

MAR 10 2017

SENATE CONCURRENT RESOLUTION

REQUESTING THE OFFICE OF HAWAIIAN AFFAIRS TO CONVENE A TASK FORCE OF HAWAIIAN LEADERS, LEGAL SCHOLARS, AND A BROAD REPRESENTATION OF MEMBERS OF THE HAWAIIAN COMMUNITY TO REVIEW AND CONSIDER WHETHER ITS FIDUCIARY DUTY TO BETTER THE CONDITIONS OF HAWAIIANS AND MANAGE ITS RESOURCES TO MEET THE NEEDS OF HAWAIIAN BENEFICIARIES WOULD BE BETTER SERVED BY HAVING TRUSTEES APPOINTED RATHER THAN ELECTED.

1 WHEREAS, article XII, section 5, of the Hawaii State
2 Constitution created the Office of Hawaiian Affairs (OHA), to be
3 governed by not less than a nine member board of trustees who
4 shall be Hawaiian and elected by qualified voters who are
5 Hawaiian, as provided by law; and

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7 WHEREAS, the 1978 Constitutional Convention created a
8 number of committees, including a Hawaiian Affairs Committee
9 that proposed the creation of OHA to manage and administer
10 resources held for the benefit of people of Hawaiian ancestry;
11 and

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13 WHEREAS, these proposed amendments were approved by the
14 Convention as a whole and were then ratified by Hawaii voters in
15 November of 1978; and

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17 WHEREAS, Standing Committee Report No. 59 from the
18 Convention's Hawaiian Affairs Committee articulates the primary
19 principle which committee members wanted to ensure through its
20 creation of OHA: the right of Hawaiians to elect their Hawaiian
21 leaders and Hawaiian control of Hawaiian trust assets as a
22 seeming response to the overthrow of the lawful government of
23 Hawaii in 1893 by the United States; and

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25 WHEREAS, the committee wrote:

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27 "Your committee is unanimously and strongly of the
28 opinion that people to who assets belong should have



1 control over them. In order to insure accountability, it
2 was felt that the board should be composed of elected
3 members. The election of the board will enhance
4 representative governance and decision-making
5 accountability, and, as result, strengthen the fiduciary
6 relationship between the board member, as trustee, and the
7 native Hawaiian, as beneficiary. Finally, the committee
8 agreed that the board should be elected by all the
9 beneficiaries. Certainly, they would best protect their
10 own rights"; and

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12 WHEREAS, the Hawaiian Affairs Committee's recommendations
13 were included in and strongly endorsed by the written report of
14 the Convention's Committee of the Whole which focused on the
15 need for Hawaiians to be able to realize a sense of self-
16 determination and self-government through creation of OHA,
17 stating:

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19 "Members were impressed by the concept of the Office of
20 Hawaiian Affairs which establishes a public trust entity
21 for the benefit of the people of Hawaiian ancestry.
22 Members foresaw that it will provide Hawaiians the right to
23 determine the priorities which will effectuate the
24 betterment of their condition and welfare and promote the
25 protection and preservation of the Hawaiian race.

26 . . .
27 If one looks to the precedent of other native peoples, one
28 finds that they have traditionally enjoyed self-
29 determination and self-government. They have power to make
30 their own substantive rules in internal matters. Although
31 no longer possessed of the full attributes of sovereignty,
32 they remain a separate people with the power of regulation
33 over their internal and social problems. The establishment
34 of the Office of Hawaiian Affairs is intended to grant
35 similar rights to Hawaiians."; and

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37 WHEREAS, this history was confirmed by the Hawaii Supreme
38 Court in 1987 in *Trustees v. Yamasaki*, 69 Haw. 154, 737 P.2d 446
39 (1987); and

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41 WHEREAS, in February of 2000, the United States Supreme
42 Court in *Rice v. Cayetano* struck down the State's provisions



1 restricting OHA elections to those of Hawaiian ancestry only on
2 the grounds that it violated the Fifteenth Amendment to the
3 United States Constitution, which provides that, "[t]he right to
4 vote shall not be denied or abridged by the United States or by
5 any State on account of race, color, or previous condition of
6 servitude"; and

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8 WHEREAS, in *Rice v. Cayetano*, a divided United States
9 Supreme Court held that the State violated the express
10 provisions of the Fifteenth Amendment by limiting the right to
11 elect OHA trustees in an official state election where only
12 voters of Hawaiian ancestry were entitled to vote for potential
13 OHA trustees; and

