

CADES SCHUTTE LLP

DAVID SCHULMEISTER 2781-0
KELLY G. LaPORTE 6294-0
1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813-4216
Telephone: (808) 521-9200
Facsimile: (808) 521-9210
E-Mail: dschulmeister@cades.com

BAYS DEEVER LUNG ROSE & BABA

CRYSTAL K. ROSE 3242-0
BRUCE D. VOSS 6532-0
Ali'i Place
1099 Alakea Street, 16th Floor
Honolulu, Hawai'i 96813
Telephone: (808) 523-9000
Facsimile: (808) 533-4184
E-Mail: crose@legalthawaii.com

KATHLEEN M. SULLIVAN *pro hac vice*
599 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 723-4455
Facsimile: (650) 723-4669
E-Mail: sullivan@law.stanford.edu

Attorneys for Defendants
Constance H. Lau, Nainoa Thompson,
Diane J. Plotts, Robert K.U. Kihune, and J.
Douglas Ing, in their capacities as Trustees of
the Estate of Bernice Pauahi Bishop dba
Kamehameha Schools

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

SEP 29 2003

at 10 o'clock and 06 min. M.
WALTER A. Y. H. CHINN, CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

JOHN DOE, a minor, by his mother
and next friend, JANE DOE,

Plaintiff,

v.

KAMEHAMEHA SCHOOLS/
BERNICE PAUAHI BISHOP
ESTATE; and CONSTANCE H. LAU,
NAINOA THOMPSON, DIANE J.
PLOTTS, ROBERT K.U. KIHUNE,
and J. DOUGLAS ING, in their
capacities as Trustees of the
Kamehameha Schools/Bernice Pauahi
Bishop Estate,

Defendants.

CIVIL NO. 03-00316 ACK-LEK

NOTICE OF MOTION;
DEFENDANTS CONSTANCE H.
LAU, NAINOA THOMPSON,
DIANE J. PLOTTS, ROBERT K.U.
KIHUNE, AND J. DOUGLAS ING,
IN THEIR CAPACITIES AS
TRUSTEES OF THE ESTATE OF
BERNICE PAUAHI BISHOP
ESTATE DBA KAMEHAMEHA
SCHOOLS' MOTION FOR
SUMMARY JUDGMENT;
MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT WITH RESPECT TO
DECLARATORY AND
INJUNCTIVE RELIEF;
DECLARATION OF KELLY G.
LaPORTE; CERTIFICATE OF
SERVICE

Hearing:

Date: November 17, 2003

Time: 9:30 a.m.

Judge: Honorable Alan C. Kay

Trial Date: July 27, 2004

NOTICE OF MOTION

TO: JOHN W. GOEMANS, ESQ.
P.O. Box 2849
Kamuela, Hawai'i 96743

and

ERIC GRANT, ESQ.
JAMES F. SWEENEY, ESQ.
Sweeney & Grant LLP
1527 "I" Street
Sacramento, California 95814

Attorneys for Plaintiff

NOTICE IS HEREBY GIVEN that Defendants Constance H. Lau, Nainoa Thompson, Diane J. Plotts, Robert K.U. Kihune, and J. Douglas Ing, in their capacities as Trustees of the Estate of Bernice Pauahi Bishop dba Kamehameha Schools' Motion for Summary Judgment shall be heard by the Honorable Alan C. Kay in his courtroom in the Prince Jonah Kuhio Kalaniana'ole Building, 300 Ala Moana Boulevard, Honolulu, Hawai'i, at 9:30 a.m. on November 17, 2003, or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawai'i, September 29, 2003.

CADES SCHUTTE LLP



DAVID SCHULMEISTER
KELLY G. LaPORTE

BAYS DEEVER LUNG
ROSE & BABA

CRYSTAL K. ROSE
BRUCE D. VOSS

KATHLEEN M. SULLIVAN

Attorneys for Defendants
Constance H. Lau, Nainoa Thompson,
Diane J. Plotts, Robert K.U. Kihune, and J.
Douglas Ing, in their capacities as Trustees
of the Estate of Bernice Pauahi Bishop dba
Kamehameha Schools

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

JOHN DOE, a minor, by his mother
and next friend, JANE DOE,

Plaintiff,

v.

KAMEHAMEHA SCHOOLS/
BERNICE PAUHI BISHOP
ESTATE; and CONSTANCE H. LAU,
NAINOA THOMPSON, DIANE J.
PLOTTS, ROBERT K.U. KIHUNE,
and J. DOUGLAS ING, in their
capacities as Trustees of the
Kamehameha Schools/Bernice Pauahi
Bishop Estate,

Defendants.

CIVIL NO. 03-00316 ACK-LEK

DEFENDANTS CONSTANCE H.
LAU, NAINOA THOMPSON,
DIANE J. PLOTTS, ROBERT K.U.
KIHUNE, AND J. DOUGLAS ING,
IN THEIR CAPACITIES AS
TRUSTEES OF THE ESTATE OF
BERNICE PAUHI BISHOP
ESTATE DBA KAMEHAMEHA
SCHOOLS' MOTION FOR
SUMMARY JUDGMENT

DEFENDANTS CONSTANCE H. LAU,
NAINOA THOMPSON, DIANE J. PLOTTS,
ROBERT K.U. KIHUNE, AND J. DOUGLAS ING, IN THEIR CAPACITIES
AS TRUSTEES OF THE ESTATE OF BERNICE PAUHI BISHOP ESTATE
DBA KAMEHAMEHA SCHOOLS' MOTION FOR SUMMARY JUDGMENT

Defendants Constance H. Lau, Nainoa Thompson, Diane J. Plotts, Robert
K.U. Kihune, and J. Douglas Ing, in their capacities as Trustees of the Estate of
Bernice Pauahi Bishop dba Kamehameha Schools ("Kamehameha"), through
counsel, move the Court for entry of summary judgment in favor of Kamehameha

and against Plaintiff John Doe on all claims asserted in the Complaint for Declaratory Relief, Injunctive Relief, and Damages filed herein on June 25, 2003.

This motion is made pursuant to Rules 7(b) and 56(b) of the Federal Rules of Civil Procedure and is based upon the attached memorandum in support; the concurrently filed concise statement of facts, declarations, and exhibits; and the pleadings and record herein.


DATED: Honolulu, Hawai'i, September 29, 2003.

CADES SCHUTTE LLP



DAVID SCHULMEISTER
KELLY G. LaPORTE

BAYS DEEVER LUNG
ROSE & BABA



CRYSTAL K. ROSE
BRUCE D. VOSS

KATHLEEN M. SULLIVAN

Attorneys for Defendants
Constance H. Lau, Nainoa Thompson,
Diane J. Plotts, Robert K.U. Kihune, and J.
Douglas Ing, in their capacities as Trustees
of the Estate of Bernice Pauahi Bishop dba
Kamehameha Schools

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

JOHN DOE, a minor, by his mother
and next friend, JANE DOE,

Plaintiff,

v.

KAMEHAMEHA SCHOOLS/
BERNICE PAUAHI BISHOP
ESTATE; and CONSTANCE H. LAU,
NAINOA THOMPSON, DIANE J.
PLOTTS, ROBERT K.U. KIHUNE,
and J. DOUGLAS ING, in their
capacities as Trustees of the
Kamehameha Schools/Bernice Pauahi
Bishop Estate,

Defendants.

CIVIL NO. 03-00316 ACK-LEK

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT WITH RESPECT TO
DECLARATORY AND
INJUNCTIVE RELIEF

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH
RESPECT TO DECLARATORY AND INJUNCTIVE RELIEF

TABLE OF CONTENTS

| | | |
|-----|---|----|
| I. | INTRODUCTION | 1 |
| II. | STATEMENT OF FACTS | 9 |
| A. | Overview | 9 |
| B. | Brief History of the Hawaiian People | 13 |
| C. | The Creation of the Schools and the Intent of Its Founder | 17 |
| D. | The Serious Socioeconomic and Educational Disadvantages Facing Native Hawaiians Today | 20 |
| E. | Congressional Recognition of Past Deprivations and Current Disadvantages Facing Native Hawaiians | 24 |
| F. | Congressional Enactment of Remedial Legislation Giving Preferences to Native Hawaiians | 28 |
| G. | Congressional Preferences for Native Hawaiians in Educational Opportunities | 31 |
| H. | Kamehameha’s Educational Programs and Policies..... | 36 |
| I. | Kamehameha’s Mission to Remedy Educational Disadvantages Suffered by Native Hawaiian Children..... | 40 |
| J. | Kamehameha’s Mission to Produce Native Hawaiian Civic, Community and Business Leaders | 44 |
| K. | Kamehameha’s Mission to Preserve and Perpetuate Native Hawaiian Culture | 48 |

| | | |
|------|---|----|
| III. | ARGUMENT..... | 52 |
| A. | Summary Judgment for Kamehameha Is Appropriate..... | 52 |
| B. | No Constitutional Issue is Presented..... | 53 |
| C. | The Sole Question Presented Is Whether Kamehameha Has a Legitimate Justification for Its Race-Conscious Admissions Policy..... | 56 |
| D. | Race-Conscious Policies Are Permissible Under § 1981 If They Have Legitimate Remedial Justification | 59 |
| E. | Kamehameha’s Admissions Policy Serves a Legitimate Remedial Purpose By Ameliorating Native Hawaiian Social and Educational Disadvantages, Producing Native Hawaiian Leadership, and Revitalizing Native Hawaiian Culture..... | 64 |
| 1. | Kamehameha’s Admissions Policy Has the Legitimate Purpose of Remedying Past Injustice and Present Imbalances to Native Hawaiians | 65 |
| 2. | Kamehameha’s Admissions Policy Has the Legitimate Remedial Purpose of Producing Racially Diverse Leadership in Hawaiian Society..... | 68 |
| 3. | Kamehameha’s Admissions Policy Has the Legitimate Remedial Purpose of Preserving Native Hawaiian Culture and Identity | 70 |
| F. | The Schools’ Admissions Policy Is Reasonably Related to Its Remedial Purpose..... | 75 |
| G. | The Legitimacy of the Admissions Policy is Confirmed by its Consistency with Past and Present Congressional Policy Providing Preferences for Native Hawaiians, and § 1981 Should be Read in Harmony With That Policy | 78 |
| IV. | CONCLUSION..... | 86 |

TABLE OF AUTHORITIES

CASES

| | |
|---|----|
| <u>Adarand Constructors, Inc. v. Pena,</u> 515 U.S. 200 (1995) | 62 |
| <u>Antoku v. Hawaiian Electrical Co.,</u> 266 F. Supp. 2d 1233 (D. Haw. 2003) | 52 |
| <u>Arakaki v. Cayetano,</u> 324 F.3d 1078 (9th Cir. 2003) | 7 |
| <u>Board of County Commissioners v. Seber,</u> 318 U.S. 705 (1943) | 25 |
| <u>Brown v. Board of Education,</u> 347 U.S. 483 (1954) | 4 |
| <u>Burgert v. Lokelani [sic] Bernice Pauahi Bishop Trust,</u> 200 F.3d 661 (9th Cir. 2000) | 30 |
| <u>Carroll v. Nakatani,</u> 188 F. Supp. 2d 1233 (D. Haw. 2002) | 52 |
| <u>Carroll v. Nakatani,</u> ____ F.3d ____ (Slip op. pp. 12573-75); (9th Cir. No. 02-15483, decided Sept. 2, 2003) | 85 |
| <u>Cerrato v. San Francisco Cmty. Coll. District,</u> 26 F.3d 968 (9th Cir. 1994) | 53 |
| <u>City of Richmond v. J.A. Croson Co.,</u> 488 U.S. 469 (1989) | 62 |
| <u>Close v. Glenwood Cemetery,</u> 107 U.S. 466 (1883) | 85 |
| <u>Davis v. City of San Francisco,</u> 890 F.2d 1438 (9th Cir. 1989) | 62 |
| <u>Gay v. Waiters' & Dairy Lunchmen's Union,</u> 694 F.2d 531 (9th Cir. 1982) | 58 |

| | |
|---|---------------------------------|
| <u>General Building Contractors Association v. Pennsylvania</u> , 458 U.S. 375 (1982) | 57 |
| <u>Gonzales v. Fairfax-Brewster School, Inc.</u> , 363 F. Supp. 1200 (E.D. Va. 1973), <u>aff'd in part, rev'd in part sub nom.</u> <u>Runyon v. McCrary</u> , 515 F.2d. 1082 (4th Cir. 1975), <u>aff'd</u> , 427 U.S. 160 | 82 |
| <u>Griffin v. Board of Supervisors of Prince Edward County</u> , 339 F.2d 486 (4th Cir. 1964) | 82 |
| <u>Griffin v. County Board of Prince Edward County</u> , 377 U.S. 218 (1964) | 82 |
| <u>Grutter v. Bollinger</u> , 123 S. Ct. 2325 (2003) | 2, 7, 8, 57, 61, 62, 63, 64, 69 |
| <u>Hawaii Housing Authority v. Midkiff</u> , 467 U.S. 229 (1984) | 37 |
| <u>Jackson v. Metropolitan Edison Co.</u> , 419 U.S. 345 (1974) | 2, 54 |
| <u>Jean v. Nelson</u> , 472 U.S. 846 (1985) | 85 |
| <u>Johnson v. Transportation Agency</u> , 480 U.S. 616 (1987) | 55, 60, 62 |
| <u>Johnson v. Transportation Agency</u> , 770 F.2d 752 (9th Cir. 1984), <u>aff'd</u> , 480 U.S. 616 | 60, 62 |
| <u>Kahawaiolaa v. Norton</u> , 222 F. Supp. 2d 1213 (D. Haw. 2002) | 52 |
| <u>Lawrence v. Texas</u> , 123 S. Ct. 2472 (2003)._ | 74 |
| <u>Legal Aid Society of Hawaii v. Legal Services Corp.</u> , 961 F. Supp. 1402 (D. Haw. 1997) | 72 |

| | |
|--|------------------------------|
| <u>Linville v. State of Hawaii,</u> 874 F. Supp. 1095 (D. Haw. 1994) | 59 |
| <u>Manatt v. Bank of America, NA,</u> 339 F.3d 792 (9th Cir. 2003) | 58, 59 |
| <u>McDonnell-Douglas Corp. v. Green,</u> 411 U.S. 792 (1973) | 58, 59, 60, 61 |
| <u>Medical Institute v. National Association of Trade & Technical Sch.,</u> 817 F.2d 1310 (8th Cir. 1987) | 1, 54 |
| <u>Patterson v. McLean Credit Union,</u> 491 U.S. 164 (1989) | 54, 57, 58 |
| <u>Reassure America Life Insurance Co. v. Rogers,</u> 248 F. Supp. 2d 974 (D. Haw. 2003) | 52, 53 |
| <u>Reno v. Condon,</u> 528 U.S. 141 (2000) | 85 |
| <u>Rice v. Cayetano,</u> 528 U.S. 495 (2000) | 6, 7, 55, 56, 85 |
| <u>Roberts v. United States Jaycees,</u> 468 U.S. 609 (1984) | 72 |
| <u>Runyon v. McCrary,</u> 427 U.S. 160 (1976) | 4, 5, 56, 57, 73, 76, 81, 82 |
| <u>Runyon v. McCrary,</u> 515 F.2d 1082 (4th Cir. 1975), <u>aff'd,</u> 427 U.S. 160 | 82 |
| <u>Sanghvi v. City of Claremont,</u> 328 F.3d 532 (9th Cir. 2003) | 58 |
| <u>Setser v. Novack Investment Co.,</u> 657 F.2d 962 (8th Cir. 1981) | 60, 62, 63, 75 |
| <u>United Steelworkers of America v. Weber,</u> 443 U.S. 193 (1979) | 55, 59, 62, 83 |

