No. 11-336

# In the Supreme Court of the United States

JOHN M. CORBOY, ET AL., PETITIONERS

*v.*

DAVID M. LOUIE, ATTORNEY GENERAL OF HAWAII, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


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## QUESTIONS PRESENTED

Petitioners brought a tax-refund action in the state Tax Appeal Court to recover their real property taxes, contending that equal-protection principles entitle them to the same tax exemption as participants in the homestead leasing program established by the Hawaiian Homes Commission Act, 1920, ch. 42, 42 Stat. 108 (1921). The Supreme Court of Hawaii held that petitioners lack standing under Hawaii law to bring such an equal-protection claim, because they are not interested in participating in the homestead leasing program and thus are not properly situated to challenge the requirements for participation in that program. The questions presented are as follows:

1. Whether the judgment of the state supreme court rests on an adequate and independent state-law ground, *i.e.*, the state court's conclusion that petitioners lacked standing under Hawaii law.

2. Whether petitioners have standing under Article III of the Constitution to invoke this Court's jurisdiction.

3. Whether, if the state supreme court had reached the merits of petitioners' equal-protection claim, it should have reversed the judgment in respondents' favor.

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

This brief is submitted in response to this Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## STATEMENT

1. a. The Hawaiian Islands were originally settled by Polynesians from the Western Pacific. In 1810, Kamehameha I united the islands into a single Kingdom of Hawaii. Between 1826 and 1893, the United States recognized the Kingdom as a sovereign nation and entered into several treaties with it. *Rice* v. *Cayetano*, 528 U.S. 495, 500-504 (2000); *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 232 (1984).

In 1893, in response to increasing American influence, Queen Lili'uokalani attempted to promulgate a new constitution to reestablish native Hawaiian control

over governmental affairs. *Rice*, 528 U.S. at 504. Subsequently, a group representing American commercial interests, with the assistance of a detachment of United States Marines, overthrew the monarchy and established a provisional government seeking annexation to the United States. Act of Nov. 23, 1993 (Apology Resolution), Pub. L. No. 103-150, 107 Stat. 1510.[1] Although President Cleveland initially refused to recognize the provisional government, *id.* at 1511, the Queen subsequently abdicated her throne, and the United States recognized the Republic of Hawaii. *Id.* at 1512; see 13 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* 5958-5959 (1897).

In 1898, the United States annexed Hawaii. Hawaiian Annexation Resolution (Newlands Resolution), J. Res. No. 55, 30 Stat. 750. The provisional government ceded 1.8 million acres of crown, government, and public lands to the United States. *Rice*, 528 U.S. at 505; Newlands Resolution, 30 Stat. 750; Apology Resolution pmbl., 107 Stat. 1512. The United States, in turn, provided that revenues from the ceded lands would be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes," Newlands Resolution, 30 Stat. 750, and that most of those lands would be administered by the territorial government for those purposes, Hawaiian Organic Act, ch. 339, § 91, 31 Stat. 159 (1900).

Not long after establishing the Territory of Hawaii, Congress became concerned with the condition of native Hawaiians and, in 1921, enacted the Hawaiian Homes

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[1] The Apology Resolution, a joint resolution adopted by Congress and signed by the President, acknowledged the 100th anniversary of the overthrow and apologized for the United States' role in it. See *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163, 168-169 (2009).

Commission Act, 1920 (HHCA), ch. 42, 42 Stat. 108. The HHCA set aside about 200,000 acres of the ceded lands and created a program of loans and long-term leases for the benefit of "native Hawaiians," which the statute defined to mean "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. The lands set aside under the HHCA are known as the Hawaiian "home lands." § 201(a)(5), 42 Stat. 108.

