

NO. 04-15306

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al.,) D.C. No. CV-02-00139 SOM/KSC

Plaintiffs-Appellants,)

vs.)

LINDA LINGLE, in her)
official capacity as)
GOVERNOR OF THE STATE OF)
HAWAII et al.,)

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE DISTRICT OF HAWAII

State Defendants-Appellees,)

[remainder of caption omitted]

STATE DEFENDANTS-APPELLEES'
AND HHCA/DHHL DEFENDANTS-APPELLEES'
MOTION FOR STAY OF MANDATE PENDING THE
FILING OF A PETITION FOR WRIT OF CERTIORARI

State Defendants-Appellees and HHCA/DHHL Defendants-Appellees

("State Appellees") hereby move this Honorable Court to stay the mandate pending the filing by State Appellees of a petition for writ of certiorari in the United States Supreme Court, pursuant to FRAP 41(d)(2)(A).

According to FRAP 41 (d)(2)(A):

A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

State Appellees will file a timely petition for writ of certiorari seeking to overturn the panel's reaffirmance of the doctrine of state taxpayer standing adopted in Hoohuli v. Ariyoshi, 741 F.2d 1169 (1984). The petition will urge that the position set forth in Justice Kennedy's opinion in ASARCO v. Kadish, 490 U.S. 605 (1989), be adopted. See Declaration of Mark J. Bennett at ¶ 2.

If the petition is successful, plaintiffs' lawsuit would be wholly and completely terminated, as the only portion of plaintiffs' case remaining after the panel ruling are the claims regarding the appropriation of taxpayer dollars to the Office of Hawaiian Affairs premised on state taxpayer standing. See Arakaki, 423 F.3d at 967. Failure to stay the mandate would mean that costly and extensive proceedings could occur in United States District Court, only to have them ultimately be deemed useless and of no consequence were the United States Supreme Court to grant the writ of certiorari and determine that state taxpayer

standing was not proper. This would not only waste substantial time and money of the parties and their clients, but it would impose a costly and unnecessary burden on the federal judiciary.

And, of course, failure to stay the district court proceedings could -- were plaintiffs to obtain a district court injunction -- severely disrupt Office of Hawaiian Affairs programs using state taxpayer dollars, and thereby damage the state's **ability** to fulfill its special relationship with Native Hawaiians.

In addition, failure to stay the district court proceedings could mean that the federal district court would be exercising authority outside the scope of federal court Article III or prudential jurisdiction, thereby interfering needlessly with both federalism and separation of powers concerns.'

Given these significant consequences of a failure to grant a stay of the mandate, assuming the petition "would present a substantial question" as demonstrated below, there is necessarily "good cause for a stay." FRAP 41 (d)(2)(A).

This Court's panel ruling upholding the Hoohuli state taxpayer standing doctrine (which doctrine State Appellees will challenge in their certiorari petition) meets two separate and independent bases for certiorari review. First, it raises "an important question of federal law that has not been, but should be, settled by [the

' See discussion *infra*, at pp. 3-4.

United States Supreme] Court," Sup. Ct. R. 10(c).'

Second, the panel ruling constitutes "a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Indeed, the panel ruling conflicts with rulings of at least five (5) other circuits. (And we are unable to find a single circuit that follows the Ninth Circuit's Hoohuli position.).

A The Question of state taxpayer standing that State Appellees will present in their certiorari petition presents an important question of federal law that has not been, but should be, settled by the United States Supreme Court.

The issue of whether state taxpayer standing forms a valid basis for federal court jurisdiction is surely an important federal issue as it goes to the heart of Article III's case or controversy requirement, governing the fundamental authority of federal courts to decide cases. Allowing mere state taxpayers to challenge state laws in federal court, when they are not directly or uniquely injured by those laws, severely distorts the balance of power between the federal government and the states (i.e., federalism), and intrudes upon separation of powers. Federal court exercise of jurisdiction in state taxpayer suits would violate federalism principles because a federal court would be interfering with the enforcement of state laws even though no plaintiff has been directly and uniquely injured. Similarly, state

² Alternatively, the panel "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c); see footnote 4, *infra*.

taxpayer suits violate separation of powers concerns because a 'udicial branch would be unnecessarily interfering with state legislative and state constitutional enactments, even though no one has been truly injured, and where the political branches can step in instead. See United States v. Richardson, 418 U.S. 166, 189 (1974) (Powell, J., concurring) ("taxpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government.").

