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No. 04-15306

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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EARL F. ARAKAKI, *et al.*,  
Plaintiffs/Appellants,

v.

LINDA LINGLE, *et al.*,  
Defendants/Appellees

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

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**ANSWERING BRIEF  
OF THE OFFICE OF HAWAIIAN AFFAIRS (OHA) DEFENDANTS**

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**ANSWERING BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS (OHA)**  
**DEFENDANTS-APPELLEES**

**I. INTRODUCTION.**

The Complaint filed by Plaintiffs-Appellants (hereafter collectively referred to as “Arakaki”) primarily as state taxpayers challenged the constitutionality of the Department of Hawaiian Home Lands, which was established by Congress in 1921, 42 Stat. 108 (1921), and the Office of Hawaiian Affairs (OHA), which was established by the people of Hawai`i in the 1978 general election when they adopted amendments to the Hawai`i Constitution, Article XII, Sections 46. The creation of an agency to work for the betterment of the conditions of Native Hawaiians<sup>1</sup> was authorized by Congress in 1959 when it admitted Hawai`i to

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<sup>1</sup> In light of the claims presented by Arakaki, the OHA Appellees use the term “Native Hawaiian” in the same manner as it is used in the Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-568, 114 Stat. 2868 (2000), sec. 801(a), where this term is defined as any individual who is (A) a citizen of the United States and (B) a descendant of the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that currently constitutes the State of Hawai`i. This definition has been used by Congress in legislation dealing with Native Hawaiians since 1974. *See, e.g., Bonnichsen v. United States*, 367 F.3d 864, 878 (9<sup>th</sup> Cir. 2004)(*quoting* the definition of “Native Hawaiian” from the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. sec. 3001(10), which defines the term as “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii”). The Hawaiian Homes

statehood and delegated part of the federal government's trust responsibilities regarding Native Hawaiians to the new State of Hawai'i. Admission Act, Pub.L. No. 86-3, 73 Stat.4 (1959); *see infra* Section IV(A)(3). OHA has been operating for a quarter of a century, providing programs designed to address the economic and social needs of Native Hawaiians and to preserve, develop, and transmit Native Hawaiian culture and the use of the Hawaiian language to future generations.<sup>2</sup> OHA and its responsibilities are described, *e.g.*, in *Rice v. Cayetano*,

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Commission Act, 1920, 42 Stat. 108 (1921), as amended, defines "native Hawaiian" to refer to persons with 50% Hawaiian blood and also permits certain heirs with 25% Hawaiian blood to hold leases as successors. *Id.*, sec. 209.

<sup>2</sup> After the people of Hawai'i amended the State Constitution to establish OHA in 1978, the State Legislature in 1979 enacted an implementing statute that explained OHA's purpose as follows:

The people of the State of Hawaii and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, the betterment of conditions for native Hawaiians. The people of the State of Hawaii reaffirmed their solemn trust obligation and responsibility to native Hawaiians and furthermore declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawaii.

Hawai'i Revised Statutes, Sec. 101(a). In mandating OHA to serve the needs of all persons of Hawaiian ancestry, the State was following the approach taken by Congress since 1974, whereby it has defined "Native Hawaiian" to include all persons with any Hawaiian blood. (*See also* Hawaii Revised Statutes, sec 10-3 (1) and (2).)



528 U.S. 495, 508-10 (2000), and 146 F.3d 1075 ,1077-78 (1998). The District Court ruled that Arakaki did not have standing as beneficiary of the Public Land Trust to pursue an Equal Protection challenge and had limited standing as a state taxpayer to maintain their challenge. *Arakaki v. Cayetano*, 299 F.Supp.2d 1090 (D.Hawai`i 2002), Excerpts of Record (ER) 5, Docket 117. The District Court subsequently dismissed the claim against the Department of Hawaiian Home Lands, relying on this Honorable Court's decision in *Carroll v. Nakatani*, 342 F.3d 934 (9<sup>th</sup> Cir. 2003), ruling that Arakaki, who had standing only as a state taxpayer, could not maintain a claim against the United States, and that without the United States as a party, Arakaki could not pursue an Equal Protection challenge to the Hawai`i Admission Act. *Arakaki v. Lingle*, 299 F.Supp.2d 1114 (D.Hawai`i 2003), ER 14, Docket 323. The District Court subsequently dismissed the claims against OHA on the grounds that these claims were nonjusticiable political questions. *Arakaki v. Lingle*, 305 F.Supp.2d 1161 (D.Hawai`i 2004), ER 28, Docket 354.

## **II. COUNTER STATEMENT OF THE STANDARD OF REVIEW**

Because the reasons for dismissing Arakaki's' claims are based on legal principles, this Honorable Court's 'task is to determine whether the district court correctly applied the relevant substantive law' and it should review the District Court's rulings *de novo*. *Arakaki v. Hawai`i* 314 F.3d 1091, 1094 (9<sup>th</sup> Cir. 2002).

The District Court's Orders should be affirmed if this Honorable Court agrees that, even with the limited standing the District Court granted to Arakaki as state taxpayer, Arakaki's claims are barred by the indispensable party and political question doctrines.

Arakaki errs in asserting (Opening Brief at 15, 47-55) that this Court should examine and rule on the Counter Motion for Partial Summary Judgment they filed with the District Court on December 15, 2003, ER 25, Docket 332. Arakaki cites no cases that support the proposition that a court should reach substantive issues in a case where procedural doctrines block the claim, and OHA knows of no such cases. If this Court were to reverse the District Court's dismissal of Arakaki's claims, then the complex issues raised by Arakaki's Counter Motion for Partial Summary Judgment should be considered by the District Court on remand.

