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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 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

REPLY MEMORANDUM IN
SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT; DECLARATION OF
KELLY G. LaPORTE; CERTIFICATE
OF SERVICE

Hearing:

Date: November 17, 2003

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Judge: Honorable Alan C. Kay

Trial Date: July 27, 2004

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case raises important questions of first impression. No court has ever used the authority of § 1981 to strike down an educational preference for descendants of an indigenous people who have been displaced and disadvantaged by past history. No court has even applied § 1981 to the remedial use of race by private schools. There are no § 1981 cases involving the remedial use of race by an indigenous institution such as Kamehameha, and there are no § 1981 cases involving the remedial use of race by a private institution in which Congress has acknowledged and applauded the efforts of the institution and urged it to “redouble its efforts.”

Indeed, contrary to Plaintiff’s claims in his opening and responsive briefs, it is far from clear that § 1981 applies to the Admissions Policy at issue here at all.

To begin with, § 1981 applies only to commercial contracts, and it is highly doubtful that Kamehameha Schools engages in commercial trade covered by § 1981. Kamehameha was established under the Will of Princess Pauahi to transmit her wealth to future generations of Native Hawaiians, those closest to her blood descendants after she died childless. Admission to Kamehameha is thus a testamentary gift, limited to the intended

beneficiaries of the Princess' Will, and not an open offer of contract to all comers.

In keeping with Pauahi's donative intent, the Schools subsidize the vast majority of expenses associated with educating each of its students. See Ing Dec. ¶ 24. Only a token amount of tuition is charged to encourage families to feel a vested interest in the education of their children. Id. Such tuition is akin to a donation to the Schools, designed to ensure some stake in the success of Kamehameha's mission. Nor does Kamehameha advertise that it is open to all who might seek admission. To the contrary, in all of its descriptions of its Admissions Policy, Kamehameha makes clear that children of Native Hawaiian ancestry will be given a preference. See Makuakane-Drechsel Dec. ¶ 3. Non-Native Hawaiians are not the intended beneficiaries of Pauahi's Will and are plainly on notice that they have no legitimate expectation of admission. Thus Plaintiff seeks to extend § 1981 in unprecedented fashion to a gift to blood relations, with whom the donor had a particular and close personal affinity, rather than a commercial transaction made on the open market.

There is a powerful argument that such a gift to a group of people lineally descended from one's own nearly extinguished ancestors lies entirely outside the scope of § 1981. Section 1981 does not extend to any

“personal contractual relationship” in which “there is reason to assume that, although the choice made by the offeror is selective, it reflects ‘a purpose of exclusiveness’ other than the desire to bar” non-recipients on the basis of race. Runyon v. McCrary, 427 U.S. 160, 187-89 (1976) (Powell, J., concurring). Kamehameha thus presents a situation far different from the White-only academies in Runyon that simply “were advertised and offered to members of the general public,” and open to anyone, other than Blacks, who could pay their fee. Runyon, 427 U.S. at 172.¹

Moreover, as a private educational institution, Kamehameha has vital First Amendment rights, including the right to determine its mission, assemble a student body that is consistent with its mission, and associate “in pursuit of a wide variety of . . . *educational . . . and cultural ends*.”

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (emphasis

¹ For similar reasons, it is not clear that Congress even has authority to reach conduct such as Kamehameha’s. Section 1981 was enacted, as to private parties, under the authority of the Thirteenth Amendment. The scope of § 1981 is therefore limited by Congress’ power to legislate under the Thirteenth Amendment, which was enacted in order to eliminate the “badges and incidents” of slavery. The effects of Kamehameha’s Policy are hardly “badges” or “incidents” of slavery. To the contrary, Kamehameha’s Policy seeks to erase the effects experienced by a long-oppressed group of people to enable them to compete equally in society, just as § 1981 was intended to do with respect to the newly freed slaves. Thus, if § 1981 were read to bar Kamehameha’s Policy, it would arguably exceed Congress’ authority and be unconstitutional *as applied*.

added); see also Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (upholding the Boy Scouts' First Amendment rights to exclude members who did not conform to its mission as a defense to state anti-discrimination laws). Plaintiff would construe § 1981 in total disregard of Kamehameha's First Amendment rights to such expressive association.

Contrary to Plaintiff's representations, Runyon requires no such result. To be sure, Runyon rejected a claimed expressive association defense to § 1981's application to white-only schools. But the White academies covered by Runyon had no proclaimed or distinctive educational mission, nor sought to promote any particular cultural traditions, much less survival of a threatened indigenous people. They functioned as mere businesses and advertised indiscriminately to all comers. In contrast, Kamehameha's mission, as plainly set forth in all of its statements of policy and invitations to applicants, is clearly identified as devoted to perpetuating distinctive Hawaiian linguistic, artistic, musical, and historical traditions quintessential to defining and preserving the Native Hawaiian people as an indigenous people. Its Admissions Policy is designed to ensure the perpetuation of a culture and a way of life that colonization and annexation might otherwise have rendered extinct.

There is thus a strong argument that, in order to avoid a serious constitutional question under the First Amendment right of expressive association, § 1981 should be construed not to apply to a school such as Kamehameha, designed to protect and perpetuate a native culture.

For these reasons, there are good grounds to reject Plaintiff's complaint without further inquiry as falling outside the purview of § 1981 altogether. But, while Kamehameha vigorously preserves these defenses for purposes of appeal, this Court need not reach these difficult questions of first impression here. For even if § 1981 is held applicable to the facts of this case, that statute, itself designed to remedy race discrimination, does not bar a remedial race-conscious admissions policy on behalf of indigenous schoolchildren. As Kamehameha has demonstrated in its opening brief, even if § 1981 does apply to the facts of this case, this Court should grant summary judgment for Defendants and deny Plaintiff's motion. Plaintiff's arguments to the contrary in his responsive brief are unavailing.

