proving a § 1981 claim that he must meet in establishing a disparate treatment claim under Title VII . . .”).³

Plaintiff contends (Appellant’s Br. at 20-21) that the district court misread this settled body of law, and asserts that the courts have applied only the “burden shifting” aspect of the Title VII standard to § 1981 cases, while not rejecting the application of strict scrutiny in such cases. This assertion, however, is logically untenable and is belied by the language of the cases themselves. It is not

³ Although many § 1981 cases involve claims against employers, the courts have also applied the Title VII standard to a wide variety of § 1981 cases outside the employer context as well. *See, e.g., Lizardo v. Denny’s Inc.*, 270 F.3d 94, 103 (2d Cir. 2001) (denial of restaurant service); *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253 (4th Cir. 2001) (refusal to rent motel room); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001) (discrimination against retail customers); *Hampton v. Dillard Dep’t Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001) (department store refusal to give customer a free sample), *cert. denied*, 534 U.S. 1131 (2002); *Brown v. American Honda Motor Co.*, 939 F.2d 946 (11th Cir. 1991) (refusal to award an automobile dealership), *cert. denied*, 502 U.S. 1058 (1992).

meaningful to talk about the “burden shifting” aspect of the Title VII standard in isolation, divorced from the nature of the substantive burden that defendants must carry. The “scheme of proof” developed under Title VII consists of specific evidentiary showings that are made in a particular order; plaintiff’s suggestion that § 1981 cases have adopted only the order, but not the substance, of the evidentiary burdens is unsupported.

Section 1981 cases, in importing the Title VII standard, make clear that they are referring to a substantive standard and not merely to some procedural “burden shifting” approach to proof. *See Frost v. Chrysler Motor Corp.*, 826 F. Supp. 1290, 1295 n.34 (W.D. Okla. 1993) (noting that “[p]ublic employers’ plans, if challenged under Section 1983, are reviewed under the more demanding ‘strict scrutiny’ analysis,” but that when “the Court is concerned only with Title VII and Section 1981,” the “Supreme Court’s decision in *Johnson* . . . which was based solely upon a Title VII analysis and not upon the more demanding equal protection analysis, is . . . controlling”); *see also, e.g., DeHorney v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 879 F.2d 459, 467 (9th Cir. 1989) (“In a section 1981 case,” establishing a prima facie case shifts the burden “to the defendant to articulate some legitimate, nondiscriminatory reasons for the discharge.”); *Stones v. Los Angeles Community College Dist.*, 796 F.2d 270, 274 n.4 (9th Cir. 1986) (employer meets its burden by introducing “evidence indicating a legitimate,

nondiscriminatory basis for the rejection”).⁴ Indeed, if the rule were otherwise, the Title VII jurisprudence governing employer conduct would be largely meaningless because a plaintiff could easily circumvent the Title VII standard by suing the employer under § 1981. *See Setser*, 657 F.2d at 967.

Accordingly, as the district court correctly ruled below, review of a § 1981 claim against a private race preference is properly conducted under the Title VII standard, which asks first whether there is a legitimate justification for the defendant’s use of race, and then whether the use of race is reasonably related to that justification. *See Setser*, 657 F.2d at 965-68 (cited with approval in *Johnson v. Transportation Agency*, 770 F.2d at 755 n.2); *Johnson*, 770 F.2d at 758-59. The plaintiff bears the burden of demonstrating that a race preference is impermissible. *See Johnson*, 480 U.S. at 626.

⁴ Decisions from other courts of appeals are equally clear in “equating the affirmative action standards of title VII with those of section 1981.” *Setser*, 657 F.2d at 967. *See, e.g., Schurr v. Resorts Int’l Hotel, Inc.*, 196 F.3d 486, 498-99 (3d Cir. 1999) (“While a valid affirmative action plan serves as a defense to an action under section 1981, the standard for evaluating the validity of a plan is identical to the standard developed in Title VII cases.”); *Brown v. American Honda Motor Co.*, 939 F.2d at 949 (“the test for intentional discrimination in suits under § 1981 is the same as the formulation used in Title VII discriminatory treatment causes”; the defendant must come forward with “evidence demonstrating legitimate, nondiscriminatory reasons for its conduct”).

II. KAMEHAMEHA SCHOOLS' ADMISSIONS POLICY IS REASONABLY RELATED TO A LEGITIMATE REMEDIAL PURPOSE

A. Kamehameha's Policy Serves a Legitimate Remedial Purpose

Applying the proper Title VII standard below, the district court, after carefully reviewing the extensive factual record, correctly determined that Kamehameha's Policy has a legitimate remedial purpose. The district court concluded that the Policy "has a legitimate justification and serves a legitimate remedial purpose by addressing the socioeconomic and educational disadvantages facing Native Hawaiians, producing Native Hawaiian leadership for community involvement, and revitalizing Native Hawaiian culture, thereby remedying current manifest imbalances resulting from the influx of western civilization." ER at 181-82; *see also id.* at 165-67, 171-75.

This conclusion is not in dispute, as Kamehameha demonstrated below with abundant evidence that its Policy remedies current imbalances stemming from historical wrongs committed against the Native Hawaiian people. Native Hawaiians are over-represented in negative socioeconomic statistics such as poverty, homelessness, child abuse and neglect, and criminal activity, SER at 297-300 (Kanaiaupuni Decl. ¶¶ 12-14); ER at 116-17, are more likely to live in economically disadvantaged neighborhoods and attend low-quality schools, SER at 365-68 (Kanaiaupuni Decl. ¶ 114-18), and because of low levels of educational

attainment are severely under-represented in professional and managerial positions and over-represented in low-paying service and labor occupations, *id.* at 301, 316-18 (Kanaiaupuni Decl. ¶¶ 16, 37-40).

Kamehameha Schools remedies these continuing imbalances by increasing the levels of Native Hawaiians' educational attainment and post-graduation economic success. Kamehameha succeeds in increasing "the achievement test scores of Native Hawaiian students," and "the number of Native Hawaiian students receiving college and advanced degrees," SER at 55-56 (Ing Decl. ¶ 60), and at the same time "embraces Native Hawaiian culture, reconnects the children with the values of respect and sharing that guided their ancestors, and builds their pride and senses of dignity," *id.* at 62-63 (Ing Decl. ¶ 71). As stated by Dr. Kanaiaupuni:

In short, in a world where little is fair, Native Hawaiian children begin with the odds for success stacked against them. By providing Native Hawaiian students a strong educational foundation from pre-school through post-secondary scholarships, Kamehameha offers a bridge to social and economic success that breaks the cycle of marginalization and offers greater hope for future generations of Native Hawaiian children.

SER at 303-04 (Kanaiaupuni Dec. ¶ 19).