As Arakaki acknowledges (Opening Brief at 15), he can prevail regarding his allegations of delay and the award of costs only if he can convince this Court that the District Court abused its discretion regarding these matters.

### **III. SUMMARY OF ARGUMENT**

The District Court's ruling dismissing the claim against OHA on the ground that Arakaki's claims raised nonjusticiable political questions should be affirmed. This ruling was properly grounded on the many decades of congressional

legislation recognizing the special political relationship between the United States and Native Hawaiians. U.S. courts have recognized since the founding of our nation that the legislative and executive branches have primary responsibility to define the relationship between the United States and its native peoples, and have deferred to these political decisions. For a recent decision affirming this deferential approach, *see, e.g., United States v. Lara*, 124 S.Ct. 1628, 1634 (2004). The United States has unique and varied relationships with its many native peoples, and courts do not question such relationships, even when one native group appears to have benefits not available to other native groups. In the Joint Resolution to Acknowledge the 100<sup>th</sup> Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub.L. No. 103-150, 107 Stat. 1510 (1993)[hereafter cited as Apology Resolution], Congress acknowledged that U.S. military and diplomatic personnel had participated in the illegal overthrow of the Kingdom of Hawai`i and that substantial amounts of lands were transferred to the United States “without the consent of or compensation to” Native Hawaiians, and thereby called for a “reconciliation” between the United States and Native Hawaiians. That reconciliation process is now underway. Several important statutes have already been enacted, including one passed this year establishing an Office of Native Hawaiian Affairs in the Office of the Secretary of Interior,

Consolidated Appropriations Act of 2004, Pub.L. No. 108-199, 118 Stat. 3, div. H, sec. 148 (2004), and others are currently being considered. For federal courts to interfere with this process would be inconsistent with two centuries of federal judicial decisions.

The other issues raised by Arakaki are also without merit. The claim against the Department of Hawaiian Home Lands was properly dismissed because of the absence of the United States in this litigation. Arakaki had no right to have his claims on the merits considered, given the procedural barriers that block these claims. If the merits were somehow to be reached, Arakaki would not be entitled to have certain issues automatically rendered in his favor via the doctrine of issue-preclusion/collateral-estoppel, because the context of this case is distinctly different from the context of the other cases Arakaki refers to. The District Court proceeded expeditiously in this case, and Arakaki has no basis for the claim of injury based on judicial delay. The District Court's ruling on costs followed time-tested precedents and should also be affirmed.

#### **IV. ARGUMENT**

##### **A. THE DISTRICT COURT PROPERLY RULED THAT ARAKAKI'S CLAIM PRESENTED A NONJUSTICIABLE POLITICAL QUESTION.**

###### **1. The District Court's Order Was Correct.**

In its Order of January 14, 2004, the District Court dismissed the remaining claims brought by Arakaki against OHA, ruling that they presented a nonjusticiable political question that should be resolved by the political branches of the government:

Whether Hawaiians should be treated as being recognized by Congress such that the more lenient review standard found in *Morton* [v. *Mancari*, 417 U.S. 535 (1974)] should be applied to Plaintiffs' Equal Protection challenge to programs being administered by OHA is an issue that is a nonjusticiable political question.

*Arakaki v. Lingle*, 305 F.Supp.2d 1161, 1172 (D.Hawaii` i 2004), ER 28, Docket 354. This conclusion was based on the traditional deference that federal courts have given to the political branches regarding the programs that are enacted for the native peoples living in the United States, as exemplified, for instance, by the decision in *United States v. Sandoval*, 231 U.S. 28 (1913); on the many statutes Congress has enacted defining the political relationship between the United States and Native Hawaiians; and because Congress is currently considering legislation to

codify this relationship in greater detail.<sup>3</sup> 305 F.Supp.2d at 1171-73. The District Court noted that the U.S. Supreme Court had chosen to “stay far off that difficult terrain” regarding the precise status of Native Hawaiians in *Rice v. Cayetano*, 528 U.S. 495, 519 (2000), and concluded that other federal courts should also allow the political branches to decide how to structure this terrain. 305 F.Supp.2d at 1173-74.

**2. Congress Has Repeatedly Recognized Native Hawaiians as Native People with a Status Similar to that of Other Native Americans.**

The central question raised by Arakaki’s Complaint is whether federal courts should question Congress’s determination that the United States has a “political” relationship with Native Hawaiians, and Congress’s decision to delegate, in part, the trust obligations it owes to Native Hawaiians to the State of Hawai`i. OHA submits that it is improper for a court to question Congress’s conclusions on these issues and hence that the District Court acted properly in dismissing Arakaki’s Complaint because it raises nonjusticiable political questions.

Congress has determined on numerous occasions that Native Hawaiians are an indigenous people and that their political status under U.S. law is comparable to that of American Indians. In the 1993 Apology Resolution, Congress referred to Native Hawaiians as “the indigenous Hawaiian people [who] never directly relinquished their claims to their inherent sovereignty as a people or over their

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<sup>3</sup> Now pending before Congress is Senate Bill 344, known as the Akaka Bill, which would establish a process enabling Native Hawaiians to form a governing entity and receive formal federal recognition.

