

---

NO. 04-15044

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

JOHN DOE, a minor, by his mother  
and next friend, Jane Doe,

*Plaintiff-Appellant,*

v.

KAMEHAMEHA SCHOOLS/  
BERNICE PAUAHI BISHOP ESTATE, et al.,

*Defendants-Appellees.*

---

**AMICUS BRIEF OF THE JAPANESE AMERICAN CITIZENS  
LEAGUE OF HAWAI'I-HONOLULU CHAPTER, CENTRO LEGAL DE  
LA RAZA, AND THE EQUAL JUSTICE SOCIETY IN SUPPORT OF  
DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC**

---

On Appeal from the United States District Court for the District of Hawai'i,  
CIVIL NO. 03-00316-ACK

---

Eric K. Yamamoto  
Susan K. Serrano  
E. A. Ho'oiipo Kalaena'auao Pa  
2515 Dole Street  
Honolulu, HI 96822  
(808) 956-6548

*Attorneys for Amici Curiae*

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... iii

**INTEREST OF AMICI** ..... 1

**ARGUMENT** ..... 2

    I.    KAMEHAMEHA SCHOOLS’ ADMISSIONS POLICY DOES NOT VIOLATE CIVIL RIGHTS; RATHER, IT SERVES TO RESTORE TO NATIVE HAWAIIANS THAT WHICH 19TH AND 20TH CENTURY “WESTERN INFLUENCE” NEARLY DESTROYED: HAWAIIAN EDUCATION, CULTURE AND A MEASURE OF SELF-GOVERNANCE ..... 2

    II.   IN ASSESSING AN INDIGENOUS GROUP’S ATTEMPTS TO RESTORE A MEASURE OF SELF-GOVERNANCE AND CULTURE THROUGH EDUCATION IN THE FACE OF OVERWHELMING “WESTERN INFLUENCE,” THE COURT’S INQUIRY INTO “LEGITIMATE NONDISCRIMINATORY REASONS” MUST INCORPORATE THE CONTEXT OF COLONIZATION AND ITS RESULTING “DEVASTATION” OF THE NATIVE PEOPLE ..... 5

**CONCLUSION** ..... 11

**CERTIFICATE OF COMPLIANCE** ..... 12

## TABLE OF AUTHORITIES

### CASES

<i>Doe v. Kamehameha Sch.</i> , No. 04-15044, slip op. 8921 (9th Cir. Aug. 2, 2005).....	6, 7, 10
<i>Doe v. Kamehameha Sch.</i> , 295 F. Supp. 2d 1141 (D. Hawai‘i 2003).....	3, 5, 7, 10
<i>Johnson v. Transportation Agency</i> , 480 U.S. 616 (1987) .....	6
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974) .....	7, 10
<i>Rice v. Cayetano</i> , 528 U.S. 495 (2000) .....	5, 8
<i>Rice v. Cayetano</i> , 963 F. Supp. 1547 (D. Hawai‘i 1997) .....	8
<i>United Steelworkers of Am. v. Weber</i> , 443 U.S. 193 (1979) .....	6

### STATUTES

42 U.S.C. § 1981 .....	6, 10
------------------------	-------

### OTHER AUTHORITIES

S. James Anaya, <i>International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State</i> , 21 Ariz. J. Int’l & Comp. L. 13 (2004).....	5
Apology Resolution, S. Joint Res. 19, Pub. L. No. 103-150, 107 Stat. 1510 (1993).....	5
David H. Getches et al., <i>Cases and Materials on Federal Indian Law</i> (5th ed. 2005).....	8
Hawaiian Homes Commission Act of 1920 (HHCA), Pub. L. No. 66-34, ch. 42, 42 Stat. 108 (1921).....	4

