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WRITTEN TESTIMONY

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United States Senate Committee on Indian Affairs
Hearing on S. 147, The Native Hawaiian Government Reorganization Act
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Room 485, Russell Senate Office Building

Nā 'Ōiwi 'Ōlino

E ō e nā 'Ōiwi 'Ōlino 'eā
Nā pulapula a Hāloa 'eā
Mai Hawai'i a Ni'ihau 'eā
A puni ke ao mālamalama 'eā ē

Ku'ē au i ka hewa, ku'ē!
Kū au i ka pono, kū!
Ku'ē au i ka hewa, ku'ē!
Kū au i ka pono, kū!

Answer, O Natives, those who seek knowledge
The descendants of Hāloa
From Hawai'i island in the east to Ni'ihau in the west
And around this brilliant world

I resist injustice, resist!
I stand for righteousness, stand!
I resist injustice, resist!
I stand for righteousness, stand!

INTRODUCTION

E nā alaka'i a me nā lālā o kēia Kōmike o nā Kuleana o ka 'Aha'ōlelo Nui o 'Amelika Hui
Pū ia, aloha mai kākou. He loa ke ala i hele 'ia e mākou, nā 'Ōiwi 'ōlino o Hawai'i, a he ala i hehi

mua 'ia e nā ali'i o mākou, e la'a, 'o ka Mō'ī Kalākaua, ke Kamali'iwahine Ka'iulani, a me ka Mō'īwahine hope o ke Aupuni Mō'ī Hawaii, 'o ia ko mākou ali'i i aloha nui 'o Lili'uokalani. A he nui no ho'i nā Hawai'i i kūnou mai ai i mua o 'oukou e nānā pono mai i ke kulana o ka 'ōiwi Hawai'i, kona nohona, kona olakino, ka ho'onaua a pēlā wale aku.

Ua pono ka helena hou a mākou nei a loa'a ka pono o ka 'āina, ke kulaiwi pa'a mau o ka lāhui 'ōiwi o Hawai'i pae'āina, 'o ia wale nō ka Hawai'i. No laila, eia hou no ka 'ōiwi Hawai'i, he alo a he alo, me ka 'Aha'ōlelo Nui.

TO THE LEADERS AND MEMBERS OF THIS COMMITTEE ON INDIAN AFFAIRS OF THE UNITED STATES CONGRESS, GREETINGS.

My name is Haunani Apoliona and I am the Chairperson of the Board of Trustees for the Office of Hawaiian Affairs (OHA), a body corporate created by the Hawai'i State Constitution and statute. The mission of OHA is to protect and assist Native Hawaiian people and to protect our environmental and other resources, and by so doing work to perpetuate our threatened traditional culture. Perhaps most importantly, OHA is working to bring meaningful self-government to the Native Hawaiian people, who are the only indigenous group in the United States to whom Congress has not fully afforded that fundamental right.

Mr. Chairman, as you have stated, "self-determination enables tribes to more successfully develop programs that best serve their members, lessen dependency on the federal government, and ensure greater participation in the national economy." (*Indian Tribes as Sovereign Governments, Second Edition (2004), Foreword; page xii.*) Native Hawaiians seek this same opportunity, this same freedom, to develop programs that best serve our members, lesser dependence on government, and ensure greater participation in the economy.

I testify today in support of enactment of S. 147 and its companion legislation in the House of Representatives, H.R. 309.

WE DESERVE TO BE TREATED WITH THE SAME RESPECT AS AMERICA'S OTHER INDIGENOUS GROUPS

There are three indigenous populations within the United States: American Indians in the lower 48 states, Eskimos, Aleuts and other native groups in Alaska, and Native Hawaiians. The governing entities of American Indians and Alaska Natives have both been recognized by Congress. This recognition extends to indigenous people the ability to govern their own internal affairs in a manner appropriate to their cultures and traditions. Congress acted in 1934 by passing the Indian Reorganization Act, and in 1971 by passing the Alaska Native Claims Settlement Act. In this legislation, as Hawaiians, we seek only what long ago was granted this nation's other indigenous peoples. See Appendix C. Congress has held numerous hearings on analogous bills very similar to S. 147 to recognize a Native Hawaiian governing entity over the past several years. Indeed, this Committee issued voluminous reports in the 106th, 107th and 108th Congresses detailing the historical relations between the United States and Native Hawaiians and documenting the need for this legislation. A brief summary of this history is further set forth in Appendix A. During this same time period, the United States Departments of Interior and Justice, Governor Linda Lingle of

Hawai‘i, the National Congress of American Indians, and the Alaska Federation of Natives, as well as others, all have testified before this Committee in support of similar legislation. The Committee reported favorably on those previous bills. We hope that the Committee will do the same with S. 147.

THE DISMANTLING OF THE ORIGINAL NATIVE HAWAIIAN GOVERNMENT

For nearly a century before the forcible annexation of the Kingdom of Hawai‘i in 1898, the United States recognized the Native Hawaiian government as a sovereign entity, entering into four treaties and other agreements with the Kingdom over the course of most of the nineteenth century. Not unsurprisingly, however, when the United States forcibly took control of the Hawaiian Kingdom, it worked to dismantle our native government, leaving our ability to manage our own internal affairs severely compromised.

