
No. 04-15306

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al.,

Plaintiffs/Appellants,

v.

LINDA LINGLE, et al.,

Defendants/Appellees.

On Appeal from the United States District Court
for the District of Hawaii
Honorable Susan Oki Mollway, District Judge

APPELLANTS' OPENING BRIEF

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APPELLANTS' OPENING BRIEF

INTRODUCTION

Appellants (sometimes also referred to as ‘Plaintiffs’ or ‘Plaintiffs/Appellants’) are fourteen individual citizens of the United States of America, five women and nine men, all born and raised in, or long-time residents of, Hawaii. All are taxpayers of the State of Hawaii and beneficiaries of Hawaii’s public land trust. Included among Appellants are persons of Japanese, English, Filipino, Hawaiian, Irish, Chinese, Scottish,

Polish, Jewish, German, Spanish, Okinawan, Dutch, French and other ancestries.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. ' ' 1331 (federal question), 1343(3) and 1343(4) (civil rights) and 2202 (declaratory judgment). Appellants allege violations of their constitutional and other rights under color of state law contrary to 42 U.S.C. §1983. This Court has jurisdiction under 28 U.S.C. ' 1291, as the District Court entered final judgment dismissing all Plaintiffs' claims on January 15, 2004. Excerpts of Record (" ER") 29 . Appellants filed their notice of appeal on February 12, 2004. (ER 31.) The appeal is timely under FRAP 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. **Political Question.** Whether Appellants' challenge to the State's and the United States' use of the racial classifications, "Hawaiian" 1 and "native Hawaiian" 2, to determine the recipients of public land and other benefits presents a nonjusticiable political question?

1 **Native Hawaiian or native Hawaiian:** "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." as defined in the HHCA.

2 **Hawaiian:** "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands" in 1778, as defined in HRS §10-2.

2. **Standing as Trust Beneficiaries.** Whether Appellants, as trust beneficiaries, have standing to challenge the Trustees' (i.e., the State officials' and the United States') breach of their duty under the public land trust, including breach of the duty of impartiality and the duty not to enforce illegal terms of the trust.

3. **Restrictions on Taxpayer Standing.** Whether Appellants, as State taxpayers, have standing to:

a. Challenge the misuse of public lands and public moneys (for example by giving homestead leases at \$1 per year for 99 years, renewable for another 100 years, or allocating revenues, or issuing bonds or making "settlements" as well as spending general funds, all for the exclusive benefit of persons selected by race), where the misuses increase the tax burden of, but deny the benefits to, Appellants because they are not of the favored race.

b. Seek declaratory and injunctive relief against the United States because of federal laws which require the State to violate the Fourteenth Amendment, resulting in the increase in each Appellant's tax burden to pay for benefits from which each Appellant is excluded because he or she is not of the favored race.

c. Challenge the validity, under the U.S. Constitution, of the Hawaiian Homes Commission Act (“HHCA”), and related laws, whether or not the United States is a party where, as a result of the HHCA laws, imposed on the State by the United States, each Appellant’s tax burden is increased to pay for benefits from which each Appellant is excluded because he or she is not of the favored race.

d. Whether the three Appellants who are Hawaiians have standing to challenge the Office of Hawaiian Affairs (“OHA”) laws and HHCA/DHHL (Department of Hawaiian Home Lands) laws to the extent that those laws provide benefits exclusively to native Hawaiians, where, as a result of those laws, each of those Appellant’s tax burden in increased to pay for benefits from which each of those Appellants is excluded because she is not of the favored race.

4. **Partial Summary Judgment.** Whether Appellants are entitled to partial summary judgment as to the issues already adjudicated and as to issues not genuinely disputed, as sought in their Counter Motion for Partial Summary Judgment which was stricken by the trial court.

5. **Twenty Two Months of Delays, Reassignment.** Whether the trial court’s procedural and scheduling delays for 22 months, together with its orders preventing Plaintiffs from moving for summary judgment on the

merits, deprived Plaintiffs/Appellants of a just, speedy and inexpensive determination of this action and whether on remand the case should be assigned to another judge.

6. **Chilling Effect of Costs.** Whether the trial court's award of costs to two State agencies and intervening Defendants would chill the vigorous enforcement of the civil rights laws by individuals acting as private attorneys general?

STATEMENT OF THE CASE

Hawaii is justly admired as an integrated, intermarried, racially blended society. Its people share qualities of open friendliness and respect for others, without regard to race or origin or station in life, which fit perfectly with the American ideal of equality under the law without regard to race or ancestry.

But Hawaii's leadership in integration and equality has unfortunately been offset by state constitutional and statutory provisions granting special privileges to some or all persons of Hawaiian ancestry. It began when Congress passed the HHCA, Act of July 9, 1921, c. 42, 42 Stat. 108. Then, in 1959 Congress required Hawaii to adopt the HHCA as a condition of statehood and Hawaii became the only state in the nation to give 99 year homestead leases of its public lands at \$1 per year exclusively to persons

defined by race. In the 1978 Constitutional Convention OHA was established to manage the ‘income and proceeds from that pro rata portion of the’ public land trust ‘for native Hawaiians.’ (Haw. Const. Art. XII -§6.). This led to the State of Hawaii making annual cash distributions of **revenues** from the public land trust exclusively for native Hawaiians.

The racial preference movement burgeoned during the years 1986 - 1994, when John Waihee was Governor: Act 304 SLH 1990 became law and money poured from the State treasury into OHA, \$135 million in June 1993 for prior years (1980 – 1991) as well as sharply increased current years’ payments. (ER 9) Similarly, through a December 1994 Memorandum of Understanding (Exh. 2 filed 4/13/04 in this Court) a task force of State officials and the ‘independent representative’ of the beneficiaries of the Hawaiian home lands trust, agreed to seek payment for DHHL of \$30 million per year from state funds for 20 years, total \$600 million. That resulted in Act 14 SLH 1995 which began appropriating the \$30 million per year. That \$30 million per year depletion of the State treasury has continued.

The moneys from the public lands, instead of going for public education (as they did for the first 20 years after statehood. Hawaii Atty.Gen. Op. 80-8, *Hoohuli v. Ariyoshi*, 631 F.Supp 1153, 1155 (D.Hawaii,

1990)) were being diverted to cash distributions for the exclusive benefit of one comparatively small racial group. OHA, after receiving the \$135 million in 1993, sued the State for hundreds of millions more for the same period. (See *The Ceded Lands Case: Money intended for education goes to OHA*, Hawaii Bar Journal, H. William Burgess and Sandra Burgess, July 2001.)

Some Hawaii residents became concerned. In 1996, one of those residents, Harold “Freddy” Rice, sued then -Governor Ben Cayetano challenging the Hawaiians-only restriction on voting for trustees of the Office of Hawaiian Affairs (“OHA”). On February 23, 2000 the United States Supreme Court in *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000) held that the definitions of “Hawaiian” and “native Hawaiian” are racial classifications. Because these classifications were the basis for state restrictions on voting in statewide elections for OHA trustees, the court held that those restrictions violated the Fifteenth Amendment.

The message of *Rice* was clear: Hawaii' s laws defining "Hawaiian" and "native Hawaiian" are racial classifications. These definitions are the foundation and only reason for the existence of OHA and HHC/DHHL. Other messages from the Supreme Court were equally clear. “Accordingly, we hold today that all racial classifications, imposed by whatever federal,

state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). “A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.” *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993).

The response of the state to *Rice*, like the response of many states in analogous circumstances after the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), ranged from denial to evasion. The state, for example, still refused to allow non-Hawaiians to *run* for OHA trustee. In July 2000 a multi racial group of Hawaii residents (many of whom are also Plaintiffs/Appellants in this case) filed suit to protect the right to run for OHA trustee and to vote in OHA elections without the choice of candidates being abridged by race. In September 2000, the district court granted summary judgment in favor of plaintiffs and required the State to permit otherwise qualified non-Hawaiians to run for office and to serve, if elected, as trustees of OHA. The Ninth Circuit affirmed this judgment. *Arakaki v. State of Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (“*Arakaki I*”).

But the state and its officials still refused to dismantle the state' s racially discriminatory programs. The state' s two bastions of racial allocation of public resources are OHA and DHHL. Through these two

programs, unjustified by any compelling interest and in no sense narrowly tailored to any legitimate purpose, the state (and to an extent, the federal government) engages in invidious racial discrimination and also breaches its fiduciary duty as trustee.

Plaintiffs/Appellants filed this suit March 4, 2002 to protect their pocketbooks as state taxpayers and the value of their benefits and equitable ownership of the lands in the public land trust from further erosion. In a series of “standing” orders under F.R.Civ.P. Rule 12(b)(1) lack of jurisdiction over the subject matter, and/or 12(b)(6) failure to state a claim upon which relief can be granted, beginning May 8, 2002 and continuing until the final judgment January 15, 2004, the trial court dismissed part after part of Plaintiffs’ claims by rulings on the law, without finding any facts or deciding any issue on the merits and without affording to Plaintiffs the benefit of the well-established presumption that all well-pleaded allegations of fact in the complaint are true and to be construed in the light most favorable to the plaintiffs.

SUMMARY OF ARGUMENT

Political question. Appellants do not raise any nonjusticiable political questions. They present their Equal Protection and federal trust law claims for adjudication under the federal courts’ well

developed and familiar judicial standards. Possible passage of legislation in Congress is not a reason for judicial inaction.