STATUTES

| | |
|---|------------------------|
| 1994 Native Hawaiian Education Act, 20 U.S.C. § 7901 <u>et seq.</u> (1994) | 27, 31, 33, 34, 78, 84 |
| 2002 Native Hawaiian Education Act, 20 U.S.C. § 7511 <u>et seq.</u> (Supp. I 2002) | <i>passim</i> |
| 20 U.S.C. § 4901 <u>et seq.</u> (1988) | 32 |
| 42 U.S.C. § 1981 | <i>passim</i> |
| Act of Dec. 22, 1980, Pub. L. No. 96-565, §§ 101-110, 94 Stat. 3321, 3321-23 (1980)..... | 29 |
| Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, sec. 203, § 1953, 106 Stat. 323, 409 (1992) | 30 |
| Department of Defense Appropriations Act of 1995, Pub. L. No. 103-335, 108 Stat. 2599, 2652 (1994) | 29 |
| Fed. R. Civ. P. 56 | 52 |
| H.R. Rep. No. 103-425, 103d Cong., 2d Sess. 28 (1994) | 28 |
| H.R. Rep. No. 107-63 at 333 (2001) | 6, 36, 80 |
| Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (1921) | 25 |
| Joint Resolution on the Overthrow of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) | 25, 26, 27 |
| Native American Programs Act of 1974, 42 U.S.C. §§ 2991-2991h, <u>as amended by</u> Native American Programs Act Amendments of 1997, Pub. L. No. 105-361, sec. 3, § 803A, 112 Stat. 3278 (1998) ... | 30 |
| Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130 | 32 |

| | |
|---|----|
| Pub. L. No. 106569, §§ 511-14, 114 Stat. 2944, 2966-67, 2990 (2000) | 29 |
| S. Rep. No. 100-122 at 95 (1988), <u>reprinted in</u> 1988 U.S.C.A.A.N | 32 |
| S. Rep. No. 100-222 at 155, <u>reprinted in</u> 1988 U.S.C.A.A.N | 32 |
| The Native Hawaiian Health Care Act of 1988, 42 U.S.C. § § 11701-11714 (2000) | 30 |
| Workforce Investment Act of 1998, Pub. L. No. 105-220, § 166, 112 Stat. 936, 1021 (1998) | 29 |

MISCELLANEOUS

| | |
|---|----|
| <u>Wills and Deeds of Trust</u> , 17-18 (3d ed. 1957) | 18 |
| 1993 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, 47 U.N. GAOR Supp. No. 49, at 210, U.N. Doc. A/47/49 (1993) (adopted 12/18/92) | 74 |

MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
WITH RESPECT TO DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

At issue in this case is the freedom of a great private, charitable trust to carry on the mission of its donor, Princess Bernice Pauahi Bishop, the great-granddaughter of King Kamehameha I, to use her private wealth to educate Native Hawaiian children, whom she regarded as her own, in order to remedy the deprivations they suffered as the result of Western contact. There is no dispute here that the Kamehameha Schools ("Kamehameha" or the "Schools") gives preference in admissions to children of Native Hawaiian ancestry, defined as those who descend from the aboriginal peoples inhabiting the Hawaiian Islands in 1778, the date when Westerners first made landfall. Nor is there any dispute that such preferences based on ancestry are sometimes deemed equivalent to preferences based on race.

What *is* in dispute here is the novel claim that such a *remedial* race preference in a private educational setting constitutes invidious discrimination on the basis of race in violation of 42 U.S.C. § 1981, a civil rights law originally enacted by the Reconstruction Congress as part of the Civil Rights Act of 1866 in order to protect the rights of newly freed slaves to make and enforce contracts in the post-Civil War South. Plaintiff argues

from a simple syllogism: he claims that § 1981 bars discrimination in private educational contracting based on race, that Kamehameha Schools' preference for Native Hawaiians is race-based, and that therefore the Schools' preference violates § 1981. See Plaintiff's Memorandum in Support of Motion for Summary Judgment with Respect to Declaratory and Injunctive Relief ("Plaintiff's MSJ"). In essence, he argues that any use of race in private educational admissions is per se illegal under § 1981. But this is not and has never been the law.

To the contrary, while § 1981 has been broadly construed to prohibit "invidious" discrimination on the basis of race and ethnic ancestry in the formation and enforcement of contracts, not all race-conscious contracting decisions are prohibited by § 1981. To take a prominent recent example, the Supreme Court of the United States just last Term upheld, against both Equal Protection Clause and § 1981 challenge, the University of Michigan Law School's policy of using race-based preferences in admissions. Grutter v. Bollinger, 123 S. Ct. 2325, 2338 (2003) (noting that "[n]ot every decision influenced by race is equally objectionable"). In cases involving purely *private* entities like the Kamehameha Schools, rather than state actors such as a public university, courts have given even greater leeway under § 1981 to the use of race-conscious preferences aimed at remedying

demonstrated effects of past discrimination. This Court should give similar, if not greater, leeway here.

The Schools' policy of giving preference in admissions to Native Hawaiians (the "Admissions Policy" or the "Policy") is permissible under § 1981 because, like § 1981 itself, it has a legitimate remedial purpose. The mission of the Schools, inspired by the compassionate and enlightened vision of its founder, Princess Pauahi, is to provide educational opportunities to improve the capability and well-being of the Native Hawaiian people – an indigenous people whose decimation and suffering over the last 200 years arising out of Western contact is well documented and well known to this Court.

Through this lawsuit, Plaintiff seeks to enjoin the Policy and end Kamehameha Schools as it has existed since it first opened in 1887. Plaintiff thus seeks to bring an end to Princess Pauahi's vision and to destroy the vitality of the Schools' mission, which would be devastating to the prospects of present and future generations of Native Hawaiian children and to all the citizens of Hawai'i. Notwithstanding the economic, educational, and social deprivations that Native Hawaiians have long faced and the vision of Princess Pauahi to save her people through education, Plaintiff now seeks to take from the Hawaiian people one of the last significant institutions that

they can call their own. As one alumnus and Trustee of the Schools puts it, this would cause the “Schools named after the founder of the Hawaiian Monarchy, Kamehameha I, . . . [to] face the same catastrophic fate suffered by the Monarchy itself.” Declaration of J. Douglas Ing ¶ 78 (“Ing Dec.”).¹

Plaintiff attempts to derive support for this effort from the Supreme Court’s decision in Runyon v. McCrary, 427 U.S. 160 (1976), which applied § 1981 to bar racial discrimination in admissions in White-only private schools, see Plaintiff’s MSJ at 8, but his reliance upon Runyon is greatly misplaced. The schools whose policies were challenged in Runyon were among many established in the South by White segregationists in deliberate circumvention of the federal policy of desegregation of public schools ordered by the Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954), and promoted by Congress through the passage of the Civil Rights Act of 1964. Far from having any legitimate remedial purpose, the exclusion of Black children from these schools served to perpetuate injurious racial stigmas, stereotypes, and discrimination, i.e., the very “badges and incidents of slavery” that Congress sought to eliminate when it passed the Civil Rights Act of 1866.

¹ All cited declarations are filed concurrently herein with Defendants’ Concise Statement of Material Facts in Support of this Motion (“Statement”).

The Kamehameha Schools' Admissions Policy has exactly the opposite purpose. The Schools exist in order to reach those who have suffered, and who continue to suffer in successive generations, from the traumatic effects of the loss of land, sovereignty, culture, and dignity experienced by their ancestors. By steeping them in Hawaiian culture and nurturing pride in that culture, the Schools aim to inspire and train Native Hawaiian children to be productive and responsible citizens and leaders who will help to reverse the continuing effects of those losses. As eloquently expressed by the Schools' Trustee C. Nainoa Thompson, "Kamehameha Schools is an institution of hope and healing for the Native Hawaiian community." Declaration of C. Nainoa Thompson ¶ 25 ("Thompson Dec.").

Kamehameha's Policy also differs from the one at issue in Runyon because it employs a Native Hawaiian preference that has been expressly sanctioned by Congress. In Runyon, as the Court noted, the admissions policies of the challenged schools clearly contravened the contemporaneous congressional policy of ending segregated public education. 427 U.S. at 174-75. In stark contrast to the situation presented in Runyon, Congress has "expresse[d] its commitment . . . to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people," and in keeping with that remedial purpose, has enacted numerous statutes

extending explicit preferences to Native Hawaiians. These include the educational benefits that the Native Hawaiian Education Act (“NHEA”) provides to Native Hawaiians, defined by the same reference to ancestry as the Schools employ.

Indeed, Congress has expressly acknowledged and lauded the precise efforts undertaken by the Kamehameha Schools to aid Native Hawaiians, noting that the Schools serve Congress’ remedial purposes, and even requested that Kamehameha “redouble its efforts to educate Native Hawaiian children.” H.R. Rep. No. 107-63 at 333 (2001). It would be incongruous at best for this Court now to hold that an Admissions Policy that enables the Schools to “educate Native Hawaiian children,” as explicitly *encouraged* by Congress, at the same time amounts to invidious discrimination on the basis of race *forbidden* by Congress in § 1981.

Nor should this conclusion be undermined by any question whether current congressional policy supporting preferences in education for Native Hawaiians might someday be found constitutionally infirm through extension of Rice v. Cayetano, 528 U.S. 495 (2000). Rice, of course, has no direct bearing on this case. The Supreme Court’s holding in Rice was limited solely to the Fifteenth Amendment voting rights issue presented by the State of Hawaii’s voting scheme for the election of Office of Hawaiian

Affairs (“OHA”) trustees. Rice thus involved a state actor bound by the federal Constitution; this case, by contrast, involves a private charity governed only by § 1981, which affords considerably more leeway to private entities than the Constitution does to public entities in the adoption of race-conscious remedial programs. Rice also involved racial classifications in voting, which the Court held to be prohibited by the Fifteenth Amendment by a per se, categorical bright-line rule; by contrast, race preferences in the allocation even of government benefits, much less private benefits, are subject to judicial balancing under the Fourteenth Amendment and upheld if they are justified by an adequate remedial or educational purpose. See Grutter, supra.² Thus, there is no reason to believe that Rice brings into constitutional question any of the many congressional policies, including the NHEA, that confer educational and other benefits upon Native Hawaiians.

But even if such questions could be raised in some future case involving federal parties, they are not properly before the Court in this case.

² For just this reason, as Justice Kennedy took pains to note in Rice, the Court did not reach or decide the constitutionality of the preferential benefits programs for Native Hawaiians that OHA administers; to the contrary, he wrote, “we assume the validity of the underlying administrative structure and trusts, without intimating any opinion on that point.” Rice, 528 U.S. at 521-22; see Arakaki v. Cayetano, 324 F.3d 1078, 1087 (9th Cir. 2003) (“The Supreme Court . . . avoided addressing the constitutionality of the [Department of Hawaiian Homelands and OHA] benefits and trust structure . . . limiting its opinion only to the voting restriction.”).

Plaintiff's challenge to the Admissions Policy does not depend on any alleged denial of preferential treatment under any congressional legislation favoring Native Hawaiians. So long as that is true, this Court is obliged to presume the validity of such legislation and to respect the congressional policy embodied therein when construing the legislative purpose of § 1981 as applied to the Admissions Policy.

Section 1981 has never been used to strike down a race-conscious admissions policy employed by a private school to remedy past race discrimination and injury. Nor has § 1981 ever been used to invalidate any policy, public or private, aimed at rectifying the effects of the dispossession of an indigenous people from its land, its culture, and its sovereignty. And § 1981 has never been used to strike down a remedial use of race under a policy that has been expressly sanctioned by Congress.

This Court should not now for the first time undertake such a novel departure from existing law. Grutter teaches that in determining the legitimacy of race preferences, “[c]ontext matters,” 123 S. Ct. at 2338, and the context in which this case arises is *unique*: The history of the Hawaiian people, the generosity of their Princess, the United States’ acknowledgment of its responsibility for past wrongs and promise to assist in remedying the continuing effects of those wrongs, the recognition of the critical role of

education in this process, the federal policy of reconciliation, and the critical place that Kamehameha Schools occupies as the leading institution devoted to educating Native Hawaiians and embodying their cultural heritage, traditions and pride. As we demonstrate below, it would be tragic indeed, and wholly without legal justification, to deprive Pauahi's people of the now storied institution she gave to them.

II. STATEMENT OF FACTS

A. Overview

This case arises in a unique factual setting, described in summary here and in more detail in the sections below. Princess Bernice Pauahi Bishop, the great-granddaughter of King Kamehameha I, was a citizen of the sovereign Kingdom of Hawai'i. At her death in 1884, the Native Hawaiian people were economically deprived and on the verge of extinction. Princess Pauahi saw education as the key to the salvation of her people. Having no children of her own, she embraced the children of her people and made them her heirs, bequeathing the bulk of her vast estate to a trust for the establishment and maintenance of the Kamehameha Schools. In accordance with Princess Pauahi's wishes, Kamehameha has given a preference to children of Hawaiian ancestry since it first opened in 1887.

For more than 116 years, the Schools have worked to fulfill Pauahi's vision of educating the children of her people. In the process, the Schools have evolved from a small vocational trade school to a highly successful multi-faceted educational system, providing educational services to Native Hawaiians from prenatal care to early education, K-12 campus programs, summer school enrichment programs, and post-high school scholarships. The Schools have been remarkably successful in producing leaders for the Native Hawaiian community and in contributing to diversity in leadership positions within the larger community. Today, the Schools occupy a position of fundamental importance to Native Hawaiian children and to the Native Hawaiian community. Kamehameha is a part of their heritage and an embodiment of their history and traditions. The preference in admissions accorded to Native Hawaiian children is an essential part of the Schools; without it, Kamehameha would cease to exist as it is known today.

Notwithstanding the Schools' accomplishments, much remains to be done. Recent statistical data show that Native Hawaiians face a variety of at-risk factors in disproportionate numbers. Educational programs such as those offered by Kamehameha are essential to ending the cycle of marginalization in which many Native Hawaiians are trapped. This same data show that the Schools are having a dramatic impact in addressing the

educational needs of Native Hawaiians and in ending the tragic cycle of marginalization facing so many Native Hawaiian children. Thus, the Schools' programs continue to be needed as much today as in the past to rectify the continuing effects of past adverse treatment.

Giving preference in admissions to Native Hawaiian children continues to be essential to serve the mission of the Schools, as a matter of mathematical necessity. There are approximately 70,000 Native Hawaiian children enrolled in grades K-12 in Hawai'i, and Kamehameha, despite its impressive growth, can accommodate only approximately 4,800 students in its campus programs. Although Kamehameha accepts applications from non-Native Hawaiians and offers admission to them when there is space available, given these figures, it is not surprising that it is rare for non-Native Hawaiians to be admitted to Kamehameha's campus programs. But it is equally clear that the Schools' Policy is not intended to exclude non-Native Hawaiians but rather to include as many Native Hawaiians, the intended beneficiaries of Pauahi's Will, as possible. And, in other programs offered by the Schools, where there is more space available, non-Native Hawaiians are admitted with greater frequency.