Indeed, Kamehameha has achieved remarkable success, as demonstrated by the comparatively high achievement test scores and high rates of scholastic and vocational achievement of its graduates relative to the Native Hawaiian population generally. *Id.* at 402-03, 405-06, 459-69, 475 (Kanaiaupuni Decl. ¶¶ 170-71, 176-

77, 260-75, 282). Kamehameha also has helped to perpetuate and preserve Native Hawaiian culture and identity, as demonstrated by its alumni's significant involvement in Native Hawaiian organizations. *Id.* at 442-44, 445-46, 451-57 (*Id.* Kanaiaupuni Decl. ¶¶ 235-37, 239-40, 249-56).

In sum, Kamehameha plainly redresses the underrepresentation of Native Hawaiians in Hawai'i's civic, business, and philanthropic leadership, benefiting not only Native Hawaiians but the larger Hawaiian society as well. *See* ER at 173; *see also* SER at 526-27 (Lingle Decl. ¶¶ 8-13) (Kamehameha Schools are important to the development of a diverse leadership and to the well-being of the Native Hawaiian community and society-at-large); at 570-71 (Fukino Decl. ¶ 13) (without Kamehameha, she might not have been able to attend college, but with Kamehameha's help she went on to receive a medical degree and now serves as the Director of the Hawai'i State Health Department); at 560-62 (Gonsalves Decl. ¶¶ 1-7) (Kamehameha played important role in his development and earning a Ph.D., which enabled him to help develop a genetically engineered papaya that saved Hawai'i's papaya industry); at 577-79 (Akamu Decl. ¶¶ 1-6) (discussing the opportunities provided to him by Kamehameha, and his current position at GEAR UP Hawaii, an organization that seeks to encourage low-income Hawaiians to stay in school and succeed academically); at 538 (Dods Decl. ¶ 7) (Kamehameha is important for providing a diverse group of business leaders).

Unable to refute these factual findings, the plaintiff seeks to escape their force by suggesting that Kamehameha's Policy, although concededly aimed at the remediation the court describes, does not fit a finite list of justifications for race preferences previously approved by the Supreme Court: namely, attaining student body diversity, redressing past discrimination by the institution itself, or redressing racial imbalances within the institution itself. Appellant's Br. at 24 & 31. But no court has ever held the legitimate justifications for race preferences to be so limited.

To the contrary, the Supreme Court in *Grutter* emphasized that earlier cases had not ruled out purposes other than diversity or compensation that might justify race-conscious measures even by public actors. *See* 539 U.S. at 327-30. Different circumstances might provide different legitimate justifications for race preferences in educational admissions. This Court has held, for example, that the State of California has a legitimate justification for using race in admission to a public elementary school for the purpose of studying the needs of urban children and improving the quality of education in urban schools. *Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 531 U.S. 877 (2000).

The plaintiff likewise errs in attacking the Policy for seeking to remedy imbalances external to Kamehameha rather than internal to Kamehameha's student body itself. The district court properly rejected such a rigid application of the

Title VII standard, observing that “such a narrow lens forces the inquiry to ignore the unique historical context which surrounds Kamehameha Schools, a private *educational* institution.” ER at 162. The Title VII standard is a flexible one that should not “be blindly followed in all aspects of section 1981 cases.” *Gay v. Waiters’ & Dairy Lunchmen’s Union*, 694 F.2d 531, 539 (9th Cir. 1982); *see also Johnson*, 770 F.2d at 757 (“[t]he *Weber* Court did not establish a rigid formula for testing the validity of an affirmative action plan”). The employment cases illustrate one kind of legitimate justification for a race preference. But there “is no bright line distinction between permissible and impermissible affirmative action plans. A flexible evaluation of the particular method adopted is appropriate.” *Setser*, 657 F.2d at 969-70.

Viewed under such a properly flexible standard, the employment and education contexts are different, and give rise to different justifications for race preferences. Employers are exposed to liability under Title VII if there are racial imbalances in their workforce. Not surprisingly, therefore, the focus of the employment cases and affirmative action plans adopted by employers to avoid such liability is internal, with a focus on correcting discrepancies between the employer’s workforce and the available labor force.

Kamehameha, by contrast, is an educational institution that operates to redress the effects of historical wrongs done to the Native Hawaiian people by

preparing students for society at large, and so its mission necessarily has an external focus. Educational institutions, by definition, train students for the workforce and roles within the larger society. *See Grutter*, 539 U.S. at 330-33; *Hunter*, 190 F.3d at 1063-67; *see also Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 371-72 (D. Mass. 2003) (noting that “an important mission of K-12 schools, in addition to fostering academic achievement, is the cultivation of social skills that enable students to function as citizens in a complex and diverse world”). Educational institutions therefore necessarily look externally to the larger society in assessing the need for race-conscious programs.

As the Supreme Court recently emphasized, educational institutions have not just a legitimate but a compelling interest in producing graduates who go on to comprise a leadership group in the larger society, across business, military, and civic affairs, whose diversity gives it “legitimacy in the eyes of the citizenry.” *Grutter*, 539 U.S. at 332. The Court recognized that educational institutions, in preparing students for experiences *external* to the educational environment, may look beyond their own internal circumstances in fashioning race preferences. The district court’s decision thus comports with the flexibility and deference long given to educational institutions in achieving their external mission. *See, e.g., Grutter*, 539 U.S. at 328-30; *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1535 (7th Cir. 1996).

Plaintiff's assertion that Kamehameha has an illegitimate purpose of remedying "societal discrimination" is likewise misguided. Appellant's Br. at 28. To begin with, Kamehameha is not remedying generalized societal discrimination, but rather is remedying the continuing effects of a very specific harm in which government was plainly implicated: the actions of the United States in bringing about the overthrow of the Hawaiian Monarchy and the dispossession of the Native Hawaiian people. Congress has apologized for the United States's role in the historical wrongs committed, has recognized that Native Hawaiians continue to suffer as a result of these wrongs, has legislated to help redress these wrongs, and has recognized the important role that Kamehameha plays in helping the Native Hawaiian people overcome the continuing effects of these wrongs.⁵

Moreover, rectification of societal imbalances is itself a wholly legitimate remedial goal for private actors to pursue. Even *public* actors may employ some race preferences to correct discrimination within their jurisdiction that has been practiced by parties other than themselves. *See, e.g., City of Richmond v. J.A.*

⁵ Plaintiff's reliance on a dissenting opinion in *Rice v. Cayetano*, 528 U.S. 495 (2000) for the proposition that this Court should ignore the unique history of Hawai'i in evaluating the legitimacy of Kamehameha's Policy under § 1981, *see* Appellant's Br. at 34-35, is meritless. In *Rice*, the Supreme Court applied a virtually *per se* rule against racial classifications in voting to a state actor bound by the Fifteenth Amendment. The question here concerns only the scope of the race-conscious remedial conduct permitted by Congress under § 1981, to which historical context, including congressional policy, is clearly relevant.