Trust beneficiary claims. When a government acts as trustee it is bound by the same standards as private trustees. Hawaii ceded its public lands and the United States accepted them in trust solely for the benefit of the inhabitants of the Hawaiian Islands. Later, by adopting the HHCA and still later, by requiring the State to adopt and implement the HHCA and by still today prohibiting repeal or amendment of the HHCA or changing lessee qualifications without its consent and reserving a restriction on the land and the authority to enforce the HHCA, the United States violated and continues to violate its fiduciary duty as Trustee of the public land trust. State officials, by accepting the public lands in trust and adopting and implementing the HHCA and, later, the OHA laws, violated and continue to violate their and the State's fiduciary duty as Trustee. The fiduciary duties being violated by the United States and by State officials include the duty to treat beneficiaries impartially and the duty not to implement illegal trust terms; and the violation is in giving Homestead leases (99 years at \$1 per year) and making cash distributions of trust revenues

exclusively for “native Hawaiian” beneficiaries and not for other beneficiaries.

Appellants, as trust beneficiaries, shortchanged by the Trustees’ favoritism and racial discrimination, have standing to seek declaratory and injunctive redress.

State taxpayer standing. The District Court correctly held Plaintiffs have taxpayer standing but erroneously limited the activities they could challenge and the remedies available to them. In the Ninth Circuit, “Legislative enactments are not the only government activity which the taxpayer may have standing to challenge”; “municipal taxpayer standing simply requires the ‘injury’ of an allegedly improper expenditure of municipal funds, and in this way mirrors our threshold for state taxpayer standing”; and state taxpayers may sue to prevent “a misuse of public funds”, “loss of revenue”, activities such as leases that “could have a detrimental impact on the public fisc.” and an unconstitutional policy that permeates an entire state agency.

Partial Summary Judgment. Some of the key issues, including the “*Mancari*” defense, the major issue raised as a defense by Defendants-Appellees in this case, have already been adjudicated.

For example: The definitions of “native Hawaiian” and “Hawaiian” are racial classifications and the scope of the rule announced in *Mancari* (allowing differential treatment of certain members of Indian tribes) is limited to members of federally recognized Indian tribes, applies only to the BIA, which is *sui generis*, and does not apply to state agencies.

Also, key facts relating to the *Mancari* defense have been conceded by Defendants-Appellees or are not genuinely disputed. For example: There is no Hawaiian tribe; neither Congress nor the Executive branch has recognized native Hawaiians or Hawaiians as an Indian tribe; in 1920, there was no government or tribe of Hawaiians to deal with; Hawaiians are no longer a community under one leadership, or indeed any leadership at all outside of state created entities such as OHA.

The trial court struck Plaintiffs’ counter motion for partial summary judgment but should have heard and granted it.

Twenty two months of delays. Reassignment. This case is a straightforward challenge to two state agencies, both based on the same explicitly racial classifications and therefore presumptively

unconstitutional. They must be stricken down unless the court finds they pass strict scrutiny. Both agencies give native Hawaiians special benefits in the lands and revenues of the public land trust denied to other beneficiaries, thereby openly breaching the trustees' fiduciary duty of impartiality under black letter trust law. This important but uncomplicated legal challenge was entitled to a just, speedy and inexpensive determination.

The District Court provided the opposite. It forbade motions for summary judgment on the merits while it considered and reconsidered standing and bifurcation motions, then parsed possible defenses into multiple pieces and scheduled separate briefings and hearings, then postponed the scheduled hearings, then deemed briefings already filed as withdrawn, struck Plaintiffs' counter motion for partial summary judgment and finally, 22 months after the case was filed, granted the motion to dismiss on political question grounds that it had originally denied only two months after the case was filed. Unless the case is reassigned to another judge, it is likely that the delays, expense and injustice will continue.

Chilling effect of awarding litigation costs. The trial court awarded costs to the two separate state agencies and to intervening Defendant without considering the chilling effect on the vigorous enforcement of the civil rights laws by individuals acting as private attorneys general. This is abuse of discretion. It is especially inappropriate in light of the unnecessary expense caused by the 22 months of delays.

ARGUMENT

Standard of Review. Issues I, II and III cover the trial court's dismissal of Plaintiffs' claims under F.R.C iv.P. Rule 12(b)(1) and/or 12(b)(6). The Court of Appeals reviews de novo a dismissal for lack of subject matter jurisdiction, which is the same standard under which it reviews a dismissal for failure to state a claim. *Bollard v. California Province of the Society of Jesus*, 196 F. 3d 940 (9th Cir. 1999). Dismissal is appropriate only when the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Bergquist v. County of Cochise*, 806 F.2d 1364 (9th Cir. 1986). The Court of Appeals will not dismiss the complaint unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th Cir. 1995).

Part IV covers Plaintiffs' Counter Motion for Partial Summary Judgment stricken by the trial court. Dismissal on summary judgment is reviewed *de novo* and the evidence must be considered in the light most favorable to the non-moving party. *Chale v Allstate Life Ins. Co.*, 353 F.3d 742, 745 (9th Cir. 2002). Here, Plaintiffs filed but were denied the opportunity to have their counter motion for partial summary judgment considered and adjudicated. The opportunity is expressly guaranteed by Rule 56(a). The main issue in Plaintiffs' motion was that Defendants were precluded from re-litigating questions that had already been decided against them. These legal questions therefore come before this court for review *de novo* and should be addressed on their merits on this appeal. *See Valiente v. Rivera*, 966 F.2d 21 (1st Cir., 1992). The remaining undisputed factual issues and are appropriate for resolution by this court as a matter of judicial economy should this court remand the case to the district court for further proceedings.

Part V, 22 months of delays, comes before this court for review on an abuse of discretion standard, as does Part VI dealing with the award of costs to prevailing defendants in this civil rights case.

I. THE CHALLENGE TO THE STATE'S USE OF RACIAL CLASSIFICATIONS DOES NOT PRESENT A NONJUSTICIABLE POLITICAL QUESTION.

The District Court’s January 14, 2004 Order Dismissing Plaintiffs’ Remaining Equal Protection Claim (the “Political Question” Order. ER 28) provides at 3, “The political status of Hawaiians is currently being debated in Congress, and this court will not intrude into that political process.” The court concluded that to resolve Plaintiffs’ equal protection claims it would have to determine “whether Hawaiians should be treated as federally recognized such that the *Morton* analysis is applicable,” *Id.* at 19, which the court said is a nonjusticiable “political question.” *Id.* at 22.

That conclusion is in error.

A. *This Case Does Not Raise any Nonjusticiable Political Questions.*

This is an equal protection and federal trust law case, not an Indian law case. The Supreme Court determined that “Hawaiian” and “native Hawaiian” are racial classifications, and it held that the use of those racial classifications to deny some of Hawaii’s citizens the right to vote violated the Fifteenth Amendment. *Rice v. Cayetano*, 528 U.S. at 514-17. The case now before this court simply challenges the same state’s use of these same racial classifications to grant or deny access by Hawaii’s citizens to other publicly funded programs and resources. All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. *Adarand Constructors, Inc. v. Pena*,

515 U.S. 200, 227 (1995). "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only [*644] upon an extraordinary justification." *Shaw v. Reno*, 509 U.S. 630, 641 et. seq. (1993). Defendants/Appellees have the burden of showing that allocations of public lands and moneys using these racial classifications survive strict scrutiny.

Tribal status is not an issue here, but if it were, it would be within the court's jurisdiction to address it. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803); *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986) (courts cannot shirk responsibility to interpret statutes merely because a decision may have significant political overtones).

OHA cited *Baker v. Carr* in *Arakaki I* and argued, as it did yet again in the District Court in this case, "that the determination of whether and to what extent native people will be recognized and dealt with under the guardianship and protection of the United States is a question reserved for Congress." *Arakaki I Summary Judgment Order*, ER 25 at 29. In that case, the district court properly rejected that argument and said:

“The federal courts, however, are charged with the interpretation of the United States Constitution. ... The possible passage of proposed legislation in Congress is not an event that this court can look to as a reason not to act.” *Id.* noting in footnote 5, “Senator Akaka has proposed a bill relating to the status of native Hawaiians.” See S. 2899, 106th Cong. §2 (2000).” Judge Gillmor could and did determine that the state law infringed the Constitution when its classification was “based on race rather than political designations. These are proper judicial determinations that do not impinge upon the concerns expressed in Baker.” *Id.* at 30 and 31. That holding is precisely applicable here. Just as the Supreme Court had jurisdiction to decide *Rice v. Cayetano*, 528 U.S. 495 (2000), under the Constitution and on the merits, the District Court and this Court have jurisdiction to decide this case. Calling this case a “political question” case because there is an ongoing political debate about related issues is a mere “play on words,” as the Supreme Court said in *Baker v. Carr*, 369 U.S. 186 (1962).³ Appellants simply ask the court to apply the explicit holdings of

³ It is worth noting that the courts have not hesitated to intervene in questions of tribal status. In *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior*, 255 F.3d 342 (7th Cir. 2001), the Court reviewed and affirmed the Interior Department’s determination that a group claiming tribal status did not meet the applicable regulatory standards. In *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the Supreme Court interpreted the relevant federal statute and determined that land held

Rice in an indistinguishable state law context to challenge the state's obdurate refusal to apply *Rice* to its other discriminatory conduct.

