H. WILLIAM BURGESS #833
2299C Round Top Drive
Honolulu, Hawai`i 96822
Telephone: (808) 947-3234
Fax: (808) 947-5822

PATRICK W. HANIFIN #2716
IM HANIFIN PARSONS, LLLC
1001 Bishop Street
Pacific Tower, Suite 2475
Honolulu, Hawai`i 96813
Telephone: (808) 585-0335
Fax: (808) 585-0336

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, EVELYN C. ARAKAKI, EDWARD U. BUGARIN, SANDRA PUANANI BURGESS, PATRICIA A. CARROLL, ROBERT M. CHAPMAN, BRIAN L. CLARKE, MICHAEL Y. GARCIA, ROGER GRANTHAM, TOBY M. KRAVET, JAMES I. KUROIWA, JR., FRANCES M. NICHOLS, DONNA MALIA SCAFF, JACK H. SCAFF, ALLEN H. TESHIMA, THURSTON TWIGG-SMITH, Plaintiffs, v. BENJAMIN J. CAYETANO in his official capacity as GOVERNOR OF THE STATE OF HAWAI`I, NEAL MIYAHIRA in his official capacity as DIRECTOR OF THE DEPARTMENT OF BUDGET AND FINANCE, GLENN OKIMOTO in his official capacity as STATE COMPTROLLER, and DIRECTOR OF THE DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES, GILBERT COLOMA-AGARAN in his official capacity	) CIVIL NO. _____)) PLAINTIFFS' NOTICE OF MOTION) AND MOTION FOR TEMPORARY) RESTRAINING ORDER AND) PRELIMINARY INJUNCTION;)) MEMORANDUM IN SUPPORT OF) MOTION FOR TEMPORARY) RESTRAINING ORDER AND) PRELIMINARY INJUNCTION;)) DECLARATIONS OF PLAINTIFFS;) 1. EARL F. ARAKAKI;) 2. EVELYN C. ARAKAKI;) 3. PATRICIA A. CARROLL;) 4. ROBERT M. CHAPMAN;) 5. BRIAN L. CLARKE;) 6. MICHAEL Y. GARCIA;) 7. ROGER GRANTHAM) (CONTINUED ON NEXT PAGE))) HEARING:) DATE: _____) TIME: _____) JUDGE: _____

as CHAIRMAN OF THE BOARD OF LAND AND NATURAL RESOURCES, JAMES J. NAKATANI, in his official capacity as DIRECTOR OF THE DEPARTMENT OF AGRICULTURE, SEIJI F. NAYA, in his official capacity as DIRECTOR OF THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM, BRIAN MINAAI in his official capacity as DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION,

State Defendants,

HAUNANI APOLIONA, Chairman, and ROWENA AKANA, DONALD B. CATALUNA, LINDA DELA CRUZ, CLAYTON HEE, COLETTE Y.P. MACHADO, CHARLES OTA, OSWALD STENDER, and JOHN D. WAIHE`E, IV in their official capacities as trustees of the Office of Hawaiian Affairs,

OHA Defendants,

RAYNARD C. SOON, Chairman, and WONDA MAE AGPALSA, HENRY CHO, THOMAS P. CONTRADES, ROCKNE C. FREITAS, HERRING K. KALUA, MILTON PA, and JOHN A.H. TOMOSO, in their official capacities as members of the Hawaiian Homes Commission,

HHCA/DHHL Defendants,

THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10,

Defendants.

8. TOBY M. KRAVET;
9. JAMES I. KUROIWA, JR.;
10. FRANCES M. NICHOLS;
11. DONNA MALIA SCAFF;
12. JACK H. SCAFF;
13. ALLEN H. TESHIMA;
14. THURSTON TWIGG-SMITH;
15. SANDRA PUANINI BURGESS

EXHIBITS “A” – “EE”;

CERTIFICATE OF SERVICE

PLAINTIFFS= NOTICE OF MOTION AND MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

To the defendants in the above-entitled action and to their attorney,
EARL I. ANZAI, ESQ. Attorney General, State of Hawaii
425 Queen Street, Honolulu, Hawaii 96813

Please take notice that Plaintiffs will move the court before the Honorable _____ in his or her courtroom in the U.S. District Court, 300 Ala Moana Blvd. Honolulu, Hawaii on the _____ day of _____, 2002 at _____ o=clock ___ m., or as soon thereafter as counsel may be heard, to enter a temporary restraining order and preliminary injunction, without security, restraining defendants as follows:

1. Restraining the HHC/DHHL defendants from issuing any further Homestead leases and from expending or encumbering any further funds from the Hawaiian home lands trust fund;

2. Restraining the State defendants from depositing any further funds into the Hawaiian home lands trust fund;

3. Restraining the OHA defendants from expending or encumbering any part of the accounts or assets presently held in the “Total Fund Equity” referred to in the OHA Financial Report of November 30, 2001 as $337,985,289;

4. Restraining the State defendants, HHC/DHHL defendants and OHA defendants from issuing any further bonds or otherwise borrowing any further money for HHC, DHHL or OHA;

5. Restraining the State defendants from making any further payments to or for HHC, DHHL or OHA.

6. Restraining the OHA defendants and the HHC/DHHL defendants from expending any further public funds for lobbying, advertising or other advocacy of the racially discriminatory goals of OHA and DHHL.

This motion is made pursuant to Rule 65 of the Federal Rules of Civil Procedure to protect plaintiffs and others similarly situated, pending final judgment, from further violation of their constitutional rights as taxpayers, citizens and beneficiaries of the public land trust.

The grounds of this motion are that either:

(1) Plaintiffs will likely prevail on the merits and if preliminary relief is not granted may suffer irreparable harm; or

(2) Serious questions are raised and the balance of hardships tips sharply in plaintiffs' favor.

This motion is supported by the attached memorandum in support and declarations of plaintiffs and exhibits and by the Complaint, pleadings, records and files of this case.

DATED: Honolulu, Hawai`i this 4th day of March, 2002.

_____

H. WILLIAM BURGESS
PATRICK W. HANIFIN
Attorneys for Plaintiffs

TABLE OF CONTENTS

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

PAGE

TABLE OF AUTHORITIES

Cases

Federal Statutes

Federal Regulations

Hawai`i Constitutions

Hawai`i Statutes

Hawai`i Statutes Cont'd

Other Authorities

H. WILLIAM BURGESS #833
2299C Round Top Drive
Honolulu, Hawai`i 96822
Telephone: (808) 947-3234
Fax: (808) 947-5822

PATRICK W. HANIFIN #2716
IM HANIFIN PARSONS, LLLC
1001 Bishop Street
Pacific Tower, Suite 2475
Honolulu, Hawai`i 96813
Telephone: (808) 585-0335
Fax: (808) 585-0336

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, et al., Plaintiffs, v. BENJAMIN J. CAYETANO et al., State Defendants, HAUNANI APOLIONA, et al., OHA Defendants, RAYNARD C. SOON, et al., HHCA/DHHL Defendants, THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10, Defendants.	CIVIL NO. _____ MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

In *Rice v. Cayetano*, 528 U.S. 495 (2000), the U.S. Supreme Court held that the definitions of AHawaiian@ and "native Hawaiian" are racial classifications. The use of those classifications to restrict eligibility to vote in Office of Hawaiian Affairs ("OHA") elections violated the 15th Amendment. (Exhibit A attached to the Declaration of Plaintiff Sandra Puanani Burgess, hereinafter "Dec. SPB")

In *Arakaki v. State*, CV. NO. 514 HG-BMK Order Granting Plaintiffs' Cross Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment, September 19, 2000, the Honorable Helen Gillmor held that the use of those racial classifications to restrict eligibility for election or appointment to the board of trustees of OHA violated the 14th and 15th Amendments. (Ex. B Dec. SPB)

In this case, Plaintiffs seek a declaration that the Hawaiian Homes program and the OHA program, each of whose sole purpose is to provide benefits exclusively to persons defined by those same racial classifications, are invalid because they violate the 14th Amendment and other federal laws. Plaintiffs also seek a permanent injunction against further enforcement of both those programs.