Hearings on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii before the House Committee on the Territories, 66th Cong., 2d Sess. (1920).....	4
H.R.Rep. No. 66-839 (1920).....	4
Lilikala Kame‘eleihiwa, <i>Native Land and Foreign Desires: Pehea La e Pono Ai?</i> (1992).....	3
Albert Memmi, <i>Attempt at a Definition, in Dominated Man: Notes Toward A Portrait</i> (1968).....	9
Albert Memmi, <i>The Colonizer and the Colonized</i> (1965).....	9
Sally Engle Merry, <i>Colonizing Hawai‘i: The Cultural Power of Law</i> (2000).....	4
Noenoe K. Silva, <i>Aloha Betrayed</i> (2004) .....	4
George E. Stannard, <i>Before the Horror: The Population of Hawai‘i on the Eve of Western Contact</i> (1989).....	3
Rennard Strickland, <i>The Genocidal Premise In Native American Law and Policy: Exorcising Aboriginal Ghosts,</i> 1 J. Gender Race & Just. 325 (1998).....	8
Treaty of Paris, Dec. 10, 1898, U.S.–Spain, art. II, III, 30 Stat. 1754, T.S. No. 343.....	7
U.N. Charter, Chapt. XI, Art.73 (1946).....	5
Robert A. Williams, Jr., <i>Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law</i> , 31 Ariz. L. Rev. 237 (1989).....	9

## **INTEREST OF AMICI**

The Japanese American Citizens League of Hawai‘i, Honolulu Chapter (JACL), seeks protection of civil and human rights regardless of race, creed, color, national origin, or sex.

Centro Legal de la Raza advances the rights of low-income and Spanish-speaking communities, and empowers the community to assert its rights in order to create a just and fair society for everyone.

The Equal Justice Society (EJS) is a national organization of scholars, advocates and individuals advancing innovative legal strategies and public policy for enduring social change.

## ARGUMENT

### **I. KAMEHAMEHA SCHOOLS' ADMISSIONS POLICY DOES NOT VIOLATE CIVIL RIGHTS; RATHER, IT SERVES TO RESTORE TO NATIVE HAWAIIANS THAT WHICH 19TH AND 20TH CENTURY "WESTERN INFLUENCE" NEARLY DESTROYED: HAWAIIAN EDUCATION, CULTURE AND A MEASURE OF SELF-GOVERNANCE.**

As non-Hawaiian civil rights organizations, amici JACL-Hawai'i, Centro Legal de la Raza, and the Equal Justice Society write to say that the Kamehameha Schools admissions policy favoring Hawaiian children does not transgress civil rights. We have seen the harsh reality of racism and have fought hard for equal justice under law. African-Americans suffered slavery, segregation and present-day discrimination in jobs and housing. Asian-Americans and Latinos faced racialized immigration exclusion, alien land and anti-miscegenation laws, the internment and current treatment as perpetual foreigners. We have experienced the pain of civil rights violations. And we can say that the Kamehameha Schools admissions policy is not about unfair treatment based on race.

Doe's suit is not, as some suggest, about trying to end a program comparable to Jim Crow segregation in the South. Rather, the suit is about an effort to break apart a successful educational program by Hawaiians for Hawaiians that aims to repair the continuing harms of the 19th and 20th century "influx of Western

civilization.” *Doe v. Kamehameha Sch.*, 295 F. Supp. 2d 1141, 1147 (D. Hawai‘i 2003).

The Kamehameha Schools were created in 1883, fifteen years before the United States annexed Hawai‘i, by the private trust of Princess Bernice Pauahi Bishop, the last descendant of Hawai‘i’s first king. Pauahi Bishop created the trust to uplift Hawaiian children through education because the forces of Westernization had nearly decimated the Hawaiian people (a population drop from 400,000 to 45,000) and foreshadowed the American takeover of the Hawaiian government. *See id.* at 1146, 1155; George E. Stannard, *Before the Horror: The Population of Hawai‘i on the Eve of Western Contact* (1989). Pauahi Bishop sought not to exclude others by labeling them inferior or unworthy (a classic civil rights violation) but rather to rebuild her own people (an act of restoration and self-determination).