national lands to the United States, either through their monarchy or through a plebiscite or referendum.” As the District Court explained, “the United States overthrew the Kingdom of Hawaii,” through a process that Congress later “acknowledged” to be “illegal.” *Arakaki v. Cayetano*, 198 F.Supp.2d 1165, 1170 (D.Hawaii 2002), Docket 26 (citing Apology Resolution). In Whereas Clause 25 of the Apology Resolution, Congress also acknowledged that “1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii” had been ceded to the United States in 1898 “without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.”<sup>4</sup> Section 1(5) of the Apology Resolution directs the President of the United States “to support reconciliation efforts between the United States and the Native Hawaiian people” for the wrongs that were done by the United States to Native Hawaiians. *See also* Hawaiian Homelands Homeownership Act of 2000, Pub. L. 106-568 (Title II of the Omnibus Indian Advancement Act), 114 Stat. 2868 (2000), sec. 202(13)(enacted after *Rice v. Cayetano*, 528 U. S. 495 (2000)), and stating clearly

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<sup>4</sup> In 1997, the Hawaii Legislature adopted a similar statute endorsing the Apology Resolution and acknowledging the illegality of the 1893 overthrow and seizure of the Crown and Government lands of the Kingdom. Act Relating to the Public Land Trust, ch. 329, 1997 Haw. Sess. Laws 956. This law expressly directed State officials to meet with Native Hawaiians to resolve their historic claims to the Ceded Lands.

that ‘the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives’); 2002 Native Hawaiian Education Act, Pub. L. 107-110, 115 Stat. 1425, 20 U.S.C. sec. 7512(1)(‘Native Hawaiians are a distinct and unique indigenous people’), and sec 7512(12)(‘the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives’). In the Consolidated Appropriations Act of 2004, Pub. L. 108-199, 118 Stat. 3, div. H, sec. 148 (2004), Congress established the Office of Native Hawaiian Relations within the Office of the Secretary of the Interior, in order to:

- (1) effectuate and implement the special legal relationships between the Native Hawaiian people and the United States;
- (2) continue the process of reconciliation with the Native Hawaiian people; and
- (3) fully integrate the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people by assuring timely notification of and prior consultation with the Native Hawaiian people before any federal agency takes any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands.<sup>5</sup>

Once again, Congress has recognized that Native Hawaiians have established (but to some extent unquantified) rights and claims to resources and lands, just like other Native Americans.

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<sup>5</sup> This Office was established by the Secretary of the Interior in Order No. 3254, June 24, 2004.



Congress has affirmed this status repeatedly by treating Native Hawaiians as Native Americans<sup>6</sup> and by including Native Hawaiians in legislation and programs designed to assist Native Americans, as listed, for instance, in Section 202(14)-(15) of the Hawaiian Homelands Homeownership Act of 2000 and in the 2002 Native Hawaiian Education Act, 20 U.S.C. sec. 7512(13).<sup>7</sup> Just a few months ago, in the

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<sup>6</sup> In the Act of June 20, 1938, ch. 530, sec. 3, 52 Stat. 781, 784, for instance, Congress granted fishing rights in the Hawai`i National Park to certain Native Hawaiians. The people of the State of Hawai`i have recognized Native Hawaiian traditional rights in Hawai`i's Constitution, Article XII, Sec. 7, which guarantees the exercise of traditional and customary rights for "subsistence, cultural and religious purposes by ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the state to regulate such rights." *See also Damon v. Hawai`i* 194 U.S. 154 (1904)(upholding traditional Native Hawaiian konohiki and hoa`aina fishing rights).

<sup>7</sup> In Section 8014(3) of the Fiscal Year 2002 Defense Appropriations Act, Pub. L. No. 107-117, 115 Stat. 2230, 2272 (2002), and Fiscal Year 2001 Defense Appropriations Act, Pub. L. No. 106-259, 114 Stat. 656, 677 (2000), Congress defined those Native American organizations eligible for the preference as "an Indian tribe, as defined in 25 U.S.C. 450b(e), or a Native Hawaiian organization, as defined under 15 U.S.C. 637(a)(15)," thus referring to a "Native Hawaiian organization" as the equivalent to an "Indian tribe." *See also* Native American Graves Protection and Repatriation Act, 25 U.S.C. sec. 3001-13, which designates "Native Hawaiian organizations," as defined in 25 U.S.C. sec. 3001(11), as having the same rights as Indian tribes to claim culturally-important remains and items. Senate Report No. 101-473 at 6 explained that "there are over 200 tribes and 200 Alaskan Native villages and Native Hawaiian communities, each with distinct cultures and traditional and religious practices that are unique to each community."

Consolidated Appropriations Act of 2004, Pub.L. 108-199, 118 Stat.3, div. G, title II, Congress authorized financial assistance for “programs benefitting Alaska Native Corporations and Native Hawaiians” and \$9,500,000 for Native Hawaiian housing under Title VIII of the Native American Housing Assistance and Self-Determination Act of 1996. In the 2002 Native Hawaiian Education Act, the Congress found that: “Despite the consequences of over 100 years of nonindigenous influence, the Native Hawaiian people are determined to preserve, develop, and transmit to future generations their ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions.” 20 U.S.C. sec. 7512(20).

Congress has also been clear in explaining that it has delegated to the State of Hawai`i responsibilities to assist in fulfilling the trust obligations owed to Native Hawaiians. *See, e.g.*, Hawaiian Homelands Homeownership Act of 2000, sec. 202(13), Pub. L. No. 106-568 (2000), and the 2002 Native Hawaiian Education Act, Sec. 7202(12)(D), Pub. L. 107-110 (Feb. 8, 2002), both of which say that “*Congress has also delegated broad authority to administer a portion of the Federal trust responsibility to the State of Hawaii.*” (Emphasis added.)