In an Apology Resolution adopted by Congress a decade ago, Congress explicitly acknowledged that the United States-backed overthrow of the Kingdom of Hawaii in 1893 and the United States' annexation of Hawai‘i in 1898 resulted in the “deprivation of the rights of Native Hawaiians to self-determination.” (See Apology Resolution, Pub. L. No.103-150, 107 Stat. 1510 (1993), *see also* Robert N. Clinton, Arizona State Law Journal, “There Is No Federal Supremacy Clause for Indian Tribes,” *Symposium on Cultural Sovereignty* Spring 2002, 34 Ariz. St. L.J. 113, 165.) The Departments of Justice and the Interior have acknowledged the same, and have called upon Congress to “enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.” U.S. Depts. Of Justice and Interior, *From Mauka to Makai: The River of Justice Must Flow Freely* at 4 (Report on the Reconciliation Process Between the Federal Government and native Hawaiians, Oct. 23, 2000). S. 147 reflects the Departments' recommendation and Congress' commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai‘i. S. 147 advances the process of healing for Native Hawaiians. See Appendix D.

The United States has a unique legal and political relationship with the indigenous people of Hawai‘i, and that relationship is forged in a history of treaties, the Admission Act of Hawai‘i, hundreds of federal statutes, Executive Orders, and court decisions. The United States has repeatedly acknowledged its trust responsibility to Native Hawaiians through the Executive, Legislative and Judicial Branches of government. See Appendix B. Congress clearly maintains the Constitutional authority to enact this legislation.

S. 147 ESTABLISHES A PROCESS FOR NATIVE HAWAIIANS TO REORGANIZE AND REESTABLISH A NATIVE GOVERNMENT

S. 147 establishes a collaborative process through which the United States, the State of Hawai‘i and a reorganized Native Hawaiian government will work together to define the scope and nature of each government's rights and responsibilities. Here's how the process will work:

First, the Secretary of the Interior will appoint a nine-member commission to prepare a roll of those adult members who chose to become members of the reorganized government. After this

roll is compiled and certified, the Commission will submit the roll to the Secretary for publication.

Second, Native Hawaiian members will have the authority to develop criteria for candidates to be elected to the Native Hawaiian Interim Governing Council, determine the structure of the Council, and elect members to the Council.

Third, once the Council is established, it will have authority to develop organic documents for the Native Hawaiian governing entity and to hold elections for the purpose of ratifying the proposed organic documents.

Fourth, the Secretary of the Interior shall review and, if appropriate, certify the Native Hawaiian organic documents.

Fifth, the legislation provides for a collaborative negotiation process through which the United States, the State of Hawai'i and the Native Hawaiian governing entity may address matters such as the transfer of lands, the exercise of governmental authority over such lands, the exercise of civil and criminal jurisdiction, and any residual responsibilities of the United States and Hawai'i. Significantly, S. 147 does not legislate any changes to the existing laws regarding these matters. Unless and until federal and state laws are amended to reflect the results of the collaborative, negotiated process, there will be no changes in the existing framework through which Native Hawaiian lands and resources are managed.

S. 147 IS NECESSARY FOR NATIVE HAWAIIAN SELF-SUFFICIENCY, ECONOMIC SECURITY, HEALTH AND WELFARE, AND CULTURAL PRESERVATION.

S. 147 provides the Native Hawaiian people with the tools we need to reorganize so that our governing entity will be in a position to more efficiently and effectively provide for us. Administration of existing federal appropriations by a single governing entity will result in more efficient and effective use of those funds. This, in turn, will promote meaningful economic development that will create desperately needed new employment opportunities for Native Hawaiians.

S. 147 will also provide a framework to nurture and protect the unique culture of Native Hawaiians. It is well documented that Native governments throughout the United States are best positioned to ensure the continuation of native cultures through the development of educational and language programs, culturally-sensitive social services, and religious practices. In Hawaii, where this native culture is the primary attraction in a tourist industry that fuels the State's economy, preservation of Native Hawaiian culture is an economic imperative.

THE IMPACT OF S. 147 ON THE BUREAU OF INDIAN AFFAIRS' BUDGET

We, as Native Hawaiians, have not asked for, and S. 147 does not provide, the Native Hawaiian governing entity with access to the federal funding set aside for American Indian tribes. In fact, S. 147 is specifically structured so that it does not provide authority for that to occur. First, Section 7 of the bill makes clear that the Native Hawaiian governing entity shall not be considered an "Indian tribe" as that term is defined in Title 25 of the United States Code. Hence, S. 147 does

not provide for the Native Hawaiian governing entity to participate in Bureau of Indian Affairs programs and appropriated funding available only to for “Indian tribes.”

Second, Section 9 of the bill quite specifically states that “[n]othing contained in this Act provides authorization for eligibility to participate in any programs and services provided by the Bureau of Indian Affairs for any person not otherwise eligible for the programs and services.”

We think Section 7 and 9 of the bill make clear that enactment of S. 147 will not have an impact on the Bureau's budget or on money generally appropriated for Indian tribes. The House Committee on Resources came to the same conclusion on a virtually identical bill introduced in the last Congress, stating:

This legislation will continue to reflect the separate funding authorities that Native Hawaiians have enjoyed since 1910; since this date, Congress has enacted over 160 statutes designed to address the conditions of Native Hawaiians. Thus appropriations for Native Hawaiian programs have always been separately secured and have had no impact on program funding for American Indians or Alaska Natives.

H.R. Rep. No. 108-742, at 3 (2004). We reiterate and we stand by our commitment not to adversely impact our American Indian `ohana with this legislation.

FEDERAL APPROPRIATIONS CURRENTLY PROVIDED TO NATIVE HAWAIIANS

As discussed above, the Native Hawaiian governing entity need not raid the appropriated federal funds provided to American Indians through the Bureau of Indian Affairs' budget because Native Hawaiians already receive funding of their own through various non-BIA programs. For example, we receive funding from the Department of Housing and Urban Development for Native Hawaiian housing, we receive funding from the Department of Health and Welfare for health care clinics, and we receive funding from the Department of Education for educational programs.