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15 WHEREAS, Justice Kennedy, writing for the majority, opined
16 that "[a]ncestry can be a proxy for race. It is that proxy
17 here"; and

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19 WHEREAS, after the decision in *Rice*, all qualified voters
20 in Hawaii were empowered to elect the OHA trustees; and

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22 WHEREAS, a subsequent challenge was filed in 2002 against
23 the State's constitutional and statutory provisions requiring
24 that only individuals of Hawaiian ancestry could be elected as
25 OHA trustees; and

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27 WHEREAS, in *Arakaki v. State*, the Ninth Circuit Court of
28 Appeals struck the statutory and constitutional provisions
29 limiting who could run for and be elected to OHA solely to those
30 of Hawaiian ancestry; and

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32 WHEREAS, the Ninth Circuit held that disqualifying those
33 who were not of Hawaiian ancestry from running for a position as
34 an OHA trustee compromised potential voter's Fifteenth Amendment
35 rights and therefore was unconstitutional; and

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37 WHEREAS, since the decision in *Arakaki*, non-Hawaiians are
38 now eligible to run for and be elected as OHA trustees; and

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40 WHEREAS, the ability for Hawaiians to exercise their right
41 to self-determination through the election of OHA trustees has
42 been substantially diminished because non-Hawaiians are now



1 entitled to vote for and run for a position as an OHA trustee;
2 and

3
4 WHEREAS, OHA trustees are presently elected and primarily
5 function as political office holders and less as trustees who
6 are charged with exercising the highest fiduciary duty at law to
7 their Hawaiian beneficiaries; and

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9 WHEREAS, there are well-qualified individuals with strong
10 ties and stellar records of service to the Hawaiian community,
11 who meet the exacting legal and fiduciary requirements of
12 serving as a trustee, and who would consent to serving as an OHA
13 trustee if they were appointed rather than elected; and

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15 WHEREAS, the requirements to be appointed as a trustee by
16 the court rather than being elected to political office requires
17 a level of skill, expertise, maturity, and judgement that is the
18 highest at law because trustees have a fiduciary obligation to
19 prudently serve the interests of beneficiaries above their own
20 interests; and

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22 WHEREAS, in the most recent OHA election in 2016, where two
23 OHA trustee positions were on the ballot, there were 100,464
24 (twenty-three percent) blank votes recorded in the Hawaii island
25 resident trustee election and 117,600 (26.9 percent) blank votes
26 were recorded in the at-large trustee race, which indicates that
27 a substantial group of voters who show up to vote choose not to
28 vote in OHA elections; and

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30 WHEREAS, it is in the best interests of Hawaiian
31 beneficiaries that the most competent, skillful, mature, and
32 trustworthy individuals serve as trustees over the resources and
33 policies developed and implemented to better the conditions of
34 Hawaiian beneficiaries; and

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36 WHEREAS, there is a need to review the question of whether
37 the manner of selecting OHA trustees may be improved upon
38 through an appointment process, to consider the appropriate
39 appointing authority, and how to develop a list of the best
40 qualified potential trustees for submittal to the appointing
41 authority; now, therefore,

42



S.C.R. NO. 85

1 BE IT RESOLVED by the Senate of the Twenty-ninth
 2 Legislature of the State of Hawaii, Regular Session of 2017, the
 3 House of Representatives concurring, that the Office of Hawaiian
 4 Affairs is requested to convene a group of Hawaiian leaders,
 5 legal scholars, and Hawaiian community members to review whether
 6 the manner of selecting and seating OHA trustees could be
 7 improved upon through an appointment process rather than by
 8 election, consider the appropriate appointing authority, and
 9 consider how to develop a list of the best qualified potential
 10 trustees for submittal to the appointing authority; and

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 12 BE IT FURTHER RESOLVED that the Office of Hawaiian Affairs
 13 report to the legislature no later than twenty days prior to the
 14 convening of the Regular Session of 2018 on findings and
 15 recommendations, including any proposed legislation; and

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 17 BE IT FURTHER RESOLVED that certified copies of this
 18 Concurrent Resolution be transmitted to the Chairperson of the
 19 Board of Trustees of the Office of Hawaiian Affairs and the
 20 Chief Executive Officer of the Office of Hawaiian Affairs.

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OFFERED BY: _____

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 Breene Hunt
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