3. **The State of Hawai`i Accepted Trust Responsibilities Owed to Native Hawaiians as a Condition of Statehood.**

The State of Hawai`i's trust obligations to Native Hawaiians are particularly important because they stem from the 1959 Admission Act, whereby Congress admitted Hawai`i to statehood. Congress required the new State of Hawai`i to adopt the Hawaiian Homes Commission Act as a "compact" between the United States and the State and also required the State to manage the Ceded Lands as a public trust for, among other things, "the betterment of the conditions of native Hawaiians."<sup>8</sup> See, e.g., *Arakaki v. Hawai`i* 314 F.3d 1091, 1093 (9<sup>th</sup> Cir. 2002).

When Congress imposes trust responsibilities in statutes admitting territories into the Union as states, Article VI of the U.S. Constitution requires the states to defer to those admission enabling acts and to comply with the trust responsibilities. See, e.g., *The Kansas Indians*, 72 U.S. 737 (1866)(explaining that Kansas had accepted admission into the United States on the condition, articulated in the

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<sup>8</sup> 1959 Admission Act, *supra*, sec. 5(f). Although the specific language in the Admission Act refers to "native Hawaiians," defined as those with 50% or more Hawaiian blood, Congress subsequently approved an amendment allowing persons with only 25% Hawaiian blood to hold Hawaiian Homestead leases as successors, Hawaiian Homes Commission Act, *supra*, sec. 209. As explained *supra* in note 1, all of Congress's enactments since 1974 have defined "Native Hawaiian" as a person with any Hawaiian ancestry, thereby clarifying to the State of Hawai`i that its responsibility as partial delegate of the federal government's trust responsibility toward Native Hawaiians required it to give OHA the authority to serve Hawaiians with less than 50% Hawaiian blood, as well as those with more, and to convey funds to OHA so that it can provide programs for everyone of Hawaiian ancestry.

admitting statute, that the rights of Indians in Kansas remain unimpaired and that Congress would continue to have power to regulate Indian affairs); *Ex Parte Charley Webb*, 225 U.S. 663 (1912)(*accord*, with regard to the admission of Oklahoma into the Union). *See also Idaho v. United States*, 533 U.S. 262 (2001), and *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9<sup>th</sup> Cir. 2003)(both applying the presumption that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit”).

In § 5 of Hawai`i's Admission Act, Congress conveyed about 1.4 million acres of the lands that had been ceded to the United States in 1898 to the new State of Hawai`i with the condition that Hawai`i hold these lands and their income and proceeds as a “public trust” for one or more of five purposes, including “the betterment of the conditions of native Hawaiians.” *Id.* § 5(f). Then, in Section 7(b) of the same statute, Congress explicitly required the people of Hawai`i to affirm by vote that “the terms or conditions of the grants of land or other property therein made to the State of Hawaii are consented to fully by said State and its people.” And, just to reinforce the importance of these conditions, Congress added in this same section a statement that if a majority of the people of Hawai`i did not vote to accept these conditions “the provisions of this Act shall cease to be

effective.” *Id.* In other words, Hawai‘i would not have become a state if the people of Hawai‘i had not agreed by vote to the requirement that the revenues from the Ceded Lands be used, in part, for “the betterment of the conditions of native Hawaiians.” The State and the federal government thus entered into a bilateral compact regarding the revenues from the lands transferred to the new State, and an essential part of that compact was that the State would transfer part of the revenues from these lands to the Native Hawaiian people in order to resolve, in part, the claims that Native Hawaiians have regarding these lands.

Congress’s recent confirmation of the responsibilities of the State of Hawai‘i to administer federal trust responsibilities in the Hawaiian Homelands Homeownership Act of 2000 and the 2002 Native Hawaiian Education Act, as described above, especially when linked to the numerous federal statutes enacted during the past three decades confirming that all persons of Hawaiian ancestry are “Native Hawaiians” who suffered wrongs and deserve redress, certainly provides ample authority for the State to allocate its tax revenues to OHA to use for all persons of Hawaiian ancestry.<sup>9</sup> Moreover, Congress has directly selected OHA as

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<sup>9</sup> Federal courts have traditionally upheld state programs designed to provide benefits for native communities within the state, utilizing the rational-basis level of judicial review, so long as the state programs are compatible with the approach taken by the federal government. *See, e.g., Washington v. Washington State*

the appropriate body to administer various federal programs for Native Hawaiians (defined in each of these statutes as any person of Hawaiian ancestry). *See, e.g.*, 42 U.S.C. sec. 2991b-1 (Native Hawaiian Revolving Loan Fund), 42 U.S.C. sec. 11711(7)(A)(ii) (Native Hawaiian Health Care), Pub. L. 103-382, sec. 9204 (Native Hawaiian Educational Councils).

4. **The Executive Branch Has Also Recognized the Political Relationship Between the United States and Native Hawaiians.**

The executive branch of the federal government has consistently joined Congress in recognizing Native Hawaiians as indigenous people with a status similar to continental Native Americans and Alaska Natives. Executive-branch officials explicitly recognized that Native Hawaiians have the same rights as other Native Americans in the hearings that led to the passage of the Hawaiian Homes Commission Act in 1921. *See, e.g., Ahuna v. Dept. of Hawaiian Home Lands*, 640 P.2d 1161, 1167 (Hawaii 1982) (quoting Secretary of the Interior Franklin K. Lane as referring to native Hawaiians as "our wards ... for whom in a sense we are trustees"). *See also Hearings Before the House Committee on the Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed*

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*Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5<sup>th</sup> Cir. 1991); *Squaxin Island Tribe v. Washington*, 731 F.2d 715 (9<sup>th</sup> Cir. 1986).

*Amendments to the Organic Act of the Territory of Hawaii*, 66<sup>th</sup> Cong. 129-30 (1920)(quoting Secretary Lane as saying that the basis for granting special programs for native Hawaiians is "an extension of the same idea" that justifies granting such programs for Indians).