B. *Pierce Cannot be Read as Authorizing Courts to Determine Whether a Group **Should** be Recognized.*

The District Court took an inconsistent but equally incorrect position in the Political Question Order (ER 28) at 23 when it suggested that this Court's decision in *Alaska Chapter, Associated General Contractors of America v. Pierce*, 694 F.2d 1162 (9th Cir. 1982) ("*Pierce*") authorizes federal courts generally "to determine whether a native, indigenous group should be treated as equivalent to Indians for purposes of the *Morton* analysis", even though Congress has not recognized the group. This is a stretch too far. The status of Alaska Natives derives from explicit treaty language; as this Court carefully noted in *Pierce* at 694 F.2d at 1169, referring to the 1867 Treaty of

by an Alaskan village was not "Indian country" because the village and its land were not part of any "dependent Indian communities" within the meaning of the statute. In *Price v. State of Hawaii*, 764 F.2d 623, 626-28 (9th cir. 1985), the 9th Circuit affirmed the Hawaii District Court's decision on the merits that a group of native Hawaiians who claimed to be an Indian tribe did not meet the legal requirements for that status. The court noted that one of the regulatory requirements for recognition as an Indian tribe is that the group is indigenous to the continental United States. The Court also determined that there had been no showing that the entire class of native Hawaiians had been recognized as a tribe by the federal government. *Id.* 626-27 and n.1.

Cession with Russia⁴ “It is now established that through this treaty the Alaska Natives are under the guardianship of the federal government and entitled to the benefits of the special relationship.”⁵

Hawaii has no such treaty provisions or unique status. Neither the treaty offered by the Republic of Hawaii, (ER 2) nor the Newlands Resolution (Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, July 7, 1898, 30 Stat, 750) made any mention of tribes because there were and are no tribes in Hawaii. Thus *Pierce* cannot be read as authorizing federal courts to change “Congress’ decision not to deal with Native Hawaiian groups as political entities.” Nor, since *Pierce* makes no

4 The Treaty expressly acknowledged the existence of tribes in Alaska by providing that all inhabitants of the Alaska territory would be granted U.S. citizenship, “with the exception of uncivilized native tribes.” Treaty with Russia, Art. III, 15 Stat. 539 (1867) (emphasis added.) The Treaty further provided that “[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country”. In contrast, the Organic Act of 1900, which made Hawaii a formal territory, granted full and immediate United States citizenship to “all persons who were citizens of the Republic of Hawaii” in 1898, including racial “Hawaiians”. 31 Stat. 141, §4.

5 It should be noted that the Ninth Circuit, in *Williams v. Babbitt*, 115 F.3d 657, 664-666 (9th Cir. 1997) carefully examined and adjudicated a question which, under the District Court’s analysis, would be termed “political.” Indeed, it directly addressed the scope of the Indian “political questions” within the congressional prerogative and suggested that cases like *Pierce* and *Mancari* protect not all congressional preferences for Indian tribes and their members, but only those which relate to “Indian land, tribal status, self-government or culture.”

mention of the nonjusticiable political question issue, can it be considered in any way as changing or excusing the province and duty of the judicial department to say what the law is.

Precise relief sought (FRAP 28(a)(1): Reverse the order dismissing Plaintiffs' claims on 'political question' grounds.

II. STANDING AS BENEFICIARIES OF THE PUBLIC LAND TRUST TO CHALLENGE THE TRUSTEES' BREACH OF TRUST.

The May 8, 2002 Order Granting in Part and Denying in Part Motions to Dismiss on Standing Grounds, etc., Docket 117, *Arakaki v. Cayetano*, 198 F.Supp.2d 1165 (D. Hawaii 2002) (hereafter the 'Standing Order', ER 5) provides at page 26,

Trust beneficiary status has no bearing on Plaintiffs' claims. Trust beneficiaries have standing to allege a breach of trust, but that is not what Plaintiffs are alleging.

That is manifestly erroneous. Plaintiffs, as trust beneficiaries, specifically and in detail allege breaches of trust by both trustees, the United States and the State of Hawaii, through its officials charged with the administration of the Public Land Trust. The court, for purposes of standing, must accept those allegations as true and construe them in favor of Plaintiffs. (See Standard of Review, *supra*.)

In addition to constitutional claims, the Complaint (ER 1) alleges that Plaintiffs are beneficiaries of the public land trust created in 1898 (§ 9) when

the Republic of Hawaii ceded its public lands to the United States with the requirement that all revenues or proceeds, with certain exceptions, “shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes” (¶¶9, 21); The Newlands Resolution established the public land trust. (¶22) Congress, by enacting the Hawaiian Homes Commission Act (“HHCA”) in 1921, caused the United States to violate its fiduciary duty as trustee of the public land trust (¶28); Congress, by requiring as a condition of statehood that the HHCA be adopted and a race-based component be added to the purposes of the public land trust, caused the United States to violate its fiduciary duty as trustee of the public land trust (¶30); The fiduciary duty was violated by the OHA laws and HHCA laws and the conduct of State officials in implementing and enforcing them, causing ongoing harm to Plaintiffs (¶¶ 33, 34, 35, 56, 58 & 62). If and to the extent the OHA laws or the HHCA laws are defended, supported, implemented or authorized by any acts, customs or usages of the United States or its officials, they breach the fiduciary duty the United States owes to Plaintiffs as beneficiaries of the public land trust and are ongoing violations of federal laws (¶ 83).

The public land trust was created by federal law: The Newlands Resolution in 1898 expressly accepted the terms offered by the Republic of

Hawaii (including the requirement that, except for those used for civil, military or naval purposes of the United States or assigned for the use of local government, all revenues or proceeds of the ceded lands “shall be used solely for the benefit of the Inhabitants of the Hawaiian Islands for educational and other public purposes.”). Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Resolution No. 55, known as the “Newlands Resolution”, approved July 7, 1898; Annexation Act, 30 Stat. 750 (1898).

This trust was recognized by the Attorney General of the United States in 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.”

The Organic Act in 1900 reiterated that “All funds arising from the sale or lease or other disposal of public land shall be applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation approved July 7, 1898.” Organic Act §73(e).

“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.” (ER 4, Opinion by Margery Bronster, Attorney General State of Hawaii July 7, 1995 to Governor Benjamin J. Cayetano.)

“But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii.” *Rice v. Cayetano*, 528 U.S. at 525 (Breyer concurring) (emphasis in original).

Although there is no direct cause of action under the Admission Act, the Ninth Circuit has held that the Act creates federal rights which beneficiaries can enforce by invoking 42 U.S.C. § 1983, as Plaintiffs have done here: “the trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law.” *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 739 F.2d 1467, 1472 (9th Cir. 1984). The Ninth Circuit has repeatedly reaffirmed this holding that beneficiaries of the Hawaii’s Public Land Trust have standing to invoke § 1983 and sue state officials to compel them to comply with their obligations under federal law regarding both the trust lands and proceeds. *Price v. State of Hawai`i*, 764 F.2d 623, 628-30 (9th Cir. 1985) (beneficiaries have standing to seek to enjoin expenditures of trust proceeds and to compel state to apply proceeds to finance distribution of land); *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990) (standing to sue under § 1983 to challenge land exchange), *Price v. Akaka*, 915 F.2d 469, 471-72, n. 2

(1990) (standing to sue to challenge alleged illegal management and spending of public land trust income); *Napeahi v. Paty*, 921 F.2d 897, 901 n.2 (9th Cir. 1990) (standing to challenge state officials' alleged abandonment of public trust land to private individuals); *Price v. Akaka*, 928 F.2d at 828 (federal right enforceable under §1983 to challenge expenditures of trust income); *Price v. State of Hawai`i*, 939 F.2d 702, 706 (9th Cir. 1991), amended 1991 U.S. App. LEXIS 17944 (9th Cir. 1991) (standing to challenge state officials who allegedly failed to enforce trust regarding parcel of ceded lands); *Han v. Department of Justice*, 824 F.Supp. 1480 (D. Haw. 1993), affirmed 45 F.3d 333 (9th Cir. 1995) (standing to challenge use of § 5(f) land by illegal leases and licenses. The court has held that this line of standing authority is consistent with *Lujan*. *Price v. Akaka*, 3 F.3d 1220, 1223-25 (9th Cir. 1993).

The federal courts have the power to formulate a body of law governing this trust, drawing upon the common law of trusts. *Price v. State of Hawai`i*, 921 F.2d at 955. Also see *Maine v. Thiboutot*, 448 U.S. 1 (1980) (§ 1983 encompasses claims for deprivation of federal rights, not only constitutional rights). Therefore, Plaintiffs have standing to assert their federal rights as beneficiaries against State officials and the United States under all applicable sources of federal law.

Both the United States and the State of Hawaii, when acting as trustee, must refrain from compliance with a term of the trust which is illegal and harms the beneficiary.

The ‘Standing Order’ (ER 5) says at 26-27,

Instead, Plaintiffs want this court to declare unconstitutional one of the stated purposes in section 5(f) Plaintiffs are demanding that the State ignore an express trust purpose, which Plaintiffs say violates the Equal Protection Clause. Allowing such a challenge, however, would make a nullity of standing requirements.

The common law of trusts applicable to federally created trusts may be found in the Restatements of the Law of Trusts. For example, see *Price v. Akaka*, 828 F.2d 824, 827 (9th Cir. 1991).

Under the Restatement of the Law of Trusts 2d, §214, Several Beneficiaries,

(1) If there are several beneficiaries of a trust, any beneficiary can maintain a suit against the trustee to enforce the duties of the trustee to him or to enjoin or obtain redress for a breach of the trustee' s duties to him.

§201 What Constitutes a Breach of Trust,

A breach of trust is a violation by the trustee of any duty which as trustee he owes to the beneficiary.

Under § 166. Illegality,

(1) The trustee is not under a duty to the beneficiary to comply with a term of the trust which is illegal.

(2) The trustee is under a duty to the beneficiary not to comply with a term of the trust which he knows or should know is illegal, if such

compliance would be a serious criminal offense or would be **injurious to the interest of the beneficiary or would subject the interest of the beneficiary to an unreasonable risk of loss.** (emphasis added.)

An unconstitutional statute 'confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. *Norton v. Shelby County*, 118 U.S. 425, 442, 6 S.Ct. 1121, 1125, 30 L.Ed. 178 (1886).

