No. 07-1372

In the Supreme Court of the United States

STATE OF HAWAII, ET AL., PETITIONERS

v.

OFFICE OF HAWAIIAN AFFAIRS, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the resolution adopted by Congress to acknowledge the United States' role in the 1893 overthrow of the Kingdom of Hawaii strips the State of Hawaii of its present-day authority to sell, exchange, or transfer 1.2 million acres of land held in a federally created land trust unless and until the State reaches a political settlement with native Hawaiians about the status of that land.

TABLE OF CONTENTS

Table of contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, treaty and statutes:

Statutes—Continued: Page

Miscellaneous: Page

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

This case concerns whether federal law required or permitted the Supreme Court of Hawaii to enjoin the State of Hawaii from selling lands that the United States obtained in absolute fee upon the annexation of Hawaii in 1898 and granted to the State, to hold in trust, upon its admission to the Union. The issues in this case implicate significant federal interests. The State's title to the trust lands derives from the 1898 Act of Congress annexing Hawaii; the State holds the lands pursuant to a federal trust; and the United States is empowered to enforce the trust's requirements. Hawaiian Statehood Admissions Act (Admissions Act), Pub. L. No. 86-3, § 5(f), 73 Stat. 6 (48 U.S.C. ch. 3 note). In addition, the United States owns approximately 300,000 acres of land in Hawaii, acquired in the 1898 annexation; maintains

sensitive military and scientific installations on trust lands leased from the State; and engages in other land transactions with the State.

STATEMENT

1. a. The United States acquired the land at issue in this case when it annexed the Hawaiian Islands in 1898. Hawaiian Annexation Resolution (Newlands Resolution), J. Res. 55, 30 Stat. 750. The islands had been an independent kingdom until 1893, when the monarchy was overthrown and a provisional government established. Subsequently, in 1894, a Republic of Hawaii was proclaimed, and the United States extended that government official recognition. 13 James D. Richardson, *Messages and Papers of the Presidents* 5958-5959 (1897). The leadership of the Republic subsequently requested that the United States annex Hawaii and accept the cession of all its government-owned lands. In 1898, the United States agreed to the offer, annexed Hawaii as a territory, and accepted the cession of "absolute fee and ownership of all public, Government, or Crown lands." Newlands Resolution Preamble, § 1, 30 Stat. 750.[1] Although the rights to those lands, "all and singular," were "vested in the United States of America," Congress reserved income from the lands "for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." § 1, 30 Stat. 750. See generally *United States* v. *Fullard-Leo*, 331 U.S. 256, 265 (1947).

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[1] "Crown lands" were the lands formerly held by the monarchy and passed from sovereign to sovereign, although in 1865 the legislature eliminated the monarch's power to alienate or mortgage these lands. See *State* v. *Zimring*, 566 P.2d 725, 730-731 (Haw. 1977); *Liliuokalani* v. *United States*, 45 Ct. Cl. 418 (1910). "Public" and "government" lands were other lands held by the government.

During Hawaii's 61 years as a territory, the ceded lands remained federal property, although Congress allowed most to be administered by the territorial government. See Hawaiian Organic Act (Organic Act), ch. 339, § 91, 31 Stat. 159. In 1921, Congress set aside a portion of the ceded lands for the benefit of native Hawaiians, through a program of leases and loans. Hawaiian Homes Commission Act, 1920, ch. 42, 42 Stat. 108. That statute defined "native Hawaiian" to mean "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." § 201(a)(7), 42 Stat. 108.

Hawaii was admitted to the Union as the fiftieth State in 1959. Congress conveyed to the new State "the United States' title to" the ceded lands, except for certain parcels reserved in federal ownership. Admissions Act § 5(b)-(g), 73 Stat. 5-6. In Section 5(f) of the Admissions Act, Congress directed that the State hold the ceded lands granted to it, "together with the proceeds from the sale or other disposition" of such lands, as a "public trust" for one or more of five enumerated purposes, including "the development of farm and home ownership on as widespread a basis as possible," and "the betterment of the conditions of native Hawaiians" as defined in the Hawaiian Homes Commission Act. 73 Stat. 6; see p. 2, *supra*. See generally *Rice* v. *Cayetano*, 528 U.S. 495, 507-508 (2000).

b. In 1993, Congress adopted and the President signed a joint resolution formally apologizing for the United States' role in the overthrow of the Hawaiian monarchy a century before. Act of Nov. 23, 1993 (Apology Resolution), Pub. L. No. 103-150, 107 Stat. 1510. Congress "acknowledge[d] the historical significance" of the "illegal overthrow of the Kingdom of Hawaii," and

"apologize[d] to Native Hawaiians on behalf of the people of the United States" for that act. § 1(1) and (3), 107 Stat. 1513. The preamble (the "whereas" clauses) recited in great detail the history of the overthrow of the monarchy and the subsequent annexation, and concluded that it was "proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State * * * and the United Church of Christ with Native Hawaiians." 107 Stat. 1513.

2. This suit involves a tract of land on Maui, the "Leiali'i parcel," that was formerly crown land, see note 1, *supra*, was ceded to the United States at annexation, and has been held since 1959 by the State as part of the trust established by Section 5(f). Pet. App. 20a & n.11.

The Housing Finance and Development Corporation (HFDC), a state agency, has identified the area around the Leilali'i parcel as one with a "critical shortage of housing," and it accordingly wishes to build housing on that parcel. Pet. App. 18a-20a. Because the parcel is part of the Section 5(f) trust, it was managed by the Department of Land and Natural Resources (DLNR). *Id.* at 6a. HFDC obtained approval to transfer the land from DLNR's ownership to its own, and invested millions of dollars preparing to build. *Id.* at 20a-22a.

Any transfer of the Leilali'i parcel out of the trust would involve paying some compensation to respondent Office of Hawaiian Affairs (OHA), an independent state agency. OHA manages the portion of the Section 5(f) trust's proceeds (currently 20%) that state statutes designate for the benefit of "native Hawaiians." Pet. App.

