Nos. 06-16280 and 06-16568

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN R. WALSH, et al.,

Plaintiffs-Appellees,

v.

CITY AND COUNTY OF HONOLULU, a Hawaii municipal corporation,

Defendants,

and

MARK J. BENNETT, Attorney General of the State of Hawaii, in his official capacity, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the District of Hawaii

---

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE URGING AFFIRMANCE AND SUPPORTING PLAINTIFFS/APPELLEES

William R. Maurer, WSBA No. 25451
Michael E. Bindas, WSBA No. 31590
INSTITUTE FOR JUSTICE
Washington Chapter
811 First Avenue, Suite 625
Seattle, Washington 98104
Telephone: (206) 341-9300

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Institute for Justice is a nonprofit, 501(c)(3) organization incorporated under the laws of Washington, D.C. It has no parent corporation and no publicly held corporation owns stock in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. STATEMENT OF AMICUS IDENTITY, INTEREST, AND AUTHORITY

The Institute for Justice is a nonprofit, public interest legal center committed to defending and strengthening the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of its economic liberty mission, the Institute represents hardworking men and women throughout the country in challenging laws that interfere with their right to provide for themselves and their families through honest enterprise. For example, the Institute successfully represented Virginia and California vintners in challenging protectionist laws that prohibited the direct interstate shipment of wine to consumers, *Granholm v. Heald*, 544 U.S. 460 (2005), and Tennessee casket sellers in challenging similarly protectionist regulations that prohibited anyone but licensed funeral directors from selling caskets, *Craigmiles v. Giles*, 312 F.3d 220 (2002).

Like the regulatory schemes at issue in *Granholm* and *Craigmiles*, Hawaii's law prohibiting non-residents from even *seeking* certain jobs in the State is sheer protectionism, a governmental attempt to prevent mainlanders from pursuing a livelihood in the Aloha State. As such, the law is of serious concern to the Institute, which works tirelessly to vindicate the right of *all* Americans to earn an honest living.

Because the State Defendants-Appellants ("Appellants") and Municipal Defendants have refused consent to the filing of this brief, the Institute is accompanying the brief with a motion for leave to file pursuant to Fed. R. App. P. 29(b).

II. FACTUAL SUMMARY

It is Civics 101 that ours is a Union of several States and that the residents of one State must be accorded certain privileges and immunities in all others. Contrary to this fundamental precept, the State of Hawaii denies to all Americans save Hawaii residents one of the most fundamental privileges we as Americans (indeed, as persons) possess: the right to pursue one's chosen profession. By statutory decree, Hawaii prohibits every fellow American residing in any sister State from even *seeking* employment with state or county government:

> All persons seeking employment with the government of the State or in the service of any county shall be . . . residents of the State at the time of their application for employment . . . .

Haw. Rev. Stat. § 78-1(c).

In fact, the law defines "resident" so restrictively that, to seek a position, one must (1) be physically present in Hawaii, (2) establish domicile in Hawaii, *and* (3) prove an intent to permanently remain in Hawaii:

> "Resident" means a person who is physically present in the State at the time the person claims to have established

> the person's domicile in the State and shows the person's intent to make Hawaii the person's permanent residence.

Id.

The effect of this parochial and protectionist scheme is to render the ironically named Aloha State off-limits to would-be civil servants from the other forty-nine states in the Union. To even *compete* for employment, these hardworking Americans must be willing (and financially able) to quit their current jobs, leave their homes, and relocate their families, with no guarantee that they will have a job—and, thus, a means to support themselves—at the end of the day.

III. ARGUMENT

One of the foremost principles that has sustained us as a Union, rather than a mere league of States, is that there are certain fundamental rights to which we, as Americans, are all entitled—rights enjoyed "by the citizens of each state, in every other state." *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823). Through a law that codifies everything our Framers intended to prevent when they adopted the Privileges and Immunities Clause of Article IV, section 2, Hawaii has trampled that principle, along with the fundamental right of *every* American, Hawaii resident or not, to pursue her chosen livelihood.

A. The Purpose Of The Privileges And Immunities Clause Is To Prohibit Discrimination By One State Against Residents Of The Several States

The very purpose of the Privileges and Immunities Clause is to prevent the kind of discrimination against, and barriers to, non-residents that Hawaii has erected in its law limiting the *pursuit* of government employment to Hawaii residents. Such discrimination was well known to the Framers and is what motivated them to adopt the Privileges and Immunities Clause.