Pauahi Bishop’s grasp of the urgency of changing circumstances proved prescient. In 1893, the U.S. assisted in the illegal overthrow of the sovereign Hawaiian nation. American military and plantation owners lobbied hard for annexation, alternatively characterizing indigenous Hawaiians as uncivilized or childlike—in either case, in need of American control.<sup>1</sup> With a military base at

---

<sup>1</sup> *See* Lilikala Kame‘eleihiwa, *Native Land and Foreign Desires: Pehea La e Pono Ai?* 305 (1992) (account of characterization of Hawaiians as “ignorant Natives”);

Pearl Harbor and a hot commodity (sugar) at stake, the U.S. annexed Hawai‘i in 1898 and not only took control of the provisional government, but also took all former Hawaiian government and royal lands. The beloved former queen was imprisoned for “treason.” Hawaiian language was barred from the schools. Plantations diverted water from agrarian Hawaiian communities. More Hawaiians were separated from the land, severing cultural, economic and spiritual connections. *See* Noenoe K. Silva, *Aloha Betrayed* (2004).

This form of American “westernization” hastened the near-demise of indigenous Hawaiians. Indeed, Congress held hearings on the “Rehabilitation and Colonization of Hawaiians,” recommending the Hawaiian Homes Commission Act of 1921 as restorative justice for a “dying race.”<sup>2</sup> Hawaiians in their homeland still bear the worst socioeconomic indicators of all Hawai‘i’s people—the highest rates of illness, prison incarceration and homelessness, and the lowest rates of higher education and family income. Congress’ Apology Resolution of 1993

---

Sally Engle Merry, *Colonizing Hawai‘i: The Cultural Power of Law* 139 (2000) (“paternalistic racism” characterized Native Hawaiians as “childlike, benign, and foolish”).

<sup>2</sup> *See* Hearings on the Rehabilitation and Colonization of Hawaiians, 66th Cong., 2d Sess. (1920); Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (1921); H.R. Rep. No. 66-839, at 2 (1920); *id.* at 4 (testimony of Sen. Wise) (“[T]he Hawaiian people are dying.... [T]he only way to save them...is to take them back to the lands and give them the mode of living [of] their ancestors...and in that way rehabilitate them.”).

acknowledged this and commanded the President to apologize for the U.S.'s active role in the "conspiracy" to illegally overthrow the internationally-recognized Hawaiian government and for the ensuing "devastation" of the Hawaiian people. S. Joint Res. 19, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

The Kamehameha Schools admissions policy thus is not about violating civil rights, denigrating one group as inferior to justify better treatment of another. As Judge Kay highlighted in finding a "legitimate nondiscriminatory reason" for the Schools' policy, the School is about a private self-determining effort of restoration for Hawai'i's first people. 295 F. Supp. 2d at 1169, 1172.

**II. IN ASSESSING AN INDIGENOUS GROUP'S ATTEMPTS TO RESTORE A MEASURE OF SELF-GOVERNANCE AND CULTURE THROUGH EDUCATION IN THE FACE OF OVERWHELMING "WESTERN INFLUENCE," THE COURT'S INQUIRY INTO "LEGITIMATE NONDISCRIMINATORY REASONS" MUST INCORPORATE THE CONTEXT OF COLONIZATION AND ITS RESULTING "DEVASTATION" OF THE NATIVE PEOPLE.**

For these reasons, international human rights principles of self-determination and restoration for indigenous peoples illuminate the "remedial legitimacy" of the Kamehameha Schools admissions policy. *See* S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 *Ariz. J. Int'l & Comp. L.* 13, 15 (2004); *Rice v. Cayetano*, 528 U.S. 495, 545 (2000) (Stevens, J., dissenting); U.N. Charter, Chapt. XI, Art.73 (1946) (Hawai'i on U.N. list of colonized territories).