159a-166a; see Haw. Rev. Stat. Ann. §§ 10-3(1), 10-13.5 (LexisNexis 2006); *Rice*, 528 U.S. at 508-509. Accordingly, the state legislature enacted a procedure to compensate OHA for 20% of the Leiali'i parcel's fair market value when transferred. Pet. App. 20a-21a.

While the fair market value was being ascertained, Congress enacted the Apology Resolution. Ten months later, relying on the resolution, OHA demanded that, in addition to paying OHA its 20% share, the state agencies include a disclaimer preserving any native Hawaiian claims to ownership of the ceded lands (of which the Leiali'i parcel is a part). Pet. App. 21a; see *id.* at 206a-207a. HFDC declined to include the requested disclaimer because "to do so would place a cloud on title, rendering title insurance unavailable." *Id.* at 207a.

On November 4, 1994, DLNR transferred the Leiali'i parcel to HFDC for $1, and HFDC tendered to OHA a check for approximately $5.6 million as OHA's 20% share of the fair market value. Pet. App. 21a. OHA's attorney advised, however, that the Apology Resolution had created a "cloud" on the State's title, and OHA refused to accept the check. *Id.* at 21a-22a.

3. OHA and the individual respondents, four individuals of varying degrees of Hawaiian ancestry who seek to sue on behalf of the "Native Hawaiian People," filed suits (later consolidated) in state trial court in November 1994. Pet. App. 139a-142a, 209a. Respondents named as defendants the State, its Governor, HFDC (since renamed), and its officials, all petitioners here. *Id.* at 142a-143a.

a. As described by the Supreme Court of Hawaii, "[a]t the heart of the plaintiffs' claims, before the trial court and on appeal, is the Apology Resolution." Pet. App. 26a. Specifically, "[t]he plaintiffs essentially be-

lieve that the title to the ceded lands is clouded as a result of the Apology Resolution's recognition that the native Hawaiian people never relinquished their claims over their ancestral territory and that, therefore, the defendants have a 'fiduciary obligation to protect the corpus of the [p]ublic [l]ands [t]rust until an appropriate settlement is reached between native Hawaiians and the State.'" *Ibid.* The court explained that, although the claim was technically pleaded as one for breach of trust under state law, "the plaintiffs essentially maintain that the Apology Resolution gave rise to their breach of trust claim." *Id.* at 58a; see *id.* at 22a-23a, 212a-213a.

Respondents sought an injunction prohibiting petitioners "from selling or otherwise transferring the Leiali'i parcel to third parties and selling or otherwise transferring to third parties any of the ceded lands in general until a determination of the native Hawaiians' claims to the ceded lands is made." Pet. App. 26a. Respondents alleged that an injunction was proper because, "in light of the Apology Resolution, any transfer of ceded lands by the State to third-parties would amount to a breach of trust inasmuch as such transfers would be 'without regard for the claims of Hawaiians to those lands' to whom the State, as trustee, owes a fiduciary duty." *Id.* at 23a.

b. The state trial court entered judgment against respondents. Pet. App. 133a-279a. The court concluded in relevant part that the Apology Resolution "do[es] not prohibit the sale of ceded lands." *Id.* at 258a. The court explained that in the Apology Resolution, Congress "ha[s] recognized past injustices to native Hawaiians, and ha[s] expressed [its] support for native Hawaiian sovereignty and reconciliation." *Ibid.* But the court rejected the contention that the Apology Resolution "cre-

ate[d] a cloud on title," and concluded that "[i]n adopting the Apology Resolution * * * Congress did not create a 'claim' to any ceded lands." *Ibid.*

4. The Supreme Court of Hawaii vacated the trial court's judgment. The court concluded that respondents were entitled to a permanent injunction prohibiting petitioners "from selling or otherwise transferring to third parties (1) the Leiali'i parcel and (2) any other ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands have been resolved." Pet. App. 100a.

That injunction was based on a holding that "the Apology Resolution and related state legislation * * * give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved." Pet. App. 41a. The court explained its rationale as follows:

> [T]he language of the Apology Resolution itself supports the issuance of an injunction. * * * [W]e believe, *based on a plain reading of the Apology Resolution*, that Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation and which the native Hawaiian people are determined to preserve, develop, and transmit to future generations. Equally clear is Congress's "expresse[d] . . . commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, *in order to provide a proper foundation for reconciliation* between the United States and the [n]ative Hawaiian people." Accordingly, *the Apology Resolution dictates* that the ceded lands should be preserved pending a reconciliation be-

> tween the United States and the native Hawaiian people.

Id. at 85a (first and final emphases added; citation omitted). Based on that reasoning, the court concluded that injunctive relief "is proper pending final resolution of native Hawaiian claims through the political process." *Id*. at 98a; see *id*. at 98a-100a.

SUMMARY OF ARGUMENT

The Supreme Court of Hawaii misread the Apology Resolution to reverse a century's worth of federal law and policy governing the United States' 1898 annexation of Hawaii and its acquisition and treatment of ceded lands. The Apology Resolution did not change that body of law, or *any* existing law. Nor did it take the dramatic and disruptive step of stripping the State's authority to sell, exchange, or transfer lands held in the federal trust, which would have been a significant intrusion on the State's authority in this important sphere. Instead, Congress opted simply to express regret for the events of a century before.

I. At the time of the Apology Resolution, as it had for decades, federal law foreclosed two key premises of respondents' case: that the United States acquired the trust lands subject to a cloud on title, and that as trustee of the federal trust the State has a fiduciary duty not to sell those lands until that cloud is removed.