In 1959, Hawaii was admitted to the Union. Congress granted the new State title to most public lands in Hawaii, including the home lands set aside under the HHCA. See Hawaii Statehood Admissions Act (Admission Act), Pub. L. No. 86-3, § 5(b)-(d), 73 Stat. 5 (48 U.S.C. Ch. 3 note); *Rice*, 528 U.S. at 507. Under the Admission Act, the lands granted to Hawaii as well as the proceeds and income from them are held in a public trust managed by the State (the Ceded Lands Trust). Admission Act § 5(f), 73 Stat. 6; see *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163, 168 (2009). As a condition of statehood, see Admission Act § 4, 73 Stat. 5, Hawaii adopted the HHCA as part of its state constitution. See Haw. Const. Art. XII, §§ 1-3. Congress provided that Hawaii may amend the HHCA through state legislation in certain respects, but changes to the qualifications of lessees continue to require congressional approval. Admission Act § 4, 73 Stat. 5.[2]

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[2] Since statehood, Hawaii has proposed and Congress has approved a number of amendments to the HHCA. See 48 U.S.C. Ch. 3 note; see also Hawaiian Home Lands Recovery Act, Pub. L. No. 104-42, Tit. II, § 204, 109 Stat. 361 (1995) (48 U.S.C. Ch. 3 note). References in this brief to the HHCA without a corresponding reference to the Statutes at Large are to the statute as amended and now in force, which appears in the 2009 edition of *Michie's Hawaii Revised Statutes Annotated*.

b. The HHCA allows the Department of Hawaiian Home Lands (DHHL) to lease to adult native Hawaiians "the right to the use and occupancy of a tract of Hawaiian home lands," for agricultural, aquacultural, pastoral, or residential purposes. HHCA § 207(a); see § 202. Homeland tracts are subject to acreage limits that vary depending on the intended use.[3] The homestead leases cost $1 per year, last 99 years, and can be renewed for an additional 100 years. § 208(2).

The HHCA imposes numerous restrictions on homestead lessees. In particular, homeland tracts must be used according to the purpose set forth in the lease. A lessee must occupy and begin to use or cultivate the leased tract for the specified purpose within a year of the lease's commencement, and the lessee also must occupy, use, or cultivate the tract on his or her own behalf for a specified length of time out of every year. HHCA § 208(3) and (4). Lessees may not construct any buildings or improvements without approval. Haw. Code R. § 10-3-34 (LexisNexis 2012). The DHHL is authorized to cancel leases upon a finding, after notice and opportunity for a hearing, that lease conditions have been violated. HHCA § 210.

The HHCA also restricts lessees' ability to encumber, alienate, or transfer their leasehold. Any mortgage may only be on a leasehold interest, must meet certain insurance or guaranty requirements, and must be approved by the Hawaiian Homes Commission.[4] § 208(6). Lessees may not sublet their leaseholds, and they may

[3] The tracts are limited to one acre for most residential leases, 40 acres for agricultural or aquacultural leases, 100 acres for irrigated pastoral lands, and 1000 acres for other pastoral lands. HHCA § 207(a).

[4] The Commission is the collective head of the DHHL. See HHCA § 202.

transfer them only to certain family members or, with the approval of the DHHL, to another qualified native Hawaiian. § 208(5). In most cases, lessees also may not bequeath their leaseholds, except to certain relatives. § 209.

The HHCA provides that original lessees who agree to the required conditions of the leasehold and obtain a lease are exempt from paying taxes on the leasehold for seven years. HHCA § 208(8). The respondent counties further exempt qualifying lessees under the HHCA from most or all real property taxes beyond the initial seven-year period. Pet. App. 12a-14a nn.11-12.[5]

Currently, the DHHL maintains approximately 8800 homestead leases; of the approximately 200,000 acres administered by the DHHL, approximately 68,000 acres have been committed to non-homesteading purposes. The DHHL maintains waiting lists for homestead leases on each island; there are currently more than 25,000 individuals on those lists.