Even if those principles apply only indirectly, the panel majority erred in its mode of remedial analysis in assessing the Kamehameha Schools admissions policy according to unduly narrow affirmative action precepts. Rehearing is warranted for that crucial reason.

Under §1981, “the defendant must come forward with a legitimate nondiscriminatory reason justifying” its policy. *Kamehameha Sch.*, No. 04-15044, slip op. at 8946 (9th Cir. Aug. 2, 2005). What constitutes a “legitimate nondiscriminatory reason” depends upon context, and the majority adopted the wrong mode of contextual analysis.

If an affirmative action diversity program addresses “racial imbalance” in private employment then the narrow *Weber-Johnson* analysis of “racial exclusion,” relied on by the panel, is apt. *See* slip op. at 1849-50 (describing legal framework under *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987)). But, as Judge Kay below recognized, strict application of *Weber-Johnson*’s private employment remedy criteria is starkly inappropriate for assessing an indigenous group’s attempts to repair through self-education the “devastation” and continuing harms of accelerating “Western Influence,” or colonialism—which in 1898 included worldwide U.S. territorial acquisitions of not only Hawai‘i but also the Philippines,

Puerto Rico and Guam.<sup>3</sup> 295 F. Supp. 2d at 1165-66 (strict adherence to the “narrow lens” of employment diversity affirmative action “forces the inquiry to ignore the unique historical context which surrounds Kamehameha Schools, a private educational institution.”).

In assessing whether an indigenous group’s response to the Congressionally acknowledged “devastation” constitutes a “legitimate nondiscriminatory reason,” the Court cannot tightly limit its inquiry, as the panel did, to whether a challenged program effectively excludes other groups. Slip op. at 8950-51. Instead the Court must ask if the indigenous program’s use of race or ancestry is “legitimate” in that it does not denigrate other racial groups (treating them as racially inferior or uncivilized) and, most important, is crafted as a restorative response to colonialism’s devastation.

That very inquiry lies at the heart of *Morton v. Mancari*, 417 U.S. 535 (1974), in which the Supreme Court found a Native American blood preference to be a “political” restorative measure (even though race was involved) and therefore legitimate. *Id.* at 554 n.24. The fact that the indigenous hiring practice there excluded other racial groups was not determinative. Indeed, race/ancestry had to be an integral factor in the political restoration process because race/ancestry had

---

<sup>3</sup> Treaty of Paris, Dec. 10, 1898, U.S.–Spain, art. II, III, 30 Stat. 1754, T.S. No. 343.

been key originally in the U.S.'s justification for the confiscation of land, the creation of guardian-ward reservations, and the destruction of culture and self-governance (the savage and uncivilized natives had to be conquered and then watched over). See Rennard Strickland, *The Genocidal Premise In Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. Gender Race & Just. 325 (1998).<sup>4</sup> Although *Mancari* addressed a constitutional challenge, its foundational inquiry into legitimate reasons is directly relevant here.

The majority in this case, however, in its narrow assessment of “legitimate reasons,” entirely omitted this analysis. Justices Stevens and Ginsburg have acknowledged the import of this analysis in assessing Native Hawaiian programs. *Rice*, 528 U.S. at 533-35 (Stevens, J., dissenting) (self-determination and “compensat[ion] for past wrongs” principles require considering indigenous ancestry).<sup>5</sup> Scholars worldwide also acknowledge its salience. International scholar, Albert Memmi, a Tunisian Jew and resister of French colonialism, incisively describes colonization as political “aggression” (taking land and

---

<sup>4</sup> See also David H. Getches et al., *Cases and Materials on Federal Indian Law* 103 (5th ed. 2005) (race was the justification by which American Indians were deemed “incapable of...assimilation” and a “challenge to white [civilized] society”).

<sup>5</sup> See also *Rice v. Cayetano*, 963 F. Supp. 1547, 1554 (D. Hawai‘i 1997) (Native Hawaiian-only voting requirement “not based upon race, but upon a recognition of the unique status of Native Hawaiians.”).

resources and controlling indigenous populations) that is often partially justified through “race.”