"During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread," and such "discriminations . . . were by no means eradicated during the short life of the Confederation." *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975). At the Constitutional Convention, James Madison decried the problem of States discriminating against residents of their sister States and therefore insisted that the Constitution provide robust protection of citizens' privileges in interstate transactions. The new charter, he explained, must prevent the kind of "trespasses of the States on each other" whereby States "give a preference to their own citizens in cases where the Citizens (of other States) are entitled to equality of privileges." 1 M. Farrand, *Records of the Federal Convention* 317 (1911). He and the other Framers recognized that if the new Nation was to thrive and prosper, such "trespasses" must end.

It was out of this concern that the Privileges and Immunities Clause was born. Its "primary purpose," the Supreme Court has emphasized, "was to help fuse

into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). It did so by "plac[ing] the citizens of each State upon the same footing with citizens of other States"—"reliev[ing] them from the disabilities of alienage in other States" and "inhibit[ing] discriminating legislation against them by other States." *Paul v. Virginia*, 75 U.S. 168, 180 (1868), *overruled on other grounds by United States v. Se. Underwriters Ass'n*, 322 U.S. 533 (1944).

So critical to the success of the Republic was the Privileges and Immunities Clause that Alexander Hamilton, in urging ratification, called it "the basis of the Union"—a guarantee that "equality of privileges and immunities" would remain "inviolable" for citizens *of all* States, *in all* States. *The Federalist No. 80* (Alexander Hamilton).

> Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

Paul, 75 U.S. at 180.

Thus, the Privileges and Immunities Clause "was always understood as having but one design and meaning, viz., to secure to the citizens of every State, within every other, the privileges and immunities . . . accorded in each to its own citizens. It was intended to guard against a State discriminating in favor of its own

citizens." *Lemmon v. People*, 20 N.Y. 562, 626-27 (N.Y. 1860). "[N]o provision in the Constitution has tended so strongly to constitute the citizens of the United States one people," *Paul*, 75 U.S. at 180, and the Clause has therefore rightly been called the "the palladium of equal fundamental civil rights for all citizens." Cong. Globe, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence).

B. The Right To Pursue A Livelihood Is One Of The Most Fundamental Rights Protected By The Privileges And Immunities Clause

The "norm of comity" that the Privileges and Immunities Clause secures among the States, *Austin*, 420 U.S. at 660, applies to all interstate transactions—including the pursuit of a livelihood. This fact has been recognized since the earliest days of our Republic.

In *Corfield v. Coryell*, which the Supreme Court has called "the first, and long the leading, explication of the Clause," *Austin*, 420 U.S. at 661, Justice Bushrod Washington made clear that the pursuit of a livelihood is a "privilege" with respect to which a State may not discriminate against non-residents. Sitting as Circuit Justice, Justice Washington "deemed the fundamental privileges and immunities protected by the Clause to be essentially coextensive with those calculated to achieve the purpose of forming a more perfect Union." *Id.* Although he did not enumerate every such privilege and immunity (doing so would have been "more tedious than difficult," *Corfield*, 6 F. Cas. at 551), he did specify some, including:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of . . . *professional pursuits* . . . .

Id. at 552 (emphasis added). As Justice Washington explained, the Constitution's guarantee of "the enjoyment of" this right "by the citizens of *each* state, *in every other* state, was manifestly calculated . . . 'to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.'" *Id.* (emphasis added; quoting Articles of Confederation, art. IV (1777)).[1]

The Court has time and again affirmed *Corfield's* teaching that the Privileges and Immunities Clause protects every American's right to pursue her chosen profession free from the kind of provincial discrimination found in Hawaii's residents-only policy. While the Court has used various terms in describing the privilege—for example, to "practice [an] occupation," *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978), "pursue a common calling," *id.*, or "pursu[e] . . . ordinary livelihoods," *Toomer*, 334 U.S. at 408 (Frankfurter, J., concurring) — the underlying principle has remained unchanged:

> [A] nonresident's right to pursue a livelihood in a State other than his own . . . is protected by the Privileges and Immunities Clause.