Croson Co., 488 U.S. 469, 509 (1989) (noting that a city may correct “a significant statistical disparity” in minority representation in procurement and may employ race preferences “to dismantle the closed business system” and “break down patterns of deliberate exclusion,” and thus limiting earlier statements in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986), suggesting that correction of societal discrimination by public actors is always illegitimate). But even if rectifying societal discrimination were an insufficient justification for race preferences by public actors, who are subject to strict scrutiny, *private* actors suffer no such constraints under Title VII and § 1981. Indeed, private employers are always to some extent rectifying societal discrimination when they adopt voluntary affirmative action plans, which need not be linked tightly to any sins of past discrimination of their own. Accordingly, Kamehameha’s remedial purpose is entirely legitimate.

B. Kamehameha’s Policy is Reasonably Related to Its Legitimate Remedial Purpose

The appropriate legal standard for the required fit between the means and ends here is whether Kamehameha’s Policy “unreasonably exceeds its remedial purpose.” *Setser*, 657 F.2d at 968-69. The district court correctly found that the Policy does not do so, reasoning that so long as the critical needs of Native Hawaiians far exceed the available supply of student openings at Kamehameha, it

is appropriate and necessary to serve Native Hawaiians first and foremost. ER at 175-79.

The record contains extensive uncontested evidence to support this conclusion. Plaintiff does not dispute that there is a deep and continuing need within the Native Hawaiian community for Kamehameha's programs. Nor does plaintiff dispute that Kamehameha is able to reach only a small number of those in need of and qualified for its programs. Plaintiff does not dispute that Kamehameha's laudable achievements for Native Hawaiians would be diminished if its Admissions Policy did not have a preference for admitting members of the disadvantaged population that it seeks to assist. If Kamehameha's population became only 25% Native Hawaiian, for example, mirroring the general population in Hawai'i, its mission of improving the capability of Native Hawaiians and helping to preserve Native Hawaiians as an indigenous people would be greatly impaired. Given the enormous need within the Native Hawaiian community and the lack of other available services, Kamehameha's Policy of focusing first on the needs of Native Hawaiians is reasonable, as the district court found.

At the same time, the Policy is neither perpetual nor an "absolute bar" to the admission of non-Hawaiians, as plaintiff argues. Appellant's Br. at 35 & 38. When spaces exceed the number of qualified Native Hawaiian applicants, Kamehameha opens its places to others. A non-Hawaiian student was admitted to

Kamehameha's campus program in 2003, and non-Hawaiian students have been admitted to Kamehameha's other programs such as preschools, Enrichment Programs, and summer school programs. SER at 491 & 493-94 (Makuakane-Drechsel Decl. ¶¶ 7 & 9). Moreover, the trustees regularly review the need for the Policy in light of continuing socioeconomic imbalances. As the district court found, the Policy will last only as long as necessary for Kamehameha to redress the serious imbalances facing Native Hawaiians. ER at 175-79. Thus, the Policy's scope is not fixed but is structured to change with the increasing capacity of the Schools' programs and the rising well-being of the Native Hawaiian community.

The plaintiff suggests that an exclusive preference can never be reasonable, but he fails to offer any precedent supporting that proposition. Other courts have upheld even racially exclusive programs as long as such programs are supported by a legitimate justification and are reasonably related to that justification. In *Hollander v. Sears, Roebuck & Co.*, 450 F. Supp. 496 (D. Conn. 1978), for example, the court upheld under § 1981 a private employer's training program that was limited exclusively to minority students. The company sought through the training program to "stimulat[e] the interest of [minority students]" with the hope of "employ[ing] a greater number of minority members in management positions" 450 F. Supp. at 502.

Having conceded all of the material facts underlying the legitimacy and reasonableness of Kamehameha's Policy, the plaintiff has not "overcome his burden of proving the plan is invalid." ER at 182. This Court should thus affirm the district court's finding that the Policy "serves a legitimate remedial purpose" and "reasonably relates to this purpose." *See id.* at 106, 181-82.

III. UPHOLDING KAMEHAMEHA'S POLICY AGAINST § 1981 CHALLENGE HARMONIZES § 1981 WITH CONGRESSIONAL LEGISLATION GIVING REMEDIAL PREFERENCES TO NATIVE HAWAIIANS

As the district court discussed thoroughly below, ER at 117-27, 167-70, 187-90, Congress has on numerous occasions recognized the wrongs committed against Native Hawaiians and the deprivations that Native Hawaiians continue to suffer as a result. Congress has thus made findings of need within the Native Hawaiian community, including findings of educational disparities that call for remedial assistance such as that offered by Kamehameha. Congress has authorized grants to Native Hawaiian Educational Organizations in an effort to increase educational attainment among Native Hawaiians. *See* 20 U.S.C. § 4905(b) (1988). Congress again recognized the educational needs facing Native Hawaiians in 1994

and 2002, when it enacted and then re-enacted the Native Hawaiian Education Act. *See* 20 U.S.C. § 7901 *et seq.*; 20 U.S.C. § 7511 *et seq.* (SA at A-3).⁶

The severe educational imbalances facing Native Hawaiians that Kamehameha's Policy seeks to redress are identical to these imbalances identified by Congress. ER at 167-68. As recently as 2002, Congress found that (i) "Native Hawaiian students continue to begin their school experience lagging behind other students in terms of readiness factors such as vocabulary test scores;" (ii) "Native Hawaiian students continue to score below national norms on standardized educational achievement tests at all grade levels;" (iii) "both public and private schools continue to show a pattern of lower percentages of Native Hawaiian students in the uppermost achievement levels and in gifted and talented

⁶ Numerous other federal statutes also target express remedial preferences to Native Hawaiians in, for example, health care, housing, and employment. *See* ER at 186 n.29, *citing* LaPorte Decl. ¶ 3 (SER 586-87). For example, the Hawaiian Homelands Homeownership Act of 2000 provides governmental loan guarantees "to Native Hawaiian families who otherwise could not acquire housing financing." Pub. L. No. 106-569, §§ 511-14, 114 Stat. 2944, 2966-67, 2990 (2000) (SA at A-12). Congress has also enacted legislation authorizing employment preferences for Native Hawaiians. *See, e.g.*, 1995 Department of Defense Appropriations Act, Pub. L. No. 103-335, 108 Stat. 2599, 2652 (1994) ("In entering into contracts with private entities to carry out environmental restoration and remediation of Kaho'olawe Island . . . the Secretary of the Navy shall . . . give especial preference to businesses owned by Native Hawaiians.") (SA at A-10). The Native Hawaiian Health Care Act of 1988, 42 U.S.C. §§ 11701-11714 (2000) (SA at A-7), provides benefits directly and exclusively both to Native Hawaiians and to organizations that serve Native Hawaiians, and authorizes creation of a comprehensive health plan for Native Hawaiians.

programs;” (iv) “Native Hawaiians continue to be underrepresented in institutions of higher education and among adults who have completed four or more years of college;” and (v) “Native Hawaiians continue to be disproportionately represented in many negative social and physical statistics indicative of special educational needs,” such as higher rates of retention in grade and absenteeism, the highest rates of drug and alcohol use in Hawai‘i and disproportionate levels of victimization by child abuse and neglect. 20 U.S.C. § 7512(16)(B)-(D), (F)-(G), *quoted in ER* at 123-25.