The Schools' Admissions Policy is consistent with, parallel to, and even expressly sanctioned by fundamental federal policy. The United States

has formally acknowledged its responsibility for past wrongs done to Native Hawaiians and has acknowledged that Native Hawaiians experience continuing adverse effects from these wrongs. The United States has also acknowledged its responsibility to assist in remedying the effects of these past wrongs, and in an effort to do so, has enacted a plethora of federal programs providing benefits and preferences to Native Hawaiians.

In this context, Congress has repeatedly recognized the critical need for educational services targeting Native Hawaiians to address the continuing effects of these past wrongs. In enacting a series of educational programs designed solely to benefit Native Hawaiians, Congress has for more than 15 years indicated its awareness and approval of Kamehameha Schools and its policies. In so doing, Congress has also indicated its understanding that the Schools exist *solely* for the purpose of educating Native Hawaiian children first. With full awareness of these facts, and as recently as 2001, Congress has applauded the efforts of Kamehameha Schools to educate Native Hawaiian children and has urged Kamehameha to “redouble its efforts.”

Congress has also set forth a broader federal policy of reconciliation with Native Hawaiians. This policy was announced in the Apology Resolution passed by Congress in 1993. It seeks to complete the healing

process between the United States and Native Hawaiians: to close the open wounds from past deprivations suffered by Native Hawaiians. Kamehameha Schools, as the last institution specifically devoted to the education of Native Hawaiian children, is an indispensable institution for improving the overall well-being of Native Hawaiians.

To understand the preference given to applicants of Hawaiian ancestry, we review below in more detail the tragic history of Native Hawaiians, the United States' acknowledgement of responsibility for many of the wrongs committed against the Native Hawaiian people, the continuing adverse effects of those wrongs, Congress' recognition of the United States' responsibility to assist in remedying the wrongs, the critical role of educational programs targeting Native Hawaiians as part of this process, and Congress' recognition and approval of the unique role that Kamehameha and its educational programs play in this process.

B. Brief History of the Hawaiian People

As is well known to this Court, "Native Hawaiians are a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago." 2002 Native Hawaiian Education Act, 20 U.S.C. § 7512(1) (Supp. I 2002) (the "2002 NHEA"). The Native Hawaiian people first came to the Hawaiian Islands sometime

between 0-500 A.D. Declaration of R. Kawika Mākanani ¶ 12 (“Mākanani Dec.”). They established a highly structured and successful civilization, which operated under a communal land tenure system and which was governed by a system of religious law. Id. ¶¶ 12-16. At the time of Captain Cook’s arrival in 1778 – the first Western contact with the Hawaiian Islands – the Hawaiian population is estimated to have been between 300,000 and 800,000. Id. ¶ 12.

Following the arrival of Captain Cook, the history of Native Hawaiians eerily resembles the history of other indigenous peoples. Western contact introduced diseases to the Islands to which the native population had not previously been exposed. Id. ¶¶ 18-19. The introduction of these foreign diseases caused a rapid decline in the native population and a sense of despair among the Native Hawaiian people. Id. ¶¶ 19-20, 24-25. Moreover, Western sailors, merchants, and traders did not respect Hawaiian culture or religion, causing a decline in the native culture and tradition. As the influx of Westerners increased, they established a Westernized economy for which the Native Hawaiians were ill-equipped, leading to a loss of native goods and skills used to produce such goods.

Part of the westernization process involved the establishment of a Western-style school system in Hawai‘i. Id. ¶¶ 34-36. Education in

Hawaiian society traditionally had been informal and centered around the family and the learning of life-lessons. Declaration of Maenette K.P. Benham ¶¶ 26-30 (“Benham Dec.”). The adoption of a Western-style school system did not, however, account for the ways in which Hawaiians had been accustomed to learning. Id. ¶¶ 31-39. Nor did it account for their unique culture or heritage. Id. Indeed, use of the Hawaiian language as an instructional medium was banned in the schools from 1896 until 1986, and children were disciplined and scoffed at if they spoke the Hawaiian language. Thompson Dec. ¶ 5; Benham Dec. ¶ 46; 20 U.S.C. § 7512(19). In addition, the new system had two tracks, with most Hawaiians being tracked into schools that focused on training them for vocational and low paying jobs. Benham Dec. ¶¶ 35-36; Mekanani Dec. ¶¶ 35-36. Many Hawaiians felt discouraged as a result, and saw education not as a method of advancement within society, but instead as a tool for marginalization, a perspective that made it all the more difficult for Hawaiians to succeed in the new Western society in which education was the key to success. Benham Dec. ¶ 36; Mekanani Dec. ¶ 36.

Western influence also led to the abandonment of the communal land tenure system employed in early Hawaiian society, under which the Hawaiian people resided on the land with an understanding that the

government would not take it away. Makanani Dec. ¶ 16. The Hawaiian people used the land not only for their homes, but also as their method of sustenance, and as a result developed skills useful to working the land. Id. The introduction of private land ownership by Western capitalists in 1848, however, led to the widespread alienation of land held by Hawaiians. Id. ¶¶ 47-58. Many Native Hawaiians were forced to move off their lands, which resulted in loss not only of their shelter, but also their means of survival. Id. ¶¶ 57-58. Hawaiians were thus forced to survive in a cash economy to which they were unaccustomed and for which they lacked the skills necessary to succeed, leaving many Hawaiians in a cycle of marginalization and poverty. Id.

The convergence of American business interests and the interests of those pushing for American expansionism in the mid-Nineteenth Century resulted in the eventual annexation of the Hawaiian Islands as a territory of the United States. Makanani Dec. ¶¶ 59-65. With the overthrow of the Hawaiian Monarchy in 1893, the Hawaiian people lost their homeland and suffered further losses of Hawaiian culture and traditions as American influences continued to dominate. Id. ¶¶ 66-86. Policies of the new territorial government devalued Hawaiian culture and traditions and marginalized the Hawaiian people, making it all the more difficult for the

Hawaiian people to survive in the new Western environment with which they were confronted. Id. With statehood in 1959, the Hawaiian people, as Americans, were expected to adopt American ideologies and customs, which came at the expense of their native traditions. Id. ¶¶ 87-95.

In short, the arrival of Western interests in Hawai‘i, and the eventual overthrow of the Hawaiian Monarchy, caused tremendous suffering and deprivation among the Native Hawaiian people. They were ravaged by disease; the imposition of Western values devalued their native culture and traditions; they lost their lands and means of survival; they were tracked into low-paying vocational careers by the new Western educational system; and their Monarchy was eventually overthrown, leading to a continued loss of Hawaiian culture. Makanani Dec. ¶¶ 3, 96-100; Benham Dec. ¶¶ 3, 53. The Native Hawaiian people continue to suffer from these wrongs today, as demonstrated by the data detailed below.

C. The Creation of the Schools and the Intent of Its Founder

Kamehameha Schools is a private charitable trust that was established under the Will of Princess Bernice Pauahi Bishop (the “Will”) when Hawai‘i was still an independent Kingdom. Makanani Dec. ¶¶ 101-07. When she died in 1884, Princess Pauahi owned approximately one-tenth of the lands in Hawai‘i. At the same time, the Hawaiian people were on the brink of

extinction. Id. ¶¶ 108-13. Their population had dwindled from 800,000 by some estimates and 300,000 by others at the time of the first Western contact in 1778 to only 47,500 in 1878, six years before Pauahi's death. Id. ¶¶ 12, 102. Moreover, as a result of having been economically marginalized by Western business interests and educationally disadvantaged in a Western school system that ignored their culture and made no attempt to address their unique learning needs, Native Hawaiians were economically and culturally deprived and psychologically depressed. Makanani Dec. ¶¶ 96-100; Benham Dec. ¶¶ 3, 53.

Princess Pauahi had learned the value of education as a student in the Chiefs' Children's School (later called the Royal Schools) and saw education as the key to the salvation of her people. Makanani Dec. ¶¶ 101, 106. Unable to have children of her own, Pauahi in her Will embraced the children of her people as her own and set aside the bulk of her vast estate to be placed in a private charitable trust to be used for their education. Id. ¶¶ 102-06. The Will directed that the Trustees of her estate "erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools." Will of Bernice Pauahi Bishop, reprinted in Wills and Deeds of Trust, 17-18 (3d ed. 1957). The boys' school opened in

the fall of 1887, and the girls' school commenced classes in November 1894. The two schools consolidated into one coeducational institution during the 1965-66 academic year.

Pauahi left to her Trustees the discretion "to regulate the admission of pupils," Makanani Dec. ¶ 107, and the original trustees, chaired by Pauahi's husband Charles Bishop, determined that it was Pauahi's intent to give a preference to students of Hawaiian ancestry. *Id.* ¶¶ 107-13. Charles Bishop explained Pauahi's intentions in an address on the first Founder's Day in December 1888:

Bernice Pauahi Bishop, by founding the Kamehameha Schools, intended to establish institutions which would be of lasting benefit to her country. . . . She foresaw that, in a few years the natives would cease to be much if any in the majority, and that they would have to compete with other nationalities And so, in order that her own people might have the opportunity for fitting themselves for such competition, and be able to hold their own in a manly and friendly way, without asking any favors which they were not likely to receive, these schools were provided for, *in which Hawaiians have the preference*, and which she hoped they would value and take the advantages of as fully as possible.

Id. ¶ 109 (emphasis added).

As a result, since its inception, and in accordance with the wishes of Princess Pauahi, Kamehameha has given a preference in its admissions to children of Native Hawaiian ancestry. Ing Dec. ¶ 19. There is no blood quantum requirement; to qualify under the Admissions Policy, an applicant

need have only some Native Hawaiian ancestry, defined as descent from the people present in the Hawaiian Islands prior to 1778. The Policy is consistent with Pauahi's vision of healing the wounds inflicted on her people by creating an institution that would strengthen their self-image and restore their dignity, preserve and perpetuate their language and cultural heritage, and provide them with the skills necessary to compete in society. See Ing Dec. ¶¶ 59-60.

D. The Serious Socioeconomic and Educational Disadvantages Facing Native Hawaiians Today

The consequences of the historical wrongs committed against the Hawaiian people continue to linger today, manifesting themselves in a variety of "at risk" factors that are present in disproportionate numbers among Native Hawaiians. These imbalances are confirmed by Kamehameha's own data. The Policy Analysis & System Evaluation Division ("PASE") of Kamehameha Schools is charged with studying indicators of well-being among Native Hawaiians throughout society. Dr. Shawn Kanaiaupuni is the Director of PASE and has submitted a declaration in connection with this litigation ("Kanaiaupuni Dec."). In addition, PASE published a report in February 2003 that evaluates the status of Native Hawaiian students within the Hawai'i Department of Education ("DOE") public school system. See Left Behind? The Status of Hawaiian

Students in Hawaiian Public Schools, Attachment B to Ing Dec. That report, which was published only seven months ago, highlights the poor educational outcomes for Native Hawaiian children in the public school system.

In compiling statistics on Native Hawaiians, PASE uses the same broad definition of Native Hawaiian that Kamehameha uses in applying its Policy. In other words, in compiling statistics on the Native Hawaiian population, PASE includes those who are both pure and part Native Hawaiian. Kanaiaupuni Dec. ¶ 23. The following statistics therefore are representative of the population that Kamehameha serves.

“By virtually every measure of well-being, Native Hawaiians are among the most disadvantaged ethnic groups in the State of Hawai‘i.” Id. ¶ 12. They are socially and economically marginalized, as evidenced by high rates of unemployment and poverty, sickness and early death. Id. Native Hawaiian families suffer from high rates of abuse and violence. Id. Native Hawaiian children are more frequently and earlier involved with gangs, drugs, and criminal activity. Id. Native Hawaiian children, as teenagers, often become parents themselves. Id. The social and economic disadvantages facing Native Hawaiian families today breed apathy and hopelessness among Native Hawaiian children, the effects of which are apparent in poor educational outcomes. Id. ¶¶ 12-13. Poor educational

outcomes, in turn, lead to socially and economically disadvantaged lives as adults, whose problems carry over to the next generation of Native Hawaiian children. Id.

Native Hawaiians have among the lowest incomes and highest rates of poverty in Hawai'i. In addition, Native Hawaiians are more likely to live in poor neighborhoods; in other words, "areas with high concentrations of Native Hawaiians have lower median incomes, on average." Kanaiaupuni Dec. ¶ 42. Because Native Hawaiian children are more likely to live in economically disadvantaged areas, Native Hawaiian children are more likely than their peers to attend low-quality schools. Id. ¶¶ 114-18. Indeed, almost 79% of public schools in Hawai'i that have a predominantly Native Hawaiian student body are in corrective action, meaning that they do not satisfy the State's minimal educational standards, compared to only 17.4% of public schools that do not have a predominantly Native Hawaiian student body. Id. ¶ 115. Moreover, schools with high concentrations of Native Hawaiian students tend to have less experienced teachers. Id. ¶¶ 119-29.

Native Hawaiian students score the lowest among all major ethnic groups on statewide-standardized tests, with the gap between Native Hawaiian students and their peers increasing throughout the grade levels. Id. ¶¶ 130-37. When tested in the third grade, Native Hawaiian students

scored on average ten percentiles below their non-Native Hawaiian counterparts on the reading test and twelve percentiles below their peers in math. Id. By the eighth grade, the average Native Hawaiian student scores thirteen percentiles behind his non-Native Hawaiian peers in reading and fifteen percentiles below his non-Native Hawaiian counterparts in math. Id.

Native Hawaiian students are likewise over-represented in special education programs. During the 2000-01 school year, 18.1% of Native Hawaiian students participated in special education programs, compared with 11% of non-Native Hawaiians. Id. ¶¶ 138-42. Native Hawaiian children are also over-represented among students who are excessively absent from school; during the 1999-2000 school year, 9.7% of Native Hawaiian students were excessively absent, compared to 6.3% of non-Native Hawaiians. Id. ¶¶ 143-47.

Related to the above statistics, Native Hawaiian children are less likely to graduate from high school on time and are more likely to drop out of school than their non-Native Hawaiian cohorts; only 68.4% of Native Hawaiians in the public school system satisfy graduation requirements or transfer to another school system, compared with 76.6% system-wide. Kanaiaupuni Dec. ¶¶ 148-51. Lacking a strong elementary and secondary level education, Native Hawaiians are less likely to go on to higher

education and well paying jobs. In 1990, only 9.1% of Native Hawaiians 25 or older had obtained a bachelor's degree or higher. By contrast, 30.3% of Chinese, 25.2% of Japanese, and 30.2% of Caucasians obtained such degrees. Id. ¶ 273. Moreover, of those who attend college, fewer Native Hawaiians graduate than do non-Native Hawaiians. Between 1990 and 2000, only 41.3% of Native Hawaiian students at the University of Hawai'i at Mānoa graduated within six years of admittance, compared to 73.0% of Chinese students, and 64.2% of Japanese students. Id. ¶ 270.