---

[1] Appellants will likely argue that Hawaii has not violated the right recognized by Justice Washington because, technically, non-residents are still free to "pass through . . . or . . . reside in" Hawaii. Even by that hyper-technical reading, however, Hawaii most certainly has violated the right, because non-residents are not free to pass through "for purposes of . . . professional pursuits." Rather, they *must become residents* to pursue employment with the government.

Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 386 (1978).

To truly appreciate the inviolability of this right in the Framers' eyes, it is important to recall the principles for which many of them had, a few years earlier, "pledge[d] . . .[their] Lives, . . . Fortunes and . . . sacred Honor." The Declaration of Independence para. 5 (U.S. 1776). The Supreme Court has expressly linked the Privileges and Immunities Clause with the principles enshrined in the Declaration of Independence, explaining that "[i]t was undoubtedly the object of the clause . . . to place the citizens of each State upon the same footing with citizens of other States," to "insure[] to them . . . the same freedom possessed by the citizens of those States . . . *in the pursuit of happiness*." *Paul*, 75 U.S. at 180 (emphasis added); *see also Hicklin*, 437 U.S. at 524 (same). Because "[t]he right to follow any of the common occupations of life is an inalienable right[,] . . . formulated as such under the phrase 'pursuit of happiness,'" *Butchers' Union Slaughter-house & Live-Stock Landing Co. v. Crescent City Live-Stock & Slaughter-house Co.*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring), it is safe to say that its "denial . . . by any of the States would have been unthinkable to the revolutionary theoreticians," *Salla v. County of Monroe*, 423 N.Y.S.2d 878, 881, 399 N.E.2d 909, 912 (N.Y. 1979).[2]

[2] In this regard, it is also important to recall that, as a condition to its "admi[ssion] into the Union on an equal footing with the other States," Hawaii was required to

C. The Right to Pursue A Livelihood Includes Pursuit Of *Public* Employment

Appellants' primary argument on the Privileges and Immunities issue—that there is no fundamental right to public employment—is misdirected. (*See* Appellants' Opening Br. at 31 ("'[D]irect public employment is not a privilege or fundamental right protected by the Privileges and Immunities Clause of Article Four.'" (*quoting Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265, 270 (3rd Cir. 1994))); *cf. id.* at 37 ("[T]here is no fundamental right to public employment.").) This case is not about whether there is a right—fundamental or otherwise—*to* public employment.

Rather, this case asks whether one State may discriminate against the residents of its forty-nine sister States when it comes to the *pursuit* of—that is, competition for—employment (employment that happens to be public). This is not splitting hairs; to the contrary, it is a critical distinction.[3] The Declaration, after all, does not recognize a "self-evident" and "unalienable Right[]" to *happiness*—it

---

maintain consistency with "the principles of the Declaration of Independence." Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959). This includes an obligation to treat residents of other States "on an equal footing" with its own residents.

[3] One not lost on the district court in this case. (*E.g.*, ER/CR 65 at 25 ("[T]he denial of the opportunity to *apply* for public employment . . . affects the opportunity to pursue a necessity of life, especially for those who are trained for work performed primarily by the government." (emphasis added; preliminary injunction order)).)

recognizes a right only to the "*pursuit* of Happiness." The Declaration of Independence para. 2 (U.S. 1776). In that light, there is one thing the Supreme Court has been clear on in its Privileges and Immunities jurisprudence: that a State may not bar residents of sister States from competing with its own residents in the pursuit of a livelihood.

> [I]t is fair to summarize the decisions which have applied Art. IV, § 2, by saying that they bar a State from penalizing the citizens of other States . . . by discriminating against citizens of other States in the pursuit of ordinary livelihoods *in competition with* local citizens.

Toomer, 334 U.S. at 408 (Frankfurter, J., concurring) (emphasis added); *see also Grace v. Detroit*, 760 F. Supp. 646, 650 (E.D. Mich. 1991) ("[T]he right to *compete* for government employment with city residents . . . is a vital benefit and privilege." (emphasis added)). *Cf. Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1988) (recognizing, for due process purposes, the "constitutional right . . . to *pursue* an occupation" (emphasis added)).