This memorandum will show that Plaintiffs are entitled to a temporary restraining order and preliminary injunction against further implementation of or spending for those two programs pending final judgment, because either:

(1) Plaintiffs will likely prevail on the merits and if preliminary relief is not granted may suffer irreparable harm; or

(2) Serious questions are raised and the balance of hardships tips sharply in Plaintiffs' favor.

PARTIES

Plaintiffs

Plaintiffs are 16 residents, taxpayers and citizens of the State of Hawai`i and of the United States. Included among Plaintiffs are persons of Japanese, English, Filipino, Portuguese, Hawaiian, Irish, Chinese, Scottish, Polish, Jewish, German, Spanish, Okinawan, Dutch, French and other ancestries. See Declarations of Plaintiffs filed herewith (hereinafter "Dec. Pltfs").

Plaintiffs each have a material financial interest in the subject matter of this action as taxpaying citizens of the State of Hawai`i and the United States and as beneficiaries of the public land trust created in 1898 when the public lands of the government of Hawai`i were ceded to the United States with the requirement that all revenues or proceeds, with certain exceptions, Ashall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes@. (Dec. Pltfs)

Defendants

The "HHC/DHHL Defendants" are the chairman, Raynard C. Soon, and members of the Hawaiian Homes Commission ("HHC"). The Department of Hawaiian Home Lands ("DHHL") is a state agency headed by an executive board known as the Hawaiian Homes Commission composed of nine members appointed by the Governor. Island residency requirements apply to eight of the members. At least four of the

members “shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.” The chairperson serves in a full time capacity. The other members serve without pay but receive actual expenses incurred. § 202 Hawaiian Homes Commission Act, 1920 (“HHCA”); § 26-17 H.R.S.

The purpose of the HHCA laws is to benefit “native Hawaiians” (§ 101) defined as “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.” § 201(7).

The DHHL administers the HHCA (§ 26-17 H.R.S.) and controls (§ 204) the “available lands”, now referred to, with certain exceptions, as “Hawaiian home lands”, (about 200,000 acres set aside out of the ceded lands in and after 1921). DHHL is authorized to lease to native Hawaiians the right to the use and occupancy of tracts in the Hawaiian home lands at a rental of $1 a year for a term of 99 years, which may be extended on the condition that the aggregate term shall not be more than 199 years. § 207. These leases are referred to as “Homestead” leases. DHHL is authorized to make loans, §§ 213 – 217, assist lessees, § 219.1, and develop projects § 220.5. As of June 30, 2000, there were 6,927 Homestead leases outstanding covering 42,034 acres; and 116 General leases covering 51,906 acres. DHHL Overview rev. 6/30/00 (Ex. C Dec. SPB.). As of January 31, 2002, there were 7,281 Homestead leases outstanding. (Paragraph 11, Dec. SPB).

The “OHA Defendants” are the chairperson, Haunani Apoliona, and members of the Office of Hawaiian Affairs. The Office of Hawaiian Affairs (AOHA@) is a state agency. '10-3(3) H.R.S. The OHA board of trustees is composed of nine members

elected at large by qualified voters in the state. Prior to the *Rice v. Cayetano,* 528 U.S. 495 decision issued February 23, 2000, only “Hawaiians” were allowed to vote in elections for the OHA board. Island residency requirements apply to five of the members. ' 13D-1 H.R.S. OHA administers programs designed for the benefit of Anative Hawaiians@ defined as

> “any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined in the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal people which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawai`i”

and AHawaiians@ defined 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 Hawai`i.” ' § 10-2 & 10-3 H.R.S.

Throughout this memorandum, Plaintiffs will use the terms “Native Hawaiian”, “native Hawaiian” and “Hawaiian” as they are defined and used in § 10-2 H.R.S. As the Supreme Court noted in *Rice**Error! Bookmark not defined.***, “peoples” in the latter definition is synonymous with “races” in the definition of “Native Hawaiian.” *Rice*, 528 U.S. at 516, citing Hawaii Senate Journal, Conf. Comm. Rep. No. 77, at 999. Thus “Native Hawaiian” and “native Hawaiian” are substantively identical under the OHA laws and the HHCA laws and each is a subset of “Hawaiian” that is

distinguished by having at least 50% “Hawaiian” blood.[1]

The “State Defendants” are the Governor, Benjamin J. Cayetano, and other officials of the State of Hawai`i whose official duties charge them with the responsibility of allocating, remitting and/or transferring revenue or other public funds to the Trustees of OHA to be used by OHA in carrying out its racially discriminatory purposes; and allocating, remitting and/or transferring revenues or other public funds to the Defendant Hawaiian Homes Commissioners to be used by DHHL in carrying out its racially discriminatory purposes.

The United States of America is named as a party because the constitutionality of two acts of Congress affecting the public interest (the HHCA and ' '4 and 5(f) of the Admission Act) are drawn into question. 28 U.S.C. '2403. See also page 26 of this Court=s order of July 12, 2001 in *Barrett v. State of Hawaii*, CV. NO. 00-00645 DAE KSC. (Plaintiff Barrett challenged HHCA but did not name United States as party. Court granted summary judgment against Barrett. “In the absence of the United States as a party to this action, this court is unable to redress Plaintiff’s injury in any meaningful way.” Ex. D, Dec. SPB.)

HHCA was originally a federal statute. It is now a State law incorporated into the State Constitution by reference, Art. XII, §§ 1, 2 & 3. Plaintiffs do not believe that their claims are adverse to the interest of the United States in upholding the Constitution of

[1] *Rice* , 428 U.S. at 499. It should be noted that “Hawaiian” has other meanings. See e.g. *Rice*, 528 U.S. at 499 (describing the Petitioner Rice as “a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term”). “Native Hawaiian” is used in some federal statutes in the one-drop of blood sense in which Hawaiian is defined in § 10-2 H.R.S., e.g. Pub. L. 103-150, 107 Stat. 1510 (1993) (the so-called “Apology Resolution”).

the United States. Two presidents have expressed doubts as to the constitutionality of the express racial classification of Anative Hawaiian@ as used by HHCA and certain other bills. (Statement by President Ronald Reagan upon signing H.J. Res 17 in 1986 (HHCA "employs an express racial classification"…"raises serious equal protection questions." See Ex. E Dec. SPB); and Statement by President George H.W. Bush upon signing S. 566 on November 28, 1990 (Affordable Housing Act defines "native Hawaiian" in a "race-based fashion"… "cannot be derived from the constitutional authority granted to the Congress and the executive branch to benefit native Americans as members of tribes." See Ex. F Dec. SPB); then President Bush expressed similar convictions in S.J. Res. 23 on October 6, 1992; S. 2044 on October 26, 1992; and H.R. 939 on October 28, 1992, Exhibits G-I Dec. SPB.)[2] Plaintiffs therefore believe it is possible that the U.S. may chose not to defend or support the constitutionality of the HHCA laws or the OHA laws or the challenged interpretation of a portion of § 5(f) of the Admission Act.

STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

This court in *Arakaki v. State*, Civ. No. 514 HG-BMK, Order Granting Plaintiffs' Motion for Preliminary Injunctive Relief August 21, 2000 (Ex. J Dec. SPB) said,

> The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). The propriety of preliminary injunctive relief requires consideration of three factors: (1) the likelihood of the Plaintiff's success on the merits; (2) the threat of irreparable harm to the Plaintiff if the injunction is not

[2] The "express racial classification" Presidents Reagan and Bush referred to was in the Hawaiian Homes Commission Act, §201(7), "The term 'native Hawaiian' means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778".