2. Petitioners are homeowners who pay real property taxes to the four respondent counties. Petitioners paid their taxes under protest and filed actions under the state tax-refund statute in the Hawaii Tax Appeal Court.[6] They alleged that the Equal Protection Clause of the Fourteenth Amendment entitled them to tax ex-

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[5] Most of the counties require that homestead lessees pay a minimum tax, ranging from $25 to $300 per year, after the HHCA's seven-year exemption expires. See Pet. App. 14a n.12 (citing Hawai'i County Code §§ 19-89, 19-90(e) (2005 & Supp. 2011)); Rev. Ordinances of Honolulu §§ 8-10.23, 8-11.1(g) (1990); Kaua'i County Code §§ 5A-6.3(g), 5A-11.23(a) (Supp. 2011).

[6] Petitioners named the state Attorney General and the four counties as defendants. The State intervened as a defendant. Pet. App. 16a & n.15, 21a-22a.

emptions equal to the exemptions given to homestead lessees. Pet. App. 12a-14a, 17a-18a, 20a-21a. Petitioners averred that they did not qualify for homestead leases because they did not meet the HHCA's definition of "native Hawaiians," *id.* at 18a, but they did not express interest in obtaining homestead leases or ask the court to declare them eligible for such leases. They sought recovery of taxes they had already paid and declaratory and injunctive relief. *Id.* at 20a-21a.

The state Tax Appeal Court granted summary judgment to respondents. The court ruled that limiting the real property tax exemption to homestead lessees did not amount to a suspect classification and that petitioners had failed to meet their burden to show that the exemption was not supported by a rational basis. Pet. App. 34a, 36a, 83a.

3. Petitioners then appealed to the Supreme Court of Hawaii.[7] As relevant here, petitioners argued that the HHCA, both as enacted by Congress and as adopted into state law, and the counties' tax exemptions for HHCA leaseholds denied petitioners the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments. Specifically, petitioners contended that the State and counties violated the Fourteenth Amendment by providing real property tax exemptions to HHCA homestead lessees and not to petitioners or others similarly situated, as only native Hawaiians were eligible for homestead leases. Pet. App. 38a. Petitioners also asserted that the HHCA and its adoption by the State violated the equal-footing doctrine, federal civil-rights laws, and purported fiduciary duties under the Ceded

[7] The Supreme Court of Hawaii denied an injunction pending appeal, and this Court declined to review that decision. *Corboy* v. *Bennett*, 130 S. Ct. 3469 (2010) (No. 09-1256).

Lands Trust, and that the counties' tax exemptions for HHCA leaseholds violated other provisions of the federal Constitution. *Id.* at 36a-38a.

Respondents argued that petitioners lacked standing to challenge the tax exemptions because they had not demonstrated a desire to become homestead lessees. Pet. App. 39a. On the merits, respondents contended that the tax exemptions classified taxpayers on the basis of homestead-lessee status, not on the basis of race, and were not subject to strict scrutiny. *Id.* at 38a.

4. The Supreme Court of Hawaii vacated the Tax Appeal Court's judgment and remanded with instructions to dismiss petitioners' complaints for lack of jurisdiction. Pet. App. 1a-74a.

a. In reviewing the Tax Appeal Court's decision, the state supreme court "construe[d] [petitioners'] challenge to the tax exemption afforded to homestead lessees as a challenge to those lease eligibility provisions" restricting homestead leases to native Hawaiians. Pet. App. 41a. The court declined to review the merits of that claim, because it concluded that petitioners lacked standing under Hawaii law to raise it in the state courts. *Id.* at 41a-51a. The court held that petitioners had failed to allege that the HHCA's eligibility requirements caused them an injury in fact, because the record contained no indication that petitioners had any interest in obtaining leases if the eligibility requirements were invalidated. *Id.* at 42a, 49a. The court also noted that petitioners had not established in the Tax Appeal Court the amount of any pecuniary loss they claimed to have suffered based on the denial of an equivalent tax exemption. *Id.* at 50a n.32.