II. STRICT SCRUTINY DOES NOT APPLY TO § 1981 CLAIMS AGAINST REMEDIAL RACE PREFERENCES BY PRIVATE ACTORS

Plaintiff errs fundamentally in his reply brief by treating Kamehameha as no different from the government, and thus subject to strict scrutiny of its Admissions Policy. See Pl. Reply at 4-14. But Kamehameha is a private

entity, and the strict presumption against race-conscious policies by government simply does not apply to it. To the contrary, courts have consistently afforded private entities more leeway than government to employ race-conscious remedies for past discrimination, even when they have not themselves been the perpetrators of such injustice.

As a private actor, Kamehameha is not subject to the constraints of the Constitution or the standards of constitutional review, such as strict scrutiny, because “[a] fundamental principle of federal constitutional law is that private action, no matter how egregious, cannot 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. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (“private action is immune from the restrictions of the Fourteenth Amendment”); Shelly v. Kraemer, 334 U.S. 1, 13 (1948) (Fourteenth Amendment “erects no shield against merely private conduct, however discriminatory or wrongful”).

The basis of this fundamental distinction is that the Fifth and Fourteenth Amendments were intended to “prevent *government* from abusing [its] power or employing it as an instrument of oppression.” DeShaney v. Winnebago County, 489 U.S. 189, 196 (1989) (internal

quotations and citations omitted; brackets in original; emphasis added). Constitutional restraints on state action are greater than restraints on private conduct, because governmental power has a unique capacity to harm and its abuses can inflict vastly greater injury than can purely private action. See Civil Rights Cases, 109 U.S. 3, 17 (1883) (“An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror[.]”).

“Strict scrutiny” protects fundamental rights against the abuse of uniquely coercive governmental power. For this reason, “[s]trict scrutiny . . . is reserved for *state* ‘classifications based on race or national origin and classifications affecting fundamental rights.’” United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (citation omitted; emphasis added); see also Rannels v. Meridian Bancorp, Inc., 718 F. Supp. 10, 13 n.5 (E.D. Pa. 1989). Applying strict scrutiny to private actors, who lack the uniquely coercive instrumentalities of the state, would be contrary to strict scrutiny’s limited constitutional purpose and historically narrow application.

Moreover, claims under a federal statute may not be subject to strict scrutiny unless Congress has required as much. And Congress has never sought to extend to § 1981 claims against private actors the equal protection principles of the Fifth and Fourteenth Amendments, which apply to state

actors and to which strict scrutiny relates. To the contrary, 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.” Section 1981, as applicable to private actors, has its origins in the Thirteenth Amendment – which seeks only to eliminate the badges and incidents of slavery. See Runyon, 427 U.S. at 170 (noting that Congress’ power to reach private conduct under § 1981 is based on the Thirteenth Amendment). For this reason, the Ninth Circuit has held that Fourteenth Amendment equal protection standards are not applicable when evaluating legislation, like § 1981, enacted under the Thirteenth Amendment. See Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 551-52 (9th Cir. 1980) (rejecting contention that equal protection analysis applied to claim under 42 U.S.C. § 1982, holding that “§1982 . . . represents an exercise of power of Congress to eliminate ‘badges and incidents’ of slavery, and not strictly an attempt to effectuate the equal protection clause of the fourteenth amendment. We cannot, therefore, analogize to equal protection cases.”) (internal citation omitted).

Accordingly, strict scrutiny is not the appropriate standard of review under § 1981 for a remedial race preference by a *private* actor. See Defs.

Opening at 53-55. Plaintiff fails to cite a *single* case in which the “strict scrutiny” standard has been applied to a private defendant in a § 1981 action. To the contrary, every “strict scrutiny” case cited by Plaintiff involves state actors or suits against recipients of federal funding under Title VI, not purely private defendants under § 1981.² See Pl. Reply at 4-14. Indeed, in representing to this Court the Ninth Circuit’s “fundamental requirements” for a permissible racial classification in this case, Plaintiff relies on Monterey Mechanical Co. v. Wilson, 125 F.3d 702 (1997), a constitutional

² Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et. seq., is designed to ensure that federal funds are spent in accordance with the Constitution and reflects the “incorporation of a constitutional standard into Title VI” Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 286 (1978). As a result, recipients of federal funds are prohibited from employing classifications that would violate the Fourteenth or Fifth Amendments, id. at 287, and strict scrutiny is applied in evaluating Title VI claims against private defendants. Because Kamehameha does not receive federal funds, Title VI does not apply. Indeed, Plaintiff asserts no Title VI claim.

Accordingly, Plaintiff misplaces reliance on Pryor v. NCAA, 288 F.3d 548, 569 (3d Cir. 2002). Plaintiff cites Pryor for the proposition that § 1981 and the Fourteenth Amendment are coextensive for all purposes and emphasizes the fact that Pryor involved private actors. See Pl. Reply Br. 7-8. But there is nothing in Pryor that supports this assertion. Pryor involved both a § 1981 and a Title VI claim. Pryor’s language regarding strict scrutiny arises only in the court’s analysis of the Title VI claim. 288 F.3d at 562. Moreover, the discussion of strict scrutiny, even in the Title VI context, is dicta; the court expressly stated that the strict scrutiny issue was not before the Court. Id. at 563. There is *nothing* in the case to suggest that strict scrutiny would apply to a § 1981 claim against a private defendant that was not a recipient of federal financial assistance.

case involving a claim against the State of California. See Pl. Reply at 10-12. Plaintiff quotes selectively from Monterey, misleadingly deleting any reference to the presence of a “government” entity as the defendant. See Pl. Reply at 11 (“by the . . . entity making the classification”); id. at 12 (“prior discrimination by the [entity] involved”). But Monterey has no bearing on the standard of review for a *private* entity such as Kamehameha.

