APPENDIX C

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JOSIAH L. HOOHULI, G. ANALIKA N. VICTOR, LINDA DELA CRUZ, APOLONIA K. DAY, DANIEL DANCIL, WILMA LIKOLEHUA KAMAKANA GRAMBUSCH, JUDITH K. NAPOLEON, DANETTE K. RAYFORD, JOHNNY L. RAYFORD, SOLOMON P. KAHOOHALAHALA, BUD SHASTEEN and TAX PAYERS UNION, Plaintiffs, vs. GEORGE R. ARIYOSHI, Governor; JENSEN S.L. HEE, Director of Finance; HIDEO MURAKAMI, Comptroller; ADELAIDE "FRENCHY" DESOTO, JOSEPH G. KEALOHA, JR., RODNEY K. BURGESS, III, THOMAS K. KAULUKUKUI, SR., PETER K. APO, ROY L. BENHAM, MOSES K. KEALE, SR., WALTER L. RITTE, JR., and A. LEIOMALAMA SOLOMON, Trustees and EDWIN P. AULD, Administrator, Office of Hawaiian Affairs; State of Hawaii, Defendants.	CIVIL NO. 81-0182 MOTION TO DISMISS COMPLAINT OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION; AFFIDAVITS OF EDWIN P. AULD, APPENDICES "A", "B", "C", AND "D"; NOTICE OF MOTION

(CERTIFICATE OF SERVICE ATTACHED)

not have enacted it in the first place.

In the event this Court considers the issue of whether the terms "Hawaiian" and "native Hawaiian" are racially discriminatory and constitutionally offensive, Defendants respectfully invite the Court's attention to the case entitled Morton v. Mancari, 417 U.S. 535, 41 L. Ed. 2d 290 (1974) which case was relied upon by the delegates to the Constitutional Convention, as well as the Legislature, in drafting the challenged legislation. [See Constitutional Convention Committee on the Whole Report No. 13, p. 4, which states: "In conclusion, these provisions are constitutional due to the unique legal status of Hawaiians." (see Santa Clara Pueblo, et al v. Julia Martinez, et al., 46 L.W. 4412 (5/16/78); Morton v. Mancari, 417 U.S. 535 (1974); and Standing Committee Report No. 784).

In Morton v. Mancari, supra, an attack was made on preferential hiring of Indians within the Bureau of Indian Affairs. The argument was that this was a classification which was invidious.

The United States Supreme Court rejected the claim that a hiring preference for Indians in the B.I.A. violated the Fifth Amendment's due process clause guaranty of equal protection.

Apparently employing a standard between rational basis and strict scrutiny, the Court concluded that the preference was reasonably and directly related to a legitimate, nonracially based goal and thus not constitutionally objectionable.

> "Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably

> designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," Art. I, § 3, cl 3, or that a member of a city council reside within the city governed by the council. Congress has sought only to enable the BIA to draw more heavily from among the constituent group in staffing its projects, all of which, either directly or indirectly, affect the lives of tribal Indians. The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. See n 24, supra. In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly sui generis. Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination." 41 L.Ed. 2d 302, 303.

The importance of the decision for our purpose is that: (1) The Supreme Court recognized that there exists a special and unique relationship between a sovereign body and the aboriginal class of people in its territory that justifies preferential treatment. In the case of the State of Hawaii, the Federal Government, the State of Hawaii and the people of the State of Hawaii, in amending their Constitution, recognized a particular obligation and responsibility of the State to address the needs of the aboriginal class of people of Hawaii. HRS § 10-1(a);

(2) A class of aboriginal people is not a "racial" class as such, that would invalidate the use of some degree of preference to promote the overall purpose of remedial legislation to address their needs;

(3) Although the immediate purposes of Chapter 10, HRS and Article XII, Hawaii State Constitution, as stated in HRS § 10-1(a) are to reaffirm the State's trust obligation to the native Hawaiians and address the needs of the aboriginal class of people of Hawaii, the overall purpose, as stated in Conference Committee Report No. 77 on H.B. 890, Senate Journal, p. 998 is to afford all the Hawaiians equal participation in the ultimate homogeneous society that the State seeks to achieve.

Both the delegates to the Constitutional Convention and the Legislature had sufficient data before them to conclude that the Hawaiians, regardless of blood quantum, were overrepresented in the prisons, on the welfare rolls, in the number of school dropouts and underrepresented in the business, professional and political life of the State and could rationally conclude that this resulted from the loss of their lands and their traditional way of life.

These are sufficiently important State interests to support the constitutionality of the objective of betterment of conditions of native Hawaiians and Hawaiians.

(4) Where the aboriginal people to whom the legislation is addressed are all descendants of those aboriginal peoples inhabiting the territory, all of whom suffered the consequences of Western conquest, special treatment can be tied rationally to the fulfillment of the sovereign's unique obligation toward them. The blood quantum of such descendants of the aboriginal people, has no relevancy in regard to the underlying purpose of the remedial legislation;

(5) The Hawaiians enjoy a unique or special status as native Americans. The Native American Religious Freedom Act of 1978 (92 Stat. 469) which classified Hawaiians as Native Americans recognizes and encourages the value of preserving traditional but dying culture and religious practices of its indigenous peoples. Hawaiian culture and traditions will be lost unless special protection is permitted. The preservation of Hawaiian culture is a sufficiently important governmental interest and it is clearly in the public interest to allow Hawaiians to determine how best this goal can be achieved. Cf Livingston v. Ewing, 601 F.2d 1110, 1112 (10th Cir. 1979).

Thus there is ample precedent to support the constitutionality of OHA legislation.

(6) The OHA legislation which (a) reaffirms and facilitates Congress' trust obligations to native Hawaiians as recognized in the Hawaiian Homes Commission Act and again in the Admission Act of 1959 and (b) which addresses the needs of the aboriginal class of people of Hawaii satisfies the criteria of Mancari in that the preference accorded to native Hawaiians and Hawaiians is reasonable and rationally related to the fulfillment of Hawaii's unique obligation toward the Hawaiians.

Thus, whether this Court utilizes the rational basis test, the Mancari standard, or the compelling state interest test, we believe that the subject legislation passes constitutional muster because there are sufficiently important interests for the State to protect.