Respondents' purported cloud arises from the manner in which the Republic of Hawaii acquired the crown and government lands. But when *the United States* accepted those lands, it took absolute title, irrespective of their history, as the Newlands Resolution plainly stated. The Organic Act (as well as contemporaneous legislative and executive interpretations) confirmed that the Uni-

ted States' perfect title extended to the entire cession. Respondents' theory depends on the notion that if the Republic of Hawaii acquired the land illegitimately, it could not give the United States perfect title. But at least since the Louisiana Purchase, this Court has held that when the United States acquires territory, determination of the ceding sovereign's ability to pass valid title is a matter for the political Branches, bound up with the powers to recognize governments and make treaties. Neither this Court nor any other court may second-guess those determinations, in a title suit or otherwise. See, *e.g.*, *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 309 (1829) (Marshall, C.J.). The United States then transferred its unencumbered title to the State, subject only to the federal trust.

Accordingly, under federal law, the state courts may not lock up trust lands based on the perceived need for a political settlement of long-foreclosed land claims asserted by putative successors to the interests of the Kingdom of Hawaii. Nor may they do so based on a perceived state-law "fiduciary" duty to native Hawaiians in that capacity. The State's fiduciary duties as trustee derive from and are bounded by Section 5(f) of the Admissions Act, which established a federal trust and conveyed the United States' absolute title to the corpus. The State's trust responsibilities are not fettered by the sort of external constraints that respondents and the state supreme court have sought to impose. To the contrary, the Admissions Act gives the State authority to sell trust lands, as do the state constitution and statutes. The state court was not free to limit that authority and the State's important interests, especially when doing so would be inconsistent with the federal trust and with the State's underlying federal-law title to the trust corpus.

II. The Apology Resolution did not alter these well-settled principles or intrude on state authority in the manner found by the state supreme court. In the resolution's three short provisions, Congress simply expressed the Nation's regret for past events and support for efforts to seek "reconciliation" in the future. As with other recent apologies for historical events, Congress made no substantive change in the law, as the legislative history confirms. Congress did not commit the United States or the State of Hawaii to negotiate a political settlement over lands to which the United States had long since acquired absolute title. Because the Apology Resolution was just that and nothing more, the state supreme court was wrong in reading the Apology Resolution to contradict a century's worth of law that confirms the United States' valid annexation, and to frustrate the State's power to sell trust lands.

III. The state court's injunction cannot stand. Because the Apology Resolution is no basis for disregarding the effect of the Newlands Resolution, Organic Act, and Admissions Act; because those provisions of law preclude any injunction based on claims to the trust lands, or on a purported fiduciary duty to respect such claims; because there is no indication that Congress intended to intrude on this important sphere of state authority; and because no state-law ground can detract from the force of federally conferred authority over the lands, the injunction should be reversed.

ARGUMENT

CONGRESS'S APOLOGY LEFT UNTOUCHED THE GOVERNING FEDERAL LAW, WHICH PRECLUDES ANY INJUNCTION AGAINST SALE OF TRUST LANDS BASED ON PUTATIVE UNRELINQUISHED CLAIMS TO THOSE LANDS

The Supreme Court of Hawaii held that the Apology Resolution justified depriving the State of authority to alienate the trust lands. But that resolution is entirely hortatory. By contrast, the federal statutes by which the United States took title to the relevant lands and later transferred that title to Hawaii in trust are *not* hortatory, and they make clear that native Hawaiians have no lingering claims to the relevant lands and that the State may alienate those lands pursuant to its federal-law trust responsibilities. Nothing in the Apology Resolution manifests any purpose to alter those longstanding principles, and without a clear manifestation, this Court should not attribute to Congress the intent to constrict the authority conferred on the State in this important area.

I. THE UNITED STATES ACQUIRED ABSOLUTE TITLE AT ANNEXATION AND AUTHORIZED HAWAII TO SELL OR TRANSFER LANDS AS TRUSTEE, CONSISTENT WITH THE TRUST REQUIREMENTS

At the time of the Apology Resolution, any residual land claims by native Hawaiians in their asserted capacity as successors to the interest of the Kingdom of Hawaii were unequivocally barred by federal law, and had been since the United States acquired the lands at the time of annexation. And the State had the power, under both the Admissions Act and state law, to sell trust

lands in furtherance of the federal trust's five statutory purposes.

The state supreme court interpreted the Apology Resolution as undoing that settled legal framework. But as explained below, the absolute title to, and power to sell, the ceded lands was so firmly rooted in federal law that if Congress had intended to upset the status quo in the Apology Resolution, especially in the dramatic and highly disruptive fashion envisioned by the state supreme court, it surely would have said so.

A. In Annexing Hawaii, The United States Acquired Absolute Title To The Ceded Lands

1. The Newlands Resolution and Organic Act preclude challenges to the United States' title

a. The text of the Newlands Resolution annexing Hawaii makes clear that Congress intended to and did acquire absolute, unimpeachable title to the ceded lands. The resolution begins with a preamble acknowledging that the Republic of Hawaii had offered the cession of "the absolute fee and ownership of all public, Government, or Crown lands, * * * and all other public property of every kind and description belonging to the Government of the Hawaiian Islands." 30 Stat. 750. Congress then expressly stated "[t]hat said cession [of the absolute fee and ownership] is accepted, ratified, and confirmed." § 1, 30 Stat. 750. And, removing any doubt, Congress added that "*all and singular the property and rights* hereinbefore mentioned are vested in the United States of America." *Ibid.* (emphasis added).

The Newlands Resolution provided that the federal public-land laws (which permitted homesteading) would not apply to the newly acquired lands, and that "the Congress of the United States shall enact special laws

for [the newly acquired lands'] management and disposition." § 1, 30 Stat. 750. Congress specified that all revenue from the newly acquired public lands "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Ibid.*

b. Two years later in the Organic Act, which established a new territorial government, Congress firmly rejected the possibility of permitting challenges to the United States' ownership of the former crown lands. Section 99 of the Organic Act explicitly declares that the Republic of Hawaii had absolute title to the crown lands as of the date the annexation took effect:

> [T]he portion of the public domain heretofore known as Crown land is hereby declared to have been, on [August 12, 1898], and prior thereto, the property of the Hawaiian government, and to be free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof. It shall be subject to alienation and other uses as may be provided by law.