While it is true the Supreme Court has not yet addressed whether the Privileges and Immunities Clause bars State discrimination against non-residents pursuing specifically *public* employment, that fact is unremarkable. It reflects nothing more than that such a case has not yet arisen. Defendants, however, take liberties with this fact, claiming "Supreme Court precedent supports the application of the privileges and immunities clause *only to private* employment." (Appellants'

Opening Br. at 35 (first emphasis added); *see also id.* at 30 ("*[P]ublic* employment . . . is not within the scope of Supreme Court precedent defining the boundaries of the privileges and immunities clause.").)

Supreme Court precedent does not limit protection under the Privileges and Immunities Clause to the pursuit of private employment alone. Rather, the Court has held—without qualifying the nature of the employment or employer—that "a nonresident's right to pursue a livelihood in a State other than his own . . . is protected by the Privileges and Immunities Clause." *Baldwin*, 436 U.S. at 386. Again without qualification, the Court has emphasized "the limitations the Clause places on a State's power to bias employment opportunities in favor of its own residents." *Hicklin*, 437 U.S. at 525. And, on the occasion it came closest to addressing the pursuit of specifically public employment, the Court clearly suggested that pursuing work for the government does nothing to undermine one's protections under the Privileges and Immunities Clause. *See United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208, 221 (1984) ("A determination of whether a privilege is 'fundamental' for purposes of that Clause *does not depend on* whether the employees of private contractors and subcontractors engaged in public works projects can or cannot be said to be '*working for the city*.'" (emphasis added)).

Moreover, in other contexts, such as due process, the Supreme Court has looked askance at regulations that bar certain groups of persons from pursuing specifically public employment. As the Court has emphasized, "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury.'" *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 574 (1972) (alteration in original; internal quotation marks and citation omitted). Thus, "in regulating eligibility" for government employment, a State "cannot foreclose a range of opportunities" for reasons that contravene express constitutional protections. *See id.* (internal quotation marks and citation omitted); *cf. Schware v. Bd. of Bar Exam'rs of State of N.M.*, 353 U.S. 232, 238 (1972). As the Court has emphasized:

> It is undoubtedly the right of every citizen of the United States to follow *any* lawful calling, business, or profession he may choose . . . . This right may in many respects be considered as a distinguishing feature of our republican institutions. Here *all* vocations are open to every one on like conditions. *All* may be pursued as sources of livelihood . . . .

Dent v. West Virginia, 129 U.S. 114, 121 (1889) (emphasis added).

It is also important to recall just *why* the Supreme Court has emphasized the inviolability of the right to pursue one's chosen livelihood: because "the right to work for a living in the common occupations of the community is of the *very essence of . . . personal freedom and opportunity*." *Truax v. Raich*, 239 U.S. 33, 41

(1915) (emphasis added). The Montana Supreme Court has made this point convincingly:

> [T]he opportunity to pursue employment is, nonetheless, necessary to enjoy the right to pursue life's basic necessities. As a practical matter, employment serves not only to provide income for the most basic of life's necessities, such as food, clothing, and shelter for the worker and the worker's family, but for many, if not most, employment also provides their only means to secure other essentials of modern life, including health and medical insurance, retirement, and day care. We conclude that without the right to the opportunity to pursue employment, the right to pursue life's basic necessities would have little meaning, because it is primarily through work and employment that one exercises and enjoys this latter fundamental constitutional right.

Wadsworth v. State, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996) (citations omitted).

Work is no less the "essence of . . . personal freedom and opportunity" for persons who desire to pursue public service. *Truax*, 239 U.S. at 41. In fact, the Supreme Court has recognized that a fair opportunity to apply for "civil service employment, with its attendant job security, decent pay, and good benefits," is indeed "substantial." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 908 (1986).

D. Hawaii's Residents-Only Law Violates Appellees' Privileges And Immunities Clause Protections

Hawaii's residents-only policy governing the pursuit of public employment is inimical to the purpose, history, and text of the Privileges and Immunities Clause. It reflects the same kind of parochialism and protectionism that existed among the Colonies and States of the Confederation, and it is the very sort of "trespass" by the States that Madison insisted must end under the new Constitution. 1 M. Farrand, *Records of the Federal Convention* 317 (1911).

