

No. 05-1128

In the Supreme Court of the United States

EARL F. ARAKAKI, ET AL., PETITIONERS

v.

LINDA LINGLE, GOVERNOR OF HAWAII, ET AL.

*ON CONDITIONAL CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether cross-petitioners have standing to sue the United States and challenge the constitutionality of a federal statute based on an alleged injury as a state taxpayer where the cause of that injury is not fairly traceable to the United States.

2. Whether cross-petitioners have standing as alleged trust beneficiaries to sue the United States for a breach of trust where they identify no trust for which they are beneficiaries and the United States is trustee.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

<i>Hawaiian Hous. Auth. v. Midkiff</i> , 467 U.S. 229 (1984) ...	2
<i>Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n</i> , 588 F.2d 1216 (9th Cir. 1978), cert. denied, 444 U.S. 826 (1979)	11
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	9
<i>Papasan v. Allain</i> , 478 U.S. 265 (1986)	11
<i>Price v. Akaka</i> , 3 F.3d 1220 (9th Cir. 1993), cert. denied, 511 U.S. 1070 (1994)	5
<i>Rice v. Cayetano</i> , 528 U.S. 495 (2000)	2, 3, 4, 5
<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (1998)	10
<i>United States v. Hays</i> , 515 U.S. 737 (1995)	9
<i>Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.</i> , 454 U.S. 464 (1982)	9
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	12

IV

Constitutions and statutes:	Page
U.S. Const.:	
Art. III	10
Amend. V	6
Amend. XIV:	
Equal Protection Clause	8
Haw. Const. Art. XII	4
§§ 1-3	4
§ 5	5
§§ 5-6	5
Hawaiian Homes Commission Act, 1920, ch. 42, 42	
Stat. 108	4
§ 201(a)(7), 42 Stat. 108	4
Act of Mar. 18, 1959, Pub. L. No. 86-3, 73 Stat. 4:	
§ 4, 73 Stat. 5	4, 10
§ 5(b)-(d), 73 Stat. 5	4, 10
§ 5(f), 73 Stat. 6	4, 5, 12
Hawaiian Organic Act, ch. 339, 31 Stat. 141	3
§ 91, 31 Stat. 159	3
H.R. J. Res. 259, 30 Stat. 750	3, 11
§ 1, 30 Stat. 750	3
S.J. Res. 19, Pub. L. No. 103-150, 107 Stat. 1512	3
Haw. Rev. Stat. (1985):	
§ 10-2	5
§ 10-3(3)	5
§ 10-13.5	6
§ 26-17	6

Miscellaneous:	Page
<i>Hawaii-Public Lands</i> , 22 Op. Att'y Gen. 574 (1899)	11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-41)¹ is reported at 423 F.3d 954. The opinions of the district court (Pet. App. 42-64, 65-68, 69-96, 97-110, 111-139, 140-168) are reported at 198 F. Supp. 2d 1165, 299 F. Supp. 2d 1090, 299 F. Supp. 2d 1107, 299 F. Supp. 2d 1114, 299 F. Supp. 2d 1129, and 305 F. Supp. 2d 1161.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2005. A petition for rehearing was denied on November 4, 2005 (Pet. App. 169-171). The petition for a writ of certiorari was filed on February 2, 2006. See *Lingle v. Arakaki*, No. 05-988. The conditional cross-petition for a writ of certiorari was filed on March 3,

¹ "Pet. App." refers to the appendix to the petition in No. 05-998.

2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Cross-petitioners are 14 residents of the State of Hawaii. They filed suit against state agencies, state officials, and the United States, alleging that state-administered programs that provide benefits to native Hawaiians discriminate on the basis of race and therefore violate the Constitution and constitute a breach of trust.

The district court dismissed cross-petitioners' claims against the United States for lack of standing, and it dismissed their claims against the State for either lack of standing or as presenting nonjusticiable political questions. With respect to the claims against the State, the court affirmed in part, reversed in part, and remanded. The court of appeals affirmed the dismissal of the claims against the United States. This brief is filed in response to the conditional cross-petition for a writ of certiorari insofar as it challenges the court of appeals' affirmance of the dismissal of the claims against the United States.