For the same reason, Plaintiff errs in relying upon the Supreme Court’s recent decisions on the University of Michigan’s race-conscious admission policies as authority for the application of strict scrutiny in this case. See Pl. Reply at 5-9. To be sure, in those cases involving a *public* actor, the Court said that “the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause.” Grutter v. Bollinger, 123 S.Ct. 2325, 2347 (2003); see also Gratz v. Bollinger, 123 S.Ct. 2411, 2431 n.23 (2003) (“purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981”). This is not surprising, given that the Supreme Court has previously suggested that strict scrutiny applies to all racial classifications imposed by *government* without regard to the context in which they are challenged. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989).

These decisions, however, say nothing whatsoever about the applicable standards in a § 1981 action against a *private* defendant, nor do they hold or even suggest that strict scrutiny applies in such a § 1981 action.

It would be improper to read two sentences from Grutter and Gratz as overruling *sub silentio* a long line of cases, including Supreme Court authorities, that apply the Title VII standard in § 1981 actions against private defendants. The Court has often admonished that conclusory statements in a case not directly applicable should not be read as overturning prior rulings more directly on point. See United States v. Sharpe, 470 U.S. 675, 694 n.6 (1985) (Marshall, J., concurring in the judgment) (“Legal reasoning hardly consists of finding isolated sentences in wholly different context and using them to overrule *sub silentio* prior holdings.”); see also Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 98-99 (1998); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680 (1974); and International Bus. Machs. Corp. v. United States, 59 F.3d 1234, 1239 (Fed.

Cir. 1995), aff'd 517 U.S. 843 (1996).³ Accordingly, Plaintiff's effort to import strict scrutiny into this case is unavailing.

III. KAMEHAMEHA'S ADMISSION POLICY IS SUBJECT, AT MOST, TO THE DEFERENTIAL TITLE VII STANDARD OF REVIEW

Because there is no authority for applying the constitutional standard of strict scrutiny to a private actor such as Kamehameha under § 1981, Plaintiff had it right the first time when he conceded in his opening brief, unlike in his reply brief, that claims against private actors under § 1981 are subject to the far more deferential Title VII legal standard. As the Ninth Circuit has held in a recent decision cited by both parties in their opening memoranda, the "legal principles guiding a court in a Title VII dispute apply

³ Plaintiff in any event misreads these isolated sentences in Grutter and Gratz to suggest that § 1981 is co-extensive in *all respects* with the Equal Protection Clause. But the Court was making a narrower point, as made clear by its reference to the Court's earlier decision in General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389-91 (1982). That case has nothing to do with the standard of review applicable to § 1981 claims, much less the applicability of strict scrutiny standards. Rather, the case addresses whether a cause of action exists under § 1981 absent a showing of *purposeful* discrimination. The Court there found "that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination." 458 U.S. at 391. Other cases cited by Plaintiff for this unremarkable principle, Pryor v. NCAA, 288 F.3d at 569 (purposeful discrimination is required for violation of Title VI and § 1981) and Gay v. Waiters' & Dairy Lunchmen's Union, 694 F.2d 531, 539 (9th Cir. 1982) (§ 1981 requires a showing of intentional discrimination), are to the same effect. Nothing in these cases suggests that race preferences are automatically invalid under § 1981 if invalid under equal protection principles.

with equal force in a § 1981 action.” See Manatt v. Bank of Am., 339 F.3d 792, 797 (9th Cir. 2003); see also Pl. Opening at 10 n.3; Defs. Opening at 58. Indeed, it would be illogical to treat the Title VII standard as any different from the § 1981 standard: Since every employer’s affirmative action plan involves an actual or prospective employment contract, all such plans can be and frequently are challenged under both Title VII and § 1981. If such plans were required to withstand strict scrutiny under § 1981, but only the lesser Weber standard of review under Title VII, the Title VII standard would have quickly become obsolete.

That Title VII framework, which the courts thus apply uniformly in § 1981 cases, consists of a two-step test that first looks to whether the use of race is supported by a legitimate justification and then considers whether the use of race is reasonably related to that justification. See Johnson v. Transportation Agency, 770 F.2d 752, 755 n.2 (9th Cir. 1984), aff’d, 480 U.S. 616 (1987); Setser v. Novack Inv. Co., 657 F.2d 962, 965-68 (8th Cir.) (en banc), cert. denied, 454 U.S. 1064 (1981). This analysis ensures that entities engage in race-conscious classifications only when there is a legitimate reason for doing so and their use of race does not unreasonably exceed such legitimate purpose. Stated differently, having concluded that a legitimate purpose exists, the Court must ensure that there is no gratuitous

harm caused by the manner in which race is used to address that legitimate purpose.

Plaintiff seeks to escape the force of these precedents by arguing, first, that while Title VII standards apply for “procedural” purposes, strict scrutiny standards apply for “substantive” purposes. Pl. Reply at 8 n.5. This purported distinction is baseless. As the Supreme Court and the Ninth Circuit have held and Plaintiff concedes, “claims of racial discrimination under § 1981” are subject to the “scheme of proof” applicable to Title VII cases, see Patterson, 491 U.S. at 186; see also Manatt v. Bank of Am., 339 F.3d at 801; Sanghvi v. City of Claremont, 328 F.3d 532, 536 n.3 (9th Cir. 2003), in which, once the plaintiff establishes a *prima facie* case of discrimination, the defendant’s burden is to demonstrate a legitimate, non-pretextual justification for its use of race. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). But to state this standard is to refute Plaintiff’s argument for strict scrutiny; nothing in this standard of review requiring a legitimate interest and a reasonable means-ends fit remotely resembles a requirement for a defense of a compelling interest that is the least restrictive alternative.