In the *amicus curiae* brief filed by the U.S. Solicitor General in *Rice v. Cayetano*, the United States stated that “by classifying Native Hawaiians as ‘Native Americans’ under numerous federal statutes, Congress has extended to Native Hawaiians many of the same rights and privileges accorded to American Indian, Alaska Native, Eskimo and Aleut communities.” 1999 WL 569475, at \*4 (citing 42 U.S.C. 11701(2) and (19)). This brief further stated unequivocally that “the United States has concluded that it has a trust obligation to indigenous Hawaiians because it bears responsibility for the destruction of their government and the unconsented and uncompensated taking of their lands.” *Id.* at \*18. “Congress does not extend benefits and services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has a recognized trust responsibility.” *Id.* at \*20.

The executive branch has concluded unequivocally that Native Hawaiians continue today to be a distinct native group with their own cultural identity. *See*,

*e.g.*, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY at 3-4 (Joint Report of the U.S. Departments of Justice and Interior on the Reconciliation Process Between the Federal Government and Native Hawaiians, Oct. 23, 2000, available at <<http://www.doi.gov/nativehawaiians/pdf/1023fin.pdf>>), stating that: ‘It is evident from the documentation, statements, and views received during the reconciliation process undertaken by Interior and Justice pursuant to Public Law 103-150 (1993)[Apology Resolution], that *the Native Hawaiian people continue to maintain a distinct community* and certain governmental structures and they desire to increase their control over their own affairs and institutions.’ (Emphasis added.) This important report by the Interior and Justice Departments recommended that ‘Congress should enact further legislation to clarify Native Hawaiians’ political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.’ *Id.* at 4, Recommendation 1. The Report also acknowledged that ‘[t]he past history of United States-Native Hawaiian relations reveals many instances in which the United States actions were less than honorable,’ that the United States ‘cont inues to have a moral responsibility’ for the Native Hawaiian suffering caused by these actions and that ‘the past wrongs suffered by the Native Hawaiian people should be addressed.’ *Id.*, Recommendation 5. As explained above, an important step in



this reconciliation process was taken in the Consolidated Appropriations Act of 2004, Pub.L. 108-199, 118 Stat. 3, div. H, sec. 148 (2004), when Congress implemented Recommendation 2 of the Interior/Justice Report and established the Office of Native Hawaiian Relations in the Office of the Secretary of the Interior with the responsibility, *inter alia*, to “continue the process of reconciliation with the Native Hawaiian people.”

**5. Courts Have Ruled Repeatedly that the Political Question Doctrine Bars Judicial Scrutiny of the Relationship Between Native Hawaiians and the United States.**

Several of the factors identified in *Baker v. Carr*, 269 U.S. 186, 217 (1962), as triggering the political question doctrine are found in the present case. The U.S. Constitution gives the executive and legislative branches the responsibility to deal with foreign affairs and relations with natives, and the judicial branch has recognized this unreviewable responsibility repeatedly, as explained below. No universally-applicable judicially discoverable or manageable standards govern the variety of native groups in the United States. Courts have, therefore, deferred to the decisions of the political departments, even if they favor some native groups over others. Nonjudicial policy decisions must be made by the political branches to determine how to implement the trust duties owed to native groups, and a

judicial review of such decisions would be an action of disrespect toward the political branches and could lead to embarrassment because of the multifarious, and possibly conflicting, pronouncements on the issues.

The political question doctrine has been utilized repeatedly by state and federal courts to deflect judicial challenges by Native Hawaiians seeking to pursue their claims against the state and federal governments,<sup>10</sup> *see, e.g., Territory v. Kapiolani Estate*, 18 Hawai`i 640 (1908)(ruling that a claim that the Territory of Hawai`i had not received good title to the ceded lands was a nonjusticiable political question); *Territory v. Pauahi*, 18 Hawai`i 649 (1908)(same); *Price v. State of Hawai`i*, 764 F.2d 623, 628 (9<sup>th</sup> Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986)(although not explicitly utilizing the words “nonjusticiable” or “political question doctrine,” nonetheless rejecting the claims brought by the Native Hawaiian claimants because courts must defer to the political branches when addressing such claims: “In the absence of explicit governing statutes or regulations, we will not intrude on the traditionally executive or legislative prerogative of recognizing a tribe’s existence); *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Hawai`i 154, 737 P.2d 446 (1987)(ruling that OHA’s

efforts to obtain revenues from the Public Land Trust owed to it under state statutes raised a nonjusticiable political question); *Office of Hawaiian Affairs v. State*, 96 Hawai`i 388, 31 P.3d 901 (2001)(same); *Kahawaiola` a v. Norton*, 222 F.Supp.2d 1213 (D.Hawai`i 2002)*appeal pending*, 9<sup>th</sup> Cir. No. 02-1739 (ruling that the claim by Native Hawaiians that the federal law excluding natives in Hawai`i from obtaining federal recognition violated the Equal Protection Clause of the Fourteenth Amendment raised a nonjusticiable political question); *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii*, Civil No. 94-4207 (SSM)(1st Cir.Ct. Hawai`i, Dec. 5, 2002)*appeal pending*, Hawai`i Supreme Court No. 25570 (ruling that the claim brought by OHA and other Hawaiians that the ceded lands should not be sold or transferred until the claims of the Native Hawaiian people are resolved raised a nonjusticiable political question). In light of these repeated rulings that claims by Native Hawaiians to their resources and rights are nonjusticiable, it would be truly ironic and totally illogical if the political question doctrine did not also block challenges brought by non-Hawaiians to the few programs that have been established by Congress and

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<sup>10</sup> Native Hawaiians were not permitted to file under the Indian Claims Commission Act of 1946, 25 U.S.C. secs. 70-70v, and have not yet had any sort of claims commission established by the federal government to address their claims.

the State of Hawai`i in recognition of the still-festering claims of the Native Hawaiian people.