> imposed; and (3) the relative balance of potential hardships to the Plaintiff, Defendant, and the public. State of Alaska v. Native Village of Venitie, 856 F.2d 1384, 1388 (9th Cir. 1988). These three factors have been incorporated into a test under which the moving party may meet its burden by demonstrating either: (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. *American Tunaboat Assoc. v. Brown*, 67 F.3d 1404, (9th Cir. 1995*), Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 1197, 1202 (9th Cir. 1980).

ARGUMENT

I. Both HHCA and OHA rest on racial classifications.

In *Rice v. Cayetano*, 528 U.S. 495, 514-15, the U.S. Supreme Court found the OHA definitions of "Hawaiian" and "native Hawaiian" to be racial classifications. AAncestry can be a proxy for race. It is that proxy here.@ *Rice*, 528 U.S. at 514. AThe State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.@ *Rice*, 528 U.S. at 515. AThe State=s electoral restriction enacts a race-based voting qualification.@ *Rice*, 528 U.S. at 517.

The OHA definition of "native Hawaiian" incorporates and is substantively the same as the HHCA definition.

DHHL and OHA were created and are intended to promote the interests of the racial classes "native Hawaiians" and "Hawaiians," only. Each agency is set up as a trust. If Defendant OHA Trustees or Defendant Hawaiian Homes Commissioners were to divert trust assets to the use of the public, they would breach the trusts. *Ahuna v. DHHL*, 64 Haw. 327, 342-43, 640 P.2d 1161 (1982). DHHL's purpose is expressly and exclusively racial: "the rehabilitation of the Hawaiian race." Haw. Const. Art XII § 2.

OHA's purpose is equally racial: to manage trusts for the benefit of racial classes of "native Hawaiians" and "Hawaiians." Art. XII §§ 5, 6.

II. All racial classifications by any government are presumptively invalid. The burden of justification is on the State.

All racial classifications by any governmental actor are presumptively invalid and may be approved only if they pass strict scrutiny. *Shaw v. Reno*, 509 U.S. 630, 641 et. seq., 113 S.Ct. 2816, 2823-24, et. seq., (1993); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469, (1989).

AA racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.@ *Personal Adm=r of Massachusetts et. al. v. Feeney*, 442 U.S. 256 , 272, 99 S.Ct. 2282, 2292 (1979).

"Once a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972). See also *Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2475, 2490 (1995) (to satisfy strict scrutiny, State must demonstrate that its legislation is narrowly tailored to achieve a compelling interest); *University of California Regents v. Bakke*, 438 U.S. 265, 305, 98 S.Ct. 2733, 2756 (1978) (AIn order to justify the use of a suspect classification, a state must show its purpose and interest is both constitutionally permissible...and its use... necessary...@). State laws which draw racial classifications must be measured by a strict equal protection test: they are presumed unconstitutional until the state can

demonstrate that such laws are narrowly tailored to promote a demonstrated compelling interest. *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331 (1969).

A state interest is "compelling" only when it rests on a "strong basis in evidence" that government action favoring one race over another is "necessary." *Croson*, 488 U.S. at 493, 500; *Adarand ,* 515 U.S. at 226, 228, 236.

"Racial preference can never constitute a compelling state interest." *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (Powell, J. concurring). The goal of promoting the benefit of favored racial groups is not only not compelling, it is not even legitimate. To survive strict scrutiny, a race-based program "must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." *Loving v. Virginia*, 388 U.S. 1 (1967). In *Loving*, the state tried to justify its laws against interracial marriage as advancing the goals of "racial integrity" and "racial pride." The Supreme Court rejected these purposes as "repugnant to the Fourteenth Amendment," *id.* at 11, n.11, and drove the point home in *Rice*: "Distinctions between citizens solely because of their ancestry," such as the distinction between Hawaiians and their fellow citizens, "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice,* at 528 U.S. at 517, quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

A governmental program is "narrowly tailored" only when the government can meet the burden of showing it has no other choice. Notably, a program that takes race into account must be "limited such that it 'will not last longer than the discriminatory

effects it is designed to eliminate." *Id*., quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980). A program that is designed to be perpetual cannot be narrowly tailored. A program that is grounded on a claim that one racial group is owed something special because of its ancestry is not narrowly tailored. "[U]nder the Constitution, there can be no such thing as either a creditor or a debtor race." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring). A state may impose racial classifications only as a "last resort". *Croson*, 488 U.S. at 507 (Kennedy, J.) It must show that it has attempted or considered alternative, race-neutral means but has determined that those means cannot succeed. *Croson*, 488 U.S. at 519. The chosen racial classification must minimize any encroachment on the constitutional rights of other citizens. *Croson,* 488 U.S. at 510-11. The government must maintain "the most exact connection between the justification and classification." *Adarand*, 515 U.S. at 236.

III. The State has not shown, because it cannot show, it has a compelling interest in adopting or continuing the two programs which favor one race over others.

The only compelling interest the U.S. Supreme Court has found sufficient to justify race-based laws is the need to remedy present discrimination or the present effects of past discrimination. *Adarand*, 515 U.S. at 227; *Richmond v. J.A. Croson Co*., 488 U.S. 469, 496-97, 109 S.Ct. 706, 722-24 (1989).

Nothing in the record in *Rice v. Cayetano* or in the record in *Arakaki v. State* demonstrates the existence of past or present discrimination so as to justify race-conscious remedies here. Nor did this court in its opinion at 963 F.Supp. 1547 or the Ninth Circuit Court, 146 F.3d 1075, in *Rice v. Cayetano* purport to rest their decisions

on that ground. This absence is sufficient in itself to demonstrate that these two programs cannot survive strict scrutiny.

The political and economic power of Hawaiians increased dramatically once Hawaii became a Territory. University of Hawaii Political Science Professor Robert Stauffer writes:

> It was a marvelous time to be Hawaiian. They flexed their muscle in the first territorial elections in 1900, electing their own third-party candidates over the haole Democrats and Republicans...The governor-controlled bureaucracy also opened up to Hawaiians once they began to vote Republican.
>
> By the '20s and '30s, Hawaiians had gained a position of political power, office and influence never before - nor since - held by a native people in the United States. Hawaiians were local judges, attorneys, board and commission members, and nearly all of the civil service. With 70 percent of the electorate--but denied the vote under federal law--the Japanese found themselves utterly shut out. Even by the late 1930s, they comprised only just over 1 percent of the civil service.
>
> This was "democracy" in a classic sense: the spoils going to the electoral victors.
>
> ***
>
> Higher-paying professions were often barred to the disenfranchised Asian Americans. Haoles or Hawaiians got these. The lower ethnic classes (Chinese, Japanese and later the Filipinos) dominated the lower-paying professions. But even here an ethnic-wage system prevailed. Doing the same work, a Hawaiian got paid more per hour than a Portuguese, a Chinese, a Japanese or a Filipino--and each of them, in turn, got paid more than the ethnic group below them.

Robert Stauffer, "Real Politics", Honolulu Weekly, October 19, 1994 at page 4.

IV. Nor does the Indian analogy apply.

A. Under the Constitution only members of federally recognized Indian tribes may be singled out. There is no tribe in Hawai`i to be regulated by Congress' power over Indian tribes.

Plaintiffs anticipate that Defendants will rely on *Morton v. Mancari*, 417 U.S. 535

(1974) to argue that native Hawaiians are the legal equivalent of Indians or an Indian tribe and that the *Mancari* case, therefore, "saves" these programs. They made and lost similar arguments in *Rice v. Cayetano* and *Arakaki v. State*.