Native Hawaiians already receive federal funding of our own through various non-BIA programs for such matters as Native Hawaiian health, education, housing, economic development, historic preservation, culture, and elder and vocational services. Federal recognition will not make Native Hawaiians eligible for the federal programs and services established for our Indian and Alaska Native `ohana. Through federal recognition, we are not members of tribes of the lower 48 states, nor members of corporations, tribes or villages of Alaska. We are Native Hawaiians.

It is important to emphasize this existing funding because in these times of difficult budget deficits we well understand Congress' concerns about any expansion of the federal budget. Because our programs already are funded, enactment of S. 147 will have no significant impact on the federal budget.

This has been confirmed by the Congressional Budget Office, which studied an earlier (nearly identical) version of S. 147 in the 108th Congress estimated that “implementing H.R. 4282

would cost “nearly \$1 million annually in fiscal years 2005–2007 and less than \$500,000 in each subsequent year, assuming the availability of appropriated funds. Enacting the bill would not affect direct spending or revenues.” H.R. Rep. No.108-742, at 8 (2004).

Clearly implementing the provisions of S. 147 would have a minimal impact on the federal budget.

DEFINING “NATIVE HAWAIIAN”

S. 147 defines the term “Native Hawaiian” as:

(A) an individual who is one of the indigenous, native people of Hawai‘i and who is a direct lineal descendant of the aboriginal, indigenous, native people who-- (i) resided in the islands that now comprise the State of Hawai‘i on or before January 1, 1893; and (ii) occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawai‘i; or

(B) an individual who is one of the indigenous, native people of Hawai‘i and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) or a direct lineal descendant of that individual.

The definition provided in S. 147 is generally consistent with the definitions used in the myriad of federal statutes concerning Native Hawaiians, including, for example, the Native Hawaiian Health Care Act, the Native Hawaiian Education Act, the Hawaiian Homelands Homeownership Act, the Native American Graves Protection and Repatriation Act, the National Historic Lighthouse Preservation Act, and the Older Americans Act Amendments of 1987. The definition is also consistent with the lineal descendancy membership requirements of many, many Indian tribes, which key membership to lineal descendancy from an established historical membership roll. *See, e.g.* the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon; the Coquille Indian Tribe of Oregon; the Wyandotte Nation of Kansas; the Chickasaw Nation of Oklahoma; the Choctaw Nation of Oklahoma; and the Cheyenne River Sioux Tribe of South Dakota. Indeed, this Committee has itself acknowledged that the Constitution does not “impose[] any minimum blood quantum requirement for tribal membership, and suggestions to the contrary have no legal or historical basis.” S. Rep. 108-85, at 32 (2003).

There may be concerns about the implications of how “Native Hawaiian” is defined. As a practical matter, the definition of “Native Hawaiian”, as defined in S. 147, will not make members of the Native Hawaiian entity eligible to participate in Bureau of Indian Affairs funding. Therefore, we do not believe that the manner in which we identify our membership will have any significant budgetary impact.

We urge Congress not to set policy that splits us apart and separates us from our family members as was done in the past. We are Native Hawaiian, we know who we are, trust us to decide what is best for us.

Let me reemphasize that one of the most fundamental principles of meaningful self-government is the ability to determine who is a member of the Native group. We respectfully suggest that the Native Hawaiian people be able to determine who is or is not Native Hawaiian.

TRUST RESPONSIBILITIES IMPOSED ON HAWAII UPON ITS ADMISSION TO THE UNION

Hawai'i is the only State required by federal legislation to administer a portion of the federal trust obligation to its native people. The historical context of this obligation is grounded in the Hawai'i Admission Act, Pub. L. No. 86-3 (1959). As a condition of its admission to statehood in 1959, Congress required the State of Hawai'i to assume most of the federal government's trust responsibilities concerning the administration of lands and resources under the Hawaiian Homes Commission Act. The Admission Act provides:

As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act . . . shall be adopted as a provision of the Constitution of said State . . . subject to amendment or repeal only with the consent of the United States.

Pub. L. 86-3, § 4. The United States Solicitor General explained that “[t]his Section “transferred authority to the State to administer HHCA lands.” Brief of the United States at 4, *Rice v. Cayetano*, 528 U.S. 495 (2000). The Hawaii Admission Act further requires state administration and management of an additional 1.2 million acres of trust land for one of five purposes -- one of which is for “the betterment of the conditions of native Hawaiians.” Pub. L. 86-3, § 5(f).

Under the Hawaii Admission Act, the Department of the Interior retains certain trust duties relating to the administration of Native Hawaiian land and resources. In particular, the United States retained the power to enforce the trust by filing actions against the State if it failed to perform the trust responsibilities set forth in the Admissions Act. Pub. L. 86-3, § 5(f). The Secretary of the Interior also retained approval authority for exchanges of Hawaiian Home Lands. Finally, Hawai'i may amend or repeal the Hawaiian Homes Commission Act only with the consent of the United States. In other words, but for the retained oversight role of the United States, the State administers all of the trust responsibilities encompassed within the Hawaiian Homes Commission Act.

