No. 11-336

IN THE
Supreme Court of the United States

JOHN M. CORBOY, ET AL.,
Petitioners,
v.
DAVID M. LOUIE, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Hawaii

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

The Solicitor General does not dispute that "this case is important." U.S. Br. 20. Indeed, the Solicitor General openly admits that thousands of Hawaiian residents who possess a certain quantum of "the blood of the races inhabiting the Hawaiian Islands previous to 1778" are exempted from paying property taxes. Whether such a blatantly racially discriminatory regime comports with the Equal Protection Clause clearly merits this Court's review. To his credit, the Solicitor General never suggests otherwise.

Regrettably, the Solicitor General's candor ends there. To claim that the judgment below rests on an independent and adequate state ground, the Solicitor General mischaracterizes the complaint, the petition, and the decision below. The Solicitor General's claim that standing would be lacking if this action had arisen in federal court requires still further misdirection and the invention of a special standing rule that this Court has rejected in other contexts. And the Solicitor General's cursory attention to the merits confirms why this Court's review is urgently needed: The Solicitor General says little more than that this Court's rejection of a "native Hawaiian" classification in *Rice* v. *Cayetano*, 528 U.S. 495 (2000), does not *entirely* doom the use of that classification here.

A. The Solicitor General's assertion that the decision below rests on an independent and adequate state ground is dead wrong. Although he repeats the Hawaii Supreme Court's *claim* that its decision

rested on state law (U.S. Br. 9-11), saying it is so does not make it so.

1. As we have explained (Pet. 20-22), this Court routinely reviews decisions in which a purported state-law reason for declaring a case nonjusticiable is intertwined with the merits of the underlying federal question. The Solicitor General does not dispute that fact. Indeed, he never really grapples with the fact that the ostensible state-law basis of the decision below is inextricably bound up in whether the native Hawaiian classification is permissible.

The Hawaii Supreme Court ruled that petitioners could not challenge the racially discriminatory taxation scheme because they did not also seek to participate in the racially discriminatory leasehold program. But that is just an indirect way of saying that use of a transparent proxy for race (lessee status) is permissible and that the only potentially cognizable constitutional injury is the additional and separate leasehold benefit that is explicitly conditioned on an applicant's race.

Suppose that a State decided to offer mortgage loans, but only to men and with some kind of conditions attached, and that any man holding such a mortgage was also exempted from paying property taxes. Suppose further that a woman is able to obtain a private-sector mortgage on terms roughly equal to the state-sponsored mortgage, but she remains ineligible for the property-tax exemption. Has she suffered any less "injury-in-fact" from the discriminatory tax treatment? Of course not. The only way one could even contend otherwise is by first concluding that she is not "similarly situated" to the male mortgage holders, either because the State claims to have good reasons for making that initial

gender classification or because the conditions attached to the male-only, state-sponsored mortgage justify the discrimination. *But that is itself the merits question.*

This Court has repeatedly held that transparent proxies for suspect classifications do not pass constitutional muster. See Pet. 15-16 (collecting cases). The Hawaii Supreme Court turned that rule on its ear by claiming that such proxies can become independent and adequate state grounds that preclude this Court's review altogether. The Solicitor General fails to confront this reality; indeed, he ultimately concedes (U.S. Br. 12) that petitioners' lawsuit "turns to some degree on a question of federal law."

2. To avoid reckoning with cases in which this Court has rejected state courts' attempts to erect barriers to federal causes of action (see Pet. 25-26), the Solicitor General claims that petitioners sued only under a state-law cause of action, "not under Section 1983." U.S. Br. 12. A quick trip to the petition appendix proves otherwise: The Hawaii Supreme Court correctly quoted the complaint's explicit allegations that respondents had "violate[d] the Fourteenth Amendment of the United States Constitution and 42 U.S.C. §§ 1981, ***1983***, 1985(3), 1986 and 2000d et seq." Pet. App. 20a (emphasis added). The Solicitor General cites nothing to support his passing suggestion (U.S. Br. 12) that petitioners were required to bring their Section 1983 action "in the state trial court of general jurisdiction" rather than the Tax Appeal Court, and there is no suggestion by the courts below that petitioners sued in the wrong forum.