Applying the justiciability principles of Hawaii law, the court ruled that petitioners' argument was merely a

"political or intellectual grievance" that "amounts to speculation" and was insufficient to establish standing. Pet. App. 50a (quoting *Mottl* v. *Miyahira*, 23 P.3d 716, 730 (Haw. 2001)). The court further held that petitioners had not invoked various potential alternative bases for standing under Hawaii law, such as general taxpayer standing or standing to challenge the tax exemption "in general," "*i.e.*, to challenge the fact that homesteaders receive the tax exemption, while non-homesteaders do not." *Id.* at 50a-51a nn.32-33. Petitioners had neither asserted general taxpayer standing nor raised any kind of general challenge to the tax exemption for homestead lessees, but rather had focused on the eligibility requirements to obtain a homestead lease. *Ibid*. The court held that petitioners' challenge to those requirements was not justiciable under state law.

b. The court held that petitioners' remaining claims (under principles of trust law, the equal-footing doctrine, and the Contracts Clause of the Constitution) were not properly raised in the complaints and were procedurally barred for other state-law reasons as well. Pet. App. 51a-55a & n.34. The court therefore did not address the merits of those claims either.

c. Justice Acoba concurred in the result. Pet. App. 57a-74a. He would have held that petitioners had general taxpayer standing, *id.* at 60a-67a, 70a-74a, but he would have ordered dismissal on the ground that the United States was a necessary party that petitioners had failed to name, *id.* at 67a-70a.

**DISCUSSION**

The Supreme Court of Hawaii held that petitioners lack standing under state law to challenge the tax exemptions afforded to homestead lessees or the underly-

ing eligibility restrictions for the homestead lease program. That ruling, grounded in state-law justiciability principles and the particular circumstances of this case, does not warrant this Court's review, and it is in any event an adequate and independent state ground for the court's decision. And even if federal standing principles were controlling in the context of this tax-refund suit brought in state tax court, petitioners still would lack standing. For both reasons, this Court lacks jurisdiction to reach the merits of petitioners' constitutional claims.

The state supreme court concluded that petitioners sought to use their status as taxpayers to indirectly challenge the homestead lease program's eligibility restrictions by challenging the tax exemptions granted to lessees. Petitioners take issue with that interpretation of their claims, but that case-specific ruling does not warrant review. And regardless of how their claim is characterized, petitioners have not established an interest in applying for homestead leases. The Supreme Court of Hawaii reasonably concluded that they have merely asserted a generalized grievance and have failed to satisfy the injury-in-fact prong of the state standing requirement (and the same conclusion would follow under federal standing principles).

Moreover, even if the petition presented a justiciable controversy, this case is an unsuitable vehicle for this Court to review the tax exemption for HHCA lessees.

### A. The Hawaii Supreme Court's Decision Rests On An Adequate And Independent State Ground And Is Not Subject To Review

This Court lacks jurisdiction to review a state-court judgment that is based on an adequate and independent state ground. *E.g.*, *Michigan* v. *Long*, 463 U.S. 1032,

1041-1042 (1983). Under those circumstances, any review on federal-law grounds would not change the decision or the basis for the decision, and "could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945). "Respect for the independence of state courts" is a further reason to refrain from reviewing judgments based on state law, of which the state courts are the final expositors. *Long*, 463 U.S. at 1040.

In this case, the Supreme Court of Hawaii held that petitioners lacked standing to bring a state tax-refund action contending that they are entitled to the same exemption from state taxes as a homestead lessee. That decision rests on state law, not on any principle of federal law; it is independent of the merits of petitioners' equal-protection claim; and it is adequate to support the judgment. Accordingly, the state court's application of state justiciability principles is not subject to further review.

1. The state court's ruling relied on the state-law requirement "that a plaintiff demonstrate that he or she has 'suffered an actual or threatened injury as a result of the defendants' conduct.'" Pet. App. 46a (quoting *Mottl* v. *Miyahira*, 23 P.3d 716, 726 (Haw. 2001)); see also *id.* at 42a-43a. Thus, the state court's decision rested entirely on a question of state law.