31 Stat. 161; see *Liliuokalani* v. *United States*, 45 Ct. Cl. 418, 428-429 (1910). Thus, the Organic Act reaffirms that the former crown lands are part of the Republic of Hawaii's cession of "the absolute fee and ownership of *all public, Government, or Crown lands*," which the annexation "accepted, ratified, and confirmed." Newlands Resolution Preamble, § 1, 30 Stat. 750 (emphasis added).

c. If the text of these two provisions left any doubt as to Congress's intention to acquire absolute and unimpeachable title, the contemporaneous interpretations of legislative supporters and of the Executive Branch would remove it.

On several occasions during floor debate on the Organic Act, Senators proposed striking the provision that would become Section 99 (then Section 101). Senators Cullom, Morgan, and Foraker[2] explained at length that the bill's authors had been aware of the controversy surrounding the overthrow of the monarchy. See, *e.g.*, 33 Cong. Rec. 2248 (1900) (statement of Sen. Morgan) (noting that "[t]here are certain lawsuits threatened * * * in favor of the heirs presumptive and otherwise of the crown of Hawaii, set up in antagonism or in opposition to the title of the United States"); *id.* at 2249 (statement of Sen. Foraker) (alluding to the "controversy as to whether or not the republic of Hawaii had become possessed of the fee-simple title to the Crown lands"). Those members confirmed emphatically that Section 99's purpose was to declare that, upon annexation, the former crown lands "became the property of the United States," without any remaining "incumbrance" that the former monarchy might assert. *Id.* at 2248, 2448 (Sen. Morgan). Accord *id.* at 2249 (Sen. Foraker) ("[T]he only purpose of this is to show that, according to our declaration, the republic of Hawaii had become possessed of the fee-simple title to the Crown lands, and that in consequence they passed to the United States and are now the lands of the United States."); *id.* at 2444 (Sen. Cullom) (confirming that Section 99 would settle the question of

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[2] Senator Cullom, the bill's chief sponsor, and Senator Morgan had been members of a Presidentially appointed commission to visit Hawaii and recommend a form of government. Shelby Moore Cullom, *Fifty Years of Public Service* 285 (1911). Senator Morgan had chaired the Senate Foreign Relations Committee when it investigated the overthrow of the Hawaiian monarchy. See S. Rep. No. 227, 53d Cong., 2d Sess. 1 (1894); Apology Resolution Preamble, 107 Stat. 1511-1512. Senator Foraker chaired the Committee on Pacific Territories.

the monarchy's title rather than leave it for judicial determination). Accordingly, not only did the Senate reject attempts to delete Section 99, see *id.* at 2249, 2449, it also tabled an amendment to acknowledge the former Queen's title and to compensate her for a taking, see *id* at 2442-2448.

The strategic significance attached to Pearl Harbor is particularly inconsistent with the notion that the Congress thought it was acquiring imperfect title. The possibility that the United States military might one day lose access to Pearl Harbor (which the monarchy had granted on an exclusive but revocable basis, see Supplementary Convention, Dec. 6, 1884, U.S.-Haw., art. II, 25 Stat. 1400) was a primary motivation for annexing Hawaii. See H.R. Rep. No. 1355, 55th Cong., 2d Sess. 4 (1898) (endorsing annexation as a means to obtain "full power of ownership"); see also *id.* at 101, 103, 105.

The President and the Attorney General, immediately following enactment of the Newlands Resolution, interpreted it to give the United States "'absolute fee and ownership'" of the ceded lands. 22 Op. Att'y Gen. 574, 575 (1899). Indeed, the President ordered that any land transfers made by the Republic of Hawaii after the effective date of the annexation be voided. See 22 Op. Att'y Gen. 628 (1899). The Attorney General recognized that voiding those transfers might leave some of the parties unsatisfied, but he concluded that their claims did not impair the United States' absolute title; instead, the claimants should seek relief from Congress, which could be expected to "do justice to all persons having just claims of this nature." *Id.* at 636.

2. Congress acted within its authority when it precluded challenges to the United States' title

Congress's preclusion of challenges to the United States' title is final. The decisions to recognize the Republic of Hawaii, to accept that government's cession of public lands, and to make Hawaii a part of the United States are quintessentially the sorts of matters confided to the political Branches. See U.S. Const. Art. II, § 3; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive."); *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (agreeing that such determinations by the Executive Branch are "conclusive on the judicial department"); see also *Baker* v. *Carr*, 369 U.S. 186, 212 (1962).

Thus, even if (as respondents have contended, see Pet. App. 185a-193a, 236a) the transfer of the crown lands from the government of the Kingdom to the provisional government to the Republic of Hawaii was contrary to some principle of international law or the Kingdom's domestic law, the United States government's decisions to recognize the Republic and to accept its cession of absolute fee title in public lands are conclusive and may be revisited only by the political Branches of the United States Government, through legislation (to the extent allowed by the Constitution). Although after some acquisitions Congress has permitted the courts to entertain disputes over title to the new lands, it has done so out of grace or treaty commitment; it may validly decide instead to foreclose future litigation over title to the land it acquires.

This Court has upheld the United States' authority to acquire territory outright. One such case involved West Florida (coastal parts of present-day Louisiana,

Mississippi, and Alabama). In the United States' view, Spain had retroceded that territory to France in a secret 1800 treaty, and France had accordingly conveyed it to the United States as part of the 1803 Louisiana Purchase. Spain, however, remained in possession until 1810; the United States then occupied and later annexed the area. The United States and Spain settled their differences in an 1819 treaty. See, *e.g.*, David P. Currie, *The Constitution in Congress: The Jeffersonians 1801-1829*, at 192-193 & n.17, 195 (2001).