1. The Hawaiian Islands were originally settled by Polynesians from the Western Pacific. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984); see *Rice v. Cayetano*, 528 U.S. 495, 500 (2000). In 1778, England's Captain Cook landed in Hawaii. *Id.* at 500. In 1810, Kamehameha I united the Hawaiian Islands as one kingdom. *Ibid.* Between 1826 and 1893, the United States recognized the kingdom as a sovereign nation and signed several treaties with it. *Id.* at 504. During that same period, interests aligned with the United States gained political power. *Ibid.* In 1893, Queen Liliuokalani attempted to promulgate a new constitution to

reestablish native Hawaiian control over governmental affairs. *Id.* at 504-505. Fearing a loss of power, a group representing American commercial interests overthrew the monarchy and established a provisional government. See *ibid.* That government sought annexation by the United States, but President Cleveland denounced the role of American forces in the overthrow and called for restoration of the Hawaiian monarchy. *Id.* at 505. The Queen, however, was unable to reclaim her former place, and in 1894 the provisional government established the Republic of Hawaii. *Ibid.* A year later the Queen abdicated her throne. *Ibid.*

In 1898, President McKinley signed a Joint Resolution annexing Hawaii (Newlands Resolution). *Rice*, 528 U.S. at 505. At the time of the annexation, the provisional government ceded all crown, government, and public lands to the United States. *Id.* at 505; H.R. J. Res. 259, 30 Stat. 750; S.J. Res. 19, Pub. L. No. 103-150, 107 Stat. 1512. The Newlands Resolution provided that "all revenue from or proceeds of the [public lands], except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." § 1, 30 Stat. 750.

In 1900, Congress passed the Hawaiian Organic Act, ch. 339, 31 Stat. 141. That Act established the Territory of Hawaii and placed the lands ceded to the United States in the Newlands Resolution under the "possession, use, and control of the government of the Territory of Hawaii." § 91, 31 Stat. 159. Concerned with the condition of native Hawaiians, Congress subsequently enacted the Hawaiian Homes Commission Act (HHCA).

Rice, 528 U.S. at 507; Hawaiian Homes Commission Act, 1920, ch. 42, 42 Stat. 108. The HHCA set aside approximately 200,000 acres of the ceded public lands for native Hawaiians and created a program of loans and long-term leases for the benefit of native Hawaiians. *Rice*, 528 U.S. at 507. The HHCA defined a “native Hawaiian” as “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.” § 201(a)(7), 42 Stat. 108.

In 1959, Hawaii was admitted into the Union. Upon admission, the State of Hawaii agreed to adopt the HHCA as part of its constitution. See Act of Mar. 18, 1959 (Admission Act), Pub. L. No. 86-3, § 4, 73 Stat. 5; Haw. Const. Art. XII, §§ 1-3. The Admission Act granted Hawaii title to all public lands and public property within the State’s boundary, except those which the federal government retained for its own use. § 5(b)-(d), 73 Stat. 5; *Rice*, 528 U.S. 507. The grant to the State included the approximately 200,000 acres set aside under the HHCA as well as almost 1.2 million additional acres of land. *Ibid.*

The Admission Act provides that the lands granted to Hawaii and the proceeds as well as income from those lands are to be held by Hawaii “as a public trust” to be “managed and disposed of for one or more of” the following 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 HHCA, 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. § 5(f), 73 Stat. 6. The Admission Act provides that the use of the proceeds and income from the lands “for any other object shall consti-

tute a breach of trust for which suit may be brought by the United States." *Ibid.* Following its admission, Hawaii administered the HHCA lands for the benefit of native Hawaiians. The income from the remainder of the public lands largely flowed to Hawaii's Department of Education. *Rice*, 528 U.S. at 508.

In 1978, Hawaii amended its constitution and created the Office of Hawaiian Affairs (OHA). Haw. Const. Art. XII, § 5. OHA's purpose is to better the conditions of native Hawaiians and Hawaiians, the latter being a broader class of persons of native Hawaiian descent. The state statute defines a native Hawaiian as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the [HHCA], as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." Haw. Rev. Stat. § 10-2 (1985). A Hawaiian is defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Ibid.*

OHA is charged with administering and managing some of the funds from the public lands trust. See Haw. Rev. Stat. § 10-13.5 (1985); Haw. Const. Art. XII, §§ 5-6; *Price v. Akaka*, 3 F.3d 1220, 1222 (9th Cir. 1993). The 200,000 acres set aside under the HHCA are administered by a separate state agency, the Department of Hawaiian Home Lands (DHHL), which is headed by an executive board known as the Hawaiian Homes Com-

mission (HHC). See Haw. Rev. Stat. §§ 10-3(3), 26-17 (1985).

2. Cross-petitioners filed suit against state agencies, state officials, and the United States. Pet. App. 3. Cross-petitioners' claims against the United States are premised on two theories. First, they allege that the Admission Act violates the equal protection component of the Fifth Amendment and the equal footing doctrine. C.A. E.R. Tab 1, at 9-10, 14, 31. Second, the complaint alleges that the United States breached its duty as trustee of a public land trust when Congress enacted the HHCA and the Admission Act. *Id.* at 12-14, 34.