Native Hawaiians are similarly under-represented in managerial and professional occupations. Just 22.8% of Native Hawaiians are employed in managerial or professional capacities, compared with 34.2% of non-Native Hawaiians. Id. ¶ 40. Native Hawaiians are at the same time over-represented in laborer occupations; 12.1% of Native Hawaiians are employed in such capacities, compared with 8.2% of non-Native Hawaiians. Id. As discussed below, Congress has likewise recognized the imbalances adversely affecting Native Hawaiians and has enacted a myriad of laws in an effort to help remedy them.

E. Congressional Recognition of Past Deprivations and Current Disadvantages Facing Native Hawaiians

The federal government has repeatedly acknowledged that it has a unique obligation to the indigenous peoples of the United States, which

stems from the history between the United States government and Native Americans, in which the federal government “overcame the Indians and took possession of their lands, sometimes by force.” Board of County Comm’rs v. Seber, 318 U.S. 705, 715 (1943); cf. Joint Resolution on the Overthrow of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (“Apology Resolution”). In response to this unique historical relationship, the United States has enacted a substantial body of law that creates special programs for the indigenous people of this nation. Seber, 318 U.S. at 715.

As part of its obligation to the indigenous people of the United States, Congress has acknowledged on numerous occasions the historical wrongs committed against the Native Hawaiian people, the role of the United States in committing these wrongs, and the responsibility of the United States to help remedy the effects of these wrongs. Congress recognized more than 80 years ago that a special relationship exists between the United States and the Native Hawaiian people, and Congress has continued to recognize its obligation to the Native Hawaiian people since that time. Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (1921); 2002 NHEA, 20 U.S.C. § 7512 (8).

Congress recognized in the 2002 NHEA, for example, that: (1) “Native Hawaiians are a distinct and unique indigenous people . . . whose

society was organized as a nation and internationally recognized”; (2) “At the time of the arrival of the first nonindigenous people in Hawaii in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient subsistence social system based on a communal land tenure system with a sophisticated language, culture, and religion”; (3) “From 1826 until 1893, the United States recognized the sovereignty and independence of the Kingdom of Hawaii, which was established in 1810 under Kamehameha I, [and] extended full and complete diplomatic recognition”; and (4) “In 1893, the sovereign, independent, internationally recognized, and indigenous government of Hawaii, the Kingdom of Hawaii, was overthrown by a small group of non-Hawaiians, including United States citizens, who were assisted in their efforts by the United States Minister, a United States naval representative, and armed naval forces of the United States.” 20 U.S.C. § 7512 (Supp. I 2002).

In 1993, the United States Congress formally recognized these wrongs committed against the Native Hawaiian people, apologized for the United States’ role in the overthrow of the Hawaiian Kingdom, and adopted a policy of reconciliation with Native Hawaiians. The Apology Resolution recognizes that “the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national

lands to the United States,” and that economic and social changes in Hawai‘i as a result of the overthrow “have been devastating to the population and to the health and well-being of the Hawaiian people.” Pub. L. No. 103-150, 107 Stat. at 1512. As a follow-up to the Apology Resolution and part of the reconciliation effort with Native Hawaiians, the U.S. Departments of Justice and Interior issued a report on October 23, 2000, entitled “From Mauka to Makai, The River of Justice Must Flow Freely,” which concludes that, “[a]s a result of the overthrow, laws suppressing Hawaiian culture and language, and displacement from the land, the Native Hawaiian people suffered mortality, disease, economic deprivation, social distress and population decline,” and “continue to suffer from economic deprivation, low educational attainment, poor health status, substandard housing, and social dislocation.” See Benham Dec. ¶¶ 70-71 and Attachment B thereto at 1-2.

The United States has repeatedly acknowledged that, as a result of its history with the Hawaiian people, it has a “special trust relationship” with the Native Hawaiian people. This relationship underpins the federal policy of enacting remedial programs for Native Hawaiians. Congress “does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.” 20

U.S.C. § 7512(12) (Supp. I 2002). “[T]o fulfill the U.S. Government’s historical and legal obligation to the Native Hawaiian people incurred by its participation in the overthrow of the Hawaiian Monarchy,” Congress has provided various forms of assistance “for the improvement of their social and economic welfare.” H.R. Rep. No. 103-425, 103d Cong., 2d Sess. 28 (1994).

F. Congressional Enactment of Remedial Legislation Giving Preferences to Native Hawaiians

In light of its recognition that Native Hawaiians continue to suffer educational and cultural deprivations, Congress has enacted a plethora of remedial statutes aimed at helping Native Hawaiians overcome these deprivations.³ For example, the Hawaiian Homelands Homeownership Act of 2000, which notes that “the United States has a special responsibility for the welfare of the Native peoples of the United States, including Native Hawaiians,” and that “among the Native American population of the United States, Native Hawaiians experience the highest percentage of housing problems in the United States,” provides governmental loan guarantees “to Native Hawaiian families who otherwise could not acquire housing

³ Virtually all of these congressional enactments broadly define “Native Hawaiian” in a manner consistent with the definition used by Kamehameha, to include individuals of both pure and part aboriginal blood. Kanaiaupuni Dec. ¶ 23.

financing because of the unique status of the Hawaiian Home Lands or as a result of the lack of access to private financial markets.” Pub. L. No. 106-569, §§ 511-14, 114 Stat. 2944, 2966-67, 2990 (2000).

Pursuant to its trust relationship with Native Hawaiians, Congress has also enacted legislation authorizing employment preferences for Native Hawaiians. See Department of Defense Appropriations Act of 1995, Pub. L. No. 103-335, 108 Stat. 2599, 2652 (1994) (“In entering into contracts with private entities to carry out environmental restoration and remediation of Kaho‘olawe Island . . . the Secretary of the Navy shall . . . give special preference to businesses owned by Native Hawaiians.”); see also Act of Dec. 22, 1980, Pub. L. No. 96-565, §§ 101-110, 94 Stat. 3321, 3321-23 (1980) (Secretary of the Interior “shall give preference to . . . Native Hawaiians in making appointments to positions” established for the administration of Kalaupapa National Historical Park, and shall “provide training opportunities for . . . Native Hawaiians to develop skills”).

Beyond extending contractual benefits directly to Native Hawaiians, Congress has enacted a number of statutes that provide benefits exclusively to organizations that serve Native Hawaiians. See, e.g., Workforce Investment Act of 1998, Pub. L. No. 105-220, § 166, 112 Stat. 936, 1021 (1998) (authorizes grants to Indian Tribes, tribal organizations, Alaska

Native entities, and Native Hawaiian organizations for employment and job training activities); Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, sec. 203, § 1953, 106 Stat. 323, 409 (1992) (amending the Public Health Services Act by requiring the State of Hawai‘i to contract with organizations that plan, conduct, and administer comprehensive substance abuse and treatment programs for Native Hawaiians); Native American Programs Act of 1974, 42 U.S.C. §§ 2991-2991h (establishing revolving loan fund for OHA to “make loans or loan guarantees to Native Hawaiian organizations and to individual Native Hawaiians”), as amended by Native American Programs Act Amendments of 1997, Pub. L. No. 105-361, sec. 3, § 803A, 112 Stat. 3278 (1998).

The Native Hawaiian Health Care Act of 1988, 42 U.S.C. § § 11701-11714 (2000), for example, provides benefits directly and exclusively to both Native Hawaiians and to organizations serving Native Hawaiians by “authoriz[ing] the creation of a comprehensive health care master plan for Native Hawaiians; the provision of programs for comprehensive health promotion, disease prevention, and primary health services; and the granting of scholarships to Native Hawaiians.” Burgert v. Lokelani [sic] Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000). The breadth of these and scores of other congressional enactments that provide preferences

or services for Native Hawaiians, consisting of at least 85 different statutes, are set forth more fully in the attachment to the Declaration of Kelly G. LaPorte.

G. Congressional Preferences for Native Hawaiians in Educational Opportunities

Congress has long recognized the role of education as an essential means of redressing the effects of past deprivations visited upon Native Hawaiians. Congress has likewise long recognized the central role that Kamehameha in particular plays in helping to remedy past harms by providing educational opportunities for Native Hawaiians. In 1981, the Senate commissioned an educational assessment of Native Hawaiians. See 20 U.S.C. § 7512(14) (Supp. I 2002). The Report of the Native Hawaiian Educational Assessment Project was issued in 1983 (the “1983 Assessment”). Kamehameha played a significant role in the preparation of this assessment. Benham Dec. ¶ 55. The 1983 Assessment contained a number of important findings, including that Native Hawaiian students in the DOE system: (i) scored well below average in achievement test scores; ii) were disproportionately represented in many negative social and physical categories indicative of special educational needs; and (iii) had special educational needs related to their unique cultural situation, such as

different learning styles, low self-image, and the absence of a culturally relevant experience in the DOE system. See Attachment C to Benham Dec.

Based on this and other studies that demonstrated “an educational system that has failed to motivate Native Hawaiian children and address their unique cultural needs,” Congress determined that there was a need for “efforts designed to help Native Hawaiian children achieve educational parity with other ethnic groups.” S. Rep. No. 100-122 at 95 (1988), reprinted in 1988 U.S.C.A.A.N. 101, 196. Congress therefore authorized “supplemental programs to meet the unique educational needs of Native Hawaiians” in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130. Id. at 195. This 1988 legislative enactment, which was codified at 20 U.S.C. § 4901 et seq., specifically recognized Kamehameha as a Native Hawaiian Educational Organization and authorized grants to such organizations in an effort to increase educational attainment among Native Hawaiians. See 20 U.S.C. § 4905(b) (1988); S. Rep. No. 100-222 at 155, reprinted in 1988 U.S.C.A.A.N. 101, 256 (the “1988 Act”).

Kamehameha updated the 1983 Assessment with the Native Hawaiian Educational Assessment Project of 1993 (the “1993 Assessment”), a comprehensive 232-page report. The 1993 Assessment confirmed the

continued existence of many of the same educational risk factors and needs that had been identified in the 1983 Assessment. Benham Dec. ¶ 63. Congress embraced the key findings in the 1993 Assessment a year later when it enacted the Native Hawaiian Education Act (“NHEA”). See Pub. L. No. 103-382, § 101, 108 Stat. 3794 (1994), codified at 20 U.S.C. §§ 7901 et seq. (the “1994 NHEA”). Specifically, Congress found that:

- (A) educational risk factors continue to start even before birth for many Native Hawaiian children, including
 - (i) late or no prenatal care;
 - (ii) half of Native Hawaiian women who give birth are unmarried; and
 - (iii) high rates of births to teenage parents;
- (B) Native Hawaiian students continue to begin their school experience lagging behind other students in terms of readiness factors such as vocabulary test scores;
- (C) Native Hawaiian students continue to score below national norms on standardized education achievement tests at all grade levels;
- (D) Both public and private schools continue to show a pattern of lower percentages of Native Hawaiian students in the uppermost achievement levels and in gifted and talented programs;
- (E) Native Hawaiian students continue to be overrepresented among students qualifying for special education programs provided to students with learning disabilities, mild mental retardation, emotional impairment, and other such disabilities;

- (F) Native Hawaiians continue to be underrepresented in institutions of higher education and among adults who have completed four or more years of college;
- (G) Native Hawaiians continue to be disproportionately represented in many negative social and physical statistics, indicative of special educational needs, for example --
 - (i) Native Hawaiian students are more likely to be retained in grade level and to be excessively absent in secondary school;
 - (ii) Native Hawaiian students are the highest users of drugs and alcohol in the State of Hawai‘i; and
 - (iii) Native Hawaiian children continue to be disproportionately victimized by child abuse and neglect.

....

20 U.S.C. § 7902(17) (1994).

Based on these findings, Congress established educational programs for Native Hawaiian students, including financial assistance for pursuing higher education, grants to serve the needs of gifted and talented students in elementary and secondary schools, and funding for special education programs. For purposes of the 1994 NHEA, “Native Hawaiian” was broadly defined to include any descendant of the aboriginal people who exercised sovereignty in Hawai‘i prior to 1778, 20 U.S.C. § 7912 (1994), a definition similar to that used by the Schools. As with the 1988 legislation,

Kamehameha was recognized as a “Native Hawaiian Educational Organization.” Id. § 7904.

Congress reenacted the NHEA in 2002. See 20 U.S.C. §§ 7511 et seq. Using the same broad definition of “Native Hawaiian,” the 2002 Act reaffirmed the findings in the 1994 Act concerning the deficiencies facing Native Hawaiians and authorized appropriations to fund programs for Native Hawaiian students for fiscal years 2002-2007. Id. §§ 7512, 7514-15. These recent congressional findings confirm that Native Hawaiians remain disadvantaged under key criteria affecting educational achievement and that remedial educational programs targeting Native Hawaiian children are needed to address their plight. Id.

In authorizing a number of special educational services for which only Native Hawaiians would be eligible, Congress indicated its awareness and approval of the fact that there were a number of Native Hawaiian organizations, i.e., organizations providing preferences for Native Hawaiians in the field of education, and stated that the educational programs authorized by the NHEA were intended to “supplement” these private efforts to remedy the effects of past wrongs to Native Hawaiians. Id. §§ 7513-15.

Kamehameha’s educational curriculum and programs are designed to address precisely the same educational needs of Native Hawaiians that were

identified in the 1983 and 1993 Assessments, and recognized and embraced by Congress in the 1988 Act, the 1994 NHEA, and the 2002 reenactment of the NHEA. Indeed, in reenacting the NHEA in 2002, Congress singled out Kamehameha as providing the kinds of educational programs targeting Native Hawaiians that are necessary to address the continuing effects of past deprivations of the Hawaiian people and urged the Schools to continue these efforts. In the House Report on the 2002 NHEA, the House Committee on Education and the Workforce explicitly acknowledged that “Native Hawaiians have a trust, established by the last Hawaiian princess, which exists solely to educate Native Hawaiian children. The Bishop Trust is currently one of the largest charitable trusts in the world *The Committee urges the Trust to redouble its efforts to educate Native Hawaiian children.*” H.R. Rep. No. 107-63(I) at 333 (emphasis added).

H. Kamehameha’s Educational Programs and Policies

Kamehameha has evolved since it first opened in 1887 to meet the changing needs of the Native Hawaiian community. Kamehameha began as a vocational school, and for years the trust was land rich and cash poor. Over the past few decades, the Schools’ campus programs have evolved to a college preparatory curriculum, with the emphasis on improving educational attainment among Native Hawaiians and producing Native Hawaiian

business and community leaders. Ing Dec. ¶¶ 22-23, 60. With the forced sale of its lands under the Hawaii Land Reform Act in the 1980s, see Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984), the Schools suddenly had an abundance of cash. As a consequence, expenditures for educational programs began to grow, and continue to grow today. Kamehameha now operates K-12 campuses on three separate islands, Kapālama (O‘ahu), Pukalani (Maui), and Kea‘au (Island of Hawai‘i). In addition to its campus programs, Kamehameha’s activities include preschool programs, summer programs, literacy enhancement programs, post-secondary and graduate school scholarships, and various outreach programs. Although Kamehameha’s campus programs remain the principal focus of the Schools, through all of its activities Kamehameha reaches more than 16,000 Native Hawaiian children annually, and eventually hopes to reach all K-12 age children of Hawaiian ancestry. Ing Dec. ¶ 46.