A term of a public trust which violates the Constitution is illegal and unenforceable. *Pennsylvania v. Board of City Trusts*, 353 U.S. 989, 77 S.Ct. 1281 (1957).

Charitable trusts, such as Hawaii's Public Land Trust⁶, are subject to the rule that trust purposes and provisions must not be unlawful or contrary to public policy. Provisions of this type in charitable trusts are not valid if they involve *invidious* discrimination. Restatement, Trusts 3d §28, General comment f.

Appellants' complaint explicitly alleges that both the United States and the State of Hawaii officials have violated their duties as trustees of the Public Land Trust. The most egregious breaches of trust by the United

⁶ Black's Law Dictionary, 7th Ed., **public trust**. See *charitable trust*. **charitable trust**. A trust created to benefit ... the general public rather than a private individual or entity. See also Restatement, Trusts 3d §28, Charitable trust purposes include the advancement of knowledge or education, governmental or municipal purposes and other purposes that are beneficial to the community.

States were enacting the Hawaiian Homes Commission Act in 1921 and imposing upon the State of Hawaii, in 1959, as a condition of statehood, the obligation to adopt and implement that Act. The United States is involved in continuing breaches by forbidding amendment or repeal of the HHCA or change of lessee qualifications, except “with the consent of the United States”, continuing to require Hawaii to use the 200,000 acres of “available lands” “only in carrying out the provisions of said Act” and reserving the right to sue the State for breach of trust (Admission Act §§4 & 5(f)).

Appellants, as the beneficiaries injured by the illegal trust term, seek redress: A declaration that the provisions are illegal and an injunction against State officials and the United States further complying with or implementing them.

The State of Hawaii violated its duties as trustee by incorporating the HHCA into the state' s law and in 1978, by creating OHA. Its officials are in continuing breach by their ongoing administration of these state laws and their continuing application of public lands and funds for the racially discriminatory programs of both these agencies.

OHA represents a particularly clear and offensive breach by the state. Nothing in the Admission Act or other Federal law requires the state to apply any part of the Public Land Trust lands or income from them to OHA

or, through OHA, for the benefit of native Hawaiians or Hawaiians. Section 5(f) of the Admission Act simply limits the state' s use of the Public Trust Lands and their proceeds to "one or more" of five specified uses, one of which is the "betterment of the conditions of native Hawaiians." The *Rice* decision made it clear that this one of these five purposes is based on a racial classification and is thus presumptively unconstitutional. None of the other permissible uses is under a similar cloud. The state can fully discharge its trust responsibilities to all the citizens of Hawaii by applying all of the trust resources to one or more of the other four permissible uses. By continuing to implement and fund the presumptively unconstitutional OHA programs, the State' s officials continue to violate the Public Land Trust.

The Trustees' Duty to Deal Impartially With Beneficiaries.

Finally, the State and its officials breach their duties as trustees each day by administering the Public Trust Lands pursuant to the HHCA and the OHA statutes because these statutes mandate partiality toward the native Hawaiian citizens of Hawaii. The Restatement of the Law, Trusts 3d § 183 entitled "Duty To Deal Impartially With Beneficiaries," states: "When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them." The trustee must deal impartially when there is more than one beneficiary. *Ahuna v. Dept. Hawaiian Home Lands*, 64 Haw.

327, 340 (1982) citing federal authorities including *Mason*. The Uniform Principal and Income Act, HRS §557A-103 **Fiduciary duties; general principles**, provides in part, “... a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries.”

Setting aside 200,000 acres of the trust corpus exclusively for native Hawaiians and still allowing them to share in the benefits of the other 1.2 million acres is, by definition, not impartial. It favors each native Hawaiian beneficiary and disfavors every other beneficiary.

Precise relief sought (FRAP 28(a)(1): Order that Plaintiffs have standing as beneficiaries of the Public Land Trust to pursue their claims in this case.

III. STATE TAXPAYER STANDING:

A. To Challenge Unconstitutional Government Activities that Adversely Affect the Public Fisc and Increase the Tax Burden of, but Deny Benefits to, Those Not of the Favored Race.

The trial court correctly held that Plaintiffs, as taxpayers of the State of Hawaii, have standing to present their claims. *Hoohuli v. Ariyoshi*, 741

F.2d 1169 (9th Cir. 1984). (ER 5, Docket 117, the May 8, 2002 Standing order at 14 & 16, also reported as *Arakaki v. Cayetano*, 299 F.Supp. 2d 1090, 1098 & 99 (D.Hawaii 2002).

However, nothing in *Hoohuli*, or any other legal authority, authorizes the extraordinary restrictions imposed by the trial court on Plaintiffs' taxpayer standing; namely, (a) that plaintiffs only have taxpayer standing to challenge direct expenditures of tax money by the legislature, (b) that plaintiffs' taxpayer standing does not allow them to challenge 'pass-through' expenditures (revenue deposited into Hawaii's General Fund and thereafter paid out to OHA) (ER 5, DKT 117 at 17.), (c) that plaintiffs similarly lack standing to challenge the State's payment of \$30 million per year to the Hawaiian Home Lands trust because "that amount is being paid over time, in satisfaction of a decision by the Hawaii legislature to settle past claims relating to matters administered by DHHL" (ER 5 DKT 117 at 18.), (d) that plaintiffs lack standing to challenge the State's issuance of bonds or other borrowing of money [for]DHHL or OHA." (*Id.* DKT 117 at 19) and (e) that "... this court did not find that Plaintiffs may seek invalidation of the Hawaiian Homes and OHA laws in toto. (Order Granting Defendant United States of America's Motion to Dismiss September 3, 2002 ER 8 DKT 205 at 3.)

Those restrictions on activities Plaintiffs may challenge and on available remedies amount to the dismissal or partial summary judgment on the merits of substantial parts of Plaintiffs' claims, based on the pleadings, without taking evidence, without compliance with the rules for summary judgment and in violation of the requirement that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett v. Spear*, 520 U.S. 154, 168 (1997). See also Standard of Review, *supra*.

The restrictions are also contrary to the law in the Ninth Circuit. "Legislative enactments are not the only government activity which the taxpayer may have standing to challenge. (contrasting state taxpayer' s ability to challenge executive conduct with federal taxpayer' s). *Cammack v. Waihee*, 932 F.2d 765, 771 (9th Cir. 1991). In *Cammack*, the challenged statute did not appropriate any funds. The court noted, "Hawaii's section 8 - 1 appropriates no funds to carry out its purposes. By providing for state holidays, however, the statute has at least the **fiscal impact** that many state and local government offices are closed and many state and local government employees need not report to work." *Id.* at 767 (emphasis

added)). The court continued: “Thus, we conclude that **municipal taxpayer standing simply requires the “injury” of an allegedly improper expenditure of municipal funds, and in this way mirrors our threshold for state taxpayer standing.**” (Emphasis added.) See also *Hawley v. City of Cleveland*, 773 F.2d 736, 741-42 (6th Cir.1985), *cert. Denied*, 475 U.S. 1047, 106 S.Ct. 1266, 89 Led.2d 575 (1986) (municipal taxpayers may challenge city lease of airport terminal space to church where the lease agreement could have **a detrimental impact on the public fisc**) (Emphasis added).

Hoohuli, itself, noted that OHA is “supported in part by funds from a trust [the Public Land Trust] which are required to be spent exclusively for “native Hawaiians”. *Hoohuli, supra*, 741 F.2d at 1181. But the Court did not say or even suggest that taxpayers could not challenge such spending even if it increased their tax burden. Instead, it quoted the Supreme Court’s language in *Doremus* suggesting that a state taxpayer need only allege that the challenged activity “**adds any sum whatever to the cost of conducting the school.**” or “that as taxpayers they **are, will, or possibly can be out of pocket because of it.**”

In *Doe v. Madison School District*, 177 F.3d 789 (9th Cir. 1999), the Ninth Circuit, *en banc*, reviewed the rules of state taxpayer standing and

noted, citing *Fuller v. Volk*, 351 F.2d 323, 327 (3d Cir.1965) that a “taxpayer must be shown to be suing to prevent **a misuse of public funds** for this is the only interest which a federal court can protect in a taxpayer's suit.”). (Emphasis added.) The court further noted that the Doe plaintiff therein had challenged the use of municipal and state (rather than federal) tax revenues and accordingly that *Doremus v. Board of Education, supra.* controlled the requirements for taxpayer standing. The court cited with approval, *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir.1990), which held that in order to establish state taxpayer standing, plaintiffs must show that **the challenged activity involves** "a measurable appropriation" or **loss of revenue**, and "a direct dollars-and-cents injury" to themselves.

Two years after *Doe*, the Sixth Circuit Court in *Johnson v. Economic Development*, 241 F.3d 501 (6th Cir. 2001) upheld a state taxpayer’s suit claiming the issuance of tax-exempt bonds violated the Establishment Clause and cost the Michigan treasury **\$68,000 in lost revenue** from income tax that would have otherwise been paid on interest on the bonds. The court observed that the Supreme Court in *Doremus* **did not distinguish between an expenditure and loss of revenue** in determining whether there was a “good faith pocketbook injury” and that under *Doremus*, state taxpayer

standing simply requires that there be a ‘requisite **financial interest that is, or is threatened to be, injured by the unconstitutional conduct.**’”

Thus, state taxpayer standing simply requires the ‘injury’ of an allegedly improper activity which could have a detrimental impact on the public fisc. Whatever unconstitutional method is used to inflict harm on the public fisc, whether by improperly increasing expenditures or improperly decreasing revenues or by issuing bonds or making ‘settlements’ for unconstitutional purposes or by any activity that improperly adds any sum whatsoever to the cost of conducting the State’s affairs, the injury to taxpayers’ pocketbooks can be real and concrete and particularized. State taxpayers have the right to challenge such improper activities in federal court and to seek declaratory and injunctive relief to prevent their recurrence.