RESTORING NATIVE HAWAIIAN SELF-GOVERNING STATUS

In order to understand the unique trust relationship that exists between the United States government and the State of Hawai'i, we must view the Admissions Act in its historical context. Hawai'i statehood occurred at a time when the United States was moving to explicitly terminate its government to government relationships with Indian tribes. This termination policy was officially adopted by Congress in 1953, and in the following year alone Congress terminated its government-to-government relationship with at least 66 tribes. F. Cohen's Handbook of Federal Indian Law, at 171, 173-74 (1982 ed.).

In some instances Congress terminated the majority of the federal relationship with a particular tribe while concurrently transferring certain trust responsibilities for that tribe to the state in which the tribe is located. For example, in Texas, trust responsibility for the management of

tribal lands was transferred to the state when the Alabama Coushatta Tribe was terminated in 1954, and again when the Tiwa Tribe (now known as the Pueblo of Ysleta del Sur) was terminated in 1968.

Congress' decision to transfer a portion of the federal trust responsibilities to the State of Hawai'i in 1959 must be understood in that context. It also must be emphasized that the federal termination policy eventually was entirely repudiated as a moral and budgetary disaster, leading to its abandonment by the late 1960s. Since that era, nearly every terminated tribe has been restored to federal recognition and the federal government has again acknowledged its trust responsibility to those tribes. (The Alabama Coushatta Tribe and the Tiwa Indians of Ysleta del Sur were restored to federal recognition by Congressional action in 1987.)

This Committee has acknowledged that the Admissions Act reflected the United States' reputed policy of termination, stating:

when the State of Hawai'i was admitted into the Union, the Federal policy toward the native peoples of America was designed to divest the Federal government of its responsibilities for indigenous people and delegate those responsibilities to the several states. In similar fashion, the United States transferred most of its responsibilities related to the administration of the Hawaiian Homes Commission Act to the new State of Hawai'i, and in addition, imposed a public trust upon the lands that were ceded back to the State for five purposes, one of which was the betterment of conditions of Native Hawaiians.

S. Rep. 108-85, at 22 (2003). When understood in this context, it is clear that the restoration of our Native Hawaiian self-governing status, and the clarification of the federal relationship to the Native Hawaiian government, is very long overdue.

S. 147 DOES NOT ALLOW GAMING

Finally, some have questioned whether we seek a government-to-government relationship as a first step towards gaming. Such suggestions add insult to injury. Our pursuit of reorganization and recognition started long before Congress even conceived of the Indian Gaming Regulatory Act (IGRA) in 1988. Nevertheless, we wish to make it perfectly clear that gaming is not part of recognition of Native Hawaiians. S. 147 clearly states that the Native Hawaiian governing entity shall not be eligible to conduct gaming activities under IGRA. Moreover, the state of Hawai'i is one of only two states, the other being Utah, which do not allow gambling or gaming. This Committee acknowledged this in its Report on an earlier version of this proposed legislation, "a reorganized Native Hawaiian government could not conduct any form of gaming in the State of Hawai'i under the Indian Gaming Regulatory Act." S. Rep. 108-85, at 38 (2003).

CONCLUSION: IT IS NEVER TOO SOON FOR JUSTICE TO BE DONE

Congress has considered legislation almost identical to that embodied in S. 147 and H.R. 309 in three consecutive Congresses now, in the 106th, 107th, and the 108th. In every case this

Committee has reported favorably on our legislation. We urge the Committee to do this again in the 109th Congress. Native Hawaiians are hopeful that this Congress will enact S. 147 and thereby take another step toward reconciliation. Over the past year, over 12,000 Hawaiians have submitted documentation to sign up to participate in the process to form a Native Hawaiian governing entity.

Native Hawaiians seek self-determination not unlike American Indians and Alaskan natives. We ask for this same opportunity, this same freedom, the freedom to develop programs that best serve our members, lesser dependence on government, and the opportunity to make positive contributions to our economy.

Hawaiian culture, history, language, religion and traditions live on today despite over two centuries of contact with the West and despite more than a century of domination by an alien culture. Our traditional priorities, recognized by the State of Hawai'i, deserve recognition and protection from the federal government, as well. See Appendix E.

I appear before you as an elected Trustee of the Office of Hawaiian Affairs, as one of nine people duly elected by all of the citizens of Hawai'i to represent the interests of the Hawaiian people. But more importantly, I appear before you as a guardian of my people's right to self-determination. I am a Native Hawaiian. He Hawai'i au.

No laila, eia au ma ka palena pau o kēia noi ha'aha'a a ha'aeo, e ho'olohe mai a e ana mai i ka 'ike a me ka maopopo pono o kulanā 'ōiwi o ka Hawai'i i ko mākou 'āina kulaiwi mai ke au kahiko loa a ka wā pau 'ole. He pono kāia 'ōlelo i mua o 'oukou i 'ōlelo 'ia me ka ikaika a me ka mana a me ke aloha o nā kupuna i hala, nā Hawaii he lehu o kēia au a me nā hanauna e puka a'e ana no. Mahalo nui, ke aloha no

Translation:

Therefore, as I approach the conclusion of this humble testimony, I ask that you listen and look upon us with wisdom and understanding of the status of the Native Hawaiian in our ancient homeland. What is said to you is offered in truth, and is uttered with the strength and power and love of our forebears, our Native Hawaiians in Hawai'i and the continental U.S. today, and generations hence.

Mahalo (thank you) for the opportunity to present this testimony.