In *Rice v. Cayetano*, *supra*, the State, OHA and the then Solicitor General each made what the Supreme Court called the "*Mancari* argument", i.e., that under *Morton v. Mancari*, legislation may single out any "indigenous people" including Indians and Hawaiians, for special treatment, whether or not they are members of organized tribes. The State's brief, for example, argued at page 31,

> "That unique legal or political status - not recognition of 'tribal' status, under the latest executive transmutation of what that means - is the touchstone for application of *Mancari* when, as here, Congress is constitutionally empowered to treat an indigenous group as such." (Ex. K Dec. SPB)

OHA's *amicus curiae* brief likewise said at page 23,

> The Applicability of *Mancari* Does Not Turn On Whether Native Hawaiians Are Organized Into Tribes. (Ex. L Dec. SPB)

The then Solicitor General's *amicus curiae* brief joined in at page 22,

> This Court's decisions subsequent to *Mancari* confirm that a federally recognized tribal government is not a predicate for legislation on behalf of indigenous people. (Ex. M Dec. SPB)

(The District Court in *Rice* had said, "the fact that Native Hawaiians are not at this time recognized tribes is not controlling for purposes of determining the proper standard of review." *Rice v. Cayetano* 963 F. Supp. 1547, 1553 (D. Haw. 1997) rev'd. 528 U.S. 495.

The U.S. Supreme Court rejected these arguments saying, at *Rice*, 528 U.S. at 518,

> **If Hawaii's restriction were to be sustained under *Mancari* we would be required to** accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary **to conclude that Congress**, in reciting [in the Hawaii Admission Act] the purposes for the transfer of lands to the State--and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993--**has determined that native Hawaiians have a status like that of Indians in organized tribes**, and that it may, and has, delegated to the state a broad authority to preserve that status. (Emphasis added.)

Thus, the State, OHA, the then Solicitor General and the trial court in *Rice* argued that, under *Mancari*, it does not matter that native Hawaiians are not a tribe. The Supreme Court said yes it does. **If Hawaii's restriction were to be sustained under *Mancari* we would be required … to conclude that Congress … has determined that native Hawaiians have a status like that of Indians in organized tribes.** *Rice,* 528 U.S. at 518.

As the State of Hawai`i acknowledged before the U.S. Supreme Court, the tribal concept has no place in the context of Hawaiian history. *Rice v. Cayetano*, Respondent's Brief in Opposition to Petition for Writ of Certiorari (Dec. 29, 1998), p. 18 (Ex. N Dec. SPB). Jon Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE LAW & POLICY REVIEW 95 (1998) ("Native Hawaiians have never organized themselves into tribal units"). (Ex. O Dec. SPB)

Concurring in *Rice*, Justice Breyer noted that the State's definition of "Hawaiian" in § 10-2 H.R.S. is "not analogous to the membership in an Indian tribe" and to define "membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members . . . goes well beyond any reasonable limit." *Rice*, 528 U.S. at 526, 527.

The nineteenth century Kingdom of Hawai`i was not a tribe. Membership in tribes is determined by descent from a historically existing tribe. See 25 C.F.R. §§ 83.7(b)(1) and 83(e). By contrast, the Kingdom of Hawai`i followed the Anglo-American common law rule of "*jus soli*": everyone born in the country and subject to its jurisdiction was a subject. GORDON, MAILMAN & YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, § 92.04[3] (1999); *Wong Foong v. United States*, 69 F.2d 681 (9th Cir. 1934); I Statute Laws of Kamehameha III, § III, p.76, (1846). Immigrants could become naturalized subjects or "denizens" with political rights. E.g. I Statute Laws of Kamehameha III, § 10 at 78, § XIV; 1859 Civil Code § 432; *Aliens and Denizens*, 5 Haw. 167 (1884). When Hawai`i was an independent nation in the international system it was, like the United States, a multi-racial nation defined by a common citizenship. No ethnic group had any special legal status placing its members above their fellow citizens. See, 1864 Constitution of the Kingdom Art. 62 reprinted in R. LYDECKER, ROSTER: LEGISLATURES OF HAWAI`I 1841-1918 (1918) at 95 (qualifications for voting included gender, property and literacy, but not race or ancestry).

The annexation of Hawai`i did not incorporate into the United States a tribe with a pre-existing membership restriction based on ancestry. Under the terms of the Annexation Treaty, and Annexation Resolution, the independent multi-racial country of Hawai`i merged into the United States, transferring all its sovereignty and property to the federal government. Treaty of Annexation (1897), reprinted in L. THURSTON, FUNDAMENTAL LAWS OF HAWAI`I 243 (1904); Annexation Resolution, (also known as the Newlands Resolution) Resolution No. 55 of July 7, 1898, 30 Stat. 750, (Ex. P Dec.

SPB). This process left no "quasi-sovereign" behind. The Organic Act made all citizens of Hawai`i American citizens. Act of April 30, 1900, c 339, 31 Stat. 141 (2 Supp. R.S. 1141), § 4. As American citizens, their right of sovereign self-government is exercised by participating in the sovereign federal and state governments.

In *Rice*, the Supreme Court explained how Indian tribes differ from state agencies such as OHA and DHHL: They are separate quasi-sovereigns, not federal or state instrumentalities. 528 U.S. at 518 et seq. Indian tribes pre-existed the United States and "retained some elements of quasi-sovereign authority even after cession of their lands to the United States." *Id.* Their lingering remnants of original sovereignty – "quasi-sovereignty" as the Supreme Court described it – are not created by or derived from the United States or any State. *Id. United States v. Wheeler*, 435 U.S. 313, 322-323 (1978).

This has two constitutional consequences. First, Indian tribes, unlike state and federal agencies, are not subject to the Fourteenth or Fifteenth Amendments. *See, Talton v. Mayes*, 163 U.S. 376 (1896) (tribe not limited by Fifth Amendment to U.S. Constitution when dealing with its members). Second, because Indian tribes have lingering remnants of sovereignty not derived from the United States or any State, the United States enters into political relations with them, government to government. As part of that political relationship, the federal Bureau of Indian Affairs ("BIA") exercises a guardian's power over Indian tribes, as if Indian tribes were minors incapable of managing their own affairs. *See Mancari*, 417 U.S. at 541-42, 551 (plenary power of Congress exercised through BIA as guardian of tribal wards). Such a government-to-

government relationship is impossible for a group that has no separate group government.

Expanding the definition of an "Indian tribe" to a group of individuals having a certain racial ancestry, as the State suggests, would destroy the crucial constitutional distinction between an Indian tribe and a racial group. This would be inconsistent with *Mancari* itself. There, the Supreme Court noted that the BIA hiring preference excluded many individuals who are racially Indians but did not belong to a tribe. 417 U.S. at 553 n.24. "To allow any group of persons to 'bootstrap' themselves into formal 'tribal' status – simply because they are all members of a larger aboriginal ethnic body would be to ignore the concept of 'tribe' as a distinct sovereignty set apart by historical and ethnological boundaries." *Price v. State of Hawai`i*, 764 F.2d 623, 627 (9th Cir. 1985) (group of Hawaiians are not a tribe). "[R]acial or ancestral commonality isn't enough without a continuously existing political entity to constitute a tribe." *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 112 F. Supp. 2d 742, 746 (N.D. Ind. 2000), affirmed sub nom. *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior*, 255 F.3d 342, 350 (7th Cir. 2001) (when political organization ceased to effectively govern, Indian group "united only by common descent" ceased to be tribe). "Miscellaneous Indians do not make a tribe." *United Houma Nation v. Babbitt*, 1997 U.S. Dist. Lexis 10095 (D. D.C. 1997). Moreover, reading "Indian tribe" as if it meant "members of an ethnic group that lived in America before the white men arrived" ignores the rule of Indian law that a member of a tribe can voluntarily quit the tribe. See *Montoya v. United States*, 180 U.S. 261 (members of tribes quit and joined another tribe; their original tribes not

responsible for their subsequent crimes); *Nagle v. United States*, 181 F. 141 (9th Cir. 1911). One can quit a political organization but one cannot quit an ethnic group.