Taxpayers’ right to challenge “settlements”.

Act 14, SLH 1995 established the Hawaiian home lands trust fund and referred to a ‘requirement that the State make twenty annual deposits of \$30,000,000, or their discounted value equivalent, into the trust fund’ but actually appropriated only \$30 million per year for the two years 1995-96 and 1996-97. This was a tacit acknowledgement that one legislature cannot bind future legislatures. Section 1 of Act 14 made that express.

The legislature notes and expressly finds that the MOU [Memorandum of Understanding]⁷ does not bind the legislature and that it is the right and duty of the legislature to exercise its independent judgment and oversight in developing such implementing and related legislation which is in the overall public interest.

Section 20 of Act 14 also recognized that the Act might be held invalid in whole or in part and provided that, if so, the entire act (with one exception not relevant here) would be invalid. Thus, by its own terms, Act 14 does not purport to be a settlement contract which is binding on future

⁷The Memorandum of Understanding (Exh. 2 filed in this Court 4/13/04) was signed December 1 and 2, 1994 in the closing days of the Waihee administration. It set forth the “terms of action” agreed to between the members of the Task Force and the “independent representative of the beneficiaries” as to administrative action and legislation they will “seek”. For example, “the task force will seek ... establishment of the Hawaiian home lands settlement trust fund and the annual payment of \$30,000,000, until a total of \$600,000,000, over a period not to exceed twenty years, is paid into the settlement trust fund.” Par E. Paragraph L provides, “The task force recommends and will seek continuation of the state’s efforts to continue the pursuit of Hawaiian home lands trust claims against the federal government. The legislation sought by the task force is not intended to replace or affect claims of native Hawaiians or Hawaiians with regard to reparations against the federal government. Nothing in this agreement or legislation pertaining to this agreement is intended to affect any claims arising out of the 1893 overthrow, or 1898 annexation, or claims under the public land trust.”

The MOU does not refer to or purport to settle any lawsuit. Nor does it purport to be, in itself, a settlement contract binding on the State, State agencies, all beneficiaries of the public land trust or anyone else.

legislatures. The ongoing appropriations of the \$30 million per year pursuant to Act 14 are the independent acts of each subsequent legislature.

Like all state laws and all conduct of State officers in implementing them, laws characterized by legislatures as “settlements”, whether or not that characterization is accurate, are subject to the United States Constitution and other federal laws. When those state laws impose invidious discrimination that causes injury, as these do to all persons not of the favored race, they may and must be enjoined.

For similar reasons, the approximately \$135 million paid to OHA in May and June of 1993 “for the betterment of the conditions of native Hawaiians” (pursuant to Act 304 SLH 1990 to “satisfy” the amounts payable for the period from June 16, 1980 through June 30, 1991) is not exempt from judicial scrutiny merely because it was largely financed with general obligation bonds and characterized as a “settlement.” when it was presented to the legislature for approval in 1993.

Act 304 SLH 1990 amended §10-13.5 HRS retroactive to 1980 to provide that twenty per cent of all “revenue” derived from the public land trust shall be expended by OHA for the betterment of the conditions of native Hawaiians. Act 304 defined “revenue” as “all proceeds, fees, charges, rents or other income ... derived from any ... use or activity, that is

situated upon and results from the actual use of lands comprising the public land trust.” The previous language, enacted in 1980, had provided that twenty percent of all “funds” derived from the public land trust shall be expended by OHA and did not define “funds”.

The effect of this definitional change was dramatic. Instead of calculating the pro rata portion for native Hawaiians from the “income” derived from the public land trust, as allowed by Art. XII, §6 Haw. Const., the twenty percent would thenceforward and retroactively be calculated on the gross revenues of the trust itself. (See ER 17, graph showing OHA’s annual PLT receipts at least quadrupling after 1990.)

With Act 304’s broadened definition, the “Office of State Planning” (located at that time in Governor Waihee’s office) and OHA “ascertained” the amount payable to OHA for the period June 16, 1980 through June 30, 1991 and presented it to the legislature in 1993. By Act 35 SLH 1993, “pursuant to Act 304, Session Laws of Hawaii 1990”, the legislature appropriated \$136,500,000 out of general obligation bond funds, or so much thereof as may be necessary, for payment to OHA. On April 27 and 28, 1993, after the legislature had authorized the payment, the Office of State Planning and OHA signed a memorandum which stated in part, “OSP and OHA recognize and agree that the amount specified in Section 1 hereof does

not include several matters regarding revenues which OHA has asserted is due to OHA and which OSP has not accepted and agreed to.” (See ER 24, Exhibit 5, Memorandum, item 7, page 9, also part of Docket 331.)

On May 30, 1993 the Office of State Planning paid OHA \$5 million from the general fund “subject to audit” to partially satisfy the amount payable to OHA under Act 304 for the 1980-1991 period. (ER 23, Exhibit 6.) On June 4, 1993 the Office of State Planning paid OHA \$129,584,488.85 pursuant to Act 304 for the period of June 16, 1980 through June 30, 1991 “which amount is, however, subject to audit and reimbursement.” (ER 23, Exhibit 7.)

These two “settlements” (the 1993 \$135 million to OHA pursuant to the now-repealed Act 304; and the 1995 legislation referring to \$30 million per year for twenty years to the Hawaiian home lands trust), which the trial court held to be immune from challenge by Plaintiffs as state taxpayers, have been financed at least in substantial part by general obligation bonds. These bonds increase the tax burden on Plaintiffs and all other taxpayers who must repay the principal and interest but are excluded from receiving the benefits solely because they are not of the favored race.

Attachments 7 (ER 9) and 9 ER 10) show the amounts paid from the general fund on General Obligation Funded Debt through April 1, 2002:

\$91,533,355.16 paid for OHA with \$95,854,079.93 still owed and \$35,148,474.85 paid for Hawaiian Home Land Trust Fund with \$126,277,234.55 still owed.

Thus, Plaintiffs-Appellants have each suffered and continue to suffer genuine pocketbook, dollars and cents, concrete and particularized injuries as a result of these payments. They have been and still are being taxed to pay the bills but are excluded from the benefits solely because they are not of the favored race.

B. To Seek Declaratory and Injunctive Relief against the United States because of Federal Laws which Require the State to Violate the Fourteenth Amendment resulting in Harm to State Taxpayers' Pocketbooks.

The Order filed November 21, 2003 (ER 14 at 5 & 6 & 24 - 28), among other things, dismissed Plaintiffs' claims against the United States and DHHL/HHC saying at 5, "State taxpayer standing is too limited to permit a challenge to a federal law and therefore does not allow Plaintiffs to challenge the Hawaiian Home Lands lease program, which is mandated by both state and federal law." and at 27, "Relying on *Western Mining Council*, this court holds that a challenge to the Admission Act requires standing that Plaintiffs lack."

Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981)

however bears little resemblance to this case and, with all respect, it does not hold that ‘State taxpayer standing is too limited to permit a challenge to a federal law.’ (The federal law in question in that case did not require California or any other state to do anything unconstitutional or even anything at all. Here, §4 of the Admission Act requires the State of Hawaii to violate the Fourteenth Amendment and federal trust law.) Rather *Western Mining Council* simply tells us a state taxpayer does not properly state a claim merely by alleging a federal policy of generally retaining federal lands might restrict the state tax base and lead to higher state taxes. Even accepted as true and construed favorably, the allegation is nothing more than a generalized grievance shared by those plaintiffs in common with all state taxpayers.

The trial court’s Order filed November 21, 2003 (ER 14 at 26, fn 8) says other circuits are split on an analogous issue, citing *Bd. of Edu. v. N.Y. State Teachers’ Retirement Sys.*, 60 F.3d 106, 111 (2d Cir. 1995) as holding that municipal taxpayer standing is insufficient to allow a plaintiff to challenge state mandated laws. However, *State Teachers* did not hold that state taxpayers may not challenge federal statutes which compel a state to violate the Fourteenth Amendment, nor has any other court to Appellants’

knowledge. Even on the analogous issue, its language is dicta. The plaintiffs in *State Teacher* brought suit as municipal taxpayers only against the State, not against the municipality.

Here, the taxpayers do not rely on a "peculiar relation" with the municipality, see [*Frothingham*, 262 U.S. at 486-87, 43 S.Ct. at 601.](#) Indeed, this suit was not brought against a municipality, but against a state. Accordingly, the plaintiff taxpayers do not have standing as taxpayers to bring this suit, and the district court properly granted the motion to dismiss as to the claims brought under the common-law theory of taxpayer standing. *State Teachers*. 60 F.3d at 111.

It therefore appears that the municipal taxpayer plaintiffs in *State Teacher* did not sue the municipality or even allege that the challenged state laws increased their municipal taxes any more than those of any other municipal taxpayers or that they received any less benefits from the challenged expenditures than any others or that they suffered any other concrete, particularized, pocketbook injury. The case seems to be another example of a "generalized grievance" shared in common with all municipal taxpayers.

Two cases illustrate the error in the district Court's decision in this case and a more appropriate approach to taxpayer standing.