Land claimants who had been granted title by Spain between 1803 and 1810 subsequently brought suit to vindicate their rights to possession. This Court rejected their claims because Congress and the President had unmistakably rejected the claimants' premise—that under the correct interpretation of the 1800 treaty, Spain, not France, was the true owner of West Florida at the time of the Louisiana Purchase, and France therefore could not convey it. *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 302-303 (1829). As Chief Justice Marshall wrote for the Court, once the political Branches had exercised "sovereign power over the territory in dispute," based on their construction of the treaty between Spain and France, the courts must "respect the pronounced will of" the other Branches rather than adopt a competing construction of the treaty. *Id.* at 309. Thus, the Court held, the claimants would not be heard to argue "that the occupation of the country by the United States was wrongful[,] and * * * founded on a misconstruction of the treaty." *Ibid.*

Similarly, in *Doe* v. *Braden*, 57 U.S. (16 How.) 635 (1854), this Court upheld and applied a provision of the 1819 treaty of cession (and an attached declaration) expressly invalidating several grants that the King of

Spain had made, while the treaty negotiations were underway, of lands later ceded by the treaty. The United States had insisted upon extinguishing the grantees' claims in the treaty and declaration because "a claim of th[eir] character, however unfounded, would cast a cloud upon the proprietary title of the United States." *Id.* at 655. Although the Spanish grantees' successors contended that the King lacked power to agree to extinguish their rights in that manner, this Court explained that it would not second-guess the political Branches' exercise of the powers to recognize nations and make treaties, and thus would not examine the competence of the Nation's treaty partner to make the agreement. *Id.* at 657-658.

More generally, this Court has held that this Nation's courts will not re-examine the acts of another duly recognized sovereign. See, *e.g.*, *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303-304 (1918). That is so even when the recognized government is one that "originates in revolution or revolt," because the recognition "validates * * * the government so recognized from the commencement of its existence." *Id.* at 302-303. And the rule applies equally to state courts, as *Oetjen* demonstrates. That case was brought in state court to challenge, under international law, a seizure of personal property by the Mexican revolutionary government. See *id.* at 299-301. This Court rejected the claim and cautioned that because the United States subsequently recognized the revolutionary government, the validity of that government's actions was "not open to reëxamination *by this or any other American court*." *Id.* at 304 (emphasis added); see *id.* at 303.

In both *Foster* and *Doe*, the Court recognized the political Branches' authority conclusively to resolve title

disputes that had arisen before the United States took possession and to declare that the United States held the new territory in fee simple absolute. The same principles apply here: in recognizing the Republic of Hawaii, in asserting and acquiring absolute title to lands ceded by that government, and in expressly extinguishing any competing claim to the crown lands, Congress and the President exercised their constitutional authority to transact with foreign nations and to manage the territory so acquired. The nature of respondents' land claims, which are not individual claims to fee title but collective claims traceable to the Kingdom of Hawaii, confirms that any such claims could be extinguished by federal law. Cf. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279-282, 285 (1955) (discussing extinguishment of Indian title).

Any contention respondents might make about the legitimacy of the Republic of Hawaii at the time of the cession simply is not judicially cognizable; the United States' original title to the ceded lands is not subject to question on that or any other basis. "It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it." *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 589 (1823); see also *id.* at 588; *Wilson* v. *Shaw*, 204 U.S. 24, 32 (1907). Nor, *a fortiori*, is it for a state court to interfere with the administration of a federal trust on the premise that such an incompatible title to the corpus might exist.

B. The Admissions Act Granted Hawaii Title To Ceded Lands, With The Express Requirement That Those Lands Be Managed Only In Furtherance Of Five Statutory Purposes

Upon admitting Hawaii to the Union, Congress granted the new State, in trust, the United States' title to some of the lands that had been ceded to the United States in the Newlands Resolution. See Admissions Act § 5(b) and (g), 73 Stat. 5, 6. Congress required that those lands be held in trust and managed for one or more of the five purposes enumerated in Section 5(f). Although Section 5(f) allows the constitution and laws of Hawaii to govern the management and disposal of those lands *within* the federal framework, that provision does not authorize the state courts to restrain the State's trusteeship in a fashion that is inconsistent with the federal grant or that rests on asserted claims or perceived fiduciary duties *external* to the federal trust. The Supreme Court of Hawaii's issuance of an injunction based on "unrelinquished claims" to the trust lands (Pet. App. 32a) represents just such an impermissible restraint on the State's stewardship of the federal trust.

Hawaii was expressly empowered to sell trust lands as part of its duty to manage the federal trust in a manner consistent with the federal grant. That authority, while limited by the federal trust and the Admissions Act, is an important one. In Section 5(f) of the Admissions Act, Congress specified the five purposes for the benefit of which the State must hold, "manage[] and dispose[] of" those granted lands, "the income therefrom," and "the proceeds from the sale or other disposition" of such lands. 73 Stat. 6. Not only does Section 5(f) expressly contemplate selling trust lands (as trusts commonly do), it identifies as one of the trust purposes "the

development of * * * home ownership on as widespread a basis as possible," *ibid.*, which necessarily contemplates selling some land to permit new homeowners. Cf. *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 232-233 (1984) (noting Hawaii's historically low rates of residential fee-simple ownership).

The state supreme court did not dispute that the planned use of the Leilali'i parcel would be entirely consistent with the trust purpose of encouraging more widespread home ownership. Nor did that court contradict the trial court's analysis that, under state law, petitioners possess authority to sell or dispose of ceded lands. See Pet. App. 243a-257a, 259a-262a. Indeed, the supreme court acknowledged—but then did not address—petitioners' argument that they have "the undoubted and explicit power to sell [c]eded [l]ands pursuant to the terms of the Admission Act and pursuant to [s]tate law." *Id.* at 82a (brackets in original) (quoting Defs.-Appellees' Haw. Answering Br. 16).