The OHA Appellees contend that no nonfrivolous argument can be presented that Native Hawaiians are not the native peoples of the Hawaiian Islands or that they have not had a history of interaction with the United States comparable to that experienced by other Native Americans. *See, e.g., Rice v. Cayetano, supra*, 528 U.S. at 499-506 (detailing Native Hawaiian history), and *see especially id.* at 506-07, where Justice Anthony Kennedy’s opinion for the *Rice* majority refers to Native Hawaiians without qualification or limitation as “the native population,” “the native Hawaiian people,” and “the native Hawaiian population.” In a 1997 opinion letter written by the Interior Department in its role as administering agency for the Native American regarding the Native American Graves Protection and Repatriation Act, 25 U.S.C. secs. 3001-13, the Department explained that “indigenous should not be interpreted to exclude descendants of peoples, tribes, or cultures that may have migrated to the United States in prehistoric times, or, as in the case of Hawaii, in historic times, prior to European exploration.” *Cited as reflecting the current Interior Department position in Bonnichsen v. United States*, No. 02-35994, Ninth Circuit, Reply Brief of Federal Appellants (July 2, 2003), 2003 WL 22593882 at \*22.

In *Kahawaiola` a v. Norton*, *supra*, the District Court ruled that a claim brought by a group of Native Hawaiians challenging the exclusion of Native Hawaiians from the acknowledgment regulations established by the Congress and the Department of Interior constituted a nonjusticiable political question because Congress has unreviewable authority and responsibility to decide how to deal with the indigenous people within U.S. borders. 222 F.Supp.2d. at 1218 (*citing Baker v. Carr*, 369 U.S. 186, 215-17 (1962); *Miami Nation v. U.S. Dept. of Interior*, 255 F.3d 342, 347 (7<sup>th</sup> Cir. 2001); and *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057 (10<sup>th</sup> Cir. 1993)). The District Court recognized in *Kahawaiola` a* that Native Hawaiians are “people indigenous to the United States,” 222 F.Supp.2d at 1220 n.9 (*quoting from* FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 797-98 ( R. Strickland *et al* eds., 2d ed. 1982)), but concluded that it was up to Congress to determine “the full extent of the trust obligation owed by the United States to Native Hawaiians and the manner of its fulfillment.” *Id.* On appeal, Secretary of the Interior Gale A. Norton has urged affirmance, arguing that “[t]he political decision of whether to recognize Native Hawaiians as a federal Indian tribe with a government-to-government relationship with the United States is a quintessentially nonjusticiable political question.” *Kahawaiola` a v. Norton* No.

02-17239, Ninth Circuit, Brief for the Appellee (May 15, 2003), 2003 WL 22670058 at \*21 (emphasis added).

6. **The Political Branches Have the Responsibility to Determine the Relationships Between the United States and Natives Living in the United States.**

Congress has always had broad discretion to determine the rights of natives within U.S. boundaries. *See, e.g., United States v. Sandoval*, 231 U.S. 28, 46 (1913)(acknowledging that Congress is not free to “bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe,” but also explaining that with respect to “distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States *are to be determined by Congress, and not by the courts.*”

(Emphasis added.))<sup>11</sup> The leading treatise on native rights has explained that “[t]he

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<sup>11</sup> FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 5-7 ( R. Strickland *et al* eds. 2d ed. 1982) explains that a focus on “tribes” can be misleading, because Congress has consolidated disparate groups to create tribes and has sometimes divided ethnologically-related groups into a number of tribes or “bands.” The term “Indian” was never by the natives themselves, but was rather a word used mistakenly by Europeans to describe the natives they met. Captain James Cook and his crew also used this word to describe the natives they met in Hawai`i and on other Pacific Islands. *See Expressing the Policy of the United States Regarding the United States Relationship with Native Hawaiians and to Provide a Process for the Recognition by the United States of the Governing Entity, and for Other Purposes*,

Supreme Court has never refined the ‘arbitrariness’ standard referred to in *Sandoval*,” and that “[i]n light of the deference give to congressional and executive determinations in this area, however, it would appear that the only practical limitations upon congressional and executive decisions as to tribal existence are the broad requirements that (a) the group have some ancestors who lived in what is now the United States before discovery by Europeans, and (b) the group be a ‘people distinct from others.’” ( *quoting from The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867)). FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 5 ( R. Strickland *et al* eds., 2d ed. 1982). *See also id.* at 41-42: “The [Supreme] Court has never held unconstitutional an action by which Congress or the Executive has recognized or established Indian country.” It is also significant that the *Sandoval* opinion explained that Congress can exercise power to regulate relations with natives under the Indian Commerce Clause, Article I, Sec. 8, Clause 3, even with regard to natives in “territory subsequently acquired,” 231 U.S. at 46, and even with regard to natives that may have become U.S. citizens. *Id.* at 48.

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Senate Rep. No. 107-66 at 25 n.46; JARED SPARKS, MEMOIRS OF THE LIFE AND TRAVELS OF JOHN LEDYARD (London 1828), and COLONEL C. FIELD, BRITAIN’S SEA SOLDIERS (Liverpool: Lyceum Press, 1924)(both quoting written descriptions by John Ledyard, a member of Cook’s crew, who characterized the natives who fought with and killed Cook as ‘Indians’).