Under Hawaii law (as under federal law), standing is a "threshold" requirement that the plaintiff must establish at the outset. *IndyMac Bank* v. *Miguel*, 184 P.3d 821, 827 (Haw. Ct. App. 2008). Standing is assessed separately from the merits of the action; if the plaintiff cannot establish standing, the court may not reach the merits. *Ibid.*

Despite that similarity, Hawaii's law of standing differs substantively from federal law under Article III of the Constitution. For that reason, the state supreme court made clear in this case that it was not applying "the same 'cases or controversies' limitation as the federal courts," and that although federal cases applying federal standing requirements were instructive, they were "not dispositive on this issue." Pet. App. 44a; accord *id.* at 42a ("[T]he courts of Hawaii are not subject to a 'cases or controversies' limitation like that imposed upon the federal judiciary by Article III, § 2 of the United States Constitution") (quoting *Sierra Club* v. *Department of Transp.*, 167 P.3d 292, 312 (Haw. 2007)).

That statement alone would be enough to rebut even the presumption of reviewability that this Court applies when—unlike here—"a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law." *Long*, 463 U.S. at 1040. As the Court said in *Long*, "a plain statement * * * that the federal cases [cited in the state court opinion] are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached," is enough to make clear that the decision rests on state-law grounds. *Id.* at 1041. The state supreme court made just such a statement here. Pet. App. 44a ("[F]ederal cases concerning standing are not dispositive on this issue.").

2. Petitioners contend (Pet. 20-22) that the state supreme court's standing decision in fact rested on federal law or was intertwined with federal-law principles. Those contentions lack merit.

Petitioners are incorrect in their assertion that the justiciability of a state tax-refund claim is itself a federal question from start to finish, whenever the refund claim

is based on the federal Constitution, laws, or treaties. The refund claim in this case does not involve a cause of action created by federal law, such as an action under 42 U.S.C. 1983 (which can be brought in state courts of competent jurisdiction as well as in federal court, see, *e.g.*, *Haywood* v. *Drown*, 556 U.S. 729, 731 (2009)). Petitioners sued under state tax-refund statutes in the state Tax Appeal Court, not under Section 1983 in the state trial court of general jurisdiction. See Pet. App. 16a-17a. And indeed, no Section 1983 action may be brought in state court for declaratory and injunctive relief against the collection of a state tax that allegedly violates federal law, if the State provides an avenue for taxpayers to seek a refund. *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U.S. 582, 588, 590-592 (1995). Rather, the taxpayer must avail himself of the form of relief that the State makes available. See *id.* at 592. State tax administration implicates uniquely sensitive state prerogatives, and federal law contains limitations aimed at preventing disruption of state revenue procedures. See *id.* at 590 (noting the "federal reluctance to interfere with state taxation").

Petitioners' suits for refunds and for prospective relief therefore are state-law causes of action. Federal law does not set the rules of justiciability for state-law causes of action in state court, even when the claim in the state-law cause of action turns to some degree on a question of federal law. *E.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 120 (2003) (in a state-law criminal prosecution, "[w]hether Virginia's courts should have entertained [the defendant's First Amendment] overbreadth chal-

lenge is entirely a matter of state law").[8] States "have great latitude to establish the structure and jurisdiction of their own courts," *Howlett* v. *Rose*, 496 U.S. 356, 372 (1990), and that latitude is at its greatest when the question is when to entertain a state-law cause of action.