Plaintiff seeks to argue, second, that the Title VII standard is a rigid one and that classroom diversity and employment affirmative action

programs are the *only* uses of race that can satisfy the legitimate justification test. There is no support for that assertion either. The Supreme Court in Grutter emphasized that earlier cases did not rule out other purposes that would justify race-conscious measures. 123 S. Ct. at 2338-39. Indeed, the Supreme Court recognized in Grutter, for example, that the need to produce diverse leadership is a legitimate justification for the use of race by a public university, making clear that diversity in educational outputs is just as important a justification for race preferences as diversity in educational inputs. 123 S. Ct. at 2340-42. And the Ninth Circuit has held that the State of California has a legitimate justification for using race in admission to a public elementary school that is operated for the purpose of studying the needs of urban children and improving the quality of education in urban schools. Hunter ex. rel. Brandt v. Regents of Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999). If such rationales provide a legitimate justification for these *public* institutions to use race-conscious classifications, then *private* institutions, which are given greater leeway in fashioning race-conscious remedial programs, at a minimum may engage in similar conduct.

Plaintiff would have this Court conclude that the factual analysis of Kamehameha's Policy must satisfy the rationales of affirmative action employment cases, or fail. Plaintiff argues that because the focus of race-

conscious programs in the employment area is on inputs, Kamehameha's external focus on diversifying the leadership of Hawaiian civic and economic life is illegitimate. The employment cases are instructive only by way of analogy, however, as illuminating that the use of race by remedial purpose is *one* example of a legitimate justification for a race conscious program. There the analogy ends. Employers are exposed to liability under Title VII if there are racial imbalances in their workforce. Not surprisingly, therefore, the focus of the employment cases and affirmative action plans adopted by employers to avoid such liability is necessarily internal.

Kamehameha, by contrast, is an educational institution that operates to redress the effects of historical wrongs done to the Native Hawaiian people by preparing students for society at large, and as a consequence, its mission has an external focus. This is fully consistent with those cases that allow educational institutions the freedom to determine their mission and assemble a student body consistent with that mission, looking at all times to demographics external to the institution itself. See Grutter, 123 S. Ct. at 2340-42; Hunter, 190 F.3d at 1063-67. “[A] review of the goals of the enterprise and its setting is critical,” and “an important mission of K-12 schools, in addition to fostering academic achievement, is the cultivation of social skills that enable students to function as citizens in a complex and

diverse world.” Comfort ex rel. Neumyer v. Lynn Sch. Comm., 2003 WL 22204155, at *32 (D. Mass. 2003); see also Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1535 (7th Cir. 1996) (noting that education is “an institution of nurturing authority created to inculcate learning and social and political habits and mores, thereby preparing children for meaningful lives, citizenship, and the full exercise of their constitutional rights”).

Contrary to Plaintiff’s assertion, the Court need not fit its decision in this case rigidly into the rubric of prior cases decided in different factual contexts. As the Ninth Circuit has held, the Title VII standard need not “be blindly followed in all aspects of section 1981 cases” and may be adjusted to fit the circumstances of a § 1981 action. Gay, 694 F.2d at 539. “There is no fixed formula for the type or nature of the evidence sufficient” to establish a legitimate nondiscriminatory purpose. Setser, 657 F.2d at 968. Moreover, there “is no bright line distinction between permissible and impermissible [uses of race under § 1981]. A flexible evaluation of the particular [race-conscious plan] adopted is appropriate.” Id. at 969-70. And as the Court acknowledged in Grutter, “context matters” when evaluating the *bona fides* of a race-conscious program. Grutter, 123 S. Ct. at 2338.

If anything, the standard of review in the education context as here should be even more deferential than the Title VII standard in the

employment context. First, educational institutions are typically given broad managerial deference in formulating race-conscious policies. See, e.g., Grutter, 123 S. Ct. at 2339. That is because educational institutions seek to train students for employment, more advanced educational opportunities, leadership, and entry into society at large. See, e.g., Muller, 98 F.3d at 1535; Comfort, 2003 WL 22204155 at *32.

Second, as noted above, Kamehameha has important First Amendment interests at stake here, including the freedom of expressive association to assemble a student body consistent with its mission of preserving an indigenous people once nearly extinguished. See, e.g., Boy Scouts of Am., 530 U.S. 640; Roberts, 468 U.S. at 622; Legal Aid Soc’y of Haw. v. Legal Servs. Corp., 961 F. Supp. 1402, 1409 (D. Haw. 1997). Section 1981 should be read narrowly to avoid serious constitutional questions of interference with Kamehameha’s First Amendment freedoms.

Third, Kamehameha is an indigenous institution. When the federal government legislates for the benefit of indigenous people, including Native Hawaiians, such legislation is subject to the most deferential of review and is upheld if supported by any legitimate governmental interest. See Morton v. Mancari, 417 U.S. 535 (1974). Although Mancari is not directly relevant here, because this case involves Kamehameha’s conduct and not that of the

federal government, it is instructive that Congress enacted legislation for the purpose of improving educational attainment among Native Hawaiians, and that Congress recognized Kamehameha's important role in providing educational opportunities for Native Hawaiians. These facts suggest that an especially deferential standard of review, something approaching rational basis, should apply here. In no event, however, should Kamehameha's Policy be subjected to a standard of review any more stringent than the Title VII standard.