Using the assets that Princess Pauahi set aside, the Schools currently subsidize, at considerable financial expense, the vast majority of the costs associated with educating each of the approximately 4,800 students in the campus programs. Id. ¶ 24. Tuition, if charged at all, covers only a small fraction of the total cost that the Schools privately bear in providing this education. Id. It costs on average approximately \$20,000 per year to

educate a child in the campus programs. Id. The Schools currently charge an annual tuition of only \$1,784 for its K-12th grade students. Id. Even with this minimal tuition, approximately 65% of the students receive financial aid from Kamehameha. Id. The education offered by the Schools to children of Hawaiian ancestry is, therefore, in large measure, a testamentary gift from Princess Pauahi to the children of her people.

Currently, including during the cycle for admission in fall 2003, the applicants that Kamehameha deems qualified for admission are requested to provide documentation of their Native Hawaiian ancestry if they wish to be considered under the Policy. Declaration of Teresa Makuakane-Drechsel (“Makuakane-Drechsel Dec.”) ¶ 5. Kamehameha then applies the Policy, and based on the number of spaces available, selects qualified Native Hawaiian applicants for admission. Id. In the event that spaces remain unfilled after Kamehameha extends offers to qualified Native Hawaiian applicants, the Schools will offer the remaining spaces to qualified non-Native Hawaiian applicants. Id.

Kamehameha is able to reach only a limited number of students through its campus programs. Approximately 70,000 Native Hawaiian children are enrolled in grades K-12 throughout Hawai‘i, but the Schools have only approximately 4,800 spaces in the campus programs. Thus, even

with its Admissions Policy, Kamehameha's campus programs are able to reach only about 7% of this group. Ing. Dec. ¶ 74. Due to the limited number of spaces available each year relative to the number of Native Hawaiian applicants, it is rare that the Schools will have any spaces remaining for non-Native Hawaiian applicants in its K-12 campus programs. Makuakane-Drechsel Dec. ¶ 6. Kamehameha, however, typically does have space for some non-Native Hawaiians in other programs it offers, such as its preschool, Enrichment Programs, and summer school programs. Id. ¶¶ 6 7, 9.

By defining "Native Hawaiian" broadly, to include those of both pure and part Hawaiian ancestry, Kamehameha enjoys a student body that is richly diverse. Indeed, virtually all races are represented in the present student body. Approximately 77.4% of Kamehameha's students identify themselves as part-Caucasian, 70% as part-Chinese, and 42.3% as part-Japanese. See Kanaiaupuni Dec. ¶ 160. "Reflecting the mixed heritage of the contemporary Native Hawaiian population, over 96 percent of the Schools' students claim three or more ethnic identities." Id. ¶ 161. As demonstrated by the representative races and ancestries reported at Kamehameha, its student body includes members of over 60 different races and ethnicities. See Makuakane-Drechsel Dec. ¶ 8.

In 2002, the Schools' Board of Trustees requested a review of the continuing need for the Admissions Policy. Based on a comprehensive memorandum submitted to the Trustees, they confirmed that the Policy is necessary for the accomplishment of Kamehameha's mission, and resolved "[t]hat Kamehameha continue to use its longstanding preference for children of Native Hawaiian ancestry in determining admission to its K-12 campus-based program," that "Kamehameha continue to use a broad definition of 'Hawaiian' similar to the definition of 'Native Hawaiian' used in the Native Hawaiian Education Acts, for purposes of applying the Policy," and that "Kamehameha review the Policy on a periodic basis for consistency with the Schools' overall mission and objectives." Ing Dec. ¶¶ 75-76 and Attachments C and H thereto.

I. Kamehameha's Mission to Remedy Educational Disadvantages Suffered by Native Hawaiian Children

Kamehameha's campus programs seek to address the educational and socioeconomic disparities currently facing Native Hawaiians by providing them "with the skills and experience needed to compete in today's world." Ing Dec. ¶ 59. The imbalances that continue to confront Native Hawaiians today include significant under-representation in post-secondary education and in managerial and professional occupations and significant over-

representation in entry-level positions. Kamehameha's campus programs are specifically targeted at ameliorating these imbalances. Ing Dec. ¶ 60.

There is a clear link between the positive educational experience that Kamehameha provides and improved outcomes for Native Hawaiians. By providing Native Hawaiian students with a strong educational foundation from pre-school through high school, Kamehameha offers a bridge to social and economic success that breaks the cycle of marginalization and offers greater hope for future generations of Native Hawaiian children. Kanaiaupuni Dec. ¶ 19. The returns on educational investments are substantial, particularly at the post-secondary level.

Kamehameha seniors consistently outperform national norms and state averages on both the verbal and math sections of the SAT. Between 1991 and 2000, Kamehameha students scored roughly 10 points above the national average on the verbal portion of the SAT and over 40 points above the national average on the math section. Id. ¶¶ 164-71. Kamehameha's success is even greater when compared with the average SAT scores in Hawai'i. Id. Kamehameha students are also more likely to graduate on time than their Native Hawaiian counterparts in the DOE system. Approximately 84.7% of Kamehameha students in the class of 2002 graduated on time, compared with 63% of the Native Hawaiian

students in the DOE. Id. ¶ 174. When Kamehameha's graduation rate is combined with students who left Kamehameha for another school system, Kamehameha's graduation rate is likely higher than 95%. Id. ¶ 175.

Kamehameha students have higher levels of college attendance than Native Hawaiian students in the DOE. More than three-fourths of Kamehameha graduates now either attend or graduate from college. Id. ¶ 265. When interviewed, 98% of Kamehameha's class of 2002 intended to enroll in some form of post-secondary education. Id. ¶ 176. Eighty-four percent planned to attend a four-year college, and 53% planned to attend a school on the U.S. Mainland. Id. The list of institutions that graduates of the 2002 class planned to attend includes Stanford University, the University of California at Los Angeles, the University of Southern California, and the Massachusetts Institute of Technology. Id. ¶ 177. Kamehameha alumni also have greater success than other Native Hawaiian young people in completing college. Of those Kamehameha alumni who have attended college, 53.7% have received a bachelor's degree or higher, compared to only 30.2% of all Native Hawaiians. Id. ¶ 275. Randy Hitz, the dean of the University of Hawai'i College of Education, has hired three Kamehameha graduates as professors, and believes that "the loss of Kamehameha Schools as it now exists would be a significant step backward in our efforts to

increase the number of Native Hawaiian students in the University of Hawaii system, and more specifically in the College of Education.” Declaration of Randy Hitz ¶¶ 9-12.

As set forth in the Declarations of Dennis Gonsalves, Ph.D., Chiyome Leinaala Fukino, M.D., Aaron Aina Akamu, and Micah Kane, a number of Kamehameha alumni attest that, but for the unique education they received, they likely would not have overcome the hurdles they faced as Native Hawaiians. As Dr. Fukino summarized, “Statistics have consistently shown that Native Hawaiians do not do well in the dominant educational system. Kamehameha Schools affords Native Hawaiian children a structured and caring environment that facilitates learning academic subjects and teaches the value of service and good citizenship. It gives them hope to rise above whatever challenges they may face in their home environment. Until Native Hawaiians as a people are healthy and able to compete effectively with all other groups, I strongly believe that Kamehameha Schools must remain as it is, so that Native Hawaiian children may have the same opportunity I am so grateful was given to me.” Declaration of Chiyome Leinaala Fukino (“Fukino Dec.”) ¶ 13.

Many Kamehameha alumni are now “giving back” to the Hawaiian community in a way that further leverages their Kamehameha education for

the benefit of future generations of Native Hawaiians, and that further breaks the cycle of Native Hawaiian poverty and marginalization. Gonsalves ('61), the son of a sugar plantation worker, became an endowed professor of plant pathology at Cornell University, then returned to Hawai'i to help develop a genetically engineered papaya that saved Hawai'i's papaya industry. Declaration of Dennis Gonsalves ¶¶ 1-7. Dr. Fukino ('61), the second oldest of eight children in a poor family from Kalihi, has led groundbreaking research to improve the health care of Native Hawaiians, and is now Director of the Hawai'i State Health Department. Fukino Dec. ¶¶ 1-12. Akamu ('97), who grew up in an isolated plantation town, graduated from Dartmouth College but declined graduate school to return to Hawai'i to help run a program that prepares low-income students for college. Declaration of Aaron Aina Akamu ¶¶ 1-6. Kane ('87), an indigent orphan, is now Director of the Hawai'i State Department of Hawaiian Homelands. Declaration of Micah Kane ¶¶ 1, 5.

J. Kamehameha's Mission to Produce Native Hawaiian Civic, Community and Business Leaders

Kamehameha has a particular mission of "providing tomorrow's leaders in the Native Hawaiian community." Ing Dec. ¶ 78. Kamehameha works to accomplish this mission through educational programs that instill in Native Hawaiian students a responsibility for leadership that inspires them

after they graduate to work for the betterment of the Native Hawaiian community and Hawaiian civic and economic society as a whole.

Kamehameha alumni serve prominently as community leaders and occupy key positions in business, law, medicine, education, government, and the military. Ing Dec. ¶¶ 66-68. Moreover, 63% of Kamehameha alumni are engaged in community leadership, and Kamehameha alumni are almost twice as likely to serve in key decision making roles as Native Hawaiians who are not Kamehameha alumni. Kanaiaupuni Dec. ¶ 18. Kamehameha alumni also have a heightened awareness of their Native Hawaiian identity. Over 95% of alumni say they are proud to be Native Hawaiian, and approximately 75% demonstrate their commitment to their heritage by engaging in Hawaiian cultural activities. Id.

By giving back to the Native Hawaiian community, Kamehameha alumni serve as inspiration for the next generation of Native Hawaiian children. As Dr. Fukino states, “Throughout my professional life, my passion has been the improvement of healthcare for Native Hawaiians. Not many Hawaiians are visible in the professional medical community. I felt that if I made it through medical school, I needed to be an example to other Hawaiians and people in the community; to show them that not all Hawaiians are in jail or living on the beach or singing for tourists in Waikiki.

I needed to be visible, so the rest of the community could see it was good to be Hawaiian.” Fukino Dec. ¶ 8.

Hawaiian leaders from outside the Native Hawaiian community attest to the beneficial effects of such Native Hawaiian leadership for the state’s economy and society as a whole. George Ariyoshi, Hawai‘i’s Governor from 1973 to 1986, calls the suffering of Native Hawaiians “a real black mark on our community,” and states: “From my experiences in community organizations, I know the difference that one person, one leader, can make for his or her community. As Kamehameha Schools produces those leaders, we all benefit.” Declaration of George Ariyoshi (“Ariyoshi Dec.”) ¶¶ 5, 8. Governor Ariyoshi identifies Kamehameha’s approach to Native Hawaiian education as a key determinant of such future leadership: “In my experience, you cannot separate education from pride. Without pride, a person cannot really achieve. If a person is proud of his background, his ancestors, and who he is, then that person is much better able to reach out and help others. I have visited the Kamehameha Schools campus many times, and talked to the girls and boys who are students at the school. I have seen the pride in their faces when they talk about what they are being taught Kamehameha Schools is teaching, and must continue to teach, the

Hawaiian values and culture that build self-worth in being Hawaiian.”
Ariyoshi Dec. ¶ 9.

Hawai‘i’s current Governor, Linda Lingle, echoes her predecessor’s thoughts: “I . . . believe that our state needs both a qualified and a racially and ethnically diverse group of leaders, to ensure that all voices and viewpoints are heard and respected Kamehameha Schools provides an essential training ground for the education and development of our future Native Hawaiian leaders.” Declaration of Linda Lingle (“Lingle Dec.”) ¶ 12.

As Walter Dods, chief executive of one of Hawai‘i’s largest banks, attests, Kamehameha plays a vital role in producing business leaders as well as civic and professional leaders: “Leaders for an ethnic or racial group can come in many arenas -- politics, education, science, the arts and business. For Hawaii’s first people to take a greater role in their state’s 21st Century society, they need more leaders in private-sector business. By training young Hawaiians to succeed in business and other fields, Kamehameha Schools insures Hawai‘i employers a supply of leaders for the future-- leaders who can inspire others and improve the socioeconomic status of this disadvantaged segment of our society.” Declaration of Walter Dods (“Dods Dec.”) ¶ 7. He goes on to note: “In my work as a banker and as a member

of community boards, I have often seen this kind of inspiration come from Kamehameha Schools graduates. Thanks to their educational experience at Kamehameha, they feel a responsibility for leadership, a duty to work for the betterment of the Native Hawaiian community and Hawai'i society as a whole." Id. ¶ 8.

Other business leaders express similar views. Keith Vieira, who heads one of Hawai'i's largest hotel chains, cites a pressing need for "more Native Hawaiian executives and managers in Hawaii's tourism industry" and says that Kamehameha has and will continue to "play a critical role in developing and educating these future Native Hawaiian leaders for Hawai'i's tourism industry." Declaration of Keith Vieira ¶¶ 9-10. And Roger Drue, the chief executive of the State's largest private health care provider, states that Kamehameha graduates play "an integral role" in "improving the health care problems of Native Hawaiians as a group." Declaration of Roger Drue ¶ 6.

K. Kamehameha's Mission to Preserve and Perpetuate Native Hawaiian Culture

Kamehameha has an additional mission to remedy the historical deprivation suffered by Native Hawaiians by restoring the importance and value of Hawaiian language, culture, and identity. The "loss of Native Hawaiian language, culture, and traditions, along with the loss of self-

identity and self-worth, made the Native Hawaiian ashamed of his heritage causing him to disassociate from it and adopt Western ways instead.” Benham Dec. ¶ 73. Kamehameha therefore seeks to “integrate Native Hawaiian culture, heritage, language, and traditions into the educational process, and provide a first-rate educational experience for Native Hawaiians.” Ing Dec. ¶ 60.

The importance of Hawaiian culture in Kamehameha’s educational program is clearly articulated in its strategic plan. Declaration of Charlene Hoe (“Hoe Dec.”) ¶ 3. That plan reaffirms Princess Pauahi’s strong belief that a Kamehameha education should be founded on Christian belief and cultural pride, and announces as one of its goals the “cultivat[ion], nurtur[ing], perpetuat[ion], and practice [of] *‘Ike Hawai‘i* . . . defined as a body of knowledge, practices, and understandings that includes Hawaiian culture, value, history, language, oral tradition, and literature.” Id. The cultural aspect of Kamehameha’s curriculum is critical to its remedial mission. Identity is an important factor in the personal development and growth of disadvantaged minority children. Kanaiaupuni Dec. ¶ 232. A child’s understanding of, and pride in, her cultural roots increases self-esteem, supports confidence in the face of obstacles, and provides security that fosters learning and attainment. Id. ¶ 232.