On a practical level, the permissibility of state taxpayer suits affects whether hundreds of cases brought in federal court each year may proceed or must be dismissed, and thus can have a substantial impact upon federal judicial resources, not to mention the operations of state government and the administration of state laws. Rejection of state taxpayer standing will also ensure that those litigating important constitutional (or other) legal issues have a direct, unique, and "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

The importance of the issue of state taxpayer standing is confirmed by the fact that the United States Supreme Court, just over 6 weeks ago, sua sponte asked that the parties in a case granted certiorari on a Commerce Clause issue also

address the question of standing in a case wherein many of the plaintiffs are mere state taxpayers. DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 36 (2005) ("In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether respondents have standing to challenge Ohio's investment tax credit"); Wilkins v. Cuno, 126 S. Ct. 26 (2005) (same).³

Finally, the question of state taxpayer standing has not been settled by the United States Supreme Court. As the panel in this case noted:

Whether Justice Kennedy's opinion is dictum or not, that portion of his opinion on state taxpayer standing is not the opinion of the Supreme Court. It may carry persuasive value to a court that has not previously ruled on state taxpayer standing, but an opinion from an evenly divided Court is not a precedentially binding intervening opinion of the Court. We therefore may not hold our prior opinion in Hoohuli overruled by an opinion of four Justices, even if we thought it persuasive, without obtaining en banc review.

Arakaki, 423 F.3d at 968-69 (citations omitted). The criterion of Sup. Ct. R. 10(c)

-- that the important question of federal law has "not been, but should be, settled by" the Supreme Court⁴ -- is thus easily satisfied. Moreover, the unsettled nature

³ That the Supreme Court may address the issue of state taxpayer standing in a case already pending before it, of course, makes it more likely that certiorari would be granted in the case at bar as well. For if the Supreme Court in the Cuno case ultimately decides to follow Justice Kennedy's ASARCO position, or otherwise rejects state taxpayer standing, it would simply grant certiorari in the case at bar, vacate the judgment, and remand for reconsideration in light of the Cuno ruling.

⁴ Alternatively, one can view Justice Kennedy's 4-justice opinion nevertheless as a "relevant decision[] of [the Supreme] Court," Sup. Ct. R. 10(c), especially given that the other 4-justice opinion by Justice Brennan concurring in the judgment took issue more with Justice Kennedy's other standing ruling (regarding the teachers'

of the issue itself creates its own set of problems.⁵

B. The Panel ruling conflicts with the decisions of at least five (5) other circuits.

The other separate and independent criterion for certiorari -- that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a) -- is also satisfied here. Indeed, the panel's decision conflicts with the decisions of at least five (5) other circuits,, which have rejected the broad state taxpayer standing doctrine the panel in this case followed.

These other circuits have repudiated general state taxpayer standing, adopting instead Justice Kennedy's ASARCO position (either explicitly, or in effect), thereby rejecting the panel's position in this case reaffirming Hoohuli's broad state taxpayer standing doctrine. See Bd. of Educ. v. New York State Teachers, 60 F.3d 106, 110-111 (2nd Cir. 1995) (citing Justice Kennedy's opinion

association's standing), rather than Kennedy's state taxpayer standing ruling. 490 U.S. at 633. Therefore, in the alternative, it can be argued that the panel's decision, by conflicting with Justice Kennedy's opinion, does "conflict[] with [a] relevant decision[] of [the Supreme] Court." Sup. Ct. R. 10(c). Either way, however, the criteria of Sup. Ct. R. 10(c) are satisfied, whether the panel decided an issue that has not been, but should be, decided by the Supreme Court, or decided the issue in a way that conflicts with a decision of the Supreme Court.