Any judicially imposed freeze on transfer of trust assets would necessarily contradict Congress's authorization to the State to sell or otherwise dispose of lands to promote the trust purposes, including home ownership, and intrude on that important state authority. A freeze on sales otherwise authorized by state law, based on asserted land claims of native Hawaiians, contradicts the federal scheme even more directly. First, it effectively promotes one of the trust purposes—the welfare of native Hawaiians—over the other four purposes that under both federal and state law are eligible to benefit from the trust, see p. 3, *supra*. Second, it does so based on asserted claims by, and perceived "fiduciary" duties to, native Hawaiians that are external to the federal trust.

Furthermore, the "unrelinquished claims" to trust lands, on which respondents base this litigation, are apparently asserted on behalf of not just native Hawaiians as the Admissions Act uses that term, see p. 3, *supra*, but anyone descended from a pre-1778 aboriginal Hawaiian. See Pet. App. 141a-142a. Section 5(f) does not recognize such a broad-based category of native Hawaiian beneficiaries. Thus, in this important respect as well, respondents' claims and the state supreme court's reasoning are contrary to the Admissions Act.[3]

While Section 5(f) does provide that Hawaii shall manage and dispose of trust lands "in such manner as the constitution and laws of said State may provide," 73 Stat. 6, that provision does not sanction the state court's actions. Congress referred to state law as a way to fill

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[3] In *Rice*, this Court held that such an "ancestral inquiry" concerning eligibility to vote for the trustees of OHA "implicates the same grave concerns as a classification specifying a particular race by name" and therefore violated the Fifteenth Amendment. 528 U.S. at 517. Because the Court concluded that the voting restriction was invalid even if Congress could treat native Hawaiians as it does Indian tribes ("a matter of some dispute"), and because "the validity of the voting restriction [was] the only question [presented]," the Court assumed the validity of the underlying programs administered by OHA for the benefit of native Hawaiians. *Id.* at 518-519, 521-522. As it reaches this Court, this case involves no challenge brought by respondent or otherwise raised below to the constitutionality of special statutory provisions for the benefit of native Hawaiians (especially provisions approved by Congress); the only question is whether the state-court injunction is contrary to the governing Acts of Congress; and, as discussed, the Admissions Act defines "native Hawaiian" much more narrowly than would respondents in asserting claims against the trust land at issue. As in *Rice*, therefore, the Court may assume the substantive validity of Section 5(f) and the state constitutional provisions and laws that implement the Section 5(f) trust, and the Court need not confront the "questions of considerable moment" that it identified in *Rice*. *Id.* at 518.

in the details of the State's federal-law trusteeship obligation, not to authorize a state court to rewrite that trusteeship obligation. See *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 631 (1989) (phrase "as the State legislature may direct" in the New Mexico Enabling Act does not license the state legislature to disregard the Enabling Act's "express restrictions"); cf. *General Atomic Co.* v. *Felter*, 434 U.S. 12, 17 (1977) (per curiam) (congressionally conferred rights "are not subject to abridgment by state-court injunctions").

II. THE APOLOGY RESOLUTION DID NOT CHANGE THE LAW OR CLOUD THE STATE'S TITLE

As explained above, under federal law as it existed before 1993, respondents plainly could not have shown any entitlement to injunctive relief. The state supreme court, however, concluded that the adoption of the Apology Resolution in 1993 removed those federal obstacles. But the Apology Resolution does not change the preexisting law at all, let alone effect the type of dramatic change that would be necessary for respondents to mount a claim to the trust lands *and*, while they pursue that claim extrajudicially, to preclude the State from using trusteeship powers authorized by the Admissions Act. Nor is there any basis to assume that Congress would so disrupt state authority in this important sphere without saying so clearly.

A. The Apology Resolution's Text Demonstrates That Congress's Apology Was Hortatory, Not Substantive, And The State Court's Reliance On The Preamble Was Erroneous

1. The sole substantive provision of the Apology Resolution uses six verbs: Congress "acknowledges," "recognizes and commends," "apologizes," "expresses"

(a commitment), and "urges." § 1, 107 Stat. 1513. The plain meaning of each of those words demonstrates that Congress was speaking rather than acting—clearing the air rather than changing the law.

Of the six verbs, "apologizes" is the most significant. In ordinary usage an "apology" is simply "a regretful acknowledgment of an offense or failure." *E.g.*, *The New Oxford American Dictionary* 72 (2d ed. 2005) (first definition). That is what Congress did, and all that it did, in the Apology Resolution: it "apologize[d] to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States." Apology Resolution § 1(3), 107 Stat. 1513. As a simple expression of regret, an "apology," in ordinary usage, does not carry a substantive legal effect.

The state court attributed significance to another provision, in which Congress expressed its "commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the [n]ative Hawaiian people." Pet. App. 32a (quoting Apology Resolution § 1(4), 107 Stat. 1513) (emphasis omitted; brackets in original). But the reference to "reconciliation"—"action to restore to friendship, compatibility, or harmony," *Webster's Third New International Dictionary* 1897 (1993)—does not in itself entail the recognition or settlement of any claim to land. And of particular relevance here, there is no indication in Section 1(4)'s text, context, or history that Congress thought a "proper foundation for reconciliation" would involve restricting the use or sale of trust lands in anticipation of any "reconciliation." To the contrary, consistent with its status

as an "Apology Resolution," the plain text makes clear that Congress's "acknowledg[ment]" of the consequences of past actions was itself the "proper foundation for reconciliation," not some additional legal restriction.

If Congress *had* possessed the contrary view attributed to it by the state supreme court, it would have needed to change the laws (the Newlands Resolution, Section 99 of the Organic Act, and Section 5(f) of the Admissions Act) by which the United States acquired the ceded lands in fee simple absolute and then conveyed them to the State, subject only to the federal trust. But the Apology Resolution did not amend *any* existing law. See also pp. 28-29, *infra*. Nor did it state that the historical injustice it was examining gave rise to colorable present-day land claims, let alone endorse or permit a freeze on the trust lands or a change in the trust's administration as a way to encourage settlement of any such claims.