Petitioners also err in asserting that federal law determines whether any federal claim is cognizable *ab initio* in state court. See *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 620 (1989) ("[T]o impose federal standing requirements on the state courts whenever they adjudicate issues of federal law * * * would be contrary to established traditions and to our prior decisions"). This Court's cases have long recognized that States need not "create a court competent to hear the case in which the federal claim is presented." *Howlett*, 496 U.S. at 372. And although state courts "of competent jurisdiction" may not discriminate against federal causes of action, state courts may enforce neutral, evenhanded jurisdictional rules that "reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." *Id.* at 381; see *Haywood*, 556 U.S. at 739. Hawaii's standing doctrine is just such a rule: every litigant in Hawaii's courts must establish standing as a prerequisite to maintaining the action.[9] Hawaii has not opened its courts to litigants who do not meet that requirement. Cf. *id.* at 740-741;

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[8] When a state court of last resort *decides* such a federal-law question, or leaves such a question undecided without resting its decision on adequate and independent state-law grounds, the federal question is reviewable in this Court. 28 U.S.C. 1257.

[9] By contrast, in *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522 (1959), the state court's decision on standing was specific to the plaintiff's legal theory—it rested on the validity of the very provision of law that the plaintiff was challenging. See *id.* at 525-526.

*Howlett*, 496 U.S. at 378-379. Petitioners' submission that the federal Constitution requires state courts to adopt a justiciability rule at least as permissive as Article III lacks support in any decision of this Court or in the federalism principles of our constitutional structure.

The cases petitioners cite pertain primarily to a different question: whether this Court may review a decision by a state court of competent jurisdiction to reject a federal claim on mootness grounds. In petitioners' most relevant case, the state trial court had entered a permanent injunction against labor picketing and rejected the defendants' preemption defense; the state appellate court left the permanent injunction in place even as it pronounced the preemption *defense* "moot" and declined to rule on it. The state courts did not question their own jurisdiction (or else they would not have entered the injunction). *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 304-305 (1964). Accord *Tory* v. *Cochran*, 544 U.S. 734, 736 (2005) (challenge to state-court injunction remained justiciable because the injunction remained in force); *ASARCO*, 490 U.S. at 618-619, 623-624 (challenge to state-court declaratory judgment was justiciable because the judgment itself created remediable injury). In these cases, the state courts had rendered an injunction or other judgment that was binding on the parties on the merits. Here, by contrast, the state supreme court vacated the judgment and ordered the state-law cause of action dismissed at the threshold, without prejudice and without resolving any federal question, based on petitioners' lack of standing to invoke the jurisdiction of the state Tax Appeal Court. Nothing in the cases petitioners cite establishes that such a state-law justiciability ruling is not an adequate and independent state ground. And treating the state court's application of its own

justiciability principles as dispositive will not leave unreviewed any state-court judgment that actually resolves a question of federal law.

3. Petitioners contend (Pet. 23-25) that the state-law standing ground is inadequate to support the decision. The Supreme Court of Hawaii, however, explained at some length how its standing ruling conforms to state-law precedent. See Pet. App. 44a-51a. Moreover, as discussed below, pp. 16-18, *infra*, even under federal law a plaintiff's status as a taxpayer is not enough to confer standing to challenge a tax benefit, unless the only consideration separating the taxpayer from the tax beneficiary is the allegedly invidious classification, which is not the case here. It follows that the *state* courts' application of that standing principle is not so "unsubstantial and illusory," *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 282-283 (1932), as to justify this Court's disregarding the decision of a state supreme court as some sort of subterfuge. See *Beard* v. *Kindler*, 130 S. Ct. 612, 618 (2009) ("[I]t would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts."). Petitioners' insistence that "under Hawaii law [they] quite clearly *do* have standing" (Pet. 24) is not a basis for this Court to review or set aside the state supreme court's decision that they do not.[10]

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[10] Petitioners assert (Pet. 24-25) that standing in Hawaii is prudential rather than jurisdictional. Even if that is correct, petitioners are demonstrably incorrect in arguing that a prudential ground cannot bar further review. "[A] discretionary state procedural rule can serve as an adequate ground." *Kindler*, 130 S. Ct. at 618.