In *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840 (6th Cir.1984) a school district, a taxpayer of the school district and a student enrolled in one of the schools in the district, brought action against state and

federal defendants alleging inter alia, that the state defendants were violating various Constitutional provisions by the manner in which they administered state aid laws in conjunction with federal impact aid. The district court granted summary judgment in favor of the state defendants, dismissed all claims against the federal defendants, and plaintiffs appealed. The Court of Appeals held that: The individual plaintiff taxpayer of the school district and a student enrolled in one of the schools of the district, had standing to challenge the state aid formula as administered by the state superintendent of instruction; and the Michigan State School Aid Act, which provided for a reduction in state funding to school districts which were receiving federal impact aid, did not deny equal protection to students in those districts. As to the federal defendants, the Sixth Circuit said, "The district court was clearly correct in dismissing the claims against the federal defendants for failure of the plaintiffs to exhaust administrative remedies" but added,

One finding of fact with respect to exhaustion is clearly erroneous. The district court found that the plaintiffs had failed to exhaust their administrative remedies for the school year 1982-83. The record discloses, and the defendants concede, that administrative remedies related to that year are still in progress. Therefore, on remand the district court will amend its judgment to dismiss claims against the federal defendants based on allocation of state aid for the school year 1982-83 without prejudice.

The direction to dismiss the federal defendants without prejudice as to that year when administrative remedies were still in progress, indicates that,

if plaintiffs did exhaust their administrative remedies for that year but did not obtain relief, the door was open to those plaintiffs to again bring suit against the federal defendants. If the municipal taxpayers had “lacked” standing to challenge federal laws (as the trial court here said of state taxpayers) the court would have dismissed the federal defendants outright, as the trial court here did, whether administrative remedies had been exhausted or not.

Thus *Gwinn* supports the standing of municipal taxpayers (whose standing mirrors state taxpayers’ standing in the Ninth Circuit) to bring suit in federal court against both state and federal defendants for alleged constitutional violations.

In *City of New York v. United States Dep’t of Commerce*, 822 F.Supp. 906 (E.D. N.Y. 1993), Circuit Judge McLaughlin, sitting by designation, upheld the standing of individual state and municipal taxpayers (as well as states and cities) to sue federal agencies or officials for unconstitutional decision-making in the context of the census. The court noted that “Because the counts are used to calculate the political representation and financial aid to be afforded to a given area, the fear that the census may be perpetuating a system in which those most in need of representation and aid are deprived of both is a major concern.” 822 F.Supp at 911 -912. This case was later

reversed on the merits, as to the challenged census adjustment, by the Supreme Court with no suggestion that standing was insufficient. *Wisconsin v. City of New York*, 517 U.S. 1, 116 S.Ct. 1091, 134 L.Ed.2d 167 (1996).

The HHCA, as imposed on the State of Hawaii by the Admission Act, is a stark example of an act which is beyond the power of Congress, i.e., to authorize, and indeed to require, a state to violate the Fourteenth Amendment. The Supreme Court has "consistently held that Congress may not authorize the States to violate the Fourteenth Amendment." *Saenz v. Roe*, 526 U.S. 489, 508, 119 S.Ct. 1518, 1528 (1999). The Court noted:

FN21. "' Congress is without power to elicit state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause.'

Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation.

Green v. Dumke, 480 F.2d 624 (9th Cir. 1973), involved a college student's claim that he had been improperly denied federal financial assistance as a result of decisions by the college and its officials in the administration of the federal aid program. The college claimed immunity on grounds that the college was acting pursuant to federal law and not under color of state law. The Ninth Circuit denied the claim of immunity. It explained the college was "a participant in a federal-state cooperative

venture of a kind that is increasingly familiar. Its role is analogous to that of state agencies administering other kinds of federally funded or cooperatively funded, social programs such as the Aid to Families With Dependent Children (AFDC) program. The Supreme Court has repeatedly found federal jurisdiction for challenges to the activities of state agencies administering federal programs under 42 U.S.C. §1983 combined with 28 U.S.C. §1343. **It has not mattered a jurisdictional whit that the agency was enforcing federal statutes, as well as pursuing state ends."** 480 F.2d at 629.

(Citations omitted; emphasis added.)

At 480 F.2d 629, the Ninth circuit continued,

When the violation is the joint product of the exercise of a State power and a non-State power then the test under the Fourteenth Amendment and § 1983 is whether the state or its officials played a ' significant' role in the result.

Precise relief sought (FRAP 28(a)(1): Uphold Plaintiffs' standing as state taxpayers to pursue their claims against all Defendants; Reverse the trial court's restrictions on activities Plaintiffs challenge and remedies available to them.

IV. PLAINTIFFS' COUNTER MOTION FOR PARTIAL SUMMARY JUDGMENT ON ISSUES ALREADY LITIGATED, OR UNDISPUTED, SHOULD HAVE BEEN GRANTED.

On December 15, 2003 Plaintiffs counter moved for partial summary judgment (ER 25) as to certain key issues relating to the *Mancari* defense raised by OHA's motion to dismiss filed December 3, 2003 (DKT 327) On December 16, 2003, (ER 26) the trial court *sua sponte* struck Plaintiffs' motion as "untimely" and "because it raises issues that should be raised in subsequent rounds of summary judgment motions." On January 14, 2004 (ER 28) the trial court granted OHA's motion and dismissed Plaintiffs' remaining Equal Protection claim, reasoning as if the key *Mancari* defense issues had not already been raised and rejected in previous cases or were undisputed. ("To determine the level of scrutiny applicable to these preferences, this court must determine whether Hawaiians should be recognized as federally recognized such that the Morton [*Mancari*] analysis is applicable.")

Plaintiffs' counter motion was timely and appropriate because OHA's motion injected the *Mancari* issues into the first round and Plaintiffs were faced with the possibility that the court would dismiss their case without taking into account that key elements of the *Mancari* issues had already been adjudicated against OHA and were factually insupportable. The trial court

did exactly that. It should have considered and granted Plaintiffs' counter motion for the following reasons:

A. Issue preclusion.

Issue preclusion (also known as "collateral estoppel") bars the Defendants from re-litigating issues already adjudicated against them. The Ninth Circuit has explained that to

foreclose relitigation of an issue under collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.

Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320 (9th Cir. 1992). *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992). In addition, the party that is foreclosed from relitigating the issue must have been a party or in privity with a party in the prior litigation. *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167-68 (1999); *Pena v. Gardner*, 976 F.2d at 472.

Several of the key issues in this case have already been adjudicated in *Rice v. Cayetano* and in *Arakaki I*.

- The definitions of "native Hawaiian" and "Hawaiian" in HRS §10 -2 are racial classifications. *Rice*, 528 U.S. at 516-517; *Arakaki I Summary Judgment Order* (ER 25) at 28.
- OHA is a state agency. *Rice*, 528 U.S. at 520.

- OHA, a state agency, is not itself a quasi-sovereign, nor does it participate in the governance of a quasi-sovereign. *Rice*, therefore, explains that *Mancari* does not apply to the State mandate that OHA trustees be Hawaiian. *Arakaki I Summary Judgment order* at 24.

- The State does not have the same unique relationship with Hawaiians and native Hawaiians as the federal government has with Indian tribes. *Arakaki I Summary Judgment Order* at 25.

- In response to arguments by the State Defendants and OHA that ‘Hawaiians, like native Americans, are indigenous people who have a unique trust relationship with the federal government, this court in *Arakaki I* said, ‘Defendants’ and OHA’s arguments fail for several reasons.’ *Arakaki I Summary Judgment Order* at 22.

- See Admission Act §5(f). Although Congress envisioned the need for a public trust, it did not authorize the State to restrict the administration of that trust to a particular race. *Arakaki I Summary Judgment Order* at 26.

- Assuming arguendo, native Hawaiians shared the same status as Indians in organized tribes, *Mancari* would not permit Congress to authorize a state to exclude non-Hawaiians from voting for the state’s public officials. *Arakaki I Summary Judgment Order* at 23 citing *Rice* at 528 U.S. 520.

- The scope of the rule announced in *Mancari* is limited to tribal Indians. There is no other group of people favored in this manner. *Arakaki I Summary Judgment Order* at 22. *Rice*, 528 U.S. at 518.
- The preference at issue in *Mancari* only applied to the BIA. *Arakaki I Summary Judgment Order* at 22.
- The legal status of the BIA is truly sui generis. *Arakaki I Summary Judgment Order* at 22, citing *Rice* at 528 U.S.518.
- *Rice* excluded *Mancari*'s application to the OHA voting scheme precisely because OHA is an agency of the State. *Arakaki I Summary Judgment Order* at 23, citing *Rice* at 528 U.S.520-21.

Each of the above issues is also a key issue in this case. The same rule of law and arguments are at issue in this case as in *Arakaki I*. See *Disimone v. Browner*, 121 F.3d 1262, 1267 (9th Cir., 1997) (factors to be considered include whether there is substantial overlap of argument and whether application of same rule of law involved in both cases). In *Arakaki I*, Defendants ‘argue that Hawaiians, like native Americans, are indigenous people who have a unique trust relationship with the federal government.’ *Arakaki I Summary Judgment Order* at 22. Defendants make the same arguments here that they made in *Arakaki I*, without even ‘a switch in the verbal formula’ such as proved insufficient to distinguish earlier and later

cases in *Starker v. United States*, 602 F.2d 1341, 1345 (9th Cir. 1979).

Second, these constitutional issues were actually litigated in *Arakaki I* as central issues in that case.

Third, Judge Gillmor decided those issues in *Arakaki I* and her decision as to each of those issues was “a critical and necessary part of the judgment in the earlier action.” *Clark*, 966 F.2d at 1320. As the State Defendants and OHA argued in that case, and as they reiterate here, if *Mancari* applied to state agencies using the classifications “Hawaiian” and “native Hawaiian” then the statutes at issue would be upheld. *Arakaki I Summary Judgment Order* at 22. But Judge Gillmor expressly considered and rejected the Defendants’ argument. “Defendants’ and OHA’s arguments fail for several reasons.” *Arakaki I Summary Judgment Order* at 22.

