Department of Justice

STATEMENT

OF

SAM HIRSCH
DEPUTY ASSOCIATE ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

HEARING ENTITLED

“S. 1011, THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2009"

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Before the
Senate Committee on Indian Affairs
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Thank you, Chairman Dorgan, Vice Chairman Barrasso, and Members of the Committee, for the opportunity to testify before you today regarding S. 1011, the Native Hawaiian Government Reorganization Act of 2009, as well as the companion bill, H.R. 2314, now pending in the House of Representatives. It is our understanding that the bill's sponsors and cosponsors are continuing to develop the legislation's precise parameters, so I will focus here on the broad principles embodied in these bills, rather than some of the details that may still be in flux.

The Department of Justice strongly supports the core policy goals of this bill, and I am pleased to testify on this historic legislation. My remarks highlight some background considerations relevant to Native Hawaiian recognition legislation and discuss some important provisions in the bill.

I. Authority to Recognize Indian Tribes Generally

The Supreme Court has long held that Congress has broad power to recognize Indian tribes. As the Court stated in *United States v. Lara*, 541 U.S. 193, 200 (2004), "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" In *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974), the Court observed that Congress's "plenary power" to recognize and legislate on behalf of Indian tribes "is drawn both explicitly and implicitly from the Constitution itself" and is based on "a history of treaties and the assumption of a 'guardian-ward' status."

More specifically, the federal government derives its power to deal with the Indian tribes primarily from the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, which explicitly gives Congress the power to regulate commerce not only among the States and with foreign nations but also with "the Indian Tribes," and the Treaty Clause, U.S. Const. art. II, § 2, cl. 2. The federal government's authority to deal separately with the Indian tribes is thus grounded in two constitutional provisions that recognize the Indian tribes as sovereign political entities.

The Supreme Court has numerous times defined tribes based on this concept of sovereignty. Most recently, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978), the Court described Indian tribes as "'distinct, independent political communities, retaining their original natural rights' in matters of local self-government."

Congress's power to recognize Indian tribes extends to tribes that have had aspects of their sovereignty diminished. For example, in *United States v. John*, 437 U.S. 634, 652-53 (1978), the Supreme Court upheld the federal government's ability to deal with the Mississippi Choctaws, even though federal supervision over them had not been continuous and there were times when the State's jurisdiction over them and their lands went unchallenged. Similarly, in *Lara*, 541 U.S. at 200-07, the Court upheld Congress's authority, in the wake of *Duro v. Reina*, 495 U.S. 676 (1990), to relax limitations on tribes' exercise of inherent prosecutorial power over non-member Indians.

The Indian Affairs power encompasses "distinctly Indian communities." *United States v. Sandoval*, 231 U.S. 28, 46 (1913). The Supreme Court, in upholding Congress's treatment of the Pueblos of New Mexico as tribes, cautioned that Congress's plenary authority over tribes does not mean that it "may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." *Id*. Nonetheless, within these limits, the Court has

found that "the questions whether, to what extent, and for what time [distinctly Indian communities] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Id.*

II. Authority to Recognize Native Hawaiians — *Rice v. Cayetano*

Any discussion of the power of the State of Hawaii and Congress regarding Native Hawaiians must begin with *Rice v. Cayetano*, 528 U.S. 495 (2000). *Rice* involved a challenge to a provision in the Hawaii State Constitution limiting the right to vote for the trustees of the Office of Hawaiian Affairs (OHA) to "Hawaiians." This term was defined by state statute as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." The Court held that the voting provision violated the Fifteenth Amendment.

Importantly, the Court did ***not*** reach the question whether Congress has the authority to treat Native Hawaiians in the same manner as members of an Indian tribe. Instead, the Court held that because the OHA elections were "elections of the ***State***, not of a separate quasi sovereign," they were "elections to which the Fifteenth Amendment applies." *Id.* at 522 (emphasis added). The Court thus avoided what it called the "difficult terrain" of "whether Congress may treat the native Hawaiians as it does the Indian tribes." *Id.* at 518-19. And since the Supreme Court decided *Rice*, nearly a decade ago, no court that we are aware of has squarely addressed that issue.

III. History of Native Hawaiian Sovereignty and Self-Government

In recognizing a Native Hawaiian sovereign entity, Congress would in effect determine that Native Hawaiians constitute a distinct community as it has done with Indian tribes. The

history of Native Hawaiian sovereignty and the extent to which Native Hawaiians continue to function as an organized community — engaging in collective action and preserving traditional community and culture — are relevant to this analysis.