B. OHA and DHHL are agencies of the State, not separate quasi sovereigns. Hawaiians are not a federally recognized tribe.

Because there is no Hawaiian Indian tribe, no such tribe can be recognized and Congress has not attempted to do so. This Court need not address hypothetical "questions of considerable moment and difficulty" about whether Congress could invent a "Hawaiian tribe" analogous to an Indian tribe with a race-based government. *Rice*, 528 U.S. at 518. *Arakaki* Order at 28 n. 9. (Ex. B Dec. SPB) *See United States v. Sandoval*, 231 U.S. 28 (1913) (Congress may not "bring a community or body of people within the range of" its Indian commerce power "by arbitrarily calling them an Indian tribe"). Like the Supreme Court, this Court "can stay far off that difficult terrain," *id*. at 519-522, because OHA and DHHL are agencies of the State, not agencies of a separate quasi sovereign.

Congress has delegated to the Interior Department the power to recognize Indian tribes. 25 U.S.C. §§ 2, 9; *Miami Nation*, 255 F.3d at 345. The racial class of native Hawaiians does not qualify for recognition as a tribe under these regulations, 25 C.F.R. § 83.1, 25 C.F.R. § 83.7(b)(1) and 83.7(e). There is no group that has "maintained political influence or authority over its members [the racial class of native Hawaiians] as an autonomous entity from historical times until the present," 25 C.F.R. § 83.7(c), where "historical times" means "dating from first sustained contact with non-Indians," 25 C.F.R. § 83.1. Congress has not recognized the racial class of Hawaiians

or native Hawaiians as an Indian Tribe. *Price v. Hawai`i*, 764 F.2d 623, 628 n.1 (9th Cir. 1985). "If there is no tribe, for whatever reason, there is nothing to recognize." *Miami Nation,* 255 F.3d at 351. In *Rice*, the State and OHA cited passages from the so-called "Apology Resolution," Pub. L. 103-150, 107 Stat. 1510 (1993), as well as preambles to assorted statutes to argue that Congress had somehow implicitly recognized Hawaiians as an Indian tribe. Brief of Respondent in *Rice* at 6-9, 11,36-38 (Ex. K Dec. SPB); Amicus Brief of OHA at 9, 13, 27 (Ex. L Dec. SPB). This string of citations failed to persuade the Supreme Court that Congress has granted the State the power to operate a racially exclusionary program. 528 U.S. at 518-19. This Court was similarly unpersuaded by the same litany of citations in *Arakaki*. Arakaki Order granting summary judgment, pgs. 29 & 30, Ex. B Dec. SPB. An alleged "longstanding policy of Congress" does not affect federal recognition of an Indian tribe absent explicit recognition by statute. *United Houma Nation v. Babbitt,*1997 U.S. Dist. Lexis 10095 *24 (D. D.C. 1997).

Since there is no federally recognized native Hawaiian Indian tribe, there can be no congressional delegation of federal power over a native Hawaiian Indian Tribe to the State. As this Court held in *Arakaki*, this is not a case in which Congress has granted to the State "the 'explicit authority' to legislate with regard to Indian tribes." *Arakaki* Order at 30 (Ex. B Dec. SPB) quoting *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979), and holding such explicit Congressional delegation is prerequisite to exercise of state authority.

OHA and DHHL are state agencies, and like all state agencies are fully subject

to the Equal Protection Clause. See *Arakaki v. State* (applying Fourteenth and Fifteenth Amendments to OHA statute barring non-Hawaiians from running for or serving as trustees). Therefore, *Mancari* is inapplicable and the proper standard of constitutional review is strict scrutiny.

V. Plaintiffs will likely succeed on the merits.

Thus, since the racial classification supporting HHC and OHA is presumed, under the highest law of the land, to be invalid and the State has not and cannot show it will pass strict scrutiny, there is a strong likelihood Plaintiffs will succeed on the merits.

VI. Plaintiffs will suffer irreparable harm if their motion is denied.

Central to Plaintiffs= complaint is the violation of their rights under the Fourteenth Amendment. "When the alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 2948.1 at 161 and n.21 (1995) (collecting cases). Cf., *Public Service Co. v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) where the First Circuit acknowledged that some constitutional violations have "such qualitative importance as to be irremediable by any subsequent relief." The constitutional violation asserted by Plaintiffs fits squarely within that definition.

Here, the State, HHC/DHHL and OHA Defendants control vast areas of public lands and hundreds of millions of dollars of taxpayer-derived public funds. The HHCA requires the HHC to manage the Hawaiian Homes program solely for the benefit of the racial group of “native Hawaiians” as defined in HHCA § 201(a)(7). *Ahuna v.*

Department of Hawaiian Home Lands, 64 Haw. 327, 340-42 (1982). The OHA laws require OHA to manage the public resources entrusted to its care solely for the benefit of the members of the racial classes of "Hawaiians" and "native Hawaiians" and its trustees would be subject to suit if they were to give equal consideration to all members of the public. §§ 10-2, 10-3, 10-5, 10-6, 10-16 H.R.S. The track record of both agencies shows they have managed, and will continue to manage, those public resources in a way that violates the constitutional rights of Plaintiffs and over a million other Hawai`i citizens similarly situated.

For example, in 1995, based on a memorandum of understanding signed by the previous governor and enacted in the Special Session of 1995, Governor Cayetano signed Act 14 which established the "Hawaiian home lands trust fund" (now HHCA § 213.6) to be used for capital improvements and other purposes undertaken in furtherance of the HHCA and provided for the State to make twenty annual deposits of $30 million each into that fund. As of June 30, 2000, the State had paid DHHL $158 million and had appropriated another $15 million for those deposits. DHHL Annual Report FY 1999-00. (Ex. Q Dec. SPB) Although Plaintiffs' past and future tax burden has been increased by those deposits and will be further increased by additional such deposits, Plaintiffs are denied the benefits solely because they are not of the favored race. To protect Plaintiffs and others similarly situated from further constitutional violations pending final judgment, it is necessary to enjoin further deposits to and expenditures from the Hawaiian home lands trust fund.

Another example is the Homestead leases. Although Plaintiffs are beneficiaries of the public land trust which includes all of the ceded lands, including the 200,000 acres which were wrongfully set aside as Hawaiian home lands, the issuance of Homestead leases denies to Plaintiffs, solely because they are not of the favored race, the use or benefits of the lands covered by those leases and the equal protection of the laws. As of June 30, 2000, there were 6,927 Homestead leases outstanding. (DHHL Overview, Ex. C Dec. SPB) Nineteen months later, on January 31, 2002 there were 7,281 (per telephone conversation with DHHL Executive Assistant, paragraph 11, Dec. SPB), an increase of 354, or about 18 new Homestead leases issued every month. The Homestead leases require the HHC/DHHL Defendants to continue to enforce and administer racially discriminatory provisions for over 100 more years. (See paragraph 58 b. of the Complaint and Ex. R Dec. SPB, sample form of Homestead lease.) Every one of the existing leases inflicts ongoing and continuing harm on Plaintiffs. Every new Homestead lease turns the thumbnail another click, exacerbates the inequality and deprives each Plaintiff of any benefit from another parcel of public land. To protect Plaintiffs and others similarly situated from further trust and constitutional breaches pending final judgment, it is necessary to enjoin issuance of any more Homestead leases.