⁵ See Staudt, "Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine," 52 Emory L. J. 771, 836-37 (2003) (lack of guidance on state taxpayer standing issue has led to general confusion among, and within, the circuits, leading to disparate results, and unequal treatment, as well as a waste of private and judicial resources, and disrespect for federal judges as unprincipled decisionmakers).

in ASARCO, rejecting Hoohuli approach, and holding that "[s]tate taxpayers, like federal taxpayers, do not have standing to challenge the actions of state government simply because they pay taxes to the state"); Henderson v. Stalder, 287 F.3d 374, 379-80 (5th Cir. 2002) (citing Justice Kennedy's ASARCO opinion as controlling, and stating that "the state taxpayer plaintiffs have not alleged that the amount they pay to the State in the form of income taxes will increase because of the enactment" and thus their suit "at most, constitutes a generalized grievance common to all tax payers in the state"); Taub v. Commonwealth of Kentucky, 842 F.2d 912, 918-19 (6th Cir. 1988) (rejecting Hoohuli and holding that "requirements for federal taxpayer standing ... control the issue of state taxpayer standing, at least in those cases where violation of the Establishment Clause is not alleged" and requiring a state taxpayer to "allege direct and palpable injury"); Tarsney v. O'Keefe, 225 F.3d 929, 936-38 (8th Cir. 2000) (rejecting state taxpayer Free Exercise challenge to state spending offensive to taxpayer's religious beliefs because a "taxpayer who was not" "direct[ly] injur[ed]" "by the allegedly unconstitutional expenditure would not have taxpayer standing to challenge the expenditure"); Colorado Taxpayers v. Romer, 963 F.3d 1394, 1401-03 (10th Cir. 1992) (rejecting Hoohuli, following Justice Kennedy's ASARCO opinion likening state taxpayers to federal taxpayers, and requiring that, outside the Establishment

Clause area, a state taxpayer show "he has suffered a monetary loss due to the allegedly unlawful activity's effect on his tax liability ,).⁶

Accordingly, the panel's decision, in direct contradiction to rulings from at least five other circuits, easily satisfies the Rule 10(a) certiorari criterion of conflict with another circuit court's ruling on an important matter.'

*** **

For the foregoing reasons, therefore, "the certiorari petition would present a substantial question and [] there is good cause for a stay." FRAP 41(d)(2)(A). Accordingly, State Appellees' request for a stay should, respectfully, be granted.

DATED: Honolulu, Hawaii, November 10, 2005.

MARK J. BENNETT
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⁶ Furthermore, an additional circuit, in dicta, has cited Justice Kennedy's opinion in ASARCO, and stated that "state taxpayers lack a sufficiently personal interest to challenge laws of general applicability, since their injury is not significantly different from that suffered by taxpayers in general." Women's Emergency Network v. Bush, 323 F.3d 937, 943 (11th Cir. 2003).

The importance of the issue, of course, was already discussed supra at 3-5.

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HAWAII, et al.,)	
State Defendants-Appellees,)	

[remainder of caption omitted]

DECLARATION OF MARK J. BENNETT

Pursuant to 28 U.S.C. § 1746, I, Mark J. Bennett, hereby declare that:

I am the Attorney General for the State of Hawaii and a counsel for State Defendants-Appellees and HHCA/DHHL Defendants-Appellees ("State Appellees") in the above-entitled case.

2. State Appellees will be filing a timely petition for writ of certiorari in the above-entitled case seeking to overturn the Ninth Circuit panel ruling in this case to the extent that it reaffirmed the doctrine of broad state taxpayer standing adopted in Hoohuli v. Ariyoshi, 741 F.2d 1169 (1984), and held that Plaintiffs-Appellants had state taxpayer standing to challenge the appropriation of state taxpayer dollars

to the Office of Hawaiian Affairs. See Arakaki v. Lingle, 423 F.3d at 967 (2005).

The petition will urge that the Supreme Court adopt the position set forth in Justice Kennedy's opinion in ASARCO v. Kadish, 490 U.S. 605 (1989), and reject broad state taxpayer standing as a basis for Article III jurisdiction, at least outside the Establishment Clause context.

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

Executed in Honolulu, Hawaii, on _____, 2005.



Mark Jennett
Attorney General of Hawaii
Attorney for State Appellees

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing was duly served on each of the following persons by depositing the same in the U.S. mails, first class postage prepaid, on November 10, 2005:

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