The general history of the Native Hawaiian people bears significant similarities to the history of Indian tribes. Prior to the arrival of western explorers, Native Hawaiians exercised self-rule. Traditionally, each island was controlled by a chief, known as an Ali'I 'ai moku, and a hierarchy of lesser chiefs (Ahupua'a konohiki) and priests (Kahuna nui). In the early nineteenth century, King Kamehameha united the separate island chiefdoms under one government, creating the Hawaiian monarchy. The United States recognized the Kingdom of Hawaii as a sovereign power and dealt with it as such through much of the nineteenth century. In fact, the two nations executed several treaties and conventions. Then, in 1893, commercial interests, with the support of the United States military, overthrew the Hawaiian monarchy. In 1993, Congress enacted a resolution formally apologizing for the role of the United States in that overthrow. *See* Pub. L. 103-150, 107 Stat. 1510 (1993).

Despite the overthrow of the monarchy, a community of Native Hawaiians continued to act collectively to preserve their culture and institutions in many ways, and the United States and the State of Hawaii gave a variety of forms of legal recognition and legal status to those distinctive institutions and culture.

A. Federal and State Protection of Native Hawaiian Autonomy and Culture

In 1921, Congress enacted the Hawaiian Homes Commission Act (HHCA), Act of July 9, 1921, ch. 42, 42 Stat. 108. The law sought to "establish a permanent land base for the benefit and use of Native Hawaiians" and to "make alienation of such land [from the Native Hawaiians] . . . impossible," 1990 Haw. Sess. Laws, Act 349, thereby stopping the decline in the Native

Hawaiian population and revitalizing the Native Hawaiian community. One supporter of the legislation said, in explaining the need for the Act, that "[t]he idea in trying to get the land back to some of the Hawaiians is to rehabilitate them. . . . The only way to save them is to take them back to the lands." H. Rep. No. 66-839, at 3-4 (1920). Similarly, Hawaiian Delegate Kananianaole stated, "I am a believer in giving the small man a piece of land and assisting him to become a prosperous member of the community. There is no patriotism so great as that which is rooted in the soil. I am a believer in and have been consistent in the policy of home rule." 59 Cong. Rec. 7455 (May 21, 1920).

The HHCA set aside 1.2 million acres of land — land originally controlled by the Hawaiian monarchy — for the betterment of Native Hawaiians. These lands are inalienable and are available to certain descendants of the persons inhabiting the Hawaiian Islands in 1778. Significantly, the legislative history of the HHCA indicates that Congress**,** in establishing this program, recognized the similarity between Native Hawaiians and Indian tribes. For example, Hawaii Territorial Senator John Wise asserted that the United States had a duty to assist Native Hawaiians, and he cited land grants to Indian tribes as precedent for the HHCA. *See* H.R. Rep. 66-839, at 4-7, 11. He also considered programs that had been developed to assist other indigenous groups. *Id.* Former Interior Secretary Franklin Lane stated that the United States had a responsibility to help Native Hawaiians and compared the plight of Native Hawaiians to that of other Native Americans. *See id.* at 4-5. Similarly, Oregon Senator George Chamberlain compared Native Hawaiians to Indian tribes. *See* Hearing on H.R. 13500 Before the Committee on Territories, 66th Cong., 3d Sess. 23 (Dec. 14, 1920). Finally, like Senator Wise, the witness Rev. Akaiko Akana compared the HHCA to federal efforts to assist Native Americans. *Id*. at 53.

State and federal authorities have recognized Native Hawaiian tradition and culture through other enactments. For example, the federal government set aside and protected the North West Hawaiian Islands in part due to their cultural and traditional significance. Proclamation No. 8031, 50 C.F.R. § 404.1. Since the early 1970s, Congress has enacted many statutes providing benefit programs for Native Hawaiians similar to those provided to other native people, such as section 4006(a)(6) of the National Historic Preservation Act, 16 U.S.C. § 470a(d)(6), which provides particular protection to properties with religious and cultural importance to Indian tribes and Native Hawaiians; the Native Hawaiian Education Act, 20 U.S.C. §§ 7901-7912, which establishes programs to facilitate the education of Native Hawaiians; and Title VIII of the Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4221-4239. In addition, various provisions of the Hawaii State Constitution, state statutes, and State Supreme Court opinions ensure access to timber, water, and other resources with traditional significance based on ancient custom and usage. Traditional Native Hawaiian fishing and gathering rights also are protected. Moreover, in 1990, the State adopted measures to protect Native Hawaiian traditional burial sites. As stated above, such sites also are protected under the 1990 Native American Graves Protection and Repatriation Act, which protects American Indian, Alaska Native, and Native Hawaiian gravesites. Finally, the State of Hawaii created the Office of Hawaiian Affairs, whose mission is to protect Native Hawaiian interests.