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APPENDIX A

HAWAIIAN SELF-DETERMINATION: A HISTORY OF DENIAL

The relationship between the United States and the State of Hawai‘i and the Native Hawaiian people is a matter of written record. Congress itself provides a factual account of the illegal overthrow of 1893 and the annexation of 1898 in the Apology Bill, Pub. L. No. 103-150, 107 Stat. 1510 (1993). (*See also* Robert N. Clinton, Arizona State Law Journal, Spring 2002, 34 Ariz. St. L.J. 113, 165.) The story is worth retelling, however, because it serves to underscore the legacy left by over a century of neglect and the need for Congress to correct a historic wrong and restore Native Hawaiian self-determination.

One hundred and twelve years ago, diplomatic and military representatives of the United States triggered and led the overthrow of the Kingdom of Hawai‘i through, in President Grover Cleveland's words, “an act of war on a friendly and confiding people.” (*See also* Robert N. Clinton, Arkansas Law Review (1993), 46 Ark. L. Rev. 77, 109, citing President's Message Relating to the Hawaiian Islands, H.R. Exec. Doc. No. 47, 53d Cong., 2d Sess. (1989); S. Rep. No. 227, 53d Cong., 2d Sess. (1893).) Later, without the consent of the indigenous people of Hawai‘i, the illegitimate "Republic of Hawai‘i" purported to cede both Hawaiian sovereignty and more than 1.8 million acres of Hawaiian crown and government land to the United States. This usurpation of the sovereignty and land was undertaken without consent and without compensation to the Hawaiian people.

The official disenfranchisement of the Hawaiian people at the hands of the United States continued. With the Organic Act of 1900, Congress entrusted management of crown lands and government lands to the territorial legislature. (*See* Charles Wilkinson, Indian Tribes as Sovereign Governments, Second Edition [2004], p. 26.) In 1920, the United States, attempting to provide assistance to Native Hawaiians as they had American Indians, divided our people by blood quantum, thus drawing artificial lines between parent and child, grandparents and grandchildren, and `ohana (extended family) in a society and culture knowing and practicing no such distinctions. In 1959, the United States provided for the continuation of this division of the Native Hawaiian people as one of the conditions to Hawai‘i's admission as the fiftieth state of the Union.

The Native Hawaiian people have endured the painful irony that they were made part of the American political family without being permitted to exercise one of the most basic principles of American political thinking – the right of self-determination. The United States of America used its power to allow the overthrow of the legitimate government of Hawai‘i and then withheld that power and refused to rectify that wrong. While establishing a special relationship with the indigenous Hawaiian people, the U.S. unilaterally redefined what it means to be "Hawaiian."

For too long, our ancestors and `ohana have waited for the United States and its political agent, the State of Hawai‘i, to right the wrong that was committed in 1893, only to see the small steps taken for our benefit persistently attacked and maligned. **Reconciliation has been thus far denied.**

APPENDIX B

THE UNITED STATES REPEATEDLY HAS ACKNOWLEDGED ITS TRUST DUTY TO NATIVE HAWAIIANS

Executive Branch Acknowledgement

The United States has acknowledged a trust responsibility to Native Hawaiians. The U.S. Solicitor General has unambiguously stated:

- “The United States has a special responsibility for the welfare of the Native peoples of the United States, including Native Hawaiians.”
- “Congress has identified Native Hawaiians as a distinct indigenous group within the scope of its Indian affairs power, and has enacted dozens of statutes on their behalf pursuant to its recognized trust responsibility.”
- “[B]y classifying Native Hawaiians as 'Native Americans' under numerous federal statutes, Congress has extended to Native Hawaiians many of the same rights and privileges accorded to American Indian, Alaska Native, Eskimo and Aleut communities.”
- “[T]he United States has concluded that it has a trust obligation to indigenous Hawaiians because it bears responsibility for the destruction of their government and the unconsented and uncompensated taking of their lands.” (emphasis added).
- “Congress does not extend benefits and services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has a recognized trust responsibility.” (emphasis added).

United States Brief, *Rice v. Cayetano*, 528 U.S. 495 (2000) at 1, 4, 9, 18, 20.

This trust responsibility also was confirmed in a report issued by the U.S. Departments of Justice and Interior on October 23, 2000, which explained that:

- Lands ceded to the U.S. when Hawai‘i was annexed in 1898 were “impressed with a trust for the Native Hawaiian common people.”
- The 1993 Apology Resolution, Pub.L. 103-150, 107 Stat. 1510 (1993) “declared a trust relationship between the United States Government and the Native Hawaiians.” (emphasis added).
- “The United States took the clear position that the United States has a trust responsibility to Native Hawaiians” in the United States' brief filed in *Rice v. Cayetano*. (emphasis added).
- “[i]n recognition of the United States special trust relationship with its native peoples and in

furtherance of the reconciliation process, the United States should assist the Native Hawaiian people by supporting reorganization efforts and clarifying its unique legal and political relationship.” (emphasis added).

U.S. Depts. Of Justice and Interior, *From Mauka to Makai: The River of Justice Must Flow Freely* at 1, 3, 13, 40 (Report on the Reconciliation Process Between the Federal Government and native Hawaiians, Oct. 23, 2000).

The Executive Branch's continued recognition of this trust relationship has been institutionalized with the establishment of the Office of Native Hawaiian Relations in the Office of the Secretary of the Interior with the responsibility, *inter alia*, to “continue the process of reconciliation with the Native Hawaiian people. Consolidated Appropriations Act of 2004, Pub.L. 108-199, 118 Stat. 3, div. H, sec. 148 (2004). This Office was established by the Secretary of the Interior in Order No. 3254, June 24, 2004, and the Interior Department began recruiting staff members for this office in January 2005.