In *First National Bank* v. *Anderson*, 269 U.S. 341, 346 (1926), this Court said that whether a complaint "sets up a sufficient right of action" under federal law "is necessarily a question of federal law" and "this [C]ourt must determine for itself the sufficiency of the allegations displaying the right * * * and is not concluded by the view taken of them by the state court." In *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 525-526 (1959), this Court quoted that language and applied it to review—and reject—a state court's holding that taxpayers lacked standing to raise a federal constitutional challenge to a state tax. The Solicitor General tries (U.S. Br. 13 n.9) to distinguish *Allied Stores* on the ground that "the state court's decision on standing was specific to the plaintiff's legal theory," but that is true of this case as well *and* fails to grapple with the rationale this Court gave for treating the issue as one of federal law.

The Solicitor General's efforts to distinguish *Liner* v. *Jafco, Inc.*, 375 U.S. 301 (1964), are misguided. He dismisses the case because "[t]he state courts did not question their own jurisdiction." U.S. Br. 14. But *Jafco* quoted the assertion by the Court of Appeals of Tennessee that "the questions in this case have become moot," and then framed the question as whether this Court was "bound by the state appellate court's *holding* that this case was rendered moot." 375 U.S. at 304 (emphasis added). This Court thus plainly understood that it was reviewing a state court's determination of nonjusticiability and concluded that "the question of mootness is itself a question of federal law upon which we must pronounce final judgment." *Ibid.*

The Solicitor General also notes (U.S. Br. 14) that the trial court in *Jafco* had entered an "injunction * * * that was binding on the parties on the merits,"

as if to suggest that the injunction had continuing force that itself defeated the state court's mootness holding. Not so. Because the construction project at issue had been completed, the anti-picketing injunction was itself moot—there was nothing left to picket.[1] In any event, to the extent the Solicitor General urges a rule that prescribes different jurisdictional consequences based on whether a case starts out as nonjusticiable or some intervening development renders it so, that is entirely unsupported. The question is *whether* there is a federal question bound up in the ostensibly state-law ground for dismissal, not *when* such an issue arises.[2]

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[1] The Solicitor General's related suggestion that *Jafco* stands in "contrast" to the decision below because the Hawaii Supreme Court dismissed petitioners' lawsuit "without prejudice and without resolving any federal question" (U.S. Br. 14) is baseless. The Hawaii Supreme Court never specified that the dismissal was "without prejudice," and, as explained above, its ruling on standing *was* based on an (incorrect) understanding of the merits of the federal question.

[2] The Solicitor General briefly cites (U.S. Br. 14) *Tory* v. *Cochran*, 544 U.S. 734 (2005), and *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989), but neither case supports denial of review here. *Cochran* held that the case was not moot in light of the concession that the respondent's death potentially mooted only a "portion" of the injunction under state law. 544 U.S. at 737. *ASARCO* held the absence of an injury that would have supported standing if the action had originated in federal court did not necessarily deprive this Court of jurisdiction to review the issue coming out of state court. 490 U.S. 619-621. That this Court has *upheld* federal jurisdiction under those circumstances does not explain why the Court should *refuse* to exercise jurisdiction here. Notably, the Solicitor General does not even attempt to distinguish *Xerox Corp.* v. *Harris County*, 459 U.S. 145 (1982), *Costarelli* v. *Massachusetts*, 421 U.S. 193

The Solicitor General offers no response at all to the cases in which this Court has held that its jurisdiction is not defeated by state-law grounds that are no more than an attempt to evade enforcement of a federal right. See Pet. 23. All the Solicitor General says (U.S. Br. 15) is that the Hawaii Supreme Court stated its position "at some length," as if the amount of ink spilled is a suitable proxy for a genuinely independent state ground of decision. It is not, and the Solicitor General nowhere examines the content of the Hawaii Supreme Court's standing analysis.