1. The Parochial And Discriminatory Purpose of the Residents-Only Law Is Constitutionally Impermissible

Hawaii's residents-only law cannot withstand scrutiny because its very purpose—to inhibit non-residents from migrating to pursue a livelihood in the State—is constitutionally impermissible. While the Privileges and Immunities Clause is not an *absolute* protection, *see Toomer*, 334 U.S. at 396, a State policy that discriminates against non-residents will only survive if the State can prove, among other things, that "there is a substantial reason for the difference in treatment" between residents and non-residents. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 284 (1985).[4] Inhibiting non-residents' exercise of a right protected under the Privileges and Immunities Clause is not "substantial reason." *See Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (recognizing that "the purpose of inhibiting migration by needy persons into the State is constitutionally

[4] The State must also prove that "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284.

impermissible" under, among other things, the Privileges and Immunities Clause), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *see also Saenz v. Roe*, 526 U.S. 489, 506 (1999) (holding, under the Privileges or Immunities Clause of the Fourteenth Amendment, that "a purpose to deter welfare applicants from migrating to California . . . would be unequivocally impermissible"); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263-64 (1974) (holding, under the Equal Protection Clause, that "the purpose of . . . inhibit[ing] the immigration of indigents generally . . . is constitutionally impermissible").[5]

As the district court made clear in this case, Hawaii's residents-only law was indeed adopted to inhibit the exercise of a protected privilege—pursuit of a livelihood—by non-residents. That pernicious purpose is evinced by the law's legislative history, a larger historical pattern of parochialism in similar laws, and admission by the State itself.

The law owes its origin to "Governor Ariyoshi['s] request[] that [a] pre-employment residency requirement be introduced as part of his 'Legislative Package for Growth Management.'" (ER/CR 65 at 23 (preliminary injunction order).) "The standing committee reports on the . . . bill . . . noted that the

---

[5] Even under the rational basis standard, which Appellants claim governs this case and which the district court applied, "classification based solely on residence" is "impermissible." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985); *see also Williams v. Vermont*, 472 U.S. 14, 23 (1985) ("A State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation.").

purpose[] of the pre-employment residency requirement was to *encourage the hiring of local residents, control growth of the population, and protect limited resources by not encouraging in-migration.*" (ER/CR 65 at 23 (emphasis added; preliminary injunction order); *see also* ER/CR 153 at 13 ("The admitted purpose of the pre-employment residency requirement was to encourage the hiring of local residents, control growth of the population, and protect limited resources by not encouraging in-migration." (amended summary judgment order)).)

Moreover, the pre-employment residence requirement is only the latest attempt in a string of previously frustrated efforts. A three-year durational residency requirement had earlier been held unconstitutional. *See York v. State*, 53 Haw. 557, 498 P.2d 644 (1972). So had a one-year durational requirement, the "*admitted* . . . purpose of [which] was to achieve [the State's] goal of controlling growth by 'keeping people out of Hawaii.'" (ER/CR 65 at 22 (preliminary injunction order) (emphasis added; quoting *Nehring v. Ariyoshi*, 443 F. Supp. 228, 238 (D. Haw. 1977)).) In this light, the district court here explained that it

> cannot ignore the original and continuing impermissible purpose of the statute—to deter in-migration by controlling growth first through a three-year durational residency requirement, then through a one-year durational requirement, and finally through a pre-employment residency requirement for public employment.

(ER/CR 65 at 25 (preliminary injunction order).)

Were that not enough, in defending the current law in an amicus brief filed with the United States Supreme Court, the State argued:

> [M]igrant job-seekers pose problems for local residents in . . . Hawaii . . . . Over-population may ultimately mean the demise of Hawaii's visitor industry . . . . Consequently, the Legislature of the State of Hawaii . . . has . . . enacted restrictions on public employment requiring Hawaii residency for the vast majority of public jobs.

Br. of State of Hawaii as Amicus Curiae, *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (No. 77-324), 1978 WL 206744, at *3.

From the law's legislative history, its place in a long line of similarly discriminatory efforts, and the concessions of the State, it cannot be seriously questioned that the very purpose of Hawaii's residents-only law is to inhibit non-residents from pursuing a livelihood in the Aloha State. That purpose at is at loggerheads with the Privilege and Immunities Clause's "undoubted[] . . . object of . . . plac[ing] the citizens of each State upon the same footing with citizens of other States" and "insur[ing] to them . . . the same freedom possessed by the citizens of those States . . . in the pursuit of happiness." *Paul*, 75 U.S. at 180. As such, it cannot constitute "substantial reason for the difference in treatment" between residents and non-residents. *Piper*, 470 U.S. at 284.