Another example is the Fund Equity (which amounted to $337 million as of November 30, 2001 per the OHA financial report, Ex. S Dec. SPB) held by OHA. That fund is derived from moneys collected from taxpayers, including Plaintiffs, or from revenues generated by the ceded lands, which are held in trust for the inhabitants of

Hawai`i, including Plaintiffs, yet Plaintiffs and others similarly situated are denied the benefits solely because they are not of the favored race. Again, to protect Plaintiffs and others similarly situated from further trust and constitutional breaches pending final judgment, it is necessary to enjoin the OHA Defendants from further expending or encumbering any of the assets or accounts presently held in that Fund Equity, pending final judgment.

Still another example is the claim of OHA for even further amounts relating to the ceded lands. On September 12, 2001, the Hawai`i Supreme Court invalidated Act 304 SLH 1990 which required that OHA be paid 20% of revenues from ceded lands saying, "it is incumbent on the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust." *OHA v. State*, 96 Haw. 388, 31 P.3d 901 (2001). Shortly thereafter Defendant OHA Trustee Clayton Hee revealed that the State in April 1999 had offered OHA $251 million and 360,000 acres of ceded land. (Ex. T, Dec. SPB) (Previously such negotiations had been kept confidential.) He said his immediate concern is to meet with Governor Cayetano and other Hawai`i leaders to determine the State's current position with OHA. (Ex U. Dec. SPB). According to the January 2002 issue of its monthly newsmagazine, OHA is now proposing a "new Act 304" that reinstates OHA funding according to the 1990 law. (Ex. V, Dec. SPB). The current Legislature opened Wednesday January 16, 2002. To protect Plaintiffs and others similarly situated from further constitutional violations pending final judgment, it is necessary to enjoin the State Defendants from committing the State to pay any further public funds or transfer any further public lands to OHA.

Other major violations of the constitutional rights of Plaintiffs have occurred, and might well reoccur pending final judgment, from the issuance of bonds. In 1993, the legislature, by Act 35, appropriated $136 million in general obligation bond funds to settle OHA's claims for back ceded lands revenues. In June 1993, approximately $130 million of those bond proceeds was paid to OHA. Plaintiffs' past, present and future tax burdens were increased to repay the principal and interest on those bonds but, solely because they are not of the favored race, Plaintiffs were and continue to be denied the benefit of those payments. To protect Plaintiffs and others similarly situated from further constitutional violations pending final judgment, it is necessary to enjoin the State Defendants, the HHC/DHHL Defendants and the OHA Defendants from issuing any further bonds or otherwise borrowing for HHC, DHHL or OHA.

Since there may be other methods of making transfers, it is also necessary that the court enjoin the State Defendants, pending final judgment, from making any further payments or transferring any further property to or for HHC, DHHL or OHA. For the same reason, the court should enjoin the HHC/DHHL Defendants and the OHA Defendants, pending final judgment, from making any further expenditures, grants, loans, guarantees or incurring any further liabilities.

Finally, OHA's and DHHL's expenditures of public funds for lobbying and advertising to advocate and defend their race-based programs have denied and continue to deny Plaintiffs the equal protection of the laws. The public policy of the State of Hawai`i disfavors racial discrimination. Haw. Const. Art. I, § 5; *Hyatt Corp. v. Honolulu Liquor Commission* 69 Haw. 238, 244, 738 P.2d 1205. Yet OHA and HHCA

use public money (part of which is provided by Plaintiffs' tax dollars) to finance racial advocacy. OHA's statutory purposes explicitly "include: . . . conducting advocacy efforts for native Hawaiians and Hawaiians," disregarding the interests of their fellow citizens. HRS § 10-3(4). The State makes no public money available to finance advocacy which opposes this invidious discrimination.

Racial distinctions are especially "odious to a free people," *Rice,* 528 U.S. at 517 where they undermine the democratic institutions by instigating racial partisanship. This was the fundamental evil that the Rice Court detected in Hawai`i's law: "using racial classifications" that are "corruptive of the whole legal order" of democracy because they make "the law itself . . . the instrument for generating" racial "prejudice and hostility." *Rice*, 528 U.S. at 517. Eliminating OHA's racial restrictions on voting and holding office did not entirely root out this evil. It will remain as long as the OHA Trustees and the DHHL Commissioners are required to be racial advocates. It "is altogether antithetical to our system of representative democracy" to create a governmental structure "solely to effectuate the perceived common interests of one racial group" and to assign officials the "primary obligation . . . to represent only members of that group." *Shaw v. Reno,* 509 U.S. 630, 648 (1983). *Shaw* quoted Justice Douglas:

> When racial or religious lines are drawn by the State, the multi-racial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan. Since that system is at war with the democratic ideal, it should find no footing here.

Wright v. Rockefeller, 376 U.S. 52, 67 (1964) (Douglas, dissenting). In *Shaw*, the racial

partisanship was fostered indirectly by gerrymandering legislative districts. By contrast, as in *Rice*, the "structure in this case is neither subtle nor indirect;" Hawai`i law specifically directs OHA and DHHL officials to devote their efforts to the betterment of "persons of the defined ancestry and to no others." *Rice*, 528 U.S. at 514.

To advance "the perceived common interests of one racial group," *Shaw*, 509 U.S. at 648, the OHA Trustees and DHHL Commissioners spend public funds and hold public lands. This cannot stand: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Lau v. Nichols*, 414 U.S. 563, 569 (1974) (quoting Senator Humphrey during the floor debate on Title VI of the Civil Rights Act of 1964, a provision that is coextensive with the Equal Protection Clause, *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001)). The government is even forbidden to give money to private parties "if that aid has a significant tendency to facilitate, reinforce and support private discrimination." *Norwood v. Harrison*, 413 U.S. 455, 466 (1973). *Norwood* instructed the District Court to enjoin state subsidies for private schools that advocated the "private belief that segregation is desirable" and that "communicated" racial discrimination as "an essential part of the educational message." *Id.* at 469. *A fortiori*, a state agency cannot spend money to itself advocate racial classifications that are "odious to a free people" and "corruptive" of democracy. *Rice*, 528 U.S. at 517.

Accordingly, pending final decision of this case, it is proper to restrain OHA and DHHL from spending public trust assets for advertising, lobbying, and other advocacy of

the racially discriminatory goals of OHA and DHHL classifications. (Of course, Plaintiffs do not challenge the rights of individual Defendants in their individual capacities to express their personal opinions at their personal expense.)

VII. The balance of hardships tips in favor of plaintiffs.

The harm which the Defendants would suffer from granting the preliminary injunction is difficult to describe as anything but minimal relative to the loss the public and Plaintiffs would suffer. HHC, DHHL and OHA could continue the current level of their operations (i.e., they would still be able to pay operational expenses such as rent, telephone bills, office supplies, salaries to employees and trustees but not make expenditures for grants, loans, programs or capital expenditures). They would be restrained from invading the corpus of the public funds they now hold but they would not lose them. Those funds would stay intact and hopefully growing pending the court's final decision. The State would not be allowed to issue bonds, borrow money or make any more major payments to HHC, DHHL or OHA. That would help, not hurt, the State in this time of belt-tightening.

But if Plaintiffs= application is not granted, the State government's racial discrimination operations at HHC/DHHL and OHA would continue as usual. The State, HHC/DHHL and OHA Defendants would still be in full unrestrained control of vast areas of public lands and hundreds of millions of public dollars and they would still be required by the OHA laws and the HHCA laws to continue to use those public lands and public moneys to pursue their racially discriminatory objectives. There is no reason to hope Defendants will be overcome by the concept of equality and suddenly cease their

racially discriminatory conduct. There is every reason to expect they will continue it. Indeed, knowing the handwriting is on the wall, they may feel obliged to increase their discriminatory expenditures and transfers. Thus, there is a high likelihood that, without preliminary injunctive relief pending final judgment, public moneys will continue to be expended and public lands will continue to be transferred, leased or encumbered to accomplish racially discriminatory objectives, and the benefits of those payments and transfers will be irrevocably lost to Plaintiffs.