B. Native Hawaiian Self-Governance

Native Hawaiians also have a sustained history of creating institutions to preserve traditional Native Hawaiian forms of social organization, religious practice, family and cultural identity, and other distinctive cultural practices. For example, the Hawaiian Protective

Association was established in 1914 "for the sole purpose of protecting the Hawaiian people and of conserving and promoting the best things of their tradition." Hearing on H.R. 13500 Before the Committee on Territories, 66th Cong., 3d Sess. 44 (Dec. 14, 1920) (statement of Rev. Akaiko Akana). The Association was a political organization with bylaws and a constitution that sought to maintain unity among Native Hawaiians, to protect Native Hawaiian interests, to promote the education, health, and economic development of Native Hawaiians**,** and to address disputes within the Native Hawaiian community. To this end, the Association established 12 standing committees and published a newspaper. The Association developed the framework that became the HHCA.

In addition, in 1918, Prince Kuhio, Hawaii's delegate to Congress, founded the Hawaiian Civic Clubs, whose goal was "to perpetuate the language, history, traditions, music, dances and other cultural traditions of Hawaii." McGregor, *Aina Ho'opulapula: Hawaiian Homesteading*, 24 Hawaiian J. Hist. 1, 5 (1990). These civic organizations worked to secure enactment of the HHCA, and they remain in existence today.

In addition, Royal Societies**,** formed after the fall of the monarchy**,** also remain in existence today and continue to hold political and cultural value to the Native Hawaiian community. Various trusts also have established and funded Native Hawaiian language programs and immersion schools, including the Bishop Trust, which is a trust formed from property of the last descendant of King Kamehameha for the education of Native Hawaiians. Other groups, such as the 1988 Native Hawaiian Sovereignty Conference and the Kau Inoa organization, have formed to recognize traditional Native Hawaiian sovereignty and to work towards recognition of a sovereign Native Hawaiian entity.

IV. Past Congressional Action Toward Recognizing a Native Hawaiian Sovereign

As the Committee is well aware, the current legislation does not mark the first introduction of legislation designed to provide for Native Hawaiian recognition. Congress has given extensive consideration to this question. On two recent occasions — in the 106th and 110th Congresses — the House of Representatives passed recognition bills. In both those Congresses, this Committee also approved recognition bills. This Committee also reported recognition bills to the full Senate in the 107th and 108th Congresses, although those bills ultimately did not receive a vote in either Chamber. In addition, in the 109th Congress, this Committee approved recognition legislation that was debated in the full Senate. We are heartened that the bill's sponsors and cosponsors are continuing, nearly a decade after the legislation's original introduction, to address these issues and to press ahead with this important project.

V. Current Recognition Legislation

The current legislation is the product of Congress's sustained examination of the status of Native Hawaiians and has a number of features that reflect Congress's close study of these questions. For example, the legislation contains provisions that specifically state that Congress does not intend to create any new legal claims against the United States. The Department supports these provisions and believes they should remain in the bill. In particular, the Department supports section 8(c) in S. 1011, which provides that nothing in the bill creates a cause of action against or waives the sovereign immunity of the United States.

The Department also supports the bill's civil-rights protections. Section 7(c)(2)(B)(iii)(I)(cc) and section 7(c)(4)(A)(vi) require the Native Hawaiian governing entity, in its constitution or other organic governing document, to expressly protect the civil rights of Native Hawaiians and all other persons affected by the governing entity's exercise of its governmental

powers and authorities. Express civil-rights protections, as required by the Indian Civil Rights Act of 1968, have served Indian tribes, their members, and their neighbors well for many decades, while fully recognizing and respecting tribes' inherent sovereignty.

VI. Conclusion

Thank you for the opportunity to appear before the Committee to discuss this issue. As I noted at the outset, the Department of Justice strongly supports the core policy goals of the Native Hawaiian Government Reorganization Act of 2009 and looks forward to working with you as the bill's specific language further evolves. We are very pleased to have the opportunity to work with this Committee in developing this important legislation.