**B. Petitioners Lack Standing Under Federal Standards**

Even if the Hawaii Supreme Court's decision did not rest on an adequate and independent state ground, petitioners would lack standing under Article III to maintain this action in a federal court, including this Court. And the state supreme court's judgment, dismissing their claims without prejudice for lack of jurisdiction, Pet. App. 56a, does not create standing where none previously existed. See *ASARCO*, 490 U.S. at 623-624; accord *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 662-663 (2003) (Stevens, J., concurring). Petitioners' lack of standing therefore precludes further review.

1. As petitioners originally phrased their claim, Pet. App. 17a-18a, their asserted injury was that because lessees of the Hawaiian home lands are exempt from most municipal real property taxes on the leasehold, "but still receive the benefit of municipal services," petitioners "and all property owners similarly situated in each of those counties each pay proportionately more twice each year to carry [lessees]." *Id.* at 18a. That amounts to a claim of taxpayer standing, and although the state supreme court did not decide whether petitioners could invoke general taxpayer standing under state law (because petitioners had not made such an argument in that court), *id.* at 50a n.32, they plainly could not invoke federal jurisdiction on such a basis. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 345-346 (2006).

Petitioners 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. But petitioners' standing theory is still flawed, because there is no basis for concluding that petitioners would qualify for a tax exemption but for the HHCA eligibility requirement. Petitioners do not even

claim that they want to lease HHCA home lands. Pet. App. 50a n.31. The Equal Protection Clause is implicated only when those who "appear similarly situated are nevertheless treated differently." *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008). There is no basis for concluding that petitioners' taxable property is similarly situated to an HHCA tract: petitioners apparently own real property in fee simple, not leaseholds, see Pet. App. 12a, 14a, 17a, and they do not assert that their property is subject to the same rules with respect to use, cultivation, personal inhabitation, and limited alienation as HHCA leaseholds, see pp. 4-5, *supra*. Petitioners have not established that any portion of their tax bills is fairly traceable to the HHCA eligibility criterion that they challenge.

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, and to compete for it "on an equal footing." *Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 667-668 (1993); see *Warth* v. *Seldin*, 422 U.S. 490, 516 (1975). Petitioners' argument would allow any plaintiff to challenge a contracting set-aside without being a contractor, or even an aspiring contractor; it is no answer to say that, *if he were a contractor*, he would be ineligible for the benefit. Hypothetical injury does not confer standing.

At bottom, petitioners' theory appears to be that if respondents were ordered to award HHCA leaseholds without regard to native Hawaiian status, respondents then would begin taxing the leaseholds, and every Hawaii taxpayer would in turn benefit. But that hypothe-

sized sequence of events rests on nothing more than speculation that the tax treatment of petitioners' own property might be modified in some way as a result. *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1443-1444 (2011); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 480 n.17 (1982). To conclude otherwise "would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." *DaimlerChrysler*, 547 U.S. at 346 (internal quotation marks and citations omitted).

"The rule against generalized grievances applies with as much force in the equal protection context as in any other." *United States* v. *Hays*, 515 U.S. 737, 743 (1995). Quite aside from rendering petitioners' claims nonjusticiable in state court as a matter of state law, that rule bars petitioners' challenge in this Court to the tax exemption unless and until they can show that, if eligibility were not limited to native Hawaiians, they could qualify for an equivalent tax exemption (for example, by expressing interest in applying for a homestead lease).

### C. The Merits Of Petitioners' Equal-Protection Claim Are Not Properly Presented And, In Any Event, Do Not Warrant This Court's Review At This Time

Petitioners contend that this Court should take up the foregoing questions of standing and judicial federalism not because those questions warrant review in their own right, but because *if* those questions were resolved in petitioners' favor, petitioners might then be able to have this Court decide the merits questions that the state supreme court did not reach. Pet. i, 10-20. Even

if the merits questions were properly presented here, they would not warrant this Court's review at this time.