Cross-petitioners premise their standing to sue the United States on their status as state taxpayers and their alleged status as trust beneficiaries. Pet. App. 3. Cross-petitioners do not allege that they have actually suffered discrimination; there is no allegation that any cross-petitioner applied for and was denied benefits because he or she is not "Hawaiian" or "native Hawaiian." Nor do cross-petitioners challenge any appropriation of tax funds by a federal statute.

The district court dismissed all of cross-petitioners' claims against the United States for lack of standing. Pet. App. 73, 127-34; C.A. E.R. Tab 8. The court dismissed some of cross-petitioners' claims against the State on standing grounds. It dismissed the remaining claims against the State as presenting nonjusticiable political questions. Pet. App. 8-9.

3. The court of appeals affirmed the dismissal of the claims against the United States. Pet. App. 10-19. First, the court held that cross-petitioners could not bring their breach-of-trust claim against the United States because the United States is not a trustee of the public lands trust held by the State of Hawaii. *Id.* at 11-

14. The court assumed, without deciding, that the Newlands Resolution created a trust and that the United States was a trustee of that trust. *Id.* at 12-13. The court concluded, however, that any such trust was made subject to subsequent legislation, and that the HHCA and the Admission Act extinguished any trust obligation the United States might once have had. *Ibid.* The court rejected cross-petitioners' contention that the United States could be sued as a trustee under the Admission Act because that Act unambiguously makes the State of Hawaii, rather than the United States, the trustee of the land. *Ibid.* The court added that "Congress might have made the United States a co-trustee; instead it reserved to the United States the right to bring suit for breach of trust, a provision at odds with the suggestion that the United States remains a trustee." *Id.* at 14 (citation omitted).

Second, the court of appeals rejected cross-petitioners' assertion that they have standing as state taxpayers to sue the United States. Pet. App. 18-19. The court reasoned that cross-petitioners "claim no status that would distinguish them from any number of other persons," and that they therefore assert nothing more than a generalized grievance from allegedly illegal conduct. *Id.* at 18. The court also concluded that "[e]ven if [cross-petitioners] have standing as state taxpayers * * * that status cannot supply standing against the United States." *Id.* at 19.

With respect to cross-petitioners' claims against the State, the court of appeals affirmed in part, reversed in part, and remanded. The court first held that cross-petitioners could not challenge the State's administration of the eligibility requirements of the HHCA lease program. The court reasoned that the United States is an

indispensable party to such a challenge, and cross-petitioners lacked standing to sue the United States. Pet. App. 15.

For similar reasons, the court of appeals held that cross-petitioners lack standing to challenge Hawaii's spending of state tax revenue on the HHCA lease program. Pet. App. 16. The court reasoned that a determination of that claim would require it to pass on the constitutionality of the Admission Act, "and no challenge to the Admission Act may proceed without the presence of the United States as a defendant." *Id.* at 17-18.

The court of appeals held that cross-petitioners have standing as state taxpayers to challenge the State's expenditure of state tax revenue on OHA programs as a violation of the Equal Protection Clause. Pet. App. 21-31. The court further held that such a challenge does not present a nonjusticiable political question. *Id.* at 32-38. The court rejected cross-petitioners' argument that, insofar as OHA receives trust revenues governed by the Admission Act, they could sue OHA for breach of trust theory. The court concluded that the United States is an indispensable party to that claim, and that cross-petitioners lack standing to sue the United States. *Id.* at 31-32.

ARGUMENT

The court of appeals correctly affirmed the dismissal of all claims against the United States, and the court's decision with respect to those claims does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review of those claims is not warranted.²

² The United States participated in the court of appeals for the purpose of defending the district court's dismissal of the claims against

1. Cross-petitioners contend (Cross-Pet. 12-16) that their allegations established their standing to sue the United States. That contention is without merit.

In order to establish standing to sue, a plaintiff must demonstrate that he has suffered an injury in fact, that the injury is fairly traceable to the actions of the defendant and not to those of a third party, and that the asserted injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). In light of those requirements, this Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *United States v. Hays*, 515 U.S. 737, 743 (1995). Consistent with those established standing principles, the court of appeals correctly rejected cross-petitioners' assertion of standing to sue the United States. While cross-petitioners assert standing as state taxpayers and as beneficiaries of a trust, neither of those theories supplies standing to sue the United States.