It is inconceivable that the Congress that enacted all these remedial preferences for Native Hawaiians⁷ could have contemplated that remedial programs such as Kamehameha’s would be prohibited by § 1981. Section 1981 was itself initially remedial legislation aimed at improving the commercial welfare

⁷ It is not appropriate to speculate whether any of these congressional preferences for Native Hawaiians might someday be challenged as violating the equal protection component of the Fifth Amendment Due Process Clause. “Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established.” *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883); *see also Reno v. Condon*, 528 U.S. 141, 148 (2000). Presuming the constitutionality of the NHEA and similar congressional enactments is in accord with the settled principle that federal courts “ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.” *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)). In this case, where there is no federal party and plaintiff seeks no federal benefit, the question of the constitutionality of federal Native Hawaiian legislation is plainly not presented and should not be gratuitously reached. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003).

of the newly freed slaves. *See* Cong. Globe, 39th Cong., 1st Sess. 1758 (1866). Indeed, Congress simultaneously enacted both § 1981 and the Freedmen's Bureau Bill, the primary purpose of which was to provide remedial assistance to Blacks. *See id.* at 632. Moreover, Congress specifically reenacted and amended § 1981 in 1991 in response to the Supreme Court's decision in *Patterson*, contemporaneous with enactment of legislative benefits targeted exclusively at Native Hawaiians. Congress cannot have believed that its own enactment of programs for Native Hawaiians subjected federal officials to liability under § 1981. Nor did it give any indication that such benefits for Native Hawaiians might be inconsistent with § 1981 when conferred by private entities such as Kamehameha.

Because Congress is presumed to act with knowledge of, and consistent with, its other enactments, it must be presumed that Congress believed such benefits and the roles played by private Native Hawaiian organizations in serving Native Hawaiians to be permissible under § 1981. *See* ER at 188; *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

Contrary to plaintiff's assertion (Appellant's Br. at 37), the district court did not implicitly rule that the NHEA repealed § 1981 by implication. *See* ER at 182-89. Nor did Kamehameha ever make such an argument. Instead, Kamehameha has argued, and the district court correctly ruled, that the application

of § 1981 to Kamehameha's Policy should be "considered in light of and in harmony with Congress's determination that the United States wrongfully participated in the overthrow of the Hawaiian Monarchy, and with its proclamation of a policy of reconciliation with the Native Hawaiian people and the numerous laws enacted for their exclusive benefit." ER at 188-89. "[I]t would indeed make little sense for Congress to open the door with remedial programs that preference Native Hawaiians, yet have it simultaneously shut by § 1981 with respect to Kamehameha's similar remedial plan." *Id.* at 189.

Because Congress's enactments should be read in harmony, it is appropriate to look to other congressional legislation when interpreting a statute to ensure that Congress's intent is effectuated. For example, the Supreme Court examined subsequent statutes in deciding that the Food and Drug Administration lacks authority to regulate tobacco products, declaring that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Similarly, in *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court looked to contemporaneous congressional policy in determining the scope of § 1981. In that case, the Court decided that the exclusion of Blacks from private schools violated § 1981 in part because such exclusion was *inconsistent* with

contemporaneous congressional enactments such as the Civil Rights Act of 1964. *See* 427 U.S. at 174-75 (noting a recent and “clear[] indication of congressional agreement with the view that § 1981 reaches private acts of racial discrimination”); *id.* at 191 (Stevens, J., concurring) (looking to the “policy of the Nation as formulated by the Congress in recent years”).

In this case, however, the same principle dictates the conclusion that the Admissions Policy is permissible. Here, as in *Runyon*, recent congressional actions – especially the enactment and reenactment of the Native Hawaiian Education Act both after *Runyon* and after the passage of the 1991 amendments to § 1981 – shed light on the proper construction of § 1981. That contemporaneous legislation here reinforces the legitimacy of the challenged Admissions Policy. In reenacting the NHEA, Congress specifically recognized the important need for educational programs that preferentially benefit Native Hawaiians. That congressional policy cannot possibly be squared with plaintiff’s insistence that any policy that singles out Native Hawaiians for benefits is per se invalid under § 1981.

Moreover, in the NHEA Congress authorized federal contracting preferences for Native Hawaiians in the delivery of these programs – conduct that would itself violate § 1981 under the interpretation proposed by plaintiff. The legislative history of the 2002 NHEA indicates that Congress envisioned that private parties,

including Kamehameha, would provide these same sorts of educational programs in an effort to redress the imbalances that Congress found to exist in the Native Hawaiian community. *See* H.R. Rep. No. 107-63(I), at 732.

Such congressional policies favoring remediation for Native Hawaiians are highly relevant in determining whether Kamehameha's Policy violates § 1981, as Congress's intent is essential to guiding interpretation of how § 1981 applies to a particular set of facts. It would be most incongruous to hold that Kamehameha's Admissions Policy favoring Native Hawaiians violates § 1981 when Congress itself has adopted statutes that expressly and specifically benefit Native Hawaiians, and when a committee of Congress has explicitly approved Kamehameha's efforts to remedy Native Hawaiian educational disadvantages. *See e.g., Weber*, 443 U.S. at 201-07; *Setser*, 657 F.2d at 966-67.

Plaintiff erroneously contends that Congress's intent, as reflected in the NHEA and similar statutes, is irrelevant to the legality of Kamehameha's Policy. Appellant's Br. at 37-38. He wrongly relies upon *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, 154 F.3d 1117 (9th Cir. 1998), in support of this proposition. Appellant's Br. at 39. In fact, *Dawavendewa* proves the trial court's consideration of the NHEA quite correct. *Dawavendewa* was a Title VII case brought by a Hopi Indian who claimed discrimination on the basis of tribal affiliation, because the defendant had an

employment preference for members of the Navajo tribe. The defendant argued that its conduct was insulated by the “Indian Preferences exemption” to Title VII in 42 U.S.C. § 2000e-2(i). Contrary to plaintiff’s reading of the case, this Court recognized the potential relevance of this statute; it simply interpreted the statute on the merits to authorize a preference for Indians generally but not for “discrimination based on tribal affiliation.” 154 F.3d at 1121 (“[s]uch a preference is not consistent with the objectives of the Indian Preferences exemption”).