IV. KAMEHAMEHA'S ADMISSIONS POLICY IS UNDISPUTEDLY SUPPORTED BY A LEGITIMATE JUSTIFICATION

Plaintiff takes no issue with any of the extensive factual evidence submitted by Kamehameha establishing the educational needs of Native Hawaiian schoolchildren that the Schools seek to redress. Plaintiff does not contest that Native Hawaiians currently attain low achievement relative to non-Native Hawaiians at all levels of the educational system in Hawai'i, see Kanaiaupuni Dec. ¶ 16, continue to be over-represented in negative social statistics such as poverty, homelessness, child abuse and neglect, and criminal activity, id. ¶¶ 12-14, and, as a result, are underrepresented in professional and managerial occupations and over-represented in low paying service jobs, id. ¶¶ 37-40. Nor does Plaintiff challenge the success attributable to Kamehameha demonstrated by the comparatively high rates

of scholastic and vocational success of its graduates relative to their Native Hawaiian counterparts from other schools. Id. ¶¶ 170-71, 176-77, 260-75, 282.

With respect to the Schools' efforts to increase the racial diversity of those in leadership positions in the Hawaiian civic, business, and philanthropic communities, again Plaintiff does not challenge that Kamehameha serves as a training ground and has assisted in propelling many Native Hawaiians into positions of leadership in a manner that accelerates the redress of Native Hawaiian under-representation in contemporary Hawaiian society. See Ing. Dec. ¶¶ 66-68; Lingle Dec. ¶ 12. Similarly, Plaintiff does not dispute that Kamehameha serves the purpose of perpetuating and preserving Native Hawaiian culture and identity. See Ing Dec. ¶¶ 44, 71; Kanaiaupuni Dec. ¶¶ 232-40.

Indeed, Plaintiff does not contest a single fact referenced in Defendants' Concise Statement of Material Facts. The substantial proof of the Policy's purpose to redress Native Hawaiian educational disadvantages is simply uncontroverted, and therefore must be accepted by the Court as true. See, e.g., L.R. 56.1(g) ("For purposes of a motion for summary judgment, material facts set forth in the moving party's concise statement will be deemed admitted unless controverted by a separate concise statement

of the opposing party.”); Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538, 1545 (9th Cir. 1988) (upholding efficacy of local rule deeming uncontroverted material facts as admitted).

Plaintiff’s sole response to Kamehameha’s extensive showing of legitimate remedial purpose is to assert that Kamehameha is merely impermissibly remedying “societal discrimination,” rather than discrimination or imbalances that it has perpetrated itself. Pl. Reply at 12. This assertion is mistaken both on the facts and on the law.

To begin with, contrary to Plaintiff’s assertions, Kamehameha is not remedying generalized societal discrimination, but rather is remedying a very specific harm in which government was plainly implicated: the actions of the State of Hawai‘i and the United States in bringing about the overthrow of the Hawaiian Monarchy and the dispossession of the Native Hawaiian people. The Schools are addressing, through their educational programs, the continuing effects of these past wrongs. Congress has apologized for the United States’ role in the historical wrongs committed, has recognized that Native Hawaiians continue to suffer as a result of these wrongs, has legislated to help redress these wrongs, and has recognized the important role that Kamehameha plays in helping the Native Hawaiian people

overcome the continuing effects of these wrongs. See Defs. Opening at 24-35, 78-80.

Moreover, even if Kamehameha's Policy were remedying mere societal imbalances, that would be wholly legitimate. Contrary to Plaintiff's misstatement of governing law, see Pl. Reply at 12-13, even *public* actors may employ race preferences to correct discrimination within their jurisdiction practiced by private parties other than themselves. See, e.g., Croson, 488 U.S. at 486, 491-93 (opinion of O'Connor, J., joined by Rehnquist, C.J. and White, J.) ("it would seem equally clear . . . that a state or local subdivision (if delegated authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction" and limiting earlier statements in Wygant v. Jackson Board of Education, 476 U.S. 267, 274-76 (1986), suggesting that correction of societal discrimination is always illegitimate), 509 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White & Kennedy, JJ.) (city may correct "a significant statistical disparity" in minority representation in procurement and may employ race preferences "to dismantle the closed business system" and "break down patterns of deliberate exclusion"), 519 (Kennedy, J., concurring in part) ("[I]t suffices to say that the State has the power to eradicate racial discrimination and its effects in both the public and private

sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself.”).

But even if public actors were as constrained to rectifying their own past sins of discrimination as Plaintiff suggests, *private* actors suffer no such constraints under Title VII and § 1981. Deference has been given in numerous cases to race-conscious employment policies that correct statistical imbalances that are no proven fault of the employer. See, e.g., Johnson, 486 U.S. at 630 n.8 (rejecting argument that an employer may adopt an affirmative action plan “only to redress [the] employer’s past discrimination” because “the prospect of liability created by such an admission would ‘plac[e] voluntary compliance with Title VII in profound jeopardy’” and likewise refuting the contention that “employers should be able to do no more voluntarily than courts can order as remedies”); United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 n.8 (1979) (the standard for evaluating affirmative action plans under Title VII was not intended “to suggest that the freedom of an employer to undertake race-conscious affirmative action depends on whether or not his effort is motivated by fear of liability under Title VII”); Davis v. City & County of San Francisco, 890 F.2d 1438, 1448 (9th Cir. 1989); Setser, 657 F.2d at 968 (concluding that, under § 1981, an employer can implement an affirmative action plan even if

the racial imbalances in the employer's workforce "would not be sufficient to show a prima facie violation" of that statute). Accordingly, Kamehameha's remedial purposes are entirely legitimate.