1. Petitioners repeatedly suggest (Pet. 2, 10-11, 18, 20, 28) that if this case is justiciable, a decision on the merits would require only a straightforward application of this Court's holding in *Rice* v. *Cayetano*, 528 U.S. 495 (2000). But petitioners seek a decision far beyond the compass of anything resolved in *Rice*. Indeed, this Court in *Rice* cautioned that the constitutional status of native Hawaiians as an indigenous people raises "questions of considerable moment and difficulty," and the Court was able to "stay far off that difficult terrain" by confining its holding to the Fifteenth Amendment context presented in that case. *Id.* at 518-519.

*Rice* was a case under the Fifteenth Amendment about the right to vote in state elections for state officials. See 528 U.S. at 520, 522. The Court held that the Fifteenth Amendment forbade racial classifications in voting in such elections. The Court did not decide, as petitioners would have it (Pet. 10-11), that classifications that benefit native Hawaiians necessarily trigger strict scrutiny under the Equal Protection Clause. Indeed, the Court in *Rice* never referred to strict scrutiny at all. Rather, the Court expressly recognized that federal programs for the benefit of Indians do not violate equal-protection principles, 528 U.S. at 519-520, and it reserved the question whether Congress has "authority * * * to treat Hawaiians or native Hawaiians as tribes." *Id.* at 519. It is that difficult question that petitioners ask this Court to take up—and to do so in the first instance, without a decision by the court below, and (concededly, see Pet. 18-19) without conflicting decisions by any other appellate courts suggesting that a resolution by this Court might be needed.

Petitioners present no reason for this Court to take such an extraordinary step. The HHCA has been on the books for more than 90 years. Anyone with a genuine interest in participating in the leasehold program may bring an action, in either a federal district court or a Hawaii court of general jurisdiction, to challenge his exclusion as resting on an impermissible racial classification. See, *e.g.*, Pet. App. 49a (petitioners could have established standing by showing that they are "interest[ed] in participating in the homestead lease program"). The Tax Injunction Act, 28 U.S.C. 1341, is no bar to such an action by a plaintiff with standing.

Petitioners contend (Pet. 19-20) that, at a broader level of generality, this case is important because it presents the question whether all legislation to benefit Native Hawaiians is subject to strict scrutiny. That is no reason to overlook the unsuitable posture of this case: a number of such programs are on the books, and plaintiffs with standing are able to challenge them if they choose. Cf., *e.g.*, *American Fed'n of Gov't Employees* v. *United States*, 330 F.3d 513, 517 (D.C. Cir.) (equal-protection challenge to a contracting exception for the benefit of Native American-owned companies, later expanded to include Native Hawaiian-owned companies), cert. denied, 540 U.S. 1088 (2003).[11]

Moreover, recent and ongoing legal developments further counsel against reviewing the merits at this time, especially without the benefit of a developed record. While this litigation was pending, the State of Hawaii enacted legislation that provides a process for the

[11] As the government has previously explained, Congress has the authority, invoking its constitutional authority to legislate for the benefit of Indian tribes, to establish special programs for the benefit of native Hawaiians. U.S. Amicus Br. at 16-26, *Rice*, *supra* (No. 98-818).

indigenous native people of Hawaii to reorganize as a sovereign government, to be followed by formal recognition of the governing entity by the State if a reorganization is adopted. Act 195, 2011 Haw. Sess. Laws 646. The legislation further provides that the HHCA "shall be amended, subject to approval by the United States Congress, if necessary." *Id.* § 3; see p. 3, *supra*. Petitioners' argument on the merits rests in part (Pet. 17) on the proposition that no native Hawaiian entity has been recognized as a quasi-sovereign entity. In light of the ongoing legal developments in that area, even if petitioners' claims were justiciable, it would be premature for this Court to rule on those claims before the process concerning reorganization occurs; before any ensuing action by Congress or the Executive Branch has been considered; and before any lower court has an opportunity to address the legal significance of any such steps.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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