Here, by contrast, the NHEA most certainly does approve preferences for Native Hawaiians, and Kamehameha’s Policy is entirely “consistent with the objectives of” the NHEA; in fact, a congressional committee specifically praised Kamehameha’s activities and urged it “to redouble its efforts.” H.R. Rep. No. 107-63(I), at 732. In evaluating the validity of the affirmative action plan at issue in *Weber*, the Court noted that “[t]he purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy” 443 U.S. at 208. Here too, the purposes of Kamehameha’s Policy are fully consistent with the purposes of § 1981.

IV. ALTHOUGH STRICT SCRUTINY IS NOT APPLICABLE HERE, KAMEHAMEHA’S POLICY ALSO SATISFIES THAT STANDARD

As demonstrated above, the strict scrutiny standard is not applicable here. Nevertheless, even if that standard were applied, Kamehameha’s Policy would satisfy it because Kamehameha’s use of race is supported by a compelling

governmental interest and is narrowly tailored to the accomplishment of that compelling interest. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). As in the Title VII context, an evaluation of Kamehameha's Policy under the strict scrutiny standard must be contextual. "Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced . . . for the use of race in that particular context." *Grutter*, 539 U.S. at 327.

Applying such a contextual analysis here, the Court must take into consideration the history and formation of Kamehameha, Congress's recognition of the need to improve educational opportunities for Native Hawaiians, and Kamehameha's special role in helping to provide such opportunities. Indeed, Congress itself determined in the NHEA that there is a compelling interest in addressing the imbalances that currently exist among Native Hawaiians through educational programs, such as Kamehameha's, that are targeted specifically at Native Hawaiians.

In addition to serving this compelling interest identified by Congress, Kamehameha also serves the compelling interest of increasing diversity in leadership positions in the broader civic, business, and philanthropic communities. By working to propel Native Hawaiians into positions of governmental, economic,

and civic leadership in a way that accelerates redress of underrepresentation of Native Hawaiians in these categories, *see* SER at 59-61 (Ing Decl. ¶¶ 66-68), the Admissions Policy helps to produce a more racially diverse leadership, which the Court noted in *Grutter* is a compelling reason for the use of race by educational institutions, 539 U.S. at 330-32. Moreover, Kamehameha's Policy serves the compelling public interest of preserving an indigenous culture and identity that was almost lost when the language, art, music, craft, and ceremonies of the Native Hawaiian people were nearly destroyed by the imposition of Western culture. *See* SER at 435, 441 (Kanaiaupuni Decl. ¶¶ 222, 232); 107 Stat. 1512-13.

Kamehameha's Admissions Policy is narrowly tailored to meet these compelling interests – remedying past wrongs against Native Hawaiians by improving educational attainment among Native Hawaiians, producing more Native Hawaiian leaders, and preserving the indigenous Hawaiian culture and the Native Hawaiians as an indigenous people – because the students who will receive the benefit of the Kamehameha education are those whose improvement advances the achievement of these compelling interests. As demonstrated by the substantial and uncontested record evidence, the need within the Native Hawaiian community for Kamehameha's campus programs currently far exceeds the space in those programs. By “virtually every measure of well-being, Native Hawaiians are among the most disadvantaged ethnic groups in the state of Hawai‘i.” SER

at 116, *quoting* Kanaiaupuni Decl. ¶ 12 (SER at 297-98) and *citing* U.S. Dep't of Justice & U.S. Dep't of the Interior, *From Mauka to Makai: The River of Justice Must Flow Freely* 1-2 (Oct. 23, 2000) (SER at 277-78). Despite this immense need, Kamehameha is able to reach only seven percent of Native Hawaiian children enrolled in K-12 under its Policy because of the limited number of spots available in its campus program. Without the Policy, Kamehameha would no longer be a Native Hawaiian institution and could no longer achieve its compelling remedial objectives.

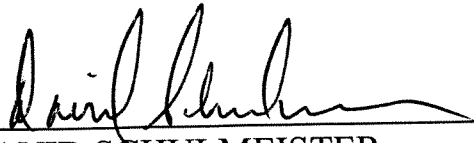
Moreover, because plaintiff's claim is entirely statutory, the strict scrutiny inquiry must ask whether Congress would consider a policy such as the Schools' to be narrowly tailored. Given that Congress authorized, through the NHEA and other statutes, the implementation of private programs using absolute preferences for Native Hawaiians, it must have viewed such programs as appropriately tailored to remedying disadvantages confronting Native Hawaiians. Thus, even if Congress had intended the private race-conscious remedial contracting decisions of private actors to be subject to strict scrutiny under § 1981, Congress must also have considered this standard to be satisfied when private actors such as Kamehameha employ the very same preferences for Native Hawaiians authorized by Congress.

CONCLUSION

The judgment of the district court should be affirmed.

DATED: May 17, 2004.

CADES SCHUTTE LLP



DAVID SCHULMEISTER
KELLY G. LaPORTE

BAYS DEAVER LUNG
ROSE & BABA

CRYSTAL K. ROSE
BRUCE D. VOSS

KATHLEEN M. SULLIVAN

Attorneys for Defendants/Appellants
Constance H. Lau, Nainoa Thompson,
Diane J. Plotts, Robert K.U. Kihune, and J.
Douglas Ing, in their capacities as Trustees
of the Estate of Bernice Pauahi Bishop dba
Kamehameha Schools

STATUTORY ADDENDUM

1. 1993 Apology Resolution A-1
2. 2002 Native Hawaiian Education Act A-3
3. 1998 Native Hawaiian Health Care Act A-7
4. 1995 Department of Defense Appropriations Act..... A-10
5. 1994 Safe and Drug-Free Schools and Communities Act..... A-11
6. 2000 Hawaiian Homelands Homeownership Act A-12

1993 Apology Resolution**PUBLIC LAW 103-150 (NOV. 23, 1993), 107 STAT. 1510**

Joint Resolution

To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.

Whereas, prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion;

Whereas a unified monarchical government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii;

Whereas, from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887;

* * *

Whereas, on January 14, 1893, John L. Stevens (hereafter referred to in this Resolution as the "United States Minister"), the United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii;

* * *

Whereas, without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms;

Whereas, on February 1, 1893, the United States Minister raised the American flag and proclaimed Hawaii to be a protectorate of the United States;

* * *

Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum:

* * *

Whereas the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land;

Whereas the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people;

* * *

Whereas it is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ACKNOWLEDGMENT AND APOLOGY.