V. KAMEHAMEHA'S ADMISSIONS POLICY DOES NOT UNREASONABLY EXCEED ITS REMEDIAL PURPOSE

Plaintiff's reply brief fails to acknowledge the appropriate legal standard for the required fit between the means it employs and its legitimate end—namely, whether Kamehameha's Admissions Policy "unreasonably exceeds its remedial purpose." Setser, 657 F.2d at 968-69. Under that standard, Kamehameha "need only produce . . . 'some evidence that its [Policy] is reasonably related to the [Policy's] remedial purpose,'" Johnson, 770 F.2d at 755 n.2 (quoting Setser, 657 F.2d at 968), which plainly it has done. Contrary to Plaintiff's suggestion, see Pl. Reply at 15, a race-conscious plan that does not unreasonably exceed its remedial purpose does not "unnecessarily trammel" the interests of others.

Kamehameha has produced a plethora of evidence that its Policy is reasonably related to its remedial purpose. As demonstrated by the substantial and uncontested evidence set forth in support of Kamehameha's cross-motion for summary judgment, there is a deep and continuing need within the Native Hawaiian community for Kamehameha's programs. Kamehameha is able to reach only a small number of those in need of and

qualified for Kamehameha's services. Although there are approximately 70,000 Native Hawaiians in the State's DOE public schools, Kamehameha has only roughly 4,800 seats in its campus-based program. See Defs. Opening at 75-77.

So long as the critical needs of Native Hawaiians far exceed the available supply of Kamehameha student positions, it is appropriate and necessary for Kamehameha to serve Native Hawaiians first and foremost, and indeed, it is also consistent with Princess Pauahi's intentions. Kamehameha is not an ordinary private school; Kamehameha is a product of Princess Pauahi's remarkable foresight to provide for her ailing people by funding their indigenous cultural and educational needs.

Kamehameha's Policy is not only necessary to Kamehameha's mission and objectives, but crucial to Kamehameha's survival as an indigenous institution. If Plaintiff's argument were adopted by this Court, Kamehameha would no longer be a Native Hawaiian institution. Its student body might, under Plaintiff's theory that no preference whether 100 percent or otherwise is permissible, be only approximately 25 percent Native Hawaiian, mirroring the population in Hawai'i. With a student body of only 25 percent Native Hawaiians, Kamehameha would no longer be able to achieve its mission of preserving Native Hawaiians as an indigenous people.

Moreover, Kamehameha would be severely hindered in its ability to improve the capacity and well-being of the Native Hawaiian people and train Native Hawaiian leaders for the future, because Kamehameha would be able to affect the lives of far fewer Native Hawaiians than it presently does. And given the enormous need within the Native Hawaiian community and the lack of other available services, Kamehameha must reach as many Native Hawaiians as possible. Thus, under the present circumstances, Kamehameha's Policy of focusing first on Native Hawaiian needs is fully justified and well within the scope of its remedial purpose.

VI. SECTION 1981 SHOULD BE READ CONSISTENTLY WITH CONGRESSIONAL POLICY CONFERRING EXPLICIT PREFERENCES UPON NATIVE HAWAIIANS

If there remained the slightest question whether Kamehameha's preference for Native Hawaiians in allocation of its benefit scheme were both legitimate in purpose and reasonable in fit, the plethora of preferences for Native Hawaiians enacted by Congress and detailed in Defendant's opening brief certainly removes any remaining doubt. See Defs. Opening at 28-36.

Plaintiff has made no effort to dispute the fact that Congress has confirmed the present imbalances facing Native Hawaiians and the legitimacy of the Schools' role in seeking to remedy them. Most recently, in

the 2002 NHEA Congress noted that “Native Hawaiian students continue to begin their school experience lagging behind other students in terms of readiness factors such as vocabulary test scores,” “continue to be underrepresented in institutions of higher education and among adults who have completed four or more years of college,” and “are more likely to be retained in grade level and to be excessively absent in secondary school.” 2002 NHEA § 7512 (16) (B), (F), &(G)(i). Not surprisingly, then, Congress stated that its purpose in enacting the 2002 NHEA was to “authorize and develop innovative educational programs to assist Native Hawaiians.” Id. § 7513 (1).

Congress has likewise confirmed the legitimacy of Kamehameha’s choice of means, namely *exclusive* preferences for Native Hawaiians while in school in order to integrate the leadership of Hawaiian society when its graduates move on from school. Educational programs funded under the NHEA have an inherently external focus that arises out of the purpose of the Act, which is to “authorize and develop innovative educational programs to assist Native Hawaiians” generally, not just Native Hawaiian students in particular educational institutions where they are underrepresented. Id. § 7513 (2002). Consistent with this external focus, scholarships funded by the NHEA are awarded by grantee organizations at the graduate level

“with a priority . . . given to students entering professions in which Native Hawaiians are underrepresented.” Id. § 7515(a)(3)(I)(i). Congress provides these grant monies to Native Hawaiian organizations not to remedy problems within those organizations, but so those organizations can use the monies to address the effects of past wrongs done to the Native Hawaiian people. These programs represent an acknowledgement by Congress that educational programs delivered by Native Hawaiian institutions to Native Hawaiians are a legitimate means of accomplishing the remedial objectives of the NHEA with respect to under-representation of Native Hawaiians outside of those institutions.

Accordingly, this Court must accept as established, for the purposes of this case, the fact that Congressional legislation “approved by both Houses and signed by the President,” see Pl. Reply at 19 (quoting Patterson, 491 U.S. at 175 n.1 (citing U.S. Const. art. I, § 7, cl. 2)) has provided explicit and categorical preferences to Native Hawaiians materially identical to those provided by Kamehameha.