VIII. Conclusion.

For the above reasons, Plaintiffs respectfully request that this Court issue a temporary restraining order and preliminary injunction as requested.

Dated: Honolulu, Hawai`i March _____, 2002.

H. WILLIAM BURGESS
PATRICK W. HANIFIN
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, et al.,	) CIVIL NO. _____
	)
Plaintiffs,	) DECLARATION OF PLAINTIFF
v.	) SANDRA PUANANI BURGESS IN
	) SUPPORT OF PRELIMINARY AND
BENJAMIN J. CAYETANO, et al.,	) PERMANENT INJUNCTIVE RELIEF
	)
Defendants.	) EXHIBITS A - EE
_____	)

DECLARATION OF PLAINTIFF SANDRA PUANANI BURGESS
IN SUPPORT OF PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

1. I am a citizen, resident, inhabitant, registered voter, and taxpayer of the State of Hawai'i and of the United States and I am over the age of 18.

2. I am an American of 25% Hawaiian, 25% Filipino and 50% Chinese ancestry. My Chinese Great-Grandfather came to Hawaii during the years of the Kingdom. His son, my Grandfather, was born in Kula, Maui, Kingdom of Hawaii June 19, 1892. I was born and raised in Hawaii and have lived here all my life.

3. As a citizen and inhabitant of Hawai`i, I am a beneficiary of the public land trust, no more and no less than any other citizen and inhabitant.

4. In this declaration, I use the term "Hawaiian" as it is defined in HRS § 10-2: any descendant of the people inhabiting the Hawaiian Islands in 1778. I use the term "native Hawaiian" as it is defined in HRS § 10-2 and the Hawaiian Homes Commission Act: any descendant of not less than one half part of the races inhabiting the Hawaiian Islands previous to 1778.

5. **Appropriations for OHA harm me as a taxpayer.** Part of the State of Hawaii's tax revenues (which include taxes I pay to the State of Hawaii) are appropriated to the Office of Hawaiian Affairs (OHA) and part also go to pay principal and interest on bonds that generated funds that have been appropriated to OHA. The trustees of the OHA administer OHA's funds and decide how those funds will be spent. The OHA laws require the OHA trustees to work solely for the benefit of the racial classes of Hawaiians and native Hawaiians and to promote the interests of people in those racial classes. If the state tax revenues (including taxes I pay) were not diverted to OHA, my taxes could be reduced or funding for racially neutral programs that I could qualify for could be increased. Although my tax burden is increased by the appropriations to OHA, and the appropriations to pay principal and interest on bonds that generated funds that have been appropriated to OHA, I am denied any benefit of the portions set aside for "native Hawaiians" solely because of my ancestry, i.e., I do not have the required one half part of the favored racial ancestry. I am injured in that I am denied the equal protection of the laws and I am forced to pay taxes for unconstitutional racially discriminatory programs.

6. **Appropriations for DHHL harm me as a taxpayer**. Part of the State of Hawaii's tax revenues (which include taxes I pay to the State of Hawaii) are also appropriated to the Department of Hawaiian Home Lands (DHHL) and part also may go to pay principal and interest on bonds that generated funds that have been appropriated to DHHL. The Hawaiian Homes Commissioners administer DHHL's funds and decide how those funds will be spent. The Hawaiian Homes Commissioners are legally obliged to work solely for the benefit of the racial class of native Hawaiians and to promote the interests of people in that class, particularly the people who have qualified for homesteads based on their racial ancestry. If the state tax revenues (including taxes I pay) were not diverted to DHHL, my taxes could be reduced or

funding for racially neutral programs that I could qualify for could be increased. Although my tax burden is increased by the appropriations to DHHL, and by any appropriations to pay principal and interest on bonds that generated funds that have been appropriated to DHHL, I am denied any benefit of those appropriations solely because of my ancestry, i.e., I am not "native Hawaiian" since I do not have the required one half part of the favored racial ancestry. I am injured in that I am denied the equal protection of the laws and I am forced to pay taxes for unconstitutional racially discriminatory programs.

7. **Diversion of public land trust revenues to OHA harms me as a trust beneficiary**. From 1990, when Act 304 was enacted, until September 12, 2001 when the Hawaii Supreme Court held that Act 304, by its own terms, had been effectively repealed, twenty percent of the revenue from the public land trust was required by Hawaii law to go to OHA for the exclusive use and benefit of "native Hawaiians". New bills are now pending before the current Legislature of the State of Hawaii that would "Reinstate Act 304-style funding" or, as an interim measure, appropriate $17 million to OHA. (See Exhibit B attached hereto.) Some legislative leaders have said that interim funding in some amount would probably be favorably considered in the current session. (Exhibit D.) Hundreds of millions of dollars of revenue from the public land trust have been diverted to OHA for the exclusive benefit of "native Hawaiians". OHA is legally obliged to segregate and earmark funds from the public land trust for "native Hawaiians". According to OHA's financial report of November 30, 2002 (Exhibit B, pg. 17.), OHA holds investments of over $304 million and total fund equity of over $337 million. I believe that most of those investments and funds are derived from public land trust revenues diverted to OHA. If the public land trust revenues were not diverted to OHA, funding for the racially neutral purposes of the public land trust, such as public education, could be increased; or that revenue could be spent

on racially neutral programs now funded by tax revenues and my taxes could be reduced; or funding for racially neutral programs that I could qualify for could be increased. As a beneficiary of the public land trust I am entitled to impartial treatment and equal access to or benefit of all programs funded by public land trust revenues. But as a result of the diversion of the public land trust assets to OHA exclusively for "native Hawaiians", I and other beneficiaries of the public land trust are denied the equal protection of the laws and the equal right to benefit from the revenue of the trust.

8. **Diversion of public land trust land and revenues to DHHL harms me as a trust beneficiary.** Approximately 200,000 acres of land in the public land trust was diverted to and is being administered today by the Hawaiian Homes Commissioners for the exclusive use and benefit of native Hawaiians. Under the HHCA, the Commissioners are required to use this land and the revenues it generates for the benefit of native Hawaiians to the exclusion of other beneficiaries of the public land trust. As a beneficiary of the public land trust I am entitled to impartial treatment, equal access to all programs funded by public land trust revenues, and equal opportunity to use and benefit from those public lands. But as a result of the diversion of the public land trust assets, I and other beneficiaries of the trust are denied any use or benefit or share of the revenues from this part of the public land trust; and I am denied access to the DHHL programs that use this land and revenues generated by this land.

9. **The exemption of Homestead lots from real property taxes also harms me as a taxpayer.** The City and County of Honolulu exempts Hawaiian homesteads from paying real property taxes. To be awarded a Hawaiian homestead one must be native Hawaiian or the child of a native Hawaiian homesteader. As a result of this racially discriminatory tax exemption, taxes imposed on the owners of other property, including me, in order to pay the costs of the

government are higher than they otherwise would be.

10. If preliminary and permanent injunctive relief is not granted, I will continue to suffer the irreparable loss of my constitutional rights as a citizen, resident, inhabitant, taxpayer and beneficiary of the public land trust.

11. On February 19, 2002 the Executive Assistant of DHHL told us that as of January 31, 2002, there were 7,281 Homestead leases outstanding (5,823 residential, 1076 agricultural and 382 pastoral.)

12. Attached hereto are true copies, to the best of my knowledge and belief, of the following documents:

Description of Exhibits

Exhibit A U. S. Supreme Court decision in *Rice v. Cayetano,* decided February 2, 2000.

Exhibit B This Court's Order Granting Plaintiffs' Cross Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment entered September 19, 2000 in *Arakaki v. State*, Civil No. 00-00514 HG-BMK.