2. Appellants' Invitation To Speculate As To Other "Conceivable" Purposes Motivating The Residents-Only Law Must Be Rejected

Despite the obvious, impermissible purpose behind Hawaii's residents-only law, Appellants invite this Court to *speculate* as to other purposes that *could have* motivated the law and to sustain the law's constitutionality if any such purpose is *conceivable.*[6] (*E.g*, Appellants' Opening Br. at 46 ("It is the *Plaintiffs* that bear the burden to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record[.]") (internal quotations marks and citation omitted; alteration in original).) Moreover, Appellants insist that it is "entirely irrelevant" whether there is any factual foundation for such speculation. (*E.g.*, Appellants' Opening Br. at 41 ("Under Supreme Court precedent, it is *entirely irrelevant* whether it is actually true . . . ."); *id.* ("It does not really matter *why* . . . .").)

This Court should reject Appellants' invitation to conjecture, speculation, and purposeful disregard of fact. To survive a Privileges and Immunities Clause challenge, the government may not rely on "any conceivable" justification. Rather, it must show that the justification *actually* exists and, moreover, that the non-residents targeted for discrimination are a "peculiar source" of the problem:

---

[6] Appellants make this argument in discussing Appellees' equal protection claim. Amicus Institute for Justice addresses it in regard to the privileges and immunities claim because Appellants offer no alternative analysis on that claim. Appellants' position, apparently, is that there is no privilege or immunity in play, so no analysis is warranted. In any event, Amicus Institute for Justice addresses the equal protection claim separately, in Section III(E), below.

> [T]he privileges and immunities clause . . . does not preclude discrimination against citizens of other States where there is a "substantial reason" for the difference in treatment. [T]he inquiry in each case must be concerned with whether such reasons *do exist* and whether the degree of discrimination bears a close relation to them. As part of any justification offered for the discriminatory law, nonresidents must somehow be shown to constitute a *peculiar source of the evil* at which the statute is aimed.

Camden, 465 U.S. at 222 (emphasis added; internal quotation marks and citations omitted; second alteration in original).

In this light, this Court may not dismiss "tru[th]" as "entirely irrelevant," as Appellants would have it do. (*See* Appellants' Opening Br. at 41 ("[I]t is *entirely irrelevant* whether it is actually true . . . .".) It may not speculate as to "conceivable" justifications that have no grounding in reality. The *facts* of this case reveal one purpose behind Hawaii's law: to inhibit non-residents from pursuing employment in Hawaii, thereby depriving them of the "freedom possessed by the citizens of [Hawaii] . . . in the pursuit of happiness." *Paul*, 75 U.S. at 180. That is *not* a permissible purpose.[7]

---

[7] Appellants complain that the district court effectively required them "to prove that all possible or hypothetical reasons that might support the statute are proper"—a standard Appellants call "illogical." (Appelants' Opening Br. at 46.) The court did nothing of the sort—it held that Hawaii's *actual* purpose was constitutionally impermissible and that "newly alleged legitimate interests" are "not rationally related to a pre-employment residency requirement." (ER/CR 65 at 26 (preliminary injunction order); *see also* ER/CR 153 at 15-16 (amended summary judgment order).) That said, amicus Institute for Justice *agrees* that it is "illogical" to require a litigant to prove the propriety of—*or to negate*—"all

E. This Court Should Refuse To Credit Speculative Justifications In Assessing Appellees' Equal Protection Claim

Related to whether Hawaii's discriminatory purpose constitutes "substantial reason" under the Privileges and Immunities Clause is whether it constitutes a "legitimate" purpose under the rational basis test applied to Appellees' Equal Protection Clause claim.[8] Appellants assert that in assessing the residents-only law's consistency with the Equal Protection Clause, this Court may consider "any reasonably conceivable" rationale advanced by the government, "whether or not [it] has a foundation in the record[.]" (Appellants' Opening Br. at 46 (internal quotations marks and citation omitted; first alteration in original).) But it is not that simple.

While the Supreme Court has been admittedly inconsistent in addressing just how far a court may go in crediting justifications proffered by the government under the rational basis test, it has held, quite clearly, that a court

> need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that

---

possible or hypothetical reasons that might support [a] statute." It is ironic, then, that Appellants are urging this Court to apply such a standard to Appellees. (*See* Appellants' Opening Br. at 46 ("It is the *Plaintiffs* that bear the burden to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record[.]") (internal quotations marks and citation omitted; alteration in original).)