The Congress--

(1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;

(2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;

(3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;

(4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and

(5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.

* * *

Native Hawaiian Education Act
PUBLIC LAW 107-110 (JAN. 8, 2002), 15 STAT. 1425

* * *

“SEC. 7202. FINDINGS.

“Congress finds the following:

* * *

“(15) In recognition of the educational needs of Native Hawaiians, in 1988, Congress enacted title IV of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (102 Stat. 130) to authorize and develop supplemental educational programs to address the unique conditions of Native Hawaiians.

“(16) In 1993, the Kamehameha Schools Bishop Estate released a 10-year update of findings of the Native Hawaiian Educational Assessment Project, which found that despite the successes of the programs established under title IV of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, many of the same educational needs still existed for Native Hawaiians. Subsequent reports by the Kamehameha Schools Bishop Estate and other organizations have generally confirmed those findings. For example--

“(A) educational risk factors continue to start even before birth for many Native Hawaiian children, including—

“(i) late or no prenatal care;

“(ii) high rates of births by Native Hawaiian women who are unmarried; and

“(iii) high rates of births to teenage parents;

“(B) Native Hawaiian students continue to begin their school experience lagging behind other students in terms of readiness factors such as vocabulary test scores;

“(C) Native Hawaiian students continue to score below national norms on standardized education achievement tests at all grade levels;

“(D) both public and private schools continue to show a pattern of lower percentages of Native Hawaiian students in the uppermost achievement levels and in gifted and talented programs;

“(E) Native Hawaiian students continue to be over-represented among students qualifying for special education programs provided to students with learning disabilities, mild mental retardation, emotional impairment, and other such disabilities;

“(F) Native Hawaiians continue to be underrepresented in institutions of higher education and among adults who have completed four or more years of college;

“(G) Native Hawaiians continue to be disproportionately represented in many negative social and physical statistics indicative of special educational needs, as demonstrated by the fact that--

“(i) Native Hawaiian students are more likely to be retained in grade level and to be excessively absent in secondary school;

“(ii) Native Hawaiian students have the highest rates of drug and alcohol use in the State of Hawaii; and

“(iii) Native Hawaiian children continue to be disproportionately victimized by child abuse and neglect;

* * *

“(19) Following the overthrow of the Kingdom of Hawaii in 1893, Hawaiian medium schools were banned. After annexation, throughout the territorial and statehood period of Hawaii, and until 1986, use of the Hawaiian language as an instructional medium in education in public schools was declared unlawful. The declaration caused incalculable harm to a culture that placed a very high value on the power of language, as exemplified in the traditional saying: ‘I ka ‘ōlelō no ke ola; I ka ‘ōlelo nō ka make. In the language rests life; In the language rests death.’

“(20) Despite the consequences of over 100 years of non-indigenous influence, the Native Hawaiian people are determined to preserve, develop, and transmit to future generations their ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions.

* * *

“SEC. 7203. PURPOSES.

“The purposes of this part are to--

“(1) authorize and develop innovative educational programs to assist Native Hawaiians;

“(2) provide direction and guidance to appropriate Federal, State, and local agencies to focus resources, including resources made available under this part, on Native Hawaiian education, and to provide periodic assessment and data collection;

“(3) supplement and expand programs and authorities in the area of education to further the purposes of this title; and

“(4) encourage the maximum participation of Native Hawaiians in planning and management of Native Hawaiian education programs.

* * *

“SEC. 7205. PROGRAM AUTHORIZED.

“(a) GENERAL AUTHORITY.--

“(1) GRANTS AND CONTRACTS.--The Secretary is authorized to make direct grants to, or enter into contracts with--

“(A) Native Hawaiian educational organizations;

“(B) Native Hawaiian community-based organizations;

“(C) public and private nonprofit organizations, agencies, and institutions with experience in developing or operating Native Hawaiian programs or programs of instruction in the Native Hawaiian language; and

“(D) consortia of the organizations, agencies, and institutions described in subparagraphs (A) through (C), to carry out programs that meet the purposes of this part.

* * *

“(3) AUTHORIZED ACTIVITIES.--Activities provided through programs carried out under this part may include--

“(A) the development and maintenance of a statewide Native Hawaiian early education and care system to provide a continuum of services for Native Hawaiian children from the prenatal period of the children through age 5;

“(B) the operation of family-based education centers that provide such services as--

“(i) programs for Native Hawaiian parents and their infants from the prenatal period of the infants through age 3;

“(ii) preschool programs for Native Hawaiians; and

“(iii) research on, and development and assessment of, family-based, early childhood, and preschool programs for Native Hawaiians;

“(C) activities that enhance beginning reading and literacy in either the Hawaiian or the English language among Native Hawaiian students in kindergarten through third grade and assistance in addressing the distinct features of combined English and Hawaiian literacy for Hawaiian speakers in fifth and sixth grade;

“(D) activities to meet the special needs of Native Hawaiian students with disabilities,

* * *

“(E) activities that address the special needs of Native Hawaiian students who are gifted and talented,

* * *

“(F) the development of academic and vocational curricula to address the needs of Native Hawaiian children and adults, including curriculum materials in the Hawaiian language and mathematics and science curricula that incorporate Native Hawaiian tradition and culture;

“(G) professional development activities for educators, including--

“(i) the development of programs to prepare prospective teachers to address the unique needs of Native Hawaiian students within the context of Native Hawaiian culture, language, and traditions;

“(ii) in-service programs to improve the ability of teachers who teach in schools with concentrations of Native Hawaiian students to meet those students' unique needs; and

“(iii) the recruitment and preparation of Native Hawaiians, and other individuals who live in communities with a high concentration of Native Hawaiians, to become teachers;

“(H) the operation of community-based learning centers that address the needs of Native Hawaiian families and communities through the coordination of public and private programs and services,

* * *

“(I) activities, including program co-location, to enable Native Hawaiians to enter and complete programs of post-secondary education,

* * *

“(J) research and data collection activities to determine the educational status and needs of Native Hawaiian children and adults;

* * *

“(L) other activities, consistent with the purposes of this part, to meet the educational needs of Native Hawaiian children and adults.

* * *

“SEC. 7207. DEFINITIONS.