In a lawsuit premised on state taxpayer standing, the only possible injury in fact is the plaintiff's payment of state taxes. See *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 478 (1982). In this case, however, cross-petitioners' payment of taxes is not fairly traceable to any action by the United States. The Admission Act requires that Hawaii hold certain lands and the proceeds

the United States. The United States accordingly did not file a response to the certiorari petition in No. 05-988, which involves the claims against the State. For the same reason, this response to the conditional cross-petition addresses only those issues that involve a claim against the United States.

and income from those lands as a public trust. § 5(b)-(d), 73 Stat. 5. And it also requires that Hawaii adopt the HHCA and use proceeds from lands reserved under the HHCA for HHCA mandated programs. § 4, 73 Stat. 5. But it does not require the State of Hawaii to impose taxes to support those undertakings. Tellingly, cross-petitioners have failed to explain how action by the United States has caused their injury. Cross-petitioners have therefore failed to satisfy the requirement of showing that the injury they have alleged is caused by the party they are suing.

For the same reason, cross-petitioners have failed to satisfy the Article III requirement of redressability. Because the federal statutes at issue do not mandate the expenditure of state tax dollars, a decision against the United States would not redress cross-petitioners' alleged injury as state taxpayers. That alleged injury, therefore, cannot provide cross-petitioners with standing to sue the United States. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). If cross-petitioners are injured by any improper use of state tax money, that is a matter between them and the State.

Cross-petitioners' assertion that they have standing to sue the United States as beneficiaries of a trust is equally without merit. That claim fails because cross-petitioners are not the beneficiaries of any trust of which the United States is trustee. As the court of appeals explained, even assuming that the Newlands Resolution created a trust and that the United States was a trustee of that trust, the Resolution specifically provided that "the Congress of the United States shall enact spe-

cial laws for the[] management and disposition” of the public lands. § 1, 30 Stat. 750. Thus, the Resolution “vest[ed] in Congress the exclusive right, by special enactment, to provide for the disposition of public lands in Hawaii.” *Hawaii—Public Lands*, 22 Op. Att’y Gen. 574, 576 (1899). Congress exercised that authority when it enacted the HHCA and the Admission Act, statutes that ultimately extinguished any trustee role that the United States might once have had under the Resolution. Moreover, even if the Newlands Resolution itself did not provide that Congress could modify the terms of any trust created by the Newlands Resolution, cross-petitioners cite no authority for the extraordinary proposition that Congress cannot change the terms of a trust that it creates for the benefit of the general public.

Furthermore, as the court of appeals correctly held, cross-petitioners cannot proceed against the United States based on any trust created by the Admission Act. While the Admission Act requires that the lands granted to Hawaii and the proceeds and income from those lands be held “as a public trust,” that Act unequivocally makes the State of Hawaii the trustee. Cross-petitioners contend that because the United States must consent before the State can change the qualifications for HHCA leases, the United States is a trustee. But cross-petitioners cite no authority for the proposition that the United States’ limited regulatory role makes it a trustee. See *Keaukaha-Panaewa Cmty. Ass’n. v. Hawaiian Homes Comm’n*, 588 F.2d 1216, 1224 n.7 (9th Cir. 1978) (“The United States has only a somewhat tangential supervisory role under the Admission Act, rather than the role of trustee.”), cert. denied, 444 U.S. 826 (1979). No one would contend that because a state legislature may amend the state statutes that govern the

conduct of private trustees, the State thereby becomes a trustee of every private trust in the State. The same is true with respect to Congress's power under the Admission Act.

Congress, of course, could have provided in the Admission Act that the United States would be a trustee. Instead, Congress provided that the United States may bring a suit for breach of trust, § 5(f), 73 Stat. 6, a provision that is "at odds with the suggestion that the United States remains a trustee." Pet. App. 14.

2. Relying on this Court's decision in *Warth v. Seldin*, 422 U.S. 490 (1975), cross-petitioners contend (Cross-Pet. 13) that the court of appeals should have "limited its focus to the Cross-Petitioners and the source and nature of the claims they allege." By focusing solely on the plaintiffs and the nature of their claims, cross-petitioners ignore an important part of this Court's standing jurisprudence—whether the defendant caused the plaintiffs' alleged injury. Indeed, *Warth* expressly holds that the standing inquiry includes an analysis of "whether the Plaintiff has made out a 'case or controversy' between himself *and the defendant* within the meaning of [Article III]." 422 U.S. at 498 (emphasis added).

Cross-petitioners also err in arguing (Cross-Pet. 16-30) that the court of appeals failed to construe their complaint in the light most favorable to them. The court of appeals expressly recognized that it "must construe the complaint in favor of the complaining party." Pet. App. 10. Cross-petitioners' argument that the court failed to apply that principle is based on their view that a court must not only accept their factual assertions as true, but it must also accept their legal assertions as true. The rule that a complaint must be construed in

favor of the complaining party, however, does not extend to a party's legal assertions. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

CONCLUSION

Insofar as it seeks review of the dismissal of the claims against the United States, the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2006