“[T]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.” *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior*, 255 F.3d 342, 347 (7<sup>th</sup> Cir. 2001)(quoting from WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 5 (3d ed. 1998)); *United States v. Wright*, 53 F.2d 300, 306 (4<sup>th</sup> Cir. 1931)(“the principle is well settled that whether the protective and regulatory power of Congress shall be extended over an Indian community is a political question with the determination of which the courts have no power to interfere” (citing *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865); *Tiger v. Western Inv. Co.*, 221 U.S. 286 (1911); *United States v. Sandoval*, 231 U.S. 28 (1913); and *Sisseton & Wahpeton Bands of Sioux Indians v. United States*, 277 U.S. 424 (1928)). See also *United States v. Lara*, 124 S.Ct. 1628, 1634 (2004)(confirming the broad power of Congress to regulate natives and to modify regulations previously enacted, noting that the “need for such legislative power would have seemed obvious,” explaining that this power emerged as “more an aspect of military and foreign policy than a subject of domestic or municipal law,” and deferring to the congressional enactment that had the effect of overturning a previous Supreme Court decision); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 534 (1998)(interpreting a statute to say



that the lands allocated by Congress to the Alaska Natives do not have the status of ‘Indian lands,’ but also acknowledging that Congress has the power to alter or amend the statute and that the ultimate determination of this issue is exclusively and unreviewably in the hands of the Congress: “Whether the concept of Indian country should be modified is *entirely* for Congress” (emphasis added)); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (“Congress possesses plenary power over Indian rights, including the power to modify or eliminate tribal rights”).

This Court’s decision in *Price v. State of Hawaii*, 764 F.2d 623, 628 (9<sup>th</sup> Cir. 1985), rejected a claim by a Native Hawaiian group to tribal status, ruling clearly that such a determination is to be made by the political branches of the federal government, not by the courts. In reaching this conclusion, the Court cited the traditional sources of authority for this conclusion: “*See United States v. Sandoval*, 231 U.S. 28, 46 (1913) (recognition of tribe is “to be determined by Congress, and not by the courts”); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865); F. Cohen, *Handbook of Federal Indian Law* 4-5 (1982).” 764 F.2d at 628.

The *Holliday* decision is particularly instructive, because the Supreme Court ruled explicitly that “it is the rule of this court to follow the action of the executive

and other political departments of the government, whose more special duty it is to determine such affairs” with regard to recognizing native groups and determining their rights. 70 U.S. at 419. “If by them [the political branches] those Indians are recognized as a tribe, this court must do the same.” *Id.* Similarly, the Court said it must defer to congressional enactments governing all Indian groups, even if they effect the rights of Indians off their reservations. *Id.* (“This power residing in Congress, that body is necessarily supreme in its exercise.”). In *The Kansas Indians*, 72 U.S. 737 (1866), the Supreme Court used just as strong language deferring to the decisions of the political branches of the federal government, and rejecting the claims of the new State of Kansas, even with regard to natives that had migrated from elsewhere into Kansas.<sup>12</sup> In *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057 (10<sup>th</sup> Cir. 1993), the Court explained that the judiciary’s deference “to executive and legislative determinations of tribal recognition...was originally grounded in the executive’s exclusive power to govern relations with foreign governments” and has expanded to cover also congressional enactments because of “broad congressional power over Indian affairs.” The

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<sup>12</sup> COHEN, *supra*, at 5 n.17, points out that “Congress also has recognized tribes which have migrated into the United States” (*citing* Act of Mar. 3, 1891, ch. 561, sec. 15, 26 Stat. 1101 (codified at 25 U.S.C. sec. 495)(reservation established for Metlakatla Indians)).

opinion in *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior*, 255 F.3d 342 (7<sup>th</sup> Cir. 2001), clarified that once ‘judicially manageable standards’ have been promulgated, the courts can play a role in seeing whether they have been complied with, but the courts still have no role in deciding what the criteria should be, or how different native groups should be treated. *Id.* at 349.<sup>13</sup>

## **7. Conclusion of This Section.**

The legislative and executive branches of the United States government have recognized and developed a political relationship with Native Hawaiians that can be traced to the Hawaiian Homes Commission Act, 1920, *supra*, and the 1959 Admission Act, *supra*, and which has been elaborated upon in the myriad of statutes enacted in the past three decades,<sup>14</sup> most recently in the Consolidated

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<sup>13</sup> This view is consistent with the analysis in COHEN, *supra*, at 3 and n. 4, which explains that ‘[t]he ‘political question’ doctrine is not likely to be used today to close off all judicial review of congressional action in Indian affairs,’ but also emphasizes that ‘[f]or most current purposes, judicial deference to findings of tribal existence is still mandated by the extensive nature of congressional power in the field.’

<sup>14</sup> See ‘Table of Federal Acts Affecting Native Hawaiians,’ attached as Appendix A to *Rice v. Cayetano*, Brief for the Hawai`i Congressional Delegation

Appropriations Act of 2004, Pub.L. 108-199, 118 Stat. 3 (2004), which established the United States Office for Native Hawaiian Relations and appropriated funds for Native Hawaiians through various programs adopted generally for Native Americans. The United States and the State of Hawai`i are presently participating in an ongoing “reconciliation” process with Native Hawaiians pursuant to the instructions of Congress in the 1993 Apology Resolution, *supra*. The Hawai`i Legislature’s general -fund allocations to the Office of Hawaiian Affairs are part of this process, undertaken pursuant to Congressional authorization in the 1959 Admission Act and the numerous federal statutes enacted subsequently that recognize that Native Hawaiians have the same legal status as continental Native Americans and Native Alaskans. It would therefore be altogether inappropriate, and a violation of the political question doctrine, for the federal judiciary to question the constitutionality of these legislative decisions.