[8] Amicus Institute for Justice does not concede that the rational basis test was the appropriate level of scrutiny for Appellees' equal protection claim.

> the asserted purpose could not have been a goal of the legislation.

Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975); *see also id.* (declining to consider justification offered by the government because it was "apparent both from the statutory scheme itself and from the legislative history" that it was not the actual purpose behind the statute). This Court has followed the Supreme Court's guidance: "We are not bound by the purposes counsel advances when it is clear that they were not the actual purposes of the governmental policy." *Christian Science Reading Room v. City and County of San Francisco*, 784 F.2d 1010, 1013 (9th Cir. 1986).

Accordingly, controlling precedent requires this Court to consider the constitutionality of Hawaii's residents-only law in the light of its *actual* purpose—to inhibit non-residents from pursuing a livelihood in Hawaii—and not in light of *post hoc* justifications offered by the State. In fact, to do otherwise would be anomalous. The Supreme Court has held that "classification based solely on residence" is "impermissible." *Metro. Life Ins.*, 470 U.S. at 883; *see also Maricopa County*, 415 U.S. at 263-64 (holding, under the Equal Protection Clause, that "the purpose of . . . inhibit[ing] the immigration of indigents generally . . . is constitutionally impermissible"); *Williams*, 472 U.S. at 23 ("A State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation."). What is constitutionally "impermissible" cannot

magically become "permissible" by virtue of some after-the-fact justification concocted by the government.

IV. CONCLUSION

Hawaii's residents-only policy is inimical to the Privileges and Immunities Clause and the principles it enshrines. By "discriminating against citizens of other States in the pursuit of ordinary livelihoods in competition with local citizens," *Toomer*, 334 U.S. at 408 (Frankfurter, J., concurring), Hawaii's law "conflicts with the constitutional purpose of maintaining a Union rather than a mere 'league of States,'" *Zobel v. Williams*, 457 U.S. 55, 73 (1982) (O'Connor, J., concurring) (quoting *Paul*, 75 U.S. at 180). In order to ensure that "equality of privileges and immunities" remains "inviolable" for citizens *of all* States, *in all* States, this Court should affirm the district court's judgment. *The Federalist No. 80.*

RESPECTFULLY submitted this 18th day of December 2006.

INSTITUTE FOR JUSTICE
Washington Chapter

William R. Maurer, WSBA No. 25451
Michael E. Bindas, WSBA No. 31590
811 First Avenue, Suite 625
Seattle, Washington 98104
(206) 341-9300

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBERS 06-16280 AND 06-16568

I certify that:

__1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

- Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

- Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

__2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

- This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

- This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

  - Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

  or is

  - Monospaced, has 10.5 or fewer characters per inch and contains _____ pages or_____ words or _____ lines of text.

__3. Briefs in Capital Cases

- This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**

  - Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words)

or is

  - Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

_X_4. Amicus Briefs

- Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

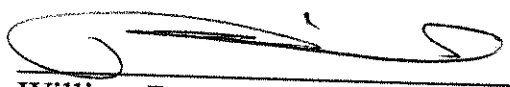
or is

- Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text,

or is

- **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

DECEMBER 20, 2006
Date



William R. Maurer, WSBA No. 25451
Michael E. Bindas, WSBA No. 31590

CERTIFICATE OF SERVICE AND FILING

I certify under Penalty of perjury under the laws of the United States and the State of Washington that on December 20, 2006, I caused: one original and fifteen copies, of the BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE ("Amicus Brief") to be filed by third-party, overnight commercial carrier with the Clerk at the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, CA 94103; and two copies of the Amicus Brief to be served by third-party, overnight commercial carrier on each of the below-listed parties:

Mark J. Bennett
Deirdre Marie-Iha
Charleen M. Aina
Girard D. Lau
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813

Lois K. Perrin
Legal Director
American Civil Liberties Union of Hawaii Foundation
P.O. Box 3410
Honolulu, HI 96801

Gordon Nelson
Deputy Corporation Counsel
City and County of Honolulu
530 S. King Street
Honolulu, HI 96813

DATED this 20th day of December 2006.

Yvonne Maletic