Following *Rice*, Judge Gillmor held that the application of the statutory definition of “Hawaiian” as a qualification to be an OHA trustee discriminates based on race. The rule announced in *Mancari* does not save the racial restriction on who may serve as a trustee of OHA. *Id* at 21.

The Defendants in this action were Defendants in *Arakaki I* or are in privity with them. The Defendants in *Arakaki I* were the State, Governor Cayetano and Chief Elections Officer Yoshina (both sued in their official capacities). The State Defendants centered their defense on their claim that

the racial classification permitting only Hawaiians to serve as trustees of OHA is akin to preferences Congress has provided to native Americans and which require only a rational basis review before the preference would be upheld. *Id.* at 12. OHA was permitted to intervene as a Defendant in order to represent the interests of its beneficiaries, Hawaiians and native Hawaiians. *Arakaki I Summary judgment order* at 12. In practical effect, Plaintiffs sought and obtained a judgment against the State, including its agency, OHA. In the present case, Governor Cayetano was again, and his successor Linda Lingle is, sued in his and her official capacity, as are all the other state officials. OHA, through its trustees, is also a party. Plaintiffs name the state officials in their official capacities in order to obtain a judgment in practical effect against the State, including its agencies, OHA and HHC/DHHL. Because an official capacity suit is a way to sue the government, an official sued in his official capacity is in privity with the government. *Conner v. Reinhard*, 847 F.2d 384, 394 (7th Cir. 1988); *Gregory v. Chehi*, 843 F.2d 111, 120 (3d Cir, 1988). Similarly, beneficiaries are bound by a judgment against a trustee with respect to the interest that is the subject of the fiduciary relationship. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593-94 (1974); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1277-78 (9th Cir. 1992).

There is also continuity among the plaintiffs in the two cases. Among the Plaintiffs in the present case are most of the Plaintiffs in *Arakaki I*: Earl F. Arakaki, Evelyn C. Arakaki, Sandra P. Burgess, Edward U. Bugarin, Patricia A. Carroll, Robert M. Chapman, Michael Y. Garcia, Toby M. Kravet, and Thurston Twigg-Smith.

Thus, the requirements for issue preclusion (collateral estoppel) are satisfied. The decision in *Arakaki I* on the issues that “Hawaiian” and “native Hawaiian” are racial classifications and that *Mancari* does not apply to a state agency using racial classifications, precludes and estops the Defendants here from relitigating these issues.

B. Undisputed issues. There is no genuine as to the fact that there are no federally recognized native Hawaiian or Hawaiian tribes. For example:

- “There is no currently existing federally recognized Native Hawaiian tribe.” OHA’s Supplemental Memo filed May 5, 2003 at 4 (ER 11, DKT 249).

- Congress has not decided that it will deal with Native Hawaiian groups as political entities on a government-to-government basis, *e.g.* as a federally recognized tribe. Indeed, Plaintiffs [*Kahawaiolaa*] have not shown, nor could they show, that Congress has established such relations.

Hawaii, either as a State or U.S. Territory, never had a reservation program. *Kahawaiolaa v. Norton*, 222 F.Supp.2d 1213, 1219, 1220, 1221, fn. 10 (D. Hawaii 2002).

- OHA's Amicus Brief dated November 18, 1997 in the Ninth Circuit in *Rice v. Cayetano*, Ninth Circuit No. 97-16095 at 25, "Native Hawaiians were not culturally organized into tribal units in pre-contact periods, so it would obviously be insensitive and inappropriate to impose that obligation on them now." Exhibit 3 to Plaintiffs' Separate Concise Statement. (ER 25.)

- In 1920, there was no government or tribe of Hawaiians to deal with. At the hearings before the House Committee on the Territories on February 3, 1920 on proposed adoption of the Hawaiian Homes Commission Act, Representative Dowell questioned the Territory of Hawaii Attorney General about the legality of "class" legislation. Harry Irwin, the Attorney General, said the 14th Amendment applies only to states. Committee Chairman Curry said, Congress does enact class legislation lands to Indians. Dowell: But we have made Indians wards of Congress. Page 167. Curry: We give land to Civil War veterans. Also, Mexican War veterans. Dowell: This is an absolute exclusion of all except a certain class of citizens. Page 168. Dowell: It seems to me that the Indian proposition is hardly a parallel

with the question we have before us. Curry mentions Indians being deprived of their lands. Dowell: That is true, but in principal have we not a different proposition because **we have no government or tribe or organization to deal with.** Page 171. Chairman Curry finally comments, I think it is legal but I would not stake my reputation on it. Page 174. (Emphasis added. Also, the above are short-hand summaries. For the exact wording see ER 25, Exhibit 2 to Plaintiffs' Separate Concise Statement of Facts filed December 15, 2003.)

- “..no vestiges of an official ‘tribe’ which purports to represent all Native Hawaiians remains.” “Native Hawaiians are no longer a community under one leadership, or indeed any leadership at all outside of state-created entities such as the Office of Hawaiian Affairs.” Brief of Patton Boggs law firm, lobbyist for OHA in approximately July 2003. Lobbying fee to Patton Boggs: reportedly up to \$450,000. (ER 25, Exhibit 4 at 4 & 6.)

For the above reasons, Appellants ask this Court to direct, on remand, that *Mancari* is inapplicable to this case and the standard of review for the HHCA/DHHL laws and the OHA laws is strict scrutiny.

V. TWENTY TWO MONTHS OF DELAYS.

This case is a straightforward challenge to the legitimacy of two state agencies, both based on the same racial classifications (*Rice, supra*, 495 U.S. at 516) and therefore presumptively unconstitutional. (*Shaw, supra*, 509 U.S. at 643-44.) They must be ended unless the court finds they pass strict scrutiny. (*Adarand, supra*, 515 U.S. at 227.) Both agencies give native Hawaiians special benefits in the lands and revenues of the public land trust denied to other beneficiaries, thereby openly and undeniably breaching the trustees' fiduciary duty of impartiality under black letter trust law. (Restatement, Trusts 3d § 183.) This important but uncomplicated legal challenge was entitled to a just, speedy and inexpensive determination. (F.R.Civ.P. Rule 1.)

The trial court, instead, almost immediately put Plaintiffs into a holding pattern. On March 12, 2002 at the first hearing just eight days after the case was filed, the trial court asked Plaintiffs not to file for summary judgment and ordered that if they did the motion would not be heard until after standing motions were heard.⁸

⁸ (March 12, 2002 hearing Transcript, p11) MR. BURGESS: Well, your Honor, we may also and it might make sense to permit us to file a motion for summary judgment in favor of the plaintiffs as well. THE COURT: Oh, no.

The trial court then scheduled dates for hearing any motions to dismiss based on standing that might be filed by Defendants, denied Plaintiffs' motion for TRO and set Plaintiffs' motion for preliminary injunction for July 24, 2002 (after the end of fiscal year 2002 and therefore too late to enjoin any end-of-year disbursements by Defendants).

On June 14, 2002, in response to a letter requesting bifurcation from counsel for the State and HHCA/DHHL Defendants, (ER 32 4/11/04, Exh. 1) the trial court requested letters from other counsel about bifurcation and ordered (DKT 149, 6/14/02 at page 2) "Any summary judgment motion filed before the bifurcation is decided will not be heard until after the bifurcation motion is decided". On June 17, 2002 one of Plaintiffs' counsel, Patrick Hanifin, responded by letter that bifurcation would needlessly delay the case, "Plaintiffs believe that this case can be resolved on summary judgment and intend to file such a motion at the appropriate time." (ER 32, Exh. 2.) The State and HHCA/DHHL Defendants however moved to bifurcate (DKT 167) joined by OHA (DKT 168).

Don't do that, please. I mean you can do it, but I'm not going to set it on the same day. These motions are going to be limited to standing, the motions to dismiss.

On August 20, 2002 (DKT 200) the court denied the Defendants' motion to bifurcate, without prejudice to the filing of another motion to bifurcate to be filed no later than October 31, 2002. The court noted "The court recognizes that Plaintiffs may be prepared to file their motion for summary judgment. However ...a delay of a few months is not unreasonable ..." and ordered on page 2, "...no dispositive motion may be filed until October 31, 2002, or until the court rules on any motion to bifurcate filed on or before that date, whichever comes later."

Plaintiffs' counsel on August 25, 2002 (ER 32, Exh. 5) wrote to counsel for Defendants that, as a result of the August 20th order, all parties are now faced with additional briefing about the purely procedural question of bifurcation and the likelihood of about three more months of delay before a decision on whether the court will or will not issue a bifurcation order. On behalf of the Plaintiffs, he proposed to stipulate, subject to the court's approval, to the bifurcation. None of the Defendants responded and on September 5, 2002, Plaintiffs' counsel wrote to the court requesting a status conference to secure a more just, speedy and inexpensive determination of this action (Rule 1, F.R.Civ.P.) "since all parties

apparently now agree” to the bifurcation. (ER 32, Exh. 6) At a telephone status conference that same day (DKT 207, 9/5/02) the court declined to amend its order.

Over five months later (DKT 230, February 19, 2003), the court granted State and HHCA/DHHL Defendants’ bifurcation motion and tri-furcated the case into three rounds of partial summary judgment motions:

1. Motions on any issue the court must decide that does not turn on whether strict scrutiny or some other level of scrutiny applies.

To be heard June 16, 2003;

2. Motions regarding the level of scrutiny applicable to Plaintiffs’ claims. To be heard September 8, 2003;

3. Motions re: application of the facts to the level of scrutiny decided in the second round. To be filed no later than November 3, 2003. Hearing date to be set after court rules on second round.