Legislative Branch

The Legislative Branch of government has confirmed the trust relationship between the United States and Native Hawaiians many times over the years. Two recent examples (both passed after *Rice v. Cayetano*) are the Hawaiian Homelands Homeownership Act of 2000, Pub.L. 106-568, 114 Stat. 2868 (2000) and the reenacted Native Hawaiian Education Act, Pub.L. 107-110, 115 Stat. 1425 (2002), codified at 20 U.S.C. sec. 7512 *et seq.* (2002).

- In the Hawaiian Homelands Homeownership Act, Congress stated that it “does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.” Section 202(10)(B) (Emphasis added.)
- In the Native Hawaiian Education Act, Congress explained that it “affirmed the special relationship between the United States and native Hawaiians in the Hawaiian Homes Commission Act, 1920, id. sec. 7202(8), and “reaffirmed the trust relationship between the United States and the Hawaiian people” through the 1959 Admission Act, Pub. L. 86-3, 73 Stat. 4 (1949). Id. sec. 7202(10) (emphasis added).
- Finally, Congress describes Native Hawaiians as “the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.” 20 U.S.C. sec. 7512(12)(B) (Emphasis added.)

The 1959 Admission Act also embodies the trust relationship between the United States and the Native Hawaiian People.

- Section 4 of the Admission Act requires the State, “as a compact with the United States” adopt the Hawaiian Homes Commission Act of 1920 as a provision of the State's Constitution. Under the Admission Act, the State may amend or repeal those provisions

“only with the consent of the United States.” Furthermore, provisions of the Hawaiian Homes Commission Act provide for continuing duties of the United States. For example, Section 204(3) of the Act requires that land exchanges may not occur without the approval of the Secretary of the Interior. *See also* Department of the Interior Departmental Manual, 514 DM 1.

- In Section 5(b) of the Admission Act, the United States transferred most of the lands it received by cession in 1898 to be held by the State as “a public trust” with the revenues generated by these lands to be used for five specific purposes including “the betterment of the conditions of native Hawaiians.” The United States retained oversight responsibilities in this section, expressly providing that “their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.”
- The United States “reaffirmed the trust relationship which existed between the United States and the Hawaiian people by retaining the power to enforce the [Hawaiian Home lands] trust, including the power to approve land exchanges, and legislative amendments affecting the rights of beneficiaries under such Act.” 1992 Health Care Act, 42 U.S.C. 11701(15) (emphasis added).

Judicial Branch

The Judicial Branch has repeatedly recognized the “trust obligation” between the United States and Native Hawaiians.

- *Price v. Akaka*, 928 F.2d 824, 826-28 (9th Cir. 1991) and 3 F.3d 1220 (9th Cir. 1993) (holding that Native Hawaiians had standing to bring claims under 42 U.S.C. § 1983 to challenge expenditures because of “trust obligations” established by Congress in section 5(f) of the 1959 Admission Act).
- *Price v. State of Hawai‘i*, 764 F.2d 623, 627-28 (9th Cir. 1985) (examining the applicability of federal court jurisdiction and observing that “native Hawaiians in general may be able to assert a longstanding aboriginal history” sufficient to give rise to standing and that the 1959 Admission Act codified a “trust obligation” between the United States and the Native Hawaiian people “that constitutes a 'compact with the United States'”).
- *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1471 (9th Cir. 1984) (“The Admission Act clearly mandates establishment of a trust for the betterment of native Hawaiians.”).
- *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 585 F.2d 1216, 1218 (9th Cir. 1978) (the State of Hawai‘i is required to hold and manage the Hawaiian Home Lands “as a public trust . . . and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States).

APPENDIX C

HAWAIIAN RECOGNITION IS ABOUT FAIRNESS AND JUSTICE

Following the illegal overthrow of the Kingdom of Hawai‘i on January 17, 1893, the Provisional Government and later the Republic of Hawai‘i seized management of all lands formerly controlled by Queen Lili‘uokalani (“Crown Lands”), Hawai‘i Constitution, Art. 95. Sec. 262 (1894), as well as the lands controlled by the government of the Kingdom of Hawai‘i (“Government Lands”).

In the 1959 Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), the United States transferred approximately 1.2 million acres of the Public Lands, plus another 200,000 acres of Hawaiian Home Lands, to the State of Hawai‘i. Section 5(f) of the Admission Act explicitly provided that the lands granted to the State of Hawai‘i upon admission were to be held by the State as a public trust. Section 5(f) required that the revenues generated by these lands be used for five specific purposes:

for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use.

Until Hawai‘i's 1978 Constitutional Convention, the State interpreted this provision as allowing it to use the revenues for any one of these purposes, not all five. The State devoted all of these revenues to public education and allocated none of these revenues specifically to benefit Native Hawaiians.

Because of the decades of neglect, the delegates to the 1978 Constitutional Convention proposed a series of constitutional amendments that were subsequently ratified by the voters and added to Hawai‘i's Constitution. These amendments affirmed that the State held the Ceded Lands as a Public Land Trust, with Native Hawaiians as one of the two named beneficiaries and the general public as the other (Article XII, Section 4). These constitutional amendments established the Office of Hawaiian Affairs (OHA) (Article XII, Section 5) and required the State to allocate a pro rata share of the revenues from the Public Lands to OHA to be used explicitly for the betterment of Native Hawaiians (Article XII, Section 6).