“The observance of Native Hawaiian cultural practices, the use of the Hawaiian language, and the incorporation of Hawaiian values are infused throughout [Kamehameha’s] educational program.” Hoe Dec. ¶ 5. This infusion is evidenced in a number of ways: “the morning routines . . . incorporate *pule* (prayer), hula movement and *mele* (Hawaiian music).” Id. Hawaiian values are posted and discussed in class. Id. Hawaiian protocols “including *ho‘okipa* (welcoming protocol) and *Oli Kahea* (chants seeking permission to enter) and *Oli Komo* (chants granting permission to exit), are used daily in the classroom.” Id. All students attend weekly classes in Hawaiian language and culture. Id. ¶¶ 6-7. These classes include the study of chants and hula, Hawaiian literature, genealogy, geography and geology, Hawaiian arts, history and cultural practices. Id. In addition, Hawaiian elements are included in other required content areas, such as “art, music, social studies, physical education, science and language arts.” Id.

Students are also offered opportunities to study and explore further Hawaiian cultural context through participation in elective classes in which Hawaiian culture and language are a central component. Id. ¶ 8. These elective courses include Hawaiian Chant and Dance, Hawaiian Ensemble, 9th Grade English with a Hawaiian literature focus, Literature of the Pacific, Hawaiian Crafts, and at the elementary level, Student Choirs. Id.

Throughout the 7th – 12th grades there are classes with Hawaiian content in “Band, Orchestra, Ukulele classes, Hawaiian Ensemble, Choirs and Concert Glee.” Id. Participation in and practice of Hawaiian culture is also encouraged in extracurricular activities and clubs that encompass an ‘Ike Hawai‘i focus. Id. ¶ 9. Major events, involving the staff and the entire student body, incorporate Hawaiian culture and traditions. Id. ¶ 10. Finally, staff and faculty incorporate Hawaiian values and practices into their curriculum and program planning across content areas. Id. ¶12.

Kamehameha’s efforts to perpetuate, preserve, and practice ‘Ike Hawai‘i are vital to the revival and survival of the culture and language of the indigenous people of Hawai‘i. At the time of Pauahi’s death, Hawaiian culture was deteriorating. Indeed, not long after her death the instructional use of Hawaiian language in the public schools was banned. Today “when applicants are interviewed for admission to [Kamehameha] the most frequent answer heard to the question, ‘Why do you want to attend Kamehameha Schools?’ is, ‘Because I want to learn more about my Hawaiian culture and heritage.’” Hoe Dec. ¶ 17. This pride and self-esteem is a critical part of the Schools’ mission of remedying the effects of past wrongs.

III. ARGUMENT

A. Summary Judgment for Kamehameha Is Appropriate

Summary judgment is appropriate in this case because there is no issue of material fact and Kamehameha Schools is entitled to judgment on the law. “Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment on the as a matter of law.” Antoku v. Hawaiian Elec. Co., 266 F. Supp. 2d 1233, 1235 (D. Haw. 2003) (citing Fed. R. Civ. P. 56(c)). The moving party has the initial burden of demonstrating that a genuine issue of material fact is absent. Reassure Am. Life Ins. Co. v. Rogers, 248 F. Supp. 2d 974, 980 (D. Haw. 2003) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Once the moving party has met its burden, the non-moving party has the burden of demonstrating specific facts that evidence the need for a trial. Carroll v. Nakatani, 188 F. Supp. 2d 1233, 1235 (D. Haw. 2002). This demonstration must be made either by declaration or as otherwise permitted by Fed. R. Civ. P. 56. Kahawaiolaa v. Norton, 222 F. Supp. 2d 1213, 1216 (D. Haw. 2002). Moreover, while “the court must view the facts in the light most favorable to the non-moving party,” Antoku, 266 F. Supp. 2d at 1235 (citation omitted), “conclusory arguments unsupported by factual statements

or evidence do not satisfy the nonmoving party's burden," Reassure, 248 F. Supp. 2d at 981.

Here the material facts are not in dispute. Kamehameha acknowledges that it employs a preference on the basis of Native Hawaiian ancestry; the sole issue is whether that policy, even if assumed to be race-conscious, violates § 1981. It is likewise undisputed that the Schools' policy is remedial in nature, and that Congress has recognized the need for such remedial preferences in educational programs for Native Hawaiians, and has expressly approved Kamehameha's policy of serving Native Hawaiians first. The sole contested issue, namely whether there is a legitimate justification for Kamehameha's policy even if deemed race-conscious, such that the policy does not violate § 1981, is strictly a question of law for decision by the Court. See, e.g., Cerrato v. San Francisco Cmty. Coll. Dist., 26 F.3d 968, 974 (9th Cir. 1994). And, as is discussed more fully below, on the undisputed facts of this case, Kamehameha's Admissions Policy does not violate § 1981 as a matter of law.

B. No Constitutional Issue is Presented

It is worth noting at the outset some of the questions that this case does *not* present. To begin with, this case raises no federal constitutional issue. The Schools are a private actor, not subject to constitutional limits

applicable to public agencies. “A fundamental principle of federal constitutional law is that private action, no matter how egregious, can not violate the equal protection or due process guarantees of the United States Constitution.” Medical Inst. v. National Ass’n of Trade & Technical Sch., 817 F.2d 1310, 1312 (8th Cir. 1987); see also Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974) (“private action is immune from the restrictions of the Fourteenth Amendment”).

Thus, when courts assess race-conscious decisions of private parties, rather than state actors, the strict commands of the Fifth and Fourteenth Amendment equal protection doctrine do not apply. Rather, courts afford considerably more leeway to private entities than to public entities to engage in race-conscious remedial action. As the Supreme Court noted in Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989), § 1981 claims against private defendants are “in the area of private discrimination, to which the ordinance of the Constitution does not directly extend” and thus the Court’s “role is limited to interpreting what Congress may do and has done.” And as the Court made clear in the analogous area of discrimination claims against private employers under Title VII of the Civil Rights Act of 1964, “Title VII . . . was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate

and particularize the commands of the Fifth and Fourteenth Amendments.” United Steelworkers of Am. v. Weber, 443 U.S. 193, 206 n.6 (1979). Failure to appreciate this distinction “ignores the fundamental difference between volitional private behavior and the exercise of coercion by the State.” Johnson v. Transp. Agency, 480 U.S. 616, 630 (1987).

For just this reason, the Supreme Court’s decision in Rice v. Cayetano, 528 U.S. 495 (2000), has no direct bearing on this case. In holding that elections to OHA could not be limited to persons of Hawaiian ancestry, Rice applied a virtually per se rule against racial classifications in voting to a state actor bound by the federal Fifteenth Amendment; this case, by contrast, involves a private entity governed only by § 1981, which, as we discuss below, affords considerably more leeway to private entities than the Constitution does to public entities in the adoption of race-conscious remedial programs.

C. The Sole Question Presented Is Whether Kamehameha Has a Legitimate Justification for Its Race-Conscious Admissions Policy

Plaintiff's case proceeds from the false premise that § 1981 prohibits all race-conscious classifications in private contracts. Plaintiff contends that the sole

question is whether [Kamehameha's Admissions Policy] can fairly be said to "deny admission to prospective students because [of their race]," Runyon, 427 U.S. at 168, or (to ask the same thing), whether that policy constitutes "discrimination . . . against, or in favor of, any race," McDonald, 427 U.S. at 295.

Plaintiff's MSJ at 9.

But Plaintiff misses the point. It is uncontroverted that Kamehameha's Admissions Policy gives a preference to students of Native Hawaiian ancestry. But even if such use of ancestry is deemed a use of race,⁴ and even if Kamehameha's Policy is deemed commercial so as to

⁴ The Court in Rice held only that the use of Hawaiian ancestry was equivalent to the use of race for purposes of interpreting the Fifteenth Amendment's prohibition of race discrimination in voting. The Court did not address whether Hawaiian ancestry constitutes a proxy for race in other circumstances. This Court need not reach the issue here because the Schools' Policy satisfies § 1981 even if it is considered race-conscious.

make §1981 applicable,⁵ not every use of race in private contracting counts as forbidden race “discrimination.” Not even the federal Constitution, much less § 1981, bars the use of racial classifications in all circumstances. See Grutter v. Bollinger, 123 S. Ct. 2325 (2003). “Legitimate” uses of race are permissible; it is only the illegitimate use of race, i.e., “invidious discrimination,” that is prohibited by § 1981. See, e.g., Runyon v. McCrary, 427 U.S. 160 (1976); General Bldg. Contractors Ass’n v. Pennsylvania, 458 U.S. 375, 390 n.17 (1982) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)). Thus, the question before the Court, and a question wholly ignored by Plaintiff in his opening memorandum, is *whether Kamehameha has a legitimate justification for its Admissions Policy*.

That inquiry is at the heart of the Title VII standard of review, which, as Plaintiff acknowledges, is the same standard of review that applies to claims of racial discrimination brought under § 1981. See Patterson, 491 U.S. at 186 (“claims of racial discrimination under § 1981” are subject to the

⁵ Some contractual relationships are of such a personal nature that they fall outside the scope of § 1981. See Runyon, 427 U.S. at 187-89 (Powell, J., concurring). Princess Pauahi’s Will and donative intent in establishing Kamehameha arguably is of such a personal nature that the Policy fulfilling it falls outside § 1981’s scope. The argument herein assumes for summary judgment purposes, without conceding, that § 1981 applies.

same “scheme of proof” applicable to Title VII cases); see also Manatt v. Bank of Am., NA, 339 F.3d 792 (9th Cir. 2003); Sanghvi v. City of Claremont, 328 F.3d 532 (9th Cir. 2003); Gay v. Waiters’ & Dairy Lunchmen’s Union, 694 F.2d 531, 538-39 (9th Cir. 1982). This “scheme of proof,” which was originally established in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), helps to determine whether the defendant has a legitimate justification for its allegedly discriminatory conduct or whether the defendant’s conduct indeed constitutes impermissible invidious discrimination, as alleged.

Under McDonnell-Douglas, plaintiffs have the initial burden of proving, by a preponderance of the evidence, a prima facie case of race discrimination. Patterson, 491 U.S. at 186 (citing Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)). If a prima facie case is established, a rebuttable inference of unlawful discrimination arises. Patterson, 491 U.S. at 187. To rebut this inference, a defendant “must present evidence that the plaintiff was rejected, or the other applicant was chosen, for a legitimate nondiscriminatory reason.” Id. The burden then shifts to the plaintiff to demonstrate that the reasons proffered by the defendant were not the actual or justified reasons. Id. Throughout, the burden of proof of unlawful discrimination ultimately remains with the

plaintiff. Id.; see also Linville v. State of Hawai'i, 874 F. Supp. 1095, 1106-10 (D. Haw. 1994) (applying the Title VII scheme of proof); Manatt, 339 F.3d 792 (applying the Title VII scheme of proof to a § 1981 claim).

D. Race-Conscious Policies Are Permissible Under § 1981 if They Have Legitimate Remedial Justification

Under the McDonnell-Douglas standard, courts have frequently upheld race-conscious remedial plans in the field of employment on the grounds that they serve a legitimate purpose. In Weber, for example, the Supreme Court held that Title VII “does not condemn all private, voluntary, race-conscious . . . plans.” Weber, 443 U.S. at 208. The Court was persuaded by the legislative history of Title VII that “an interpretation of the sections [of Title VII] that forbade all race-conscious [conduct] would ‘bring about an end completely at variance with the purpose of the statute’ and must be rejected.” Id. at 202 (quoting United States v. Public Util. Comm’n, 345 U.S. 295, 315 (1953)).

Indeed, contrary to the Plaintiff’s assertion that all racial classifications automatically constitute race discrimination under § 1981, the use of a race-conscious classification that is remedial in nature and appropriately designed to address the remedial need has even been deemed a legitimate *non-discriminatory* reason. Weber, 443 U.S. at 201-02. In

Johnson v. Transportation Agency, for example, a female employee was promoted over a male employee pursuant to a plan that considered sex as a plus factor in order to overcome the past exclusion of women from road construction supervisory jobs. 480 U.S. at 626. Noting that the same conclusion would apply to a race-conscious policy, the Court held that the plan was “fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.” Id. at 642. Recalling the steps in the McDonnell-Douglas framework, the Court noted:

Once a plaintiff establishes a prima facie case that *race* or sex has been taken into account in an employer’s employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. *The existence of an affirmative action plan provides such a rationale.* If such a plan is articulated as the basis for the employer’s decision, the burden shifts to the plaintiff to prove that the employer’s justification is pretextual and the plan is invalid.

Id. at 626 (emphasis added).

Courts have applied the identical McDonnell-Douglas framework to review race-conscious policies under § 1981 as well as Title VII. See, e.g., Setser v. Novack Inv. Co., 657 F.2d 962, 965-68 (8th Cir. 1981) (noting that Weber “implicitly approved the use of race-conscious plans to remedy past discrimination under section 1981 . . .”); Johnson v. Transp. Agency, 770

F.2d 752, 755 (9th Cir. 1984) (“We agree with the Eighth Circuit’s analysis in Setser . . . , which applied the McDonnell-Douglas formula to an affirmative action case.”), aff’d, 480 U.S. 616. Thus, a valid race-conscious plan similarly serves as a defense to an action brought under § 1981.

The defendant’s burden under McDonnell-Douglas is to demonstrate that it has a legitimate justification for its race-conscious program. That is, of course, the inquiry that a court is called upon to make in *every* case when confronted with a claim of racial discrimination, although, to be sure, the nature of proof required to establish a legitimate justification for a racial classification varies depending upon the basis of the claim (Constitution or statute), the nature of the actor (state or private), and the context in which the claim arises (employment, education, etc.). In the case of a state actor, because “[w]e are a ‘free people whose institutions are founded upon the doctrine of equality’ . . . ‘government may treat people differently because of their race only for the most compelling reasons.’” Grutter, 123 S. Ct. at 2337 (citations omitted).

But while a “compelling” public interest must be shown before *governmental* racial classifications can be said to have a legitimate justification, considerably lesser showings are required of *private* actors. For example, in the area of private employer affirmative action plans, a

legitimate justification is established if the private employer demonstrates that there were merely “manifest imbalances” in its work force and that its use of a race-conscious program was intended to correct these imbalances. See Weber, 443 U.S. at 201, 208; see also Setser, 657 F.2d at 968. A causal link between past discrimination and present imbalances need not be demonstrated, moreover, for a race-conscious policy to be held valid under § 1981. Johnson, 480 U.S. at 633 & n.11 (1987). Statistical comparisons, such as those presented by Kamehameha here, are sufficient to establish the existence of present imbalances. Davis v. City of San Francisco, 890 F.2d 1438, 1448 (9th Cir. 1989); Johnson, 770 F.2d at 758, aff’d 480 U.S. 616 (1987). This is a far lesser showing than would be required of a public actor confronted with an equal protection challenge under the Fifth or Fourteenth Amendment, where only a compelling governmental interest would suffice to support the use of race. See Grutter, 123 S. Ct. at 2337-38; City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

In addition to having a legitimate remedial purpose, the court must ensure that the program not be a pretext for unnecessary discrimination. Setser, 657 F.2d at 968; Weber, 443 U.S. at 208; Johnson, 480 U.S. at 626, 633. To defend against a § 1981 challenge, therefore, the employer

must “produce some evidence that its affirmative action plan is reasonably related to the plan’s remedial purpose.” Setser, 657 F.2d at 968. The burden then returns to the plaintiff to show that “the plan adopted unreasonably exceeds its remedial purpose.” Id. at 969. This second prong of the test is, again, much more relaxed than the second prong of the strict scrutiny standard applied to governmental actors, which requires race-conscious governmental conduct to be “narrowly tailored” to serve the relevant “compelling governmental interest.” Grutter, 123 S. Ct. at 2341-42.