The order also contained the provision preventing Plaintiffs from promptly seeking summary judgment on the merits. (DKT 230, 2/19/03 Bifurcation Order, p. 8 ‘no other dispositive motion may be

filed without leave of court.) (The hearing dates were scheduled by the Order filed March 14, 2003, DKT 234 which also provided "... the court is highly unlikely to continue any of the dates set forth unless there are personal emergencies or developments that could not reasonably have been foreseen.")

Thus, in March 2003, Plaintiffs were still in the holding pattern, prevented for the previous 12 months and for at least eight months more, until November 3, 2003, from exercising one of the basic rights of a litigant in federal court, to move for summary judgment and have a reasonably speedy determination. But it would get worse.

By Friday, June 13, 2003, the Defendants' first round motions and Plaintiffs' opposition to them had been filed and briefed ready for the hearing on Monday morning June 16, 2003. It is an understatement to simply say the motions were briefed. (Plaintiffs' counsel would later say of them in court, "since the first round have been fully and exhaustively briefed - - if your Honor remembers, you gave very liberal page limits; so there's several dead trees because of that." (Transcript 9/8/03 at 52) and the trial court would say, "The

amount of paper that I had before me on the first round alone was more than enough, I think.” (Id at 54.).

Early that Friday morning, June 13, 2003, at about 1 AM, Patrick Hanifin, one of Plaintiffs’ attorneys, was at his office working. He felt a pain in his chest and drove himself to Queens Hospital where he was admitted with what turned out to be an aortic aneurism. Later that morning, the trial judge *sua sponte* called a status conference (DKT 272) and, over the objection of Plaintiffs’ attorney (the present attorney for Plaintiffs/Appellants who has been the first named attorney for Plaintiffs from the inception of this case), continued the hearing set for June 16th to September 8, 2003. (DKT 271.)

After surgery Patrick Hanifin’s heart stopped early Saturday afternoon, June 14, 2003. On Sunday, June 15th, Plaintiffs’ attorney wrote to the trial court (ER 32, Exh. 7, letter June 15, 2003 to the Honorable Susan Oki Mollway) requesting a telephone status conference to ask the court to rescind the continuance and proceed with the hearing as originally scheduled June 16, 2003 or as soon thereafter as possible. The letter pointed out the reason for the continuance as expressed by the court, to allow Pat Hanifin time to

recover so both Plaintiffs' attorneys could attend the hearing, was no longer valid; that a year earlier Plaintiffs' attorney had said this case can be resolved on summary judgment but that the court had prohibited Plaintiffs from moving for summary judgment until November 3, 2003; that the latest continuance would further bar Plaintiffs from exercising this basic procedural right until sometime the next year.

On June 16, 2003, the trial court wrote to all counsel, "Unfortunately, the court cannot accommodate any of the requests by Mr. Burgess made in his June 15 letter." (ER 32, DKT 368, Exh. 8.)

Still further delays were in store.

On September 5, 2003 (DKT 280) the trial court *sua sponte* vacated the previous order granting the United States' motion to be dismissed "without prejudice to the filing of another motion to dismiss on the same grounds previously asserted or on other grounds." and continued the hearing of the motions scheduled for September 8, 2003. "Whether and when those motions will be heard will be discussed instead at a status conference on September 8, 2003."

At the status conference on September 8, 2003, Plaintiffs' attorney virtually begged the court to allow the case to move forward.

We, the plaintiffs, ask this court to put this case back in gear and allow it to move forward. We've been stuck in neutral for over a year. Literally, nothing significant has happened for a year in this case. During that time - - during that time the plaintiffs have lost their most brilliant attorney. They've lost one of the plaintiffs, Roger Grantham. At this rate, Your Honor, few of us will be alive when this case reaches final judgment. Justice delayed is justice denied. (Transcript 9/8/03 page 20-21.)

After THE COURT commented,

For each plaintiff the amount of state tax revenue that they are paying for what they complain of as an unconstitutional use is actually so small that it didn't seem to me to be unreasonable to take the time to make sure that everybody's rights were guarded and that all the attorneys had adequate time to fully brief me to help me. (Id. at 21-22)

and

The movants, as I understand it from their moving papers, are not pushing to go forward, even though these are their motions. They're in agreement that we have to take cognizance of what's happened and brief that. (Id. at 30)

and suggesting,

that they [the pending motions] be withdrawn without prejudice to being refiled either as they exist today or in some other fashion as may be appropriate." (Id. at 46),

Plaintiffs' attorney said ,

Your Honor, I mean this is getting worse and worse. I mean, when is this case ever going to move forward? ...Could your honor help us at all to get this case going forward? (Id at 47.)...May I suggest that the court combine the first and second round motions for that hearing date. (Id at 54.)

THE COURT: I'm not willing to do that at this time. (Id.)

As summarized in the clerk's minutes, the court directed that "All pending motions scheduled for today [i.e., the exhaustively briefed first round motions which had originally been scheduled for June 16, 2003] are deemed withdrawn without prejudice subject to being refiled. A hearing date of 1/12/04 @ 9:00 a.m. is reserved for the first round of motions." (DKT 281.)

The hearing on the first round motions was finally held on January 12, 2004. Two days later, the trial court granted OHA's motion to dismiss on political question grounds (DKT 354, January 14, 2004). This was substantially the same motion by OHA the court had originally denied May 8, 2002 ("Standing Order" DKT 117) only two months and 4 days after the case was filed.

Between May 2002 and January 2004 no change in controlling law intervened and no new evidence relating to the political question doctrine became available. The Akaka bill has been pending before Congress, in one form or another, since the fall of 2000 to the present.

(As mentioned earlier, Judge Gillmor's Order in *Arakaki I* noted that Senator Akaka has proposed a bill relating to the status of native Hawaiians. See S. 2899, 106th Cong. §2 (2000).)

If the dismissal, because "the political status of Hawaiians is being debated in Congress", was correct in January 2004, it was just as correct in May 2002 and should have been entered then. That would have obviated most of the 56 motions, 69 memoranda, 33 joinders, 11 court conferences, 2 telephone conferences, 13 court hearings, 38 orders, and 355 docket entries, and most of the months of delays that subsequently ensued while the trial court never progressed beyond the first round.

The above described actions demonstrate that the trial court unreasonably prevented Plaintiffs from moving for and obtaining a decision on the merits or even obtaining an appealable standing order for almost 22 months. They show that the trial judge is unable or unwilling to afford these civil rights Plaintiffs in this case a just, speedy and inexpensive determination. Such delays, and the unnecessary expense they inevitably cause, if condoned, will chill the vigorous enforcement of the civil rights laws by individuals acting as

private attorneys general. If this Court reverses and remands, unless the case is reassigned to another judge, it is likely that the delays, expense and injustice will continue.

Precise relief sought (FRAP 28(a)(1): If this court reverses and remands, order the case to be assigned to another trial judge. If that is too drastic, make such other order as this court deems just to ensure such delays are not repeated.

VI. BILLS OF COSTS AND DISCOVERY ORDER.

After the entry of final judgment dismissing the remainder of Plaintiffs' claims, bills of costs were filed and ultimately allowed to the OHA Defendants \$2,432.53, the State and HHCA/DHHL Defendants \$1,633.85 and the SCHHA intervening Defendants \$1,259.29: Total \$5,325.67. (ER 33.) Plaintiffs had objected for several reasons, including the chilling effect the award of costs would have on future civil rights litigants bringing meritorious suits. (ER 33 4/23/04) The trial court noted it was unpersuaded but gave no indication that any weight or consideration at all had been given to this chilling effect. (ER 34 5/5/04.) In *Stanley v. U.S.C.*, 178 F.3d 1069, 1079 (9th Cir. 1999) the Court concluded that the trial court had

“abused its discretion, particularly based on the district court’s failure to consider two factors: Stanley’s indigency, and the chilling effect of imposing such high costs on future civil rights litigants. District courts should consider the financial resources of the plaintiff and the amount of costs in civil rights cases.” The amount of costs here is not close to the \$46,710.97 involved in *Stanley* but, if the costs of the 22 months of delay Plaintiffs/Appellants endured here is included, the magnitude and the total deterrent effect is far greater than *Stanley’s*.

Appellants ask that the Court reverse the award of costs and direct that Defendants reimburse them to Plaintiffs.

As to the denial (ER 30) of the Plaintiffs’ objections to the Magistrate Judge’s report on Plaintiffs motion to compel discovery, if the Court reverses and remands, Plaintiffs ask that the Court also reverse the denial of discovery so that, on remand, Plaintiffs will have the full benefit of discovery.

CONCLUSION

The judgments of the district court dismissing Plaintiffs’ claims on “political question” grounds, dismissing Plaintiffs’ claims as trust beneficiaries, restricting Plaintiffs’ claims as state taxpayers, striking

Plaintiffs' counter motion for partial summary judgment, denying discovery and awarding costs against Plaintiffs should be reversed. The district court should be directed to adjudicate Plaintiffs' Equal Protection claims under the strict scrutiny standard before another judge. Defendants should be ordered to reimburse their costs paid by Plaintiffs. Appellants should be awarded their costs, reasonable attorneys fees and such other relief as the Court deems just.

DATED: Honolulu, Hawaii, June 4, 2004.

Respectfully submitted,



H. WILLIAM BURGESS
Attorney for Plaintiffs/Appellants

STATEMENT OF RELATED CASES

Plaintiffs/Appellants are aware of no related cases within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,946 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

DATED: Honolulu, Hawaii, June 4, 2004.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, two copies of the foregoing Appellants Opening Brief were served upon the following parties via U.S. Mail or certified U.S. Mail, postage prepaid.

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