Since the aggressor portrays itself as civilized and law-abiding, it needs a mechanism for justifying to its people and the world its bald political take-over of another country and its people.<sup>6</sup> For Memmi, “racism” in this setting is not simple ignorance or skin color prejudice. Rather, it is characterizing people as “different,” less worthy or less human “others” (threatening, uncivilized, inferior) to make political “aggression” for economic or military reasons appear necessary.

Given this reality, indigenous political efforts to rectify the devastation of colonization must address race or ancestry as part of the restoration process. This is the jurisprudential foundation for the Supreme Court’s *Mancari* decision—regardless of whether the indigenous group is formally recognized as a “political”

---

<sup>6</sup> Memmi describes four steps in the use of race for politically justifying colonization:

- 1) Stressing the real or imaginary differences between the racist and its victim;
- 2) Assigning values to those differences, to the advantage of the racist and the detriment of its victim;
- 3) Trying to make them absolutes by generalizing from them and claiming that they are final; and
- 4) Justifying any present or possible aggression or privilege.

Albert Memmi, *Attempt at a Definition, in Dominated Man: Notes Toward a Portrait* 186 (1968); Albert Memmi, *The Colonizer and the Colonized* (1965); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 262 (1989) (applying Memmi’s framework to Native Americans).

minority.<sup>7</sup> It is reflected in Justices Stevens’ and Ginsburg’s observations about the validity of government-supported Hawaiian programs. It is starkly missing, however, from the majority’s analysis in this case.

Judge Kay correctly determined that the narrow *Weber-Johnson* mode of analysis for employment affirmative action under §1981 changes substantially when the court is assessing the admissions policy of a private school established by and for the education of an indigenous people to “rectify socioeconomic and educational disadvantages resulting from the influx of western civilization.” 295 F. Supp. 2d at 1147. In finding “legitimate reasons” for Kamehameha Schools’ admissions policy, Judge Kay employed the appropriate mode of analysis: assessing the “unique historical” context of western influence on “Hawaii and Native Hawaiians[,]” including “congressional recognition of the United States’ wrongful involvement in the end of the Hawaiian Monarchy and the need to improve educational opportunities for Native Hawaiians[.]” *Id.* at 1166.

---

<sup>7</sup> *Mancari* referred to formally recognized “Indian tribes” as “political” minorities. 417 U.S. at 554. An indigenous group’s lack of formal government recognition, however, does not undercut the import of *Mancari*’s foundation for assessing “legitimate” reasons under §1981. *See also Kamehameha Sch.*, slip op. at 8963-67 (Graber, J., dissenting) (citing many Congressional remedial acts based on special relationship between the U.S. and Hawaiians even without formal recognition).

Hawai'i's multiracial populace supports Kamehameha Schools because restorative justice for Hawai'i's indigenous peoples benefits all.

### **CONCLUSION**

Amici respectfully request that the Court grant the petition.

DATED: August 30, 2005

By: \_\_\_\_\_  
Eric K. Yamamoto  
Susan K. Serrano  
E. A. Ho'oiipo Kalaena'auao Pa

*Attorneys for Amici Curiae*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)**

I, Eric Yamamoto, counsel for Amici Curiae the Japanese American Citizens League of Hawai‘i-Honolulu Chapter, Centro Legal de la Raza, and the Equal Justice Society certify that the brief to which this certificate is attached is set in 14-point Times New Roman, a proportionately-spaced typeface. According to the word processing system used to prepare it, the brief to which the certificate is attached contains a total of 2097 words, exclusive of the table of contents, table of authorities and this certificate. Pursuant to Rule 29(d), Amici’s brief is one-half the permissible length of the 4200 words for the Petition for Rehearing En Banc under Circuit Rule 40-1.

---

Eric K. Yamamoto  
*Attorney for Amici Curiae*