Plaintiff nonetheless mistakenly contends that unless such statutes as the NHEA can be read to constructively repeal § 1981, they are irrelevant. See Pl. Reply at 17-20. This is quite incorrect. Long-standing principles of statutory interpretation compel courts to interpret seemingly conflicting

statutes to avoid the conflict and give effect to Congress' intent. Watt v. Alaska, 451 U.S. 259, 266-67 (1981). Repeals by implication are disfavored, "and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Mancari, 417 U.S. at 549-51. Courts must seek to determine Congress' intent by examining the complete framework of related legislation, for "[s]tatutory construction . . . is a holistic endeavor." United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).

Moreover, Congress is presumed to know its prior legislative acts and to pass new laws in view of the legislative provisions it has already enacted. Hellon & Assocs., Inc. v. Phoenix Resort Corp., 958 F.2d 295, 297 (9th Cir. 1992). The Ninth Circuit has admonished that "court[s] are not at liberty to pick and choose among congressional enactments." California v. United States, 215 F.3d 1005, 1012 (9th Cir. 2000) (citing Mancari, 417 U.S. at 551); accord, Resource Invs., Inc. v. United States Army Corps of Eng'rs, 151 F.3d 1162, 1165 (9th Cir. 1998); see also Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys., 468 U.S. 137, 176 (1984) (O'Connor, J., dissenting) (construing one portion of federal law to implicitly repeal or override another "is a last resort, . . . and must be

avoided where an interpretation of the statutory language is available that is consistent with legislative intent and that shows the conflict to be merely apparent and not real”). In short, the Court should read federal statutes “to give effect to each if [it] can do so while preserving their sense and purpose.” Watt, 451 U.S. at 267.

Like any other statute, § 1981 should not be interpreted in a vacuum, but together with other Congressional enactments. As the Court made clear in Runyon, contemporaneous Congressional policy is highly relevant in interpreting § 1981, because § 1981 is a legislative enactment and Congress’ intent should guide the Court’s interpretation. See 427 U.S. at 174-75; Defs. Opening at 81-82.

Quite unlike the White-only academies challenged in Runyon, which were a thumb in the eye of the Congress that had sought to integrate public schools through the Civil Rights Acts of the preceding decade, Kamehameha’s Policy has been both implicitly and expressly ratified by Congress which employs similar categorical preferences for Native Hawaiians. These statutes recognize the continuing effects of past wrongs done to Native Hawaiians and the need for educational programs targeted at Native Hawaiians to remedy these effects of past wrongs.

It is simply inconceivable that the same Congress that amended § 1981 as recently as 1991 could possibly have believed that the preferences it enacted for Native Hawaiian access to property, jobs and educational subsidies in 1993, 1994, 2000, and 2002⁴ amounted to violations of that very same recently amended law. Even if Congress did not seek to

⁴ The United States Congress formally recognized the historical wrongs committed against the Native Hawaiian people and apologized for the United States' role in the overthrow of the Hawaiian Kingdom in the 1993 Apology Resolution. Pub. L. No. 103-150, 107 Stat. 1512 (1993). Congress also adopted a policy of reconciliation with Native Hawaiians and has enacted myriad legislation as part of this reconciliation effort. See Defs. Opening at 26-31. Congress has legislated for the benefit of Native Hawaiians in various areas, including in the Hawaiian Homelands Homeownership Act of 2000, where Congress sought to provide loan guarantees and other forms of housing assistance to Native Hawaiians. Pub. L. No. 106-569, §§ 511-14, 114 Stat. 2944, 2966-67, 2990 (2000). Congress has also given preferences to Native Hawaiian businesses, has given preferences to Native Hawaiians in certain park service positions, has authorized grants to Native Hawaiian organizations for employment and job training, and has authorized health care programs for Native Hawaiians, among other things. Defs. Opening at 28-31. Most relevant to this case, Congress has provided for educational programs targeted specifically at Native Hawaiians through the NHEA. Congress made findings just last year in the NHEA that Native Hawaiians continue to suffer from a lack of educational attainment and that educational programs targeted specifically at Native Hawaiians are necessary to help overcome these disparities. Moreover, Congress explicitly recognized the need for Native Hawaiian educational institutions in accomplishing this objective and the prominent role that Kamehameha plays in this regard. Indeed, Congress recognized Kamehameha as a Native Hawaiian Educational Organization in both 1988 and 1994, see Defs. Opening at 32-35, and in 2002, the House Committee on Education and the Workforce recognized the important role that Kamehameha plays in educating Native Hawaiians and urged Kamehameha to “redouble its efforts,” id. at 36.

repeal § 1981 by enacting these preferences akin to Kamehameha's, its passage of these preferences plainly establishes that it did not see these preferences as violations of § 1981 at all. Striking Kamehameha's Policy thus would be inconsistent with contemporaneous Congressional policy and would thwart Congress' efforts to create and enlist private entities in creating educational parity for Native Hawaiians. In light of such Congressional policy, it would be at the very least incongruous to hold that Kamehameha's Policy favoring Native Hawaiians violates § 1981.

VII. EVEN IF STRICT SCRUTINY WERE APPLICABLE, KAMEHAMEHA WOULD SATISFY THAT STANDARD

As demonstrated above, the strict scrutiny standard is not applicable here. Nevertheless, even if strict scrutiny were applied, Kamehameha's Policy would satisfy that standard. Under the strict scrutiny standard, the use of race must be supported by a legitimate governmental interest and must be narrowly tailored to the accomplishment of that compelling interest. See, e.g., Adarand, 515 U.S. at 227. As in the Title VII context, an evaluation of Kamehameha's Policy under the strict scrutiny standard must be contextual. Indeed "context matters"; "[n]ot every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the

reasons advanced . . . for the use of race in that particular context.”
Grutter, 123 S. Ct. at 2338.