“(1) NATIVE HAWAIIAN.--The term ‘Native Hawaiian’ means any individual who is--

“(A) a citizen of the United States; and

“(B) a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii, as evidenced by--

* * *

“(3) NATIVE HAWAIIAN EDUCATIONAL ORGANIZATION.--The term ‘Native Hawaiian educational organization’ means a private nonprofit organization that--

“(A) serves the interests of Native Hawaiians;

* * *

“(5) NATIVE HAWAIIAN ORGANIZATION.--The term ‘Native Hawaiian organization’ means a private nonprofit organization that--

“(A) serves the interests of Native Hawaiians;

* * *

Native Hawaiian Health Care Act of 1988
PUBLIC LAW 100-690 (NOV. 18, 1988), 102 STAT. 4181

SEC. 2303. COMPREHENSIVE HEALTH CARE MASTER PLAN FOR NATIVE HAWAIIANS.

(a) DEVELOPMENT.--The Secretary may make a grant to, or enter into contract with, Papa Ola Lokahi for the purpose of developing a Native Hawaiian comprehensive health care master plan designed to promote comprehensive health promotion and disease prevention services and to maintain and improve the health status of Native Hawaiians. ***

SEC. 2304. NATIVE HAWAIIAN HEALTH CENTERS.

(a) COMPREHENSIVE HEALTH PROMOTION, DISEASE PREVENTION, AND PRIMARY HEALTH SERVICES.-- (1)(A) The Secretary, in consultation with Papa Ola Lokahi, may make grants to, or enter into contracts with, any qualified entity for the purpose of providing comprehensive health promotion and disease prevention services as well as primary health services to Native Hawaiians.

(B) *** the Secretary shall give preference to Native Hawaiian health centers and Native Hawaiian organizations, and, to the extent feasible, health promotion and disease prevention services shall be performed through Native Hawaiian health centers.

(b) QUALIFIED ENTITY.--An entity is a qualified entity for purposes of subsection (a)(1) of the entity is-

- (1) a Native Hawaiian health center;
- (2) a Native Hawaiian organization; or
- (3) a public or nonprofit private health provider.

(c) SERVICES TO BE PROVIDED.--(1) Each recipient of funds under subsection (a)(1) shall provide the following services:

- (A) Outreach services to inform Native Hawaiians of the availability of health services.
- (B) Education in health promotion and disease prevention of the Native Hawaiian population by (wherever possible) Native Hawaiian health care practitioners, community outreach workers, counselors and cultural educators.
- (C) Services of physicians, physicians' assistants, or nurse practitioners.
- (D) Immunizations
- (E) Prevention and control of diabetes, high blood pressure, and otitis media.

(F) Pregnancy and infant care.

(G) Improvement of nutrition.

(2) In addition to the mandatory services under paragraph (1), the following services may be provided pursuant to subsection (a)(1):

(A) Identification, treatment, control, and reduction of the incidence of preventable illnesses and conditions endemic to Native Hawaiians.

(B) Collection of data related to the prevention of diseases and illnesses among Native Hawaiians.

* * *

(3) The health care services referred to in paragraphs (1) and (2) which are provided under grants or contracts under subsection (a)(1) may be provided by traditional Native Hawaiian healers.

* * *

SEC. 2305. ADMINISTRATIVE GRANT FOR PAPA OLA LOKAHI.

(a) IN GENERAL.--In addition to any other grant or contract under this subtitle, the Secretary may make grants to, or enter into contracts with, Papa Ola Lokahi for--

(1) coordination, implementation, and updating (as appropriate) of the comprehensive health care master plan developed pursuant to section 2303;

(2) training for the persons described in section 2304(c)(1)(B); or

(3) identification of and research into the diseases that are most prevalent among Native Hawaiians, including behavioral, biomedical, epidemiological, and health services.

* * *

SEC. 2308. DEFINITIONS.

For purposes of this subtitle:

* * *

(3) NATIVE HAWAIIAN.--The term "Native Hawaiian" means any individual who has any ancestors that were natives, prior to 1778, of the area that is now the State of Hawaii as evidenced by-

(A) genealogical records,

(B) Kupuna (elders) or Kama'aina (long-term community residents) verification, or

(C) birth records of the State of Hawaii.

(4) NATIVE HAWAIIAN HEALTH CENTER.--The term "Native Hawaiian health center" means an entity-

(A) which is organized under the laws of the State of Hawaii,

(B) which provides or arranges for health care services through practitioners licensed by the State of Hawaii, where licensure requirements are applicable,

(C) which is a public or nonprofit private entity, and

(D) in which Native Hawaiian health practitioners significantly participate in the planning, management, monitoring, and evaluation of health services.

(5) NATIVE HAWAIIAN ORGANIZATION.--The term "Native Hawaiian organization" means any organization-

(A) which serves the interests of Native Hawaiians,

(B) which is-

(i) recognized by Papa Ola Lokahi for the purpose of planning, conducting, or administering programs (or portions of programs) authorized under this subtitle for the benefit of Native Hawaiians, and

(ii) certified by Papa Ola Lokahi as having the qualifications and capacity to provide the services, and meet the requirements, under the contract the organization enters into with, or grant the organization receives from, the Secretary under this subtitle,

(C) in which Native Hawaiian health practitioners significantly participate in the planning, management, monitoring, and evaluation of health services, and

(D) which is a public or nonprofit private entity.

(6) PAPA OLA LOKAHI.--The term "Papa Ola Lokahi" means an organization composed of-

(A) E Ola Mau;

(B) the Office of Hawaiian Affairs of the State of Hawaii;

(C) Alu Like Inc.;

(D) the University of Hawaii; and

(E) the Office of Hawaiian Health of the Hawaii State Department of Health.

* * *

(9) TRADITIONAL NATIVE HAWAIIAN HEALER.--The term "traditional Native Hawaiian healer" means a practitioner

(A) who-

(i) is of Hawaiian ancestry, and

(ii) has the knowledge, skills, and experience in direct personal health care of individuals, and

(B) whose knowledge, skills, and experience are based on a demonstrated learning of Native Hawaiian healing practices acquired by-

(i) direct practical association with Native Hawaiian elders, and

(ii) oral traditions transmitted from generation to generation.

1995 Department of Defense Appropriations Act
PUBLIC LAW 103-335 (SEPT. 30, 1994), 108 STAT. 2599

* * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1995, for military functions administered by the Department of Defense, and for other purposes, namely:

* * *

**SEC. 8127. PREFERENCE FOR LOCAL AND SMALL BUSINESSES TO CARRY OUT
ENVIRONMENTAL RESTORATION AND REMEDIATION OF
KAHO'OLawe ISLAND, HAWAII.**

(a) PREFERENCE REQUIRED.--In entering into contracts with private entities to carry out environmental restoration and remediation of Kaho'olawe Island, Hawaii, and the waters surrounding that island, the Secretary of the Navy shall, to the maximum extent practicable, give a preference to small business concerns and small disadvantaged business concerns located in the State of Hawaii. In giving the preference, the Secretary shall give especial preference to businesses owned by Native Hawaiians.