To be sure, private employment cases do not precisely fit the context of the private educational setting involved in this case. The cases in which the Title VII standard has been applied to race-conscious affirmative action programs of private employers involve the remediation of *internal* imbalances, *i.e.*, the under-representation of certain racial minorities within the employer’s own workforce. Education, by contrast, serves to diversify the future work force and political and civic leadership roles that graduates will occupy *external* to the educational institution itself.

But if anything, this fact argues for even greater deference to race-conscious remedial plans in the education than in the employment context. The Supreme Court just last Term expressly declared the use of race-conscious admissions policies to produce racially diverse leadership within

the community at large to be not only a legitimate but a compelling interest, and noted the importance of schools' and universities' academic freedom in choosing admissions policies that will produce such leadership. See Grutter, 123 S.Ct. at 2338-41. Even in the more restrictive employment setting, however, it is noteworthy that the cases upholding affirmative action plans under Title VII and § 1981 recognize that private race-conscious policies are permissible so long as they are reasonably related to a legitimate remedial purpose.

E. Kamehameha's Admissions Policy Serves a Legitimate Remedial Purpose By Ameliorating Native Hawaiian Social and Educational Disadvantages, Producing Native Hawaiian Leadership, and Revitalizing Native Hawaiian Culture

Kamehameha's use of the Native Hawaiian preference in its Admissions Policy serves three legitimate remedial purposes under § 1981. Consistent with Princess Pauahi's intentions, Kamehameha seeks to provide educational opportunities that will improve the capability and well-being of the Native Hawaiian people; to address the under-representation of Native Hawaiians in higher education, professional occupations, and leadership positions; and to help preserve and perpetuate indigenous culture and traditions. Ing Dec. ¶ 60. Taken together, these three objectives of Kamehameha's program – remedying imbalances and injury suffered by

Native Hawaiians, using education to produce racially diverse leadership in Hawaiian society, and preserving and perpetuating Native Hawaiian culture that was nearly lost through the imposition of Western culture on this indigenous people – constitute a legitimate remedial purpose for a race-conscious policy under § 1981.⁶

1. Kamehameha’s Admissions Policy Has the Legitimate Purpose of Remediating Past Injustice and Present Imbalances to Native Hawaiians

Like the race-conscious plans that courts have upheld against § 1981 and Title VII challenges in the employment context, Kamehameha’s Policy serves a legitimate remedial purpose because it is designed to address the continuing effects of past wrongs suffered by the Native Hawaiian people. In particular, the Schools seek to promote “educational policies aimed at overcoming the continued educational disparities faced by Native Hawaiians.” Benham Dec. ¶ 95. The Schools seek today, as they have from Princess Pauahi’s time, to graduate industrious Native Hawaiian men and women who will break the cycle of downward mobility and marginalization

⁶ It is arguable that any of these three purposes standing alone provides sufficient remedial justification for Kamehameha’s Admissions Policy, but the Court need not reach that issue here, for taken together as a whole, these three bases a fortiori provide sufficient remedial justification.

that has plagued so many Native Hawaiians since the series of events that destroyed their ancestors' prior way of life.

As amply demonstrated in the Statement of Facts above, Kamehameha seeks to remedy the low achievement of Native Hawaiians relative to non-Native Hawaiians throughout all levels of the educational system, and thereby to improve Native Hawaiian socioeconomic well-being. Dr. Kanaiaupuni's Declaration and PASE's data demonstrate that Native Hawaiians continue to be over-represented in negative social statistics such as poverty, homelessness, child abuse and neglect, and criminal activity. Kanaiaupuni Dec. ¶¶ 12-14. Native Hawaiians also have less access to health care and lower educational attainment than do non-Native Hawaiians. Id. Native Hawaiians not only perform significantly below their non-Native Hawaiian peers throughout the DOE system, but also are less likely to graduate on time from high school and obtain post-secondary education. Id. ¶ 16. As a result, Native Hawaiians are under-represented in professional and managerial occupations and over-represented in low paying service jobs. Id. ¶¶ 37-40.

Kamehameha seeks to remedy this low level of educational attainment and low socio-economic standing among Native Hawaiians by providing a quality education for Native Hawaiian children that embraces their

indigenous culture and traditions in an environment free from the stereotypes and stigmas that often hinder their success in other settings. Ing Dec. ¶ 62; Kanaiaupuni Dec. ¶¶ 214, 222; Benham Dec. ¶¶ 93-97, 104. Indeed, as Dr. Kanaiaupuni notes in her Declaration, “[t]he believed superiority of the dominant culture led to classroom activities that often negated, and still deny, Native Hawaiian cultural tradition and ways of learning. In contrast, because Kamehameha is a school of and for Native Hawaiians, it provides a secure learning environment wherein Native Hawaiian ways of learning are expected and understood and where children may flourish scholastically without fear of discrimination.” Kanaiaupuni Dec. ¶ 214 (citations omitted).

Kamehameha’s efforts at remedying these harms have been rewarded by its students’ comparatively high rates of scholastic and vocational success relative to their Native Hawaiian counterparts in other schools. As noted above, Kamehameha seniors consistently outperform national and state averages on both the verbal and math sections of the SAT. Kanaiaupuni Dec. ¶¶ 170-71. Kamehameha alumni also have higher levels of college attendance and completion than Native Hawaiians who do not attend Kamehameha. Id. ¶¶ 176-77, 260-75. As a result, Kamehameha alumni obtain better employment and achieve higher standards of living than other

Native Hawaiians. Id. ¶ 282. The Schools, in short, have been extremely successful in producing graduates who have gone on to college and professional careers and have returned to assume leadership roles in the Native Hawaiian community. As Dr. Benham summarizes: “Against a backdrop of years of psychological, economic, and political marginalization, along with a deficient public education system, Kamehameha seeks to provide Native Hawaiian youth with the tools needed to break through the historical barriers that stand in the way of achieving success in today’s highly-competitive world.” Benham Dec. ¶ 104.

2. Kamehameha’s Admissions Policy Has the Legitimate Remedial Purpose of Producing Racially Diverse Leadership in Hawaiian Society

The Schools’ Policy serves a second legitimate purpose of remedying past harms to Native Hawaiians by increasing the racial diversity of those in leadership positions in the broader Hawaiian civic, business, and philanthropic communities. As demonstrated above, Native Hawaiians have historically been under-represented in the governance and leadership of the society over which they once were sovereign. The Schools’ policy of selecting the most academically qualified students from among the Native Hawaiian population serves to propel Native Hawaiians into positions of

governmental and economic leadership in a way that accelerates redress of this under-representation. Ing Dec. ¶¶ 66-68.

Producing a more racially diverse leadership has been held not only a legitimate but even a compelling reason for the use of race preferences in educational admissions. The Supreme Court noted as much last Term when it upheld the University of Michigan Law School's race-based admissions policy in Grutter v. Bollinger. As Justice O'Connor wrote for the Court in that decision, race preferences in educational admissions are justified because they ensure a highly qualified yet racially diverse corps of business, military, and government leaders: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." Grutter, 123 S. Ct. at 2341.

As the declarations of business and community leaders attest, Kamehameha's production of first-class Native Hawaiian leaders has helped to create a more racially diverse leadership than would exist absent Kamehameha's alumni. See Section II.J, supra. Two Kamehameha Schools graduates, both from disadvantaged backgrounds, now lead two of Hawai'i's most important agencies: the Department of Health and the Department of Hawaiian Homelands. At Hawai'i's largest private health care provider,

approximately 50 Kamehameha graduates work in positions from physicians to nurses. Drue Dec. ¶ 7. At the University of Hawai‘i’s College of Education, Kamehameha graduates have excelled not only at teaching but also at educational research for Native Hawaiians. Hitz Dec. ¶ 11.

In short, as Governor Lingle stated, Kamehameha has been a training ground for Native Hawaiian leadership throughout the state’s economy and society:

Based upon my experience as a County Councilmember, Mayor, and Governor, I . . . believe that our state needs both a qualified and a racially and ethnically diverse group of leaders, to ensure that all voices and viewpoints are heard and respected as we plan for our state's future, for the benefit of all of our citizens. Kamehameha Schools provides an essential training ground for the education and development of our future native Hawaiian leaders. I personally have appointed three Kamehameha Schools graduates to my cabinet.

Lingle Dec. ¶ 12.

3. Kamehameha’s Admissions Policy Has the Legitimate Remedial Purpose of Preserving Native Hawaiian Culture and Identity

The Schools’ Admissions Policy also has the legitimate remedial purpose of preserving an indigenous culture and identity that was almost lost when the language, art, music, craft, and ceremonies of the Hawaiian people were nearly annihilated by imposition of Western culture. Kamehameha transmits ‘Ike Hawai‘i (knowledge of Hawai‘i) to Native Hawaiian children

in order to “cultivate, nurture, and perpetuate Hawaiian culture, values, history, language, oral traditions, [and] literature.” Ing Dec. ¶ 44. By gathering Native Hawaiian children into a concentrated educational setting with other Native Hawaiian children, the Schools aim to keep endangered cultural traditions alive and to develop and reinforce pride in their Hawaiian heritage. Id. ¶ 71; Kanaiaupuni Dec. ¶¶ 232-40. See section II.K supra.

Kamehameha strives to revitalize this cultural heritage by making it a living thing. The Schools seek to restore the cultural literacy of Native Hawaiians of all ages, institutionalize Native Hawaiian cultural perspectives and practices throughout the organization, and instill in children pride, self-esteem, and a strong sense of identity with their own native, living cultures. Kanaiaupuni Dec. ¶ 214. Kamehameha’s remedial mission is enhanced by this approach to education, because “racial identity is an important factor in the personal development and growth of disadvantaged minority children,” id. ¶ 232, and enables such children to confront life obstacles more effectively and achieve greater educational attainment and success in life, id. ¶¶ 222, 232.

Moreover, the knowledge of Hawaiian culture that a child receives at Kamehameha results in the spread and perpetuation of that culture. “Cultural awareness at the individual level . . . has far-reaching social

impacts, countering the deterioration and loss of cultural memory. Each Native Hawaiian child who learns about her heritage and history contributes to the perpetuation of her culture.” Id. ¶ 233. In this way, Kamehameha’s programs and services help “to ensure that future generations of Native Hawaiian children can grow up knowing and understanding their cultural identity and heritage.” Id. This is of critical importance to an indigenous people, because unlike immigrant peoples who can look to their home nations’ ongoing cultures for self-identity, “[i]n the case of an indigenous people, preservation of culture is essential to the very preservation of the people themselves.” Id. ¶ 214. This is why “Kamehameha Schools teaches Native Hawaiian students their culture and tradition to give them an awareness of their heritage and who they are as a people.” Id.

Such preservation of indigenous cultural heritage is not only a legitimate part of Kamehameha’s remedial mission, but even implicates aspects of expression protected by the First Amendment. The Supreme Court has “long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, *educational*, religious, *and cultural ends*.” Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (emphasis added); see also Legal Aid Soc’y of Hawaii v.

Legal Servs. Corp., 961 F. Supp. 1402, 1409 (D. Haw. 1997) (recognizing this principle).

To be sure, Runyon rejected a claim that applying § 1981 to White-only private academies would violate First Amendment rights to expressive association. See Runyon, 427 U.S. at 175-79. In so holding, the Runyon Court observed that, “while ‘invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment,’” such interests must give way to the compelling governmental interest in eradicating invidious racial discrimination in education. Id. at 176-79. But quite unlike Kamehameha, the White-only schools at issue in Runyon claimed no distinctive expressive or cultural mission to which their admissions offers were tied. The Court was of course unprepared to recognize that, in the face of plainly contrary congressional policy favoring desegregation of the public schools, any supposed “culture” of white racism was legitimate.

In contrast, Kamehameha’s remedial efforts to educate Native Hawaiian children and protect their indigenous culture and their associated language, music, art, and rituals are well recognized as legitimate. As Congress stated in the 2002 NHEA, “the Native Hawaiian people are determined to preserve, develop, and transmit to future generations their

ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions,” and are entitled to engage in activities that help perpetuate and preserve their culture. 2002 NHEA § § 7512 (20), (21).⁷

In sum, all of the core aspects of Kamehameha’s curriculum – education, leadership, and culture – contribute to its overall remedial mission. As stated by Dr. Kanaiaupuni:

In short, in a world where little is fair, Native Hawaiian children begin with the odds for success stacked against them. By providing Native Hawaiian students a strong educational foundation from pre-school through post secondary scholarships, Kamehameha offers a bridge to social and economic success that breaks the cycle of marginalization and offers greater hope for future generations of Native Hawaiian children.

⁷ The legitimacy of this cultural preservation interest was further recognized by the 1993 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities. See G.A. Res. 47/135, Annex, 47 U.N. GAOR Supp. No. 49, at 210, U.N. Doc. A/47/49 (1993) (adopted 12/18/92). This Declaration proclaims in Article 1 that: “States shall protect the existence and the national or ethnic, cultural, religious, and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of their identity.” Article 2 recognizes that: “Persons belonging to national or ethnic, religious and linguistic minorities . . . have the right to establish and maintain their own associations.” Finally, Article 4 proclaims: “States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory.” This Declaration serves as evidence of the recognition of indigenous cultural rights by the international community. Cf. Lawrence v. Texas, 123 S. Ct. 2472, 2483 (2003) (citing authority from the European Court of Human Rights).

Kanaiaupuni Dec. ¶ 19. “Perhaps, more importantly, however, Kamehameha produces new leaders each year who seek a brighter future, who are personally committed to maintaining a vibrant, living Native Hawaiian culture, and who challenge Native Hawaiians to rise above the odds through service and commitment to their communities.” Id. ¶ 20. Thus, as stated by the Schools’ Trustee Douglas Ing, if the preference is struck down, “thousands of Native Hawaiian children in need of the Schools’ educational programs [will] be denied the opportunities these programs provide and [will] be deprived of the legacy that Princess Pauahi intended them to have.” Ing Dec. ¶ 78.

F. The Schools’ Admissions Policy Is Reasonably Related to Its Remedial Purpose

In the analogous context of employment cases decided under Title VII and § 1981, private employers’ remedial race-conscious policies are permissible provided they are “reasonably related to the plan’s remedial purpose.” Setser, 657 F.2d at 968. Stated differently, once the defendant establishes a legitimate remedial purpose for a race-conscious program, the plaintiff’s burden is to show that the scope of the program “*unreasonably exceeds its remedial purpose.*” Setser, 657 F.2d at 969.

It is clear that Kamehameha’s Policy does not unreasonably exceed its remedial purpose. The purpose of Kamehameha’s policy is not to exclude

non-Native Hawaiians but rather to *include* as many Native Hawaiian children as possible under conditions where Native Hawaiian demand greatly exceeds supply. Even with its policy of serving Hawaiians first, Kamehameha is only able to reach 7% of Native Hawaiian children enrolled in K-12. Ing Dec. ¶ 74. Given the scope of the remedial need and the limited number of spaces available in its campus programs, few if any non-Native Hawaiians are admitted. But given the extent of the need, it cannot be said that the paucity of non-Native Hawaiian admittees means the Policy unreasonably exceeds its remedial purpose. To the contrary, as Congress has recognized, the need is so great that Kamehameha should “*redouble its efforts*” to reach Native Hawaiian children.