In 1992, Congress found that the joint resolution of annexation (the Newlands Resolution) and the Organic Act established "a special trust relationship between the United States and the inhabitants of Hawai‘i." 42 U.S.C. §1701(12). Congress further found that Hawai‘i's Admission Act “reaffirmed the trust relationship which existed between the United States and the Hawaiian people by retaining the exclusive power to enforce the [Hawaiian Home Lands] trust, including the power to approve land exchanges, and legislative amendments affecting the rights of beneficiaries under such Act.” 42 U.S.C. §1701(15). The United States also "reaffirmed the trust relationship which existed between the United States and the Hawaiian people by retaining the legal responsibility of the State for the betterment of the conditions of Native Hawaiians under section 5(f) of the

[Admission Act]." 42 U.S.C. §1701(16).

In 1993, the U. S. Congress acknowledged in the Apology Bill (Public Law 103-150), that this action was illegal and could not have been accomplished without the assistance of U.S. agents. The Apology Bill goes on to note that the subsequent "cession" of these lands to the United States in 1898 was "without the consent of or compensation to the Native Hawaiian people of Hawai'i or their sovereign government":

Whereas, without the active support and intervention by the United States diplomatic and military representatives, the [January 1893] insurrection against the Government of Queen Lili'uokalani would have failed for lack of popular support and insufficient arms;

* * *

Whereas the Republic of Hawai'i also ceded 1,800,000 acres of crown. government and public lands of the Kingdom of Hawai'i, without the consent of or compensation to the Native Hawaiian people of Hawai'i or their sovereign government;

* * *

The Congress —

(1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawai'i 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. . .

Public Law 103-150.

Throughout all of these years, despite all of the reaffirmations of the "special relationship" between the United States and the indigenous people of Hawai'i, and despite the number of times our people have come to Congress seeking reconciliation, the historic wrongs forced on our people have been allowed to continue without redress. **The right of self-determination has been extended to the indigenous people of every other state in the union save one: Native Hawaiians.**

S. 147 and its House companion, H.R. 309, are initial but significant steps on the path of reconciling historic wrongs to Hawaiians and recognizing absolutely their political relationship with the United States of America.

APPENDIX D

THE PROCESS OF HEALING MUST CONTINUE

We are not unmindful of the efforts that have been made by the federal government and the State of Hawai‘i to try to alleviate the conditions faced today by the indigenous people of Hawai‘i. Congress has, for example, repeatedly found that the health of native peoples is tied to their relationship to land. More specifically, Congress has found this to be true for Native Hawaiians. "[T]he health and well-being of Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land" 107 Stat. at 1510. The social and economic changes in Hawai‘i which resulted from contact with the west had a "devastating" effect on the Native Hawaiian population and on their "health and well-being." (*Id.*, 107 Stat. at 1512.) Foreigners brought new diseases to Hawai‘i, and the Native Hawaiian population plummeted.

The condition of Native Hawaiians deteriorated to a point that, in 1920, territorial representatives sought assistance from Congress. Noting that Hawaiian people had been "frozen out of their lands and driven into the cities" and that "Hawaiian people are dying," the Committee recommended allotting land to the Hawaiians so that they could re-establish their traditional way of life. H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920.) The Secretary of the Interior echoed that recommendation, informing Congress that Native Hawaiians are "our wards . . . for whom in a sense we are trustees," that they "are falling off rapidly in numbers" and that "many of them are in poverty." (*Id.*) Those recommendations led to the enactment of the Hawaiian Homes Commission Act, which designated 200,000 acres of lands for homesteading by "native Hawaiians," which was defined as descendants of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands prior to western contact in 1778.

Since Hawai‘i's admission into the Union, Congress has assisted in addressing the well-being of Native Hawaiians. Congress has established special Native Hawaiian programs in the areas of health care, education, employment, housing, and business loans. (See e.g., Native Hawaiian Health Care Improvement Act, 42 U.S.C. §§11701-11714; Native Hawaiian Education Act, 20 U.S.C. §§7901-7912; Workforce Investment Act of 1998, 29 U.S.C. §2911; Native American Programs Act of 1974; and others.) These statutes are premised on Congressional findings that the conditions of Native Hawaiians in these areas continue to lag seriously behind those of non-natives, 42 U.S.C. §11701(22); 20 U.S.C. §7902(17).

The U.S. Congress and President committed themselves to pursue a reconciliation between the United States and the Native Hawaiian people in the 1993 Apology Bill, and the State of Hawai‘i has committed itself to a similar process.

Further, the United States has recognized that Native Hawaiians, as aboriginal, indigenous, native peoples of Hawai‘i, are a unique population group in Hawai‘i and in the continental United States, so declaring that in Office of Management and Budget Circular 15 in 1997 and Presidential Executive Order No. 13125, dated June 7, 1999.

On July 28, 1999, the United States filed an amicus brief in the case of *Rice v. Cayetano*,

528 U.S. 495 (2000). In its brief, the United States affirmed that it has a trust obligation to indigenous Hawaiians. The Solicitor General explained:

The United States has concluded that it has a trust obligation to indigenous Hawaiians because it bears a responsibility for the destruction of their government and the unconsented and uncompensated taking of their lands. Brief of United States at 21.

Congress does not extend benefits and services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has a recognized trust responsibility. *Id.* at 27.

In 1993, Congress, led by the Hawaii congressional delegation, concluded that a century of national silence and neglect was enough. In 1993, Congress enacted Senate Joint Resolution 19, popularly known as the Apology Bill. In that Bill, Congress acknowledged America's illegal role in destroying the legal government of the Hawaiian people and urged President Clinton to support reconciliation efforts between the United States and the Native Hawaiian people. In December of 1999, a series of community meetings on all five major islands of Hawai'i were held by the Federal Reconciliation Delegation. Those meetings represented a first step in the long-delayed journey toward reconciliation between the United States and the indigenous people of Hawai'i. These meetings resulted in the publication of a joint Department of the Interior and Department of Justice report entitled *Mauka to Makai: The River of Justice Must Flow Freely*. The report recommends that the indigenous people of Hawai'i be given right to the full expression of self-determination and calls for federal recognition of a Native Hawaiian government.