* * *

(3) The term "Native Hawaiian" means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii.

Safe and Drug-Free Schools and Communities Act of 1994**PUBLIC LAW 103-382 (OCT. 20, 1994), 108 STAT. 3518**

* * *

“SEC. 4118. PROGRAMS FOR NATIVE HAWAIIANS.

“(a) GENERAL AUTHORITY.-- * * *, the Secretary shall make grants to or enter into cooperative agreements or contracts with organizations primarily serving and representing Native Hawaiians which are recognized by the Governor of the State of Hawaii to plan, conduct, and administer programs, or portions thereof, which are authorized by and consistent with the provisions of this title for the benefit of Native Hawaiians.

“(b) DEFINITION OF NATIVE HAWAIIAN.--For the purposes of this section, the term ‘Native Hawaiian’ means any individual any of whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Hawaiian Homelands Homeownership Act of 2000
PUBLIC LAW 106-569 (DEC. 27, 2000), 114 STAT. 2944

* * *

SEC. 512. FINDINGS.

* * *

(5) although Federal housing assistance programs have been administered on a racially neutral basis in the State of Hawaii, Native Hawaiians continue to have the greatest unmet need for housing and the highest rates of overcrowding in the United States;

(6) among the Native American population of the United States, Native Hawaiians experience the highest percentage of housing problems in the United States, as the percentage

(A) of housing problems in the Native Hawaiian population is 49 percent, as compared to--

(i) 44 percent for American Indian and Alaska Native households in Indian country; and

(ii) 27 percent for all other households in the United States; and

(B) overcrowding in the Native Hawaiian population is 36 percent as compared to 3 percent for all other households in the United States;

(7) among the Native Hawaiian population, the needs of Native Hawaiians, * * * eligible to reside on the Hawaiian Home Lands are the most severe, as--

(A) the percentage of overcrowding in Native Hawaiian households on the Hawaiian Home Lands is 36 percent; and

(B) approximately 13,000 Native Hawaiians, which constitute 95 percent of the Native Hawaiians who are eligible to reside on the Hawaiian Home Lands, are in need of housing;

* * *

**"TITLE VIII--HOUSING ASSISTANCE FOR
NATIVE HAWAIIANS**

* * *

"SEC. 802. BLOCK GRANTS FOR AFFORDABLE HOUSING ACTIVITIES.

"(a) GRANT AUTHORITY.--For each fiscal year, the Secretary shall (to the extent amounts are made available to carry out this title) make a grant under this title to the Department of Hawaiian Home Lands to carry out affordable housing activities for Native Hawaiian families who are eligible to reside on the Hawaiian Home Lands.

* * *

"(e) PUBLIC-PRIVATE PARTNERSHIPS.--The Director shall make all reasonable efforts, consistent with the purposes of this title, to maximize participation by the private sector,

including nonprofit organizations and for-profit entities, in implementing a housing plan that has been approved by the Secretary under section 803.

* * *

“SEC. 803. HOUSING PLAN.

* * *

“(d) APPLICABILITY OF CIVIL RIGHTS STATUTES.--

“(1) IN GENERAL.--To the extent that the requirements of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) or of the Fair Housing Act (42 U.S.C. 3601 et seq.) apply to assistance provided under this title, nothing in the requirements concerning discrimination on the basis of race shall be construed to prevent the provision of assistance under this title--

“(A) to the Department of Hawaiian Home Lands on the basis that the Department served Native Hawaiians; or

“(B) to an eligible family on the basis that the family is a Native Hawaiian family.

“(2) CIVIL RIGHTS.--Program eligibility under this title may be restricted to Native Hawaiians. Subject to the preceding sentence, no person may be discriminated against on the basis of race, color, national origin, religion, sex, familial status, or disability.

“(e) USE OF NONPROFIT ORGANIZATIONS.--As a condition of receiving grant amounts under this title, the Department of Hawaiian Home Lands shall, to the extent practicable, provide for private nonprofit organizations experienced in the planning and development of affordable housing for Native Hawaiians to carry out affordable housing activities with those grant amounts.

* * *

“SEC. 809. AFFORDABLE HOUSING ACTIVITIES.

“(a) NATIONAL OBJECTIVES AND ELIGIBLE FAMILIES.--

“(1) PRIMARY OBJECTIVE.--The national objectives of this title are--

“(A) to assist and promote affordable housing activities to develop, maintain, and operate affordable housing in safe and healthy environments for occupancy by low-income Native Hawaiian families;

“(B) to ensure better access to private mortgage markets and to promote self-sufficiency of low-income Native Hawaiian families;

“(C) to coordinate activities to provide housing for low-income Native Hawaiian families with Federal, State, and local activities to further economic and community development;

“(D) to plan for and integrate infrastructure resources on the Hawaiian Home Lands with housing development; and

“(E) to--

“(i) promote the development of private capital markets; and

“(ii) allow the markets referred to in clause (i) to operate and grow, thereby benefiting Native Hawaiian communities.

* * *

STATEMENT OF RELATED CASES

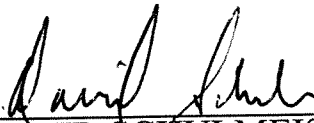
Defendants/Appellees are aware of no related cases within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 10,557 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

May 17, 2004.

CADES SCHUTTE LLP



DAVID SCHULMEISTER

Counsel for Defendants/Appellees
Constance H. Lau, Nainoa Thompson,
Diane J. Plotts, Robert K.U. Kihune, and J.
Douglas Ing, in their capacities as Trustees
of the Estate of Bernice Pauahi Bishop dba
Kamehameha Schools

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court in good standing and counsel of record for Defendants/Appellees.

I further certify that two copies of the foregoing document entitled **APPELLEES' ANSWERING BRIEF** were served on May 17, 2004 upon the following persons by the means indicated below:

JOHN W. GOEMANS, ESQ.
P.O. Box 2849
Kamuela, Hawaii 96743
(Via U.S. mail, postage prepaid)

ERIC GRANT, ESQ.
JAMES F. SWEENEY, ESQ.
Sweeney, Davidian, Greene & Grant LLP
8001 Folsom Boulevard, Suite 101
Sacramento, California 95826
(Via e-mail and U.S mail, postage prepaid)

Counsel for Plaintiff/Appellant

May 17, 2004.

CADES SCHUTTE LLP



DAVID SCHULMEISTER

Counsel for Defendants/Appellees
Constance H. Lau, Nainoa Thompson,
Diane J. Plotts, Robert K.U. Kihune, and J.
Douglas Ing, in their capacities as Trustees
of the Estate of Bernice Pauahi Bishop dba
Kamehameha Schools