Applying such a contextual analysis here, the Court must take into consideration the history and formation of Kamehameha, the unique role that Kamehameha plays, and Congress’ recognition of the need to improve educational opportunities for Native Hawaiians and Kamehameha’s role in helping to provide such opportunities. Indeed, Congress has itself determined in the NHEA that there is a compelling interest in addressing the imbalances that currently exist among Native Hawaiians through educational programs, such as Kamehameha’s, that are targeted specifically at Native Hawaiians.

In addition to serving this compelling interest identified by Congress, Kamehameha also serves the compelling interest of increasing diversity in leadership positions in the broader civic, business, and philanthropic communities. By working to propel Native Hawaiians into positions of governmental, economic, and civic leadership in a way that accelerates redress of under-representation of Native Hawaiians in these categories, see Ing Dec. ¶¶ 66-68, the Admissions Policy helps to produce a more racially diverse leadership, which the Court noted in Grutter is a compelling reason for the use of race by educational institutions. 123 S. Ct. at 2339.

Moreover, Kamehameha's Policy serves the compelling public interest of preserving an indigenous culture and identity that was almost lost when the language, art, music, craft, and ceremonies of the Native Hawaiian people were nearly annihilated by the imposition of Western culture. See Kanaiaupuni Dec. ¶¶ 222, 232.

Kamehameha's Admissions Policy is narrowly tailored to meet these compelling interests – improving educational attainment among Native Hawaiians, producing more Native Hawaiian leaders, and preserving the indigenous Hawaiian culture and the Native Hawaiians as an indigenous people – because it is necessary to the achievement of these compelling interests.

As demonstrated by the substantial and uncontested evidence put forth, there is need within the Native Hawaiian community for Kamehameha's programs that currently far exceeds the supply of places in those programs. By "virtually every measure of well-being, Native Hawaiians are among the most disadvantaged ethnic groups in the state of Hawai'i." Kanaiaupuni Dec. ¶ 12. Despite this immense need, Kamehameha is able to reach only 7 percent of Native Hawaiian children enrolled in K-12 – there are approximately 70,000 Native Hawaiians in the State DOE schools, and Kamehameha has only roughly 4,800 spots in its

campus program. It is because of this immense need and Kamehameha's limited resources that the Policy is necessary. Without it, Kamehameha would no longer be a Native Hawaiian institution and could no longer achieve its legitimate objectives.

It is also important to recognize that Plaintiff's claim is statutory in nature, and thus that strict scrutiny cannot be found to be applicable to § 1981 claims against private defendants absent some evidence that this is what Congress intended. Assuming arguendo that this is the case, Congress must also be presumed to have intended it to be legal when it authorized, through the NHEA and other statutes, private actors to implement programs employing an absolute preference for Native Hawaiian students to remedy imbalances and disadvantages confronting Native Hawaiians in the community at large. Thus, even if Congress had intended the private race-conscious remedial contracting decisions of private actors to be subject to strict scrutiny under § 1981, Congress must also have considered this standard to be satisfied when private actors such as Kamehameha employ the very same preferences for Native Hawaiians authorized by Congress.

VIII. CONCLUSION

The fundamental issue in this case is whether a longstanding and highly regarded private effort to help remedy a grievous harm done to Native Hawaiians must be terminated as unlawful.

There is no dispute about the devastating injury that was suffered by Native Hawaiians as a consequence of Western contact that resulted in the unlawful overthrow of the Hawaiian nation in 1893 and the later annexation of Hawai‘i by the United States. In fact, “devastating” is the word used in the 1993 Congressional Apology Resolution, an apology that is categorical and unprecedented. Pub. L. No. 103-150, 107 Stat. 1512. There is also no doubt that Kamehameha Schools constitutes an essential effort to help remedy the irreparable harm suffered by Native Hawaiians.

The Kamehameha Schools are a private effort to address the overwhelming problems faced by Native Hawaiians. While there is no state action here, the goal of the Schools is also the goal of the State of Hawai‘i and indeed the goal of the United States Congress in statutes such as the NHEA reenacted as recently as last year. Plaintiff frames the issue in this case as “whether in a twenty-first-century America a great Hawaiian institution will be permitted to enforce a nineteenth-century view of race relations” Pl. Reply at 2. But in fact it is Plaintiff who seeks to apply a

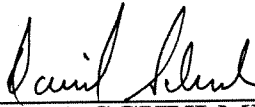
nineteenth century law (§ 1981) in a manner fundamentally inconsistent with twenty-first century Congressional policy.

The importance of the Kamehameha Schools in redressing the harm done to Native Hawaiians, and in preventing further harm, is recognized by Hawaiians – both Native and non-Native, by experts, by educators, by the State of Hawai‘i, and by the United States. Nothing in our jurisprudence, or in Plaintiff’s brief, requires this Court to bring to an end this acknowledged and essential means of redressing a grievous harm.

For these reasons, this Court should grant Defendant’s cross-motion for summary judgment and deny the motion of the Plaintiff.

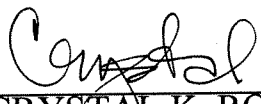
DATED: Honolulu, Hawai‘i, November 6, 2003.

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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

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 Reply Memorandum in Support of Defendants' Motion for Summary Judgment contains a total count of 8,239 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 (the "Motions Stipulation").

3. The Motions Stipulation 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.

4. Defendants' 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 contained a total count of 17,637 words according to the Microsoft Word word-count program.

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

Honolulu, Hawai'i, November 6, 2003.


KELLY G. LaPORTE

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

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

Plaintiff,

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KAMEHAMEHA SCHOOLS/
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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:

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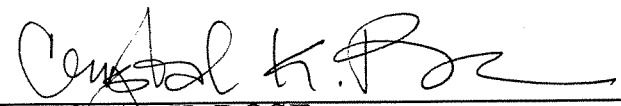
DATED: Honolulu, Hawai'i, November 6, 2003.

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