APPENDIX E

HAWAIIAN CULTURE AND PEOPLE DESERVE RECOGNITION

The culture, society, governmental organization, and religious traditions of Hawai‘i flourished in the archipelago since the time of Christ – long before the first contact with the West in 1778. With more than 200 years of settlement by European explorers, American missionaries and businessmen, plantation workers from Asia, and others from every corner of the world, Native Hawaiians faced cultural assimilation and cultural genocide, but tenaciously maintained a myriad of traditional practices that have their origins in pre-Western Hawai‘i. These cultural practices include religion and spirituality, language, celestial navigation, wood carving, one-of-a-kind feather work, poetry, dance, chant, surfing and other sports, healing arts, martial arts, fishing, farming, weaving, and more. These practices are integral to the lifestyle of the Native Hawaiian and are enjoyed by *kama ‘āina* (lifetime residents) and *malihini* (newcomers) alike.

The inseparable connectedness between Native Hawaiians and their natural environment – the land, ocean, plant life, and animal life – goes far beyond western ideologies of control, manipulation, and ownership. An ancient cosmogonic chant known as the *Kumulipo* or "source from the dark" teaches us that the ocean and land were born first as elder siblings, followed by plant and animal life. Later, man emerges as the younger sibling, ingraining in the Hawaiian an innate kinship with his environment. ‘Āina or land was not a commodity. Rather, it was regarded as the elder sibling who commanded respect and the appropriate behavior of "malama ‘āina" (care for the land). Man cared for the land and, in turn, the land sustained the lives of men.

Cultural practices of Native Hawaiians are inextricably attached to their land base and natural resources. Traditional methods of healing, including the use of native herbs and plants (*lā‘au lapa‘au*), are being studied by Western medical experts as effective alternatives to chemical-based treatment modalities. Social and behavioral scientists are adopting aspects of traditional conflict resolution techniques (*ho‘oponopono*) as a means of successful intervention therapies and prevention of family and domestic violence.

The hula, or traditional dance, perhaps the "best known" of Hawai‘i's cultural and spiritual practices, also requires the gathering of symbolic flora from regions ranging from the high rain forests to the shoreline. In honor of the gods, these materials are fashioned in adornments and costuming that pay honor and respect to those gods, the ali‘i or rulers, and lesser chiefs, important historical events, and the myriad districts, geophysical features, and islands that make up Hawai‘i. Yet over time, the hula was trivialized by westerners who, through ignorance and lack of sensitivity, reduced this time-honored tradition to pretty girls, cellophane skirts, and coconut bras. Today, the hula in its traditional form is widely popular in Hawai‘i and has brought about a heightened consciousness of the need for protection and preservation of our culture, land, and natural resources as well as renewed pride in our Hawaiian identity.

Native, Hawaiian culture, language, religion, and traditions live on and, in many respects, thrive. These traditional practices are well-recognized and are embodied in the laws of the State of Hawai‘i. The Hawai‘i State Constitution (Article XII, Section 7) recognizes Native Hawaiians'

right to exercise customary and traditional practices for subsistence, culture, and religious purposes. Article X, Section 4, mandates the promotion of the study of Hawaiian culture, history and language, and Article IX, Section 9, grants the state power to preserve and develop ethnic cultural, creative, and traditional arts. These rights have received judicial affirmation. (See Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission, 79 Haw. 425, 903 P.2d 1246 [1995].)

Our culture and language are perpetuated now by our children and grandchildren. In the fall of 2002 and 2003, the Office of Hawaiian Affairs sponsored an essay contest for elementary, middle, and high school students. The topic, "What it Means to be Hawaiian," generated numerous entries written in both English and Hawaiian.

In short, our culture, history, language, religion, and traditions live on today despite over two centuries of contact with the West and despite more than a century of domination by an alien culture. Our traditional practices, recognized by the State of Hawai'i, deserve recognition and protection from the federal government as well.

As Senator John McCain has stated, "self-determination enables tribes to more successfully develop ... programs that best serve their members, lessen dependency on the federal government, and ensure greater participation in the national economy." (*Indian Tribes as Sovereign Governments*, Second Edition (2004), Forward, page xii.) Native Hawaiians seek this same opportunity, this same freedom, to develop programs that best serve our members, lessen dependence on government, and ensure greater participation in the economy.

As native people giving voice to our ancestors, we are descendants of traditions and values indigenous to this Hawai'i. Our Native Hawaiian elders (*kūpuna*), wayfinders, and navigators established and developed a sophisticated and efficient society in the middle of the vast Pacific Ocean. Our lifestyle and survival were guided by respect and honor for God, man and nature; stewardship of land and natural resources; and careful attention to the balance of human use of a fragile ecosystem. These considerations are as important now in the 21st century as they were 1,000 years ago.

We know we don't stand alone. We stand with the two other indigenous peoples of America. Federal policy on self-determination and self-governance currently extends to Alaska Natives and Native American Indians. Native Hawaiians, the third indigenous people in these 50 states, seek such inclusion. While Queen Lili'uokalani may have stood alone in the 19th century in pursuit of reconciling history for her people, Native Hawaiians in the 21st century are joined by Native American Indians and Alaska Natives who stand with us in our pursuit of federal recognition and reconciliation. For this, we Native Hawaiians are grateful.