Moreover, Kamehameha does not unnecessarily restrict the opportunities of non-Native Hawaiians. It uses the preference only to the extent that it has fewer spaces available than eligible participants; it admits non-Native Hawaiians where there are spaces available to do so, and it offers additional educational opportunities not otherwise provided. Kamehameha is thus quite unlike the White-only schools in Runyon, which excluded Black students solely because they were Black, and would not admit a Black student under any circumstance even if they had unused capacity. Although it is currently true that non-Native Hawaiian students are rarely admitted to

Kamehameha's campus programs due to the large number of K-12 Native Hawaiians – 70,000 – and the relatively small number of spaces available – only approximately 4,800 – Kamehameha does more frequently admit non-Native Hawaiians to its other programs, such as summer and preschool programs, which often have more spaces available than Native Hawaiian applicants.

Thus, far from restricting opportunities that persons lacking Hawaiian ancestry would otherwise have had, Kamehameha's preferential policy simply targets a private gift to its intended beneficiaries. Had Pauahi had children of her own, and passed on her wealth through inheritance, no non-Native Hawaiian claimant could reasonably now be thought entitled to a share of the fortune of the heirs. The fact that she died childless and passed on her inheritance in trust for a large class of the children of her people by reference to their shared ancestry should not change the outcome. Because Pauahi established the Schools for the benefit of Native Hawaiian children, and because Kamehameha uses Pauahi's assets to subsidize the vast majority of expenses associated with educating its students, Plaintiff has no legitimate expectation of benefiting from her gift.

G. The Legitimacy of the Admissions Policy is Confirmed by its Consistency with Past and Present Congressional Policy Providing Preferences for Native Hawaiians, and § 1981 Should be Read in Harmony With That Policy

As set forth in detail in the Statement of Facts above, Congress has passed numerous statutes singling out Native Hawaiians for special benefits, subsidies, preferences, and privileges to be conferred on the basis of Native Hawaiian ancestry. These laws reflect policies of remedy, reparation, and reconciliation designed to apologize for and overcome the legacy of displacement and dispossession of the indigenous Hawaiian people in which the United States was an admitted participant.

In the education context specifically, Congress has now on three occasions – in 1988, 1994, and 2002 – recognized that Native Hawaiians continue to suffer educationally from historical deprivations and wrongs. Congress has recognized, for example, that Native Hawaiians continue to score below average on achievement tests, are disproportionately represented in negative social statistics, and have special educational needs related to their unique history and culture, such as different learning styles, low self-image, and the lack of a culturally relevant experience in the DOE system. 1983 Assessment, Attachment C to Benham Dec.; see also 1994 and 2002 NHEA, 20 U.S.C. § 7902(17) (1994), 20 U.S.C. § 7512 (Supp. I 2002).

In order to help overcome these imbalances that result from the historical deprivations discussed above and help Native Hawaiians achieve educational parity, Congress has authorized a number of educational programs specifically for Native Hawaiians. For example, in the 2002 NHEA, Congress authorized the establishment of programs for the “development and maintenance of a statewide Native Hawaiian early education and care system,” the operation of “family-based education centers” for Native Hawaiians, early education programs to enhance reading and literacy, activities for special needs students, activities for Native Hawaiian students who are considered gifted and talented, the “development of academic and vocational curricula to address the needs of Native Hawaiian children and adults,” professional development programs for educators to help them understand the unique needs of Native Hawaiian students, the “operation of community-based learning centers that address the needs of Native Hawaiian families and communities,” and activities to “enable Native Hawaiians to enter and complete programs of postsecondary education.” 20 U.S.C. § 7515(3) (Supp. I 2002).

Congress also identified Kamehameha as offering precisely the kind of remedial program that is necessary to help Native Hawaiians achieve educational parity. Indeed, Congress recognized Kamehameha as a Native

Hawaiian Educational Organization in the 1988 Act and the 1994 NHEA. Moreover, in the House Report on the 2002 NHEA, the House Committee on Education and the Workforce explicitly acknowledged that “Native Hawaiians have a trust, established by the last Hawaiian princess, which exists solely to educate Native Hawaiian children. The Bishop Trust is currently one of the largest charitable trusts in the world *The Committee urges the Trust to redouble its efforts to educate Native Hawaiian children.*” H.R. Rep. No. 107-63 at 333 (emphasis added).

These congressional policies are highly relevant in determining whether Kamehameha’s Policy violates § 1981, and strongly support an interpretation that it does not. Because Plaintiff’s claims are based solely on a federal antidiscrimination statute, it must be construed in light of other, countervailing congressional policies. It would be incongruous to hold that Kamehameha’s Admissions Policy favoring Native Hawaiians violates § 1981 when Congress itself has adopted statutes that employ a race preference identical to Kamehameha’s and expressly approved Kamehameha’s own practices.

It is clear that Congress did not envision § 1981 as a bar to the Schools’ Admissions Policy when it first enacted the Civil Rights Act of 1866. Hawai‘i was a sovereign nation in 1866 when § 1981 was first

enacted. Hawai‘i was likewise a sovereign nation in 1883 when Princess Pauahi drafted her Will and created Kamehameha Schools in an effort to remedy the deprivations suffered by indigenous Hawaiians as a result of Western contact and influence.

It is also clear from Congress’ recent legislative enactments providing and approving Native Hawaiian preferences that this is not the result that Congress would intend today. Subsequent legislative enactments are plainly relevant in construing the scope of civil rights statutes. In Runyon itself, for example, the Court noted that Congress had recently enacted legislation prohibiting invidious discrimination in education and made clear that § 1981 applied to private actors. 427 U.S. at 174-75 (noting a recent and “clear[] indication of congressional agreement with the view that § 1981 reaches private acts of racial discrimination”); id. at 191 (Stevens, J., concurring) (looking to the “policy of the Nation as formulated by the Congress in recent years”). Indeed, the Solicitor General, on behalf of the United States, argued to the Runyon Court that, if the admissions practices of the challenged schools were allowed to stand, the United States’ “efforts to desegregate public educational systems may be seriously impaired.” Brief of the United

States as Amicus Curiae in Runyon, Nos. 75-62, 75-66 & 75-278, 1976 WL 181316, at **2-3 (U.S. Apr. 9, 1976).⁸

In sharp contrast to Runyon, recent congressional actions – especially the enactment and reenactment of the Native Hawaiian Education Act both after Runyon and after the passage of the 1991 amendments to § 1981 – cut the other way, supporting the conclusion that educational preferences for Native Hawaiians cannot be considered unlawful under § 1981. In reenacting the NHEA, Congress specifically recognized the important need for educational programs, such as those offered by Kamehameha, targeting Native Hawaiians and authorized contracting preferences for Native Hawaiians in the delivery of these programs – conduct that would itself violate § 1981 under the interpretation proposed by Plaintiff. Moreover, the legislative history of the 2002 NHEA indicates that Congress envisioned that

⁸ See Gonzales v. Fairfax-Brewster Sch., Inc., 363 F. Supp. 1200, 1201 (E.D. Va. 1973) (“On May 17, 1954, the Supreme Court decided Brown v. Board of Education The same year Fairfax-Brewster School was founded. . . . In 1958 Bobbe’s Private School commenced operations.”), aff’d in part, rev’d in part sub nom. Runyon v. McCrary, 515 F.2d. 1082 (4th Cir. 1975), aff’d, 427 U.S. 160; see also Griffin v. County Bd. of Prince Edward County, 377 U.S. 218 (1964) (closure of Prince Edward County public schools and contribution to support private segregated schools denied African American students equal protection under Constitution); Griffin v. Board of Supervisors of Prince Edward County, 339 F.2d 486, 491 (4th Cir. 1964) (detailing efforts to circumvent Brown decision, including the establishment of private schools open to Whites only).

private parties, including Kamehameha, would provide these same sorts of educational programs in an effort to redress the imbalances that Congress found to exist in the Native Hawaiian community.

Reading § 1981, itself a statute with a remedial purpose, to bar remedial educational efforts for Native Hawaiians that have been expressly sanctioned by Congress would produce an anomalous result wholly unintended by Congress when it passed § 1981 and clearly not intended by Congress today. The Supreme Court's action in Weber, 443 U.S. 193, is instructive by analogy. In Weber, petitioner argued that the plain language of Title VII acted as a bar to private remedial programs in the field of employment. The Court noted that such a reading of the statute would produce an anomalous result and refused to read the statute as barring such efforts. The Court reasoned that "[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." 443 U.S. at 204 (internal citations omitted). It would be equally ironic to find that § 1981 is a bar to private voluntary efforts to address the imbalances that Congress found to exist in

the NHEA through a policy it expressly adopted therein as a matter of federal law.

Congress' findings in the NHEA should be given great weight, because they are based in part on Congress' special trust relationship with the Native Hawaiian people. See 20 U.S.C. § 7512(12) (Supp. I 2002). As noted above, Congress has on numerous occasions recognized the wrongs committed against the Hawaiian people, including the overthrow of the Hawaiian Kingdom, and the United States' role in those wrongs. It has accordingly established a policy of reconciliation with the Native Hawaiian people and enacted myriad legislative provisions for their benefit. It would be a cruel irony given this recognition, policy of reconciliation, and special trust relationship for the United States to commit yet another wrong by taking away, under the guise of § 1981, the principal remaining Native Hawaiian institution devoted to improving the educational attainment of Native Hawaiians.

It is not appropriate in this case to speculate as to whether any of these congressional preferences for Native Hawaiians might someday be challenged or questioned as themselves violations of the equal protection component of the Fifth Amendment due process clause. "Every legislative act is to be presumed to be a constitutional exercise of legislative power until

the contrary is clearly established.” Close v. Glenwood Cemetery, 107 U.S. 466, 475 (1883); see also Reno v. Condon, 528 U.S. 141, 148 (2000). Presuming the constitutionality of the NHEA and similar congressional enactments that provide preferences for Native Hawaiians is in keeping with the settled principle that federal courts “ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.” Jean v. Nelson, 472 U.S. 846, 854 (1985) (quoting Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944)). In this case, where there is no federal party and Plaintiff seeks no federal benefit, the question of the constitutionality of the federal Native Hawaiian legislation is plainly not presented and should not be gratuitously reached. Carroll v. Nakatani, ____ F.3d ____ (Slip op. pp. 12573-75); (9th Cir. No. 02-15483, decided Sept. 2, 2003). In any event, for reasons given above, there is no reason to suppose that these programs would ever be invalidated even on the merits, as Rice v. Cayetano is plainly distinguishable.

IV. CONCLUSION

The foregoing demonstrates that Kamehameha's Admissions Policy has a legitimate remedial purpose that is consistent with the congressional policy underlying § 1981, as well as with past and present congressional legislation providing preferences to Native Hawaiians. The Admissions Policy conforms to and does not exceed the scope of its legitimate remedial purpose. Plaintiff cannot possibly carry his burden of demonstrating that the Schools' legitimate justification for the Admissions Policy is pretextual or otherwise illegitimate. Accordingly, summary judgment should be entered in favor of the Schools as a matter of law.


DATED: Honolulu, Hawai'i, September 29, 2003.

CADES SCHUTTE LLP



DAVID SCHULMEISTER
KELLY G. LaPORTE

BAYS DEEVER LUNG
ROSE & BABA



CRYSTAL K. ROSE
BRUCE D. VOSS

KATHLEEN M. SULLIVAN

Attorneys for Defendants
Constance H. Lau, Nainoa Thompson,
Diane J. Plotts, Robert K.U. Kihune,
and J. Douglas Ing, in their capacities
as Trustees of the Estate of Bernice
Pauahi Bishop dba Kamehameha
Schools

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

JOHN DOE, a minor, by his mother
and next friend, JANE DOE,

Plaintiff,

v.

KAMEHAMEHA SCHOOLS/
BERNICE PAUAHI BISHOP
ESTATE; and CONSTANCE H. LAU,
NAINOA THOMPSON, DIANE J.
PLOTTS, ROBERT K.U. KIHUNE,
and J. DOUGLAS ING, in their
capacities as Trustees of the
Kamehameha Schools/Bernice Pauahi
Bishop Estate,

Defendants.

CIVIL NO. 03-00316 ACK-LEK

DECLARATION OF KELLY G.
LaPORTE

DECLARATION OF KELLY G. LaPORTE

KELLY G. LaPORTE, hereby declares:

1. I am an attorney at Cades Schutte, a Limited Liability Law Partnership, counsel for Defendants Constance H. Lau, Nainoa Thompson, Diane J. Plotts, Robert K.U. Kihune, and J. Douglas Ing, in their capacities as Trustees of the Estate of Bernice Pauahi Bishop dba Kamehameha Schools, in the above-referenced action, and I am duly authorized to make this declaration.

2. I certify that the foregoing Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment with Respect to Declaratory and Injunctive Relief contains a total count of 17,637 words according to the Microsoft Word word-count program and is in compliance with the word limitation set forth in Local Rule 7.5(b), as modified in this proceeding by the Stipulation Regarding Plaintiff's Motion for Partial Summary Judgment and Defendants' Counter-Motion for Partial Summary Judgment and Order entered herein on August 22, 2003, which allows each party a total of 90 pages (or 27,000 words) to allocate as they deem necessary for their respective motions for summary judgment, oppositions, and replies.

I declare, verify, certify, and state under penalty of perjury that the foregoing is true and correct.

Honolulu, Hawai'i, September 29, 2003.



KELLY G. LaPORTE

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

JOHN DOE, a minor, by his mother
and next friend, JANE DOE,

Plaintiff,

v.

KAMEHAMEHA SCHOOLS/
BERNICE PAUAHI BISHOP
ESTATE; and CONSTANCE H. LAU,
NAINOA THOMPSON, DIANE J.
PLOTTS, ROBERT K.U. KIHUNE,
and J. DOUGLAS ING, in their
capacities as Trustees of the
Kamehameha Schools/Bernice Pauahi
Bishop Estate,

Defendants.

CIVIL NO. CV 03-00316 ACK LEK

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing
document was served on this day as indicated below by U.S. or express mail,
postage prepaid, to the following persons at their last-known addresses:

JOHN W. GOEMANS, ESQ.
P.O. Box 2849
Kamuela, Hawaii 96743

U.S. Mail

and

ERIC GRANT, ESQ.
JAMES F. SWEENEY, ESQ.
Sweeney & Grant LLP
1527 "I" Street
Sacramento, California 95814

Express Mail

Attorneys for Plaintiff

DATED: Honolulu, Hawai'i, September 29, 2003.

CADES SCHUTTE LLP

BAYS DEEVER LUNG
ROSE & BABA



DAVID SCHULMEISTER
KELLY G. LaPORTE

CRYSTAL K. ROSE
BRUCE D. VOSS

KATHLEEN M. SULLIVAN

Attorneys for Defendants
Constance H. Lau, Nainoa Thompson,
Diane J. Plotts, Robert K.U. Kihune, and J.
Douglas Ing, in their capacities as Trustees
of the Estate of Bernice Pauahi Bishop dba
Kamehameha Schools