Exhibit C Department of Hawaiian Home Lands, an Overview 1997, revised 6/30/00.

Exhibit D The Order in the Barrett case CV. No.00-00641 & CV 00-00645 DAE KSC granting Defendant OHA's motion for judgment on the pleadings against Plaintiff Barrett.

Exhibit E Statement by President Ronald Reagan upon signing H.J. Res. 17 in 1986. HHCA "employs an express racial classification." "raises serious equal protection questions."

Exhibit F Statement by President George Bush upon signing S. 566 November 28, 1990. Affordable Housing Act defines "native Hawaiian" in a race-based fashion." "cannot be derived from the constitutional authority granted to the Congress and the executive branch to benefit native Americans as members of tribes."

Exhibit G Statement by President George Bush upon signing S.J. Res. 23 October 6, 1992. HHCA "raises serious equal protection questions."

Exhibit H Statement by President George Bush upon signing S. 2044 October 26, 1992. Native American Languages Act defines "native Hawaiian" in a race-based fashion." "cannot be derived from the constitutional authority granted to the Congress and the executive branch to benefit native Americans as members of tribes."

Exhibit I Statement by President George Bush upon signing S. 566 October 28, 1992. Veterans' Home Loan Program. The race based classification of "Native Hawaiian" cannot be supported as an exercise of the constitutional authority granted to the Congress to benefit Native Americans as members of tribes."

Exhibit J This Court's Order Granting Plaintiffs' Motion for Preliminary Injunctive Relief entered August 21, 2000 in *Arakaki v. State*, Civil No. 00-00514 HG-BMK.

Exhibit K Selected pages of Brief for the Respondent, *Rice v. Cayetano*, filed July 28, 1999, flysheet and pp. 6-11, 31, 36-39.

Exhibit L Selected pages of Amicus Curiae Brief of the Office of Hawaiian Affairs, *Rice v. Cayetano*, flysheet and pp. 9, 13, 23, 24 & 27

Exhibit M Brief for U.S. in *Rice v. Cayetano*, flysheet and pp. 22 and 23.

Exhibit N Respondent's Brief in Opposition dated December 29, 1998, to petition for certiorari in *Rice v. Cayetano*, fly sheet and pp. 17, 18 & 19

Exhibit O Jon M. Van Dyke, "The Political Status of the Native Hawaiian People", Yale Law & Policy Review, Vol. 17 No. 1, 1998 p. 144

Exhibit P Annexation Resolution (Newlands Resolution), 30 Stat. 750 (1898) (As reprinted in 1 rev. L. Haw., 1955 at 13-15); Treaty of Annexation of Hawai`i, Negotiated in 1897.

Exhibit Q Cover page and pages 6, 14, and 17-28 from the Department of Hawaiian Home Lands Annual Report FY 1999-00.

Exhibit R Notice to Requester 2/13/02 from DHHL with the attached sample Homestead lease.

Exhibit S Selected Pages from the February 2002 issue of OHA's newspaper, Ka Wai Ola, reporting on OHA Financial Report for November 30, 2001 showing Investments of $304 million and Total Fund Equity of $337,985,289 and future plans; including pp. 1, 4, 5, 8, 13, 15 and 17.

13. The following exhibits are not cited in the Memorandum in Support but support allegations of the complaint relevant to the motion for injunctive relief:

Exhibit T article from the Honolulu Star-Bulletin of September 21, 2001. Hee says "OHA could have settled for $251 million and 360,000 acres of ceded land."

Exhibit U Pages 1 and 19 of the October 2001 issue of Ka Wai Ole OHA Court Scraps Heely Decision, ACT 304. Hee to meet with Governor.

Exhibit V First page of the January 2002 issue of OHA's newspaper, Ka Wai Ola. Senator Hanabusa: Interim solution "most pressing issue."

Exhibit W Robert C. Schmitt, Demographic Statistics of Hawaii, 1778 – 1968 (Honolulu 1968) Tables 1.d, 1.e & 1.1.

Exhibit X Amicus Curiae Brief by various states, including Hawaii, in support of petition for cert. In State of Utah, Div. Of State Lands v. U.S. 6/27/86, (fly sheet and pages 10 through 13)

> "Re: Equal Footing doctrine. "*Pollards Lessee*" has since been employed by this Court to limit even Congress' Constitutional power to impose conditions on the admission of new states into the union."

Exhibit Y Attorney General Opinion July 17, 1995 Re: Authority to Alienate Public Trust Lands.

> "fn1. Section 5 [Admission Act] essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, the Congress served as trustee; under the Organic Act, the Territory of Hawaii served as trustee."

Exhibit Z Patrick Hanifin, "To Dwell on the Earth in Unity: *Rice, Arakaki*, and the Growth of Citizenship and Voting Rights in Hawai`i" Hawai`i Bar Journal, Volume V, No. 13, 2002

Exhibit AA Opinion of Attorney General of the U.S., 22 Op.Atty.Gen. 574 (1899)

> Page 576. "The effect of this clause is to subject the public lands in Hawai`i to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other public purposes."

Exhibit BB Ballot for the proposed constitutional amendments at the general election Tuesday November 7, 1978 and the informational booklet which was part of the official ballot, reprinted in Kahale Kai v. Doi, 60 Haw. 324, 349-353 (1979).

Exhibit CC Vol. I Proceedings of the Constitutional Convention of 1978 pages 497 – 499, Journal 64th day, September 21, 1978. During debate, opinion from AG read re: ballot with votes in A & B invalid. Convention then adopts SCR No. 99 & Res. No. 30 RD 1 requesting not disenfranchise voters, count vote in B & disregard A.

Exhibit DD 1978 Constitutional Convention Resolution No. 30, R.D. 1 and Standing Comm. Report No. 99.

Exhibit EE Statewide Summary Report from the Official Results of Vote Cast General Election Tuesday, Nov. 7, 1978, 5 pages printed on 11/08/78.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of March, 2002, Honolulu, Hawaii.

_____

SANDRA PUANANI BURGESS

H. WILLIAM BURGESS #833
2299C Round Top Drive
Honolulu, Hawai`i 96822
Telephone: (808) 947-3234
Fax: (808) 947-5822

PATRICK W. HANIFIN #2716
IM HANIFIN PARSONS, LLLC
1001 Bishop Street
Pacific Tower, Suite 2475
Honolulu, Hawai`i 96813
Telephone: (808) 585-0335
Fax: (808) 585-0336

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARL F. ARAKAKI, et al., Plaintiffs, v. BENJAMIN J. CAYETANO et al., State Defendants, HAUNANI APOLIONA, et al., OHA Defendants, RAYNARD C. SOON, et al., HHCA/DHHL Defendants, THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10, Defendants. _____	CIVIL NO. _____ CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, the foregoing document(s) will be duly served upon the following parties via process server, facsimile, hand delivery, U.S. Mail or certified U.S. Mail, postage prepaid.

EARL I. ANZAI, ESQ.
State of Hawai`i
Attorney General
425 Queen Street
Honolulu, HI 96813

Attorneys for Defendants,
Benjamin J. Cayetano
State Officials
Hawaiian Homes Commissioners

JOHN ASHCROFT, ESQ.
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Attorney for Defendant,
United States of America

SHERRY P. BRODER, ESQ.
Davies Pacific Center
841 Bishop Street, Suite 800
Honolulu, Hawaii 96813

Attorney for Defendant
Trustees of the Office of Hawaiian Affairs

EDWARD H. KUBO, JR., ESQ.
United States Attorney
300 Ala Moana Boulevard
Honolulu, Hawai`i 96850

Attorney for Defendant,
United States of America

Dated: Honolulu, Hawaii this 4th day of March, 2002.

_____
H. WILLIAM BURGESS
PATRICK W. HANIFIN
Attorneys for Plaintiffs