Congress would have made any such intent unmistakably plain, given the unprecedented and dramatic consequence of clouding the title of at least all the trust lands, if not all ceded lands. Congress "does not * * * hide elephants in mouseholes," *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and the pachyderm that the state court spotted is one that Congress certainly would not have concealed. Cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (Congress would not have delegated "a decision of such economic and political significance * * * in so cryptic a fashion."). Nor does Congress lightly strip States of important attributes of their authority, including by clouding title to land that a State is empowered to sell, exchange, or transfer.

Congress made no such clear statement; to the contrary, it affirmatively *disavowed* any such reading of the Apology Resolution in the final section, which is entitled "Disclaimer" and states that "[n]othing in this Resolution is intended to serve as a settlement of any claims against the United States." § 3, 107 Stat. 1514. This disclaimer confirms Congress's intent that the resolution not create a new basis for litigation. See also pp. 27-28, *infra*.

2. The Supreme Court of Hawaii asserted that its interpretation of the Apology Resolution was "[b]ased on a plain reading" of four particular passages from that enactment—but each of those passages is simply a "whereas" clause from the preamble. Pet. App. 31a-32a. As this Court recently explained in a different context, "whereas" clauses cannot bear any such weight: "[W]here the text of a clause itself indicates that it does not have operative effect, *such as 'whereas' clauses in federal legislation* * * *, a court has no license to make it do what it was not designed to do." *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2789 n.3 (2008) (emphasis added).

Nor would the "whereas" clauses support the state court's holding in any event. For example, one "whereas" clause (like Section 1(1)) refers to the "illegal overthrow" of the monarchy. 107 Stat. 1512. But nothing in the Apology Resolution states or remotely suggests that the subsequent *Acts of Congress* providing for the United States' annexation of Hawaii and acquisition of absolute fee title to the public lands—the very origins of the sovereignty of what is now the State of Hawaii and its ownership of the trust lands under the Admissions Act—were somehow unlawful. And it is those enactments that foreclose respondents' claim.

The state supreme court also relied in part on a clause that states: "Whereas 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, either through their monarchy or through a plebiscite or referendum." Pet. App. 31a (quoting 107 Stat. 1512). The Apology Resolution's "whereas" clause does not address whether any such claims were *extinguished* rather than "directly relinquished." See pp. 12-19, *supra*.[4]

The state supreme court opined that the latter "whereas" clause compelled it to construe the Apology Resolution's disclaimer provision differently, to harmonize the disclaimer with the "whereas" clause and thereby "give effect to all parts of [the] statute." Pet. App. 33a (citation omitted). But the relevant canon calls

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[4] The state supreme court also believed (Pet. App. 34a) that its interpretation of the Apology Resolution was "supported by" a report entitled "From Mauka to Makai: The River of Justice Must Flow Freely," prepared by officials of the Departments of Justice and the Interior in October 2000, seven years after the Apology Resolution. That contention is wrong. Even if that report had the force of law, or even the status of post-enactment legislative history, which it does not, it did not purport to recognize (or to recommend that Congress recognize) "unrelinquished claims" to trust lands. Nor did it purport to recommend a freeze on the transfer of those lands "pending final resolution of native Hawaiian claims through the political process," as the state court ordered, *id.* at 100a. Rather, the report recommended that Congress "*enact further legislation* to clarify [n]ative Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative [n]ative Hawaiian governing body." *Id*. at 35a (emphasis added; brackets in original; citation omitted). One example of "further legislation," known as the "Akaka Bill," has been considered by Congress in various forms at various times. See H.R. 505, 110th Cong., 1st Sess. (2007) (passed by House); see also Pet. App. 7a n.7, 183a-184a.

for construing all *substantive* parts of a statute so that none lacks force; because "whereas" clauses *always* lack force, there is no basis for construing substantive clauses purely to give effect to the preamble. See 2A Norman J. Singer, *Sutherland on Statutory Construction* § 47.04, at 146 (rev. 5th ed. 1992); accord *Heller*, 128 S. Ct. at 2789 n.3; *id.* at 2826 n.7 (Stevens, J., dissenting). It is axiomatic that a clause in the non-binding preamble cannot turn a non-binding resolution into a substantive one.

B. The Sponsors Of The Apology Resolution Disavowed Any Substantive Revision Of Federal Law

Both the applicable committee report and the lead congressional sponsors of the Apology Resolution represented to Congress that the apology would not have any substantive impact. Those assurances confirm what the text already shows: that the Apology Resolution confined itself to apologizing for the events of a century before, and did not mandate or authorize either a present-day settlement (political or judicial) of claims, or any judicial action with respect to the trust lands based on the perceived possibility of such a settlement.

As Senate rules require, the Senate Indian Affairs Committee's report contained a section cataloguing any changes to existing law that the Apology Resolution would make. S. Rep. No. 126, 103d Cong., 1st Sess. 35 (1993). That section, which contained only a single sentence, stated that "enactment of S.J. Res. 19 will not result in any changes in existing law." *Ibid.*

The legislation's sponsors made similar representations. For example, responding to a question concerning the "operative intention" of the resolution, Senator Inouye of Hawaii (the committee chairman and a chief

sponsor) explained: "[T]his is a simple resolution of apology, to recognize the facts as they were 100 years ago. * * * This resolution does not touch upon the Hawaiian homelands. I can assure my colleague of that." 139 Cong. Rec. 26,428 (1993). Senator Inouye similarly confirmed that the "whereas" clauses were not to have operative effect, but "were placed in the resolution for a very simple reason: So that those who are studying this resolution or those students of history in years to come can look back and say that is the way it was in Hawaii on January 17, 1893." *Id.* at 26,427.