3. When the Solicitor General finally does state his position on the standing issue, he demonstrates the urgent need for this Court's review. "[E]ven under federal law," the Solicitor General contends, petitioners would lack standing to challenge a racially discriminatory tax scheme "unless *the only* consideration separating the taxpayer from the tax beneficiary is the allegedly invidious classification." U.S. Br. 15 (emphasis added); see *id.* at 16-18. This Court rejected a virtually identical proposition in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 211 (1995), and *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U.S. 656, 667 (1993). See Cert. Reply at 2 (discussing those cases and *Teamsters* v. *United States*, 431 U.S. 324, 366 (1977)). When challenging a racially discriminatory system, the plaintiff need not show that the only factor separating him or her from a favored person is race. There is a constitutional right to "compet[e] on an equal footing," 508 U.S. at 667—showing that one is

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(1975), or *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276 (1932). See Pet. 21-22 (discussing same).

similarly situated in all respects may go to the merits or to remedial questions, but it is not necessary to establish standing.

The Solicitor General appears to believe that a different rule should apply because the racial preference here takes the form of tax benefits as opposed to government contracts. But there is no good reason to afford narrower review over the *direct* award of financial benefits than over the *indirect* conferral of such rewards. Just as a competitor for a government contract need not be the lowest bidder to have standing to object to a racial preference, a citizen need not claim to want *every* racially discriminatory benefit offered to have standing to object to *one* of them. Were it otherwise, a government would be better off by combining multiple racially discriminatory benefits (or burdens) into a single program.

Suppose that a government declared that only white citizens could live in a particular neighborhood, and that citizens in that neighborhood would be exempt from property taxes. Must a family wish to move into an all-white neighborhood (populated by people who would accept the benefits of such an offensive regime) in order to complain about the racially discriminatory tax burdens? The answer—as it is in every other Fourteenth Amendment context—is "no."

The Solicitor General offers no basis for distinguishing *Adarand* and *Northeastern Fla.*; rather, he first attempts to avoid them by misrepresenting the complaint. He quotes selected portions of the complaint that he characterizes as "amount[ing] to a claim of taxpayer standing" but then acknowledges that the state supreme court did not address any

such theory. U.S. Br. 16 (citing Pet. App. 50a n.32). In the next paragraph, the Solicitor General states that "[p]etitioners *now* present their claim as one challenging the fact that HHCA lessees (who must be native Hawaiians) receive a tax exemption for which petitioners do not qualify." U.S. Br. 16 (emphasis added). The implication that petitioners advance a new theory that was not in the complaint is false. As the Hawaii Supreme Court's quotations from the complaint reveal, petitioners from the beginning argued that, "in the absence of equivalent homestead leases and benefits for every Hawaii citizen without regard to race or ancestry, the [relevant laws and municipal actions providing tax exemptions to homestead lessees] * * * violate the Fifth and Fourteenth Amendments * * * and are invalid." Pet. App. 20a. The theory petitioners "now present" was in this case from the very start; the Hawaii Supreme Court "construed" it away.

The Solicitor General also attempts to bootstrap his view on the merits into a standing rule. He quotes *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591 (2008)—a merits decision—for the proposition that petitioners lack standing because "[t]here is no basis for concluding that petitioners' taxable property is similarly situated to an HHCA tract." U.S. Br. 17. But that was not the basis of any ruling by any court below, nor is it a defense at the standing stage. The question at this stage is only whether plaintiffs alleged that they were similarly situated to those Hawaiian citizens who possess the specified "blood of the races" necessary to enjoy these tax benefits.

Similarly, the Solicitor General (like the Hawaii Supreme Court) misconstrues the allegations of the complaint in hopes of turning a disagreement on the

merits into a standing hurdle. "Petitioners emphasize that if they wanted to pursue an HHCA leasehold, they would not qualify because they are not native Hawaiians. But standing to challenge the allocation of a governmental benefit depends on actually wanting to obtain that benefit * * *." U.S. Br. 17. The Solicitor General thus treats the relevant "governmental benefit" as an HHCA leasehold.