Similarly, the House committee chairman, Representative George Miller, confirmed that the resolution "does not confer any new rights [on] native Hawaiians," but rather "invokes the name of the U.S. Government in an apology to native Hawaiians for those actions that were taken." 139 Cong. Rec. at 29,106. And Representative Craig Thomas acknowledged the argument that the resolution would "form the genesis of a call for reparations or a civil lawsuit," but assured the House that "[t]his resolution does nothing to tip the scales in favor of the proponents of litigation; if I thought it did, I would not support it." *Id.* at 29,105.

C. Construing The Apology Resolution To Have Substantive Effect Would Discourage Congress From Re-examining Historical Injustices

As the Apology Resolution illustrates, from time to time Congress determines that it is appropriate to acknowledge past injustices. Congress sometimes does so by legislating appropriate reparations. See, *e.g.*, Act of Aug. 10, 1988, Pub. L. No. 100-383, §§ 1, 105, 102 Stat. 903, 905 (apologizing for, *inter alia*, the internment of Japanese-Americans during World War II and providing

for compensation). And Congress sometimes creates special procedures for redress. See, *e.g.*, Indian Claims Commission Act, ch. 959, § 2, 60 Stat. 1050 (creating tribunal to hear claims by Indian tribes, including claims "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity").

In most cases, however, Congress chooses a resolution whose sole effect is a moral one: the acknowledgment of a failing and a resolve to do better. These nonbinding resolutions may have both political and historical significance, but they confer no enforceable rights. See, *e.g.*, S. Con. Res. 153, 101st Cong., 2d Sess. (1990) (Congress "expresses its deep regret on behalf of the United States" for the 1890 Wounded Knee Massacre, "recognizes and commends the efforts of reconciliation initiated by the State of South Dakota and the Wounded Knee Survivors Association," and "expresses its commitment to acknowledge and learn from our history, including the Wounded Knee Massacre"); see also S. Res. 39, 109th Cong., 1st Sess. 3 (2005) ("apologiz[ing] * * * for the failure of the Senate to enact anti-lynching legislation"); H.R. Res. 194, 110th Cong., 2d Sess. 4 (2008) ("apologiz[ing] to African Americans * * * for wrongs committed against them and their ancestors who suffered under slavery and Jim Crow").[5]

The Apology Resolution plainly falls into the latter category, and the Supreme Court of Hawaii's decision to

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[5] Unlike the Apology Resolution, a joint resolution signed by the President, these more recent apologies were "concurrent" or "simple" resolutions, but the distinction is not relevant for present purposes; Congress routinely enacts joint resolutions that are unmistakably nonsubstantive. See, *e.g.*, Act of May 18, 2006, Pub. L. No. 109-223, 120 Stat. 374 (joint resolution "[t]o memorialize and honor the contribution of Chief Justice William H. Rehnquist").

treat it otherwise lends force to arguments that Congress should not pass such resolutions because they will foment litigation. Allowing the state supreme court's holding to stand would likely discourage Congress from adopting similar apologies for other historic wrongs, because the necessary preambles rehearsing those wrongs might be taken to create judicially cognizable legal claims. Congress must be permitted the flexibility—which is encroached upon by the decision below—to determine that a particular historical injustice is better addressed by an apology than by recognition of present-day claims or "fiduciary" duties.

III. THE INJUNCTION ORDERED BY THE SUPREME COURT OF HAWAII SHOULD BE REVERSED

The premise of the state supreme court's injunction is that there is a cloud on the State's title to the trust lands, and that until that cloud is resolved through political negotiations the State has a fiduciary obligation not to sell the lands for any purpose, even a purpose expressly authorized by Congress. Federal law establishes, however, that the public trust holds good title to the ceded lands, and that the State as trustee may sell or otherwise dispose of those lands in a manner consistent with the trust instrument. Although the state supreme court concluded that the Apology Resolution "dictates" such an injunction, Pet. App. 85a, as shown above, the Apology Resolution did not change the governing federal law, did not create a cloud on the title to the trust lands, did not amend the statutes authorizing the sale of those lands, and did not displace the State's important authority over the lands at issue. Because the asserted basis for the injunction—the Apology Resolu-

tion—is no basis at all, this Court should reverse the injunction.

In the state courts, the State raised a federal defense to respondents' demand for an injunction. See Pet. App. 82a & n.26; Defs.-Appellees' Haw. Answering Br. 18-23. The only conceivable basis for the state supreme court's failure to address that meritorious federal defense was the state court's belief that *another* federal law, the Apology Resolution, eliminated that defense. Because that premise was wrong, federal law precludes respondents from showing success on the merits and obtaining an injunction.

Respondents suggested at the petition stage that the state court would simply reinstate its holding on state-law grounds. Br. in Opp. 11, 18. That contention is meritless. State law cannot create a cloud on the title by which the United States acquired the trust lands. Nor can state law rewrite the trust purposes established by Section 5(f) or impose fiduciary duties in the administration of the trust lands based on matters external to the federal trust, such as claims of native Hawaiians in an asserted capacity as successors in interest to the former monarchy. Because existing federal law compels the conclusion that there *are* no valid but unresolved claims to the trust lands, any remand would be futile.[6]

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The United States and the State of Hawaii have maintained the trust lands for more than a hundred

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[6] The state supreme court did not address the federal defense to the injunction expressly. Because the relevant principles of federal law are made clear in examining the Apology Resolution and the body of law it left intact, however, this Court can and should resolve the case at this stage.

years, and during that time have used the income to better the lot of all Hawaiians, including native Hawaiians. If, as respondents claim, the moral consequences of the events of 1893 call for the public trust to be undone or modified, and for some or all of the trust corpus to be awarded directly to present-day people of Hawaiian descent on that basis, then it must be Congress and the President who make that moral judgment. But Congress and the President have made no such judgment. The state court therefore had no warrant to freeze the ordinary disposition of the trust lands at issue.

CONCLUSION

The judgment of the Supreme Court of Hawaii should be reversed.

Respectfully submitted.

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