As the petition emphasizes and the complaint supports, however, the relevant "governmental benefit" is equal tax treatment. Pet. 13-16; Pet. App. 20a-22a. So when the Solicitor General proceeds to say (U.S. Br. 17) that our argument "would allow any plaintiff to challenge a contracting set-aside without being a contractor, or even an aspiring contractor," he draws a completely false analogy. Petitioners are property holders; the favored class consists of property holders. Each set of property holders is taxed unequally, and petitioners are excluded from the favored set on the basis of race. That states a textbook claim of racial discrimination and does not imply that non-contractors have standing to challenge a contracting set-aside.

In short, the Solicitor General's standing theory is plainly wrong. This Court has rejected it in other contexts, and the fact that it is now the declared position of the United States is a further reason to grant review.

B. The Solicitor General briefly foreshadows his position on the merits. U.S. Br. 18-21. Unsurprisingly, he is prepared to defend the constitutionality of the Hawaii Admission Act, which required adoption of the HHCA. Also unsurprisingly, he does not deny that the constitutionality of the racial preferences embedded in those statutes is an important

question and worthy of this Court's review. He contends only that such review is not warranted "at this time." *Id.* at 19. His reasons for saying so need not long detain the Court.

He first claims that *Rice* v. *Cayetano* does not entirely doom respondents' chances on the merits. U.S. Br. 19. But the possibility that there may be some daylight between that case and this one is still further reason to grant review, not a reason to deny it—the Solicitor General does not contend that *Rice* somehow *condones* the "native Hawaiian" racial classification employed here. He also suggests that this Court should await "conflicting decisions" by "other appellate courts," *ibid.*, but the racial classification at issue is unique to Hawaii, and this Court need not await a Ninth Circuit decision striking down a discriminatory Hawaiian program under the Fourteenth Amendment before taking up issues left open in *Rice* a dozen years ago.

Finally, the Solicitor General points to the *possibility* that some number of native Hawaiians may *seek* status as a sovereign government, which would, the Solicitor General concedes, be subject to congressional approval. U.S. Br. 20-21. Congress has repeatedly declined to enact proposed measures granting such sovereignty, and the Solicitor General offers no reason why the result will be different in the future. Even if Congress did approve such a measure, that would permit Hawaii only to *argue* that native Hawaiian classifications should be granted deference similar to that shown to certain Indian classifications—this Court has already noted that "[i]t is a matter of some dispute * * * whether Congress may treat the native Hawaiians as it does the Indian tribes." *Rice*, 528 U.S. at 518. But see U.S. Br. 20 n.11 (reasserting the position this Court

declined to resolve in *Rice*). Furthermore, as a prior Solicitor General correctly advised this Court, "[w]hen Congress has established discrete programs for native Hawaiians, it has done so based solely on their status as native Hawaiians, taking care to refer to native Hawaiians as a group distinct from Indian Tribes or Indians." Brief for the Respondent in Opposition at 10-11, *Kahawaiolaa* v. *Norton*, No. 04-1041 (May 2005).

It is the height of irony for the Solicitor General to claim that petitioners—who year after year pay thousands of dollars in taxes that fellow Hawaiian citizens of a particular "race" do not—lack an "injury-in-fact," while relying on a purely speculative chain of possible future events as a reason to delay review of this indisputably important question.[3]

[3] Petitioners disagree with other merits-related assertions in the Solicitor General's brief, including portions of his historical discussion. Petitioners also disagree with legal, factual, and historical assertions in the brief the United States filed in *Rice* v. *Cayetano* and has cross-referenced in footnote 11 of its brief in this case. It is enough for present purposes to note that this case presents indisputably important issues that were to some extent left open and to some extent resolved in petitioners' favor in *Rice*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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