**B. THE DISTRICT COURT PROPERLY DISMISSED ARAKAKI’S CLAIMS AGAINST THE DEPARTMENT OF HAWAIIAN HOME LANDS ON THE GROUND THAT STATE TAXPAYERS DO NOT HAVE STANDING TO BRING A CLAIM AGAINST THE UNITED STATES, WHICH IS AN INDISPENSABLE PARTY WHENEVER THE CONSTITUTIONALITY OF AN IMPORTANT FEDERAL STATUTE IS CHALLENGED.**

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as *Amicus Curiae* Supporting Respondent, 1999 WL 557289 (listing 157 federal statutes enacted prior to 1999).

The essential reason why the United States is an indispensable party to any challenge to the constitutionality of the Hawaiian Home Lands Program can be found in this Court’s opinion in *Carroll v. Nakatani*, 342 F.3d 934, 944 (9<sup>th</sup> Cir. 2003), where the Court explained that “Article XII of the Hawaiian Constitution cannot be declared unconstitutional without holding [Section 4] of the Admissions Act unconstitutional.” *See also Arakaki v. Hawai`i*, 314 F.3d 1091, 1093 (9<sup>th</sup> Cir. 2002), where this Court explained that “Congress *required* that Hawaii hold these ceded lands, and their income and proceeds, as a ‘public trust’ to be ‘managed and disposed of for one or more of the foregoing purposes,” one of which is ‘the betterment of the conditions of native Hawaiians, as defined in the [HHCA].’ Admission Act sec. 5(f).” (Emphasis added.) If the constitutionality of an important federal act is to be challenged, it can only be done in a case in which the United States is a party and is able to defend the federal enactment.

Arakaki’s Opening Brief clearly demonstrates that he is challenging federal enactments and federal actions, thus leaving no doubt that the United States is an indispensable party regarding his challenge to the Hawaiian Home Lands Program.<sup>15</sup> OHA submits, in addition, that the United States must also be viewed

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<sup>15</sup> Arakaki’s phrasing of this issue at page 4 of their Opening Brief (stating that the Hawaiian Homes Commission Act was “imposed on the State by the

as an indispensable party regarding Arakaki’s challenge to OHA’s constitutionality, because OHA was established by the people of Hawai`i in order to fulfill the responsibility to use revenues from the Public Land Trust “for the betterment of the conditions of native Hawaiians,” a responsibility assigned to Hawai`i by the United States in Section 5(f) of the Admission Act. The District Court did not need to reach this issue because of its action dismissing the claim against the OHA Appellees based on the political question doctrine.

**C. THE DISTRICT COURT PROPERLY RULED THAT ARAKAKI HAS LIMITED STANDING AS A STATE TAXPAYER TO CHALLENGE THE PROGRAMS HE DISAGREES WITH.**

**1. Arakaki Has Limited Standing as a State Taxpayer.**

Arakaki filed the Complaint in the present case primarily as a state taxpayer. His only alleged personal injury is the injury to his pocketbook that he might suffer as a taxpayer paying taxes to the State of Hawai`i.<sup>16</sup> All other injuries are political in nature, and thus are “generalized grievances” that are insufficient to obtain a forum in federal court. The Supreme Court has said on many occasions that

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United States’) makes it clear why the United States must be considered to be an indispensable party regarding this issue.

<sup>16</sup> It is instructive that on this appeal, the Arakaki Appellants give no examples whatsoever of any injuries they have actually personally suffered, but

federal courts should not adjudicate abstract questions of wide public significance that are ‘pervasively shared and most appropriately addressed in the representative branches.’ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975), and *United States v. Hays*, 515 U.S. 737, 743 (1995).

The District Court ruled that Arakaki – as a state taxpayer – could challenge only the general fund expenditures from the State of Hawai`i that funded OHA and the Department of Hawaiian Home Lands (DHHL). *Arakaki v. Cayetano*, 198 F.Supp.2d 1165, 1174-76 (D.Hawai`i 2002), Docket 26; 299 F.Supp.2d 1090, 1099-1101 (D.Hawai`i 2002), ER 5, Docket 117. In the Opening Brief, Arakaki repeats arguments rejected below that his status as taxpayer entitles him to attack all aspects of every program that receives any tax money, but he is unable to cite to any case, outside the Establishment Clause area,<sup>17</sup> in which any federal court has allowed such a broadscale attack by taxpayers. Relying upon *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9<sup>th</sup> Cir. 1984); *Cantrell v. City of Long Beach*, 241 F.3d 674 (9<sup>th</sup>

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assert only generalized “violations of their constitutional and other rights under color of state law.” Opening Brief at 2.

<sup>17</sup> Establishment Clause cases are treated differently because of *Flast v. Cohen*, 392 U.S. 83 (1968), which provided a narrow exception to the usual rule disallowing taxpayer standing and allowed taxpayers to challenge expenditures alleged to violate the Establishment Clause of the First Amendment.

Cir. 2001); and *Cammack v. Waihee*, 932 F.2d 765 (9<sup>th</sup> Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992), the District Court ruled that taxpayers challenging state expenditures “must allege a direct injury caused by the expenditure of tax dollars” and “must set forth the relationship between the taxpayer, tax dollars, and the allegedly illegal government activity.” 198 F.Supp.2d at 1174, Docket 26. Based on this test, the District Court concluded that Arakaki had standing to challenge direct expenditures of tax dollars by the State of Hawai`i from its general fund, but could not challenge any other activities by OHA or DHHL based on any other revenue sources they may have access to. *Id.* at 1175-76; *see also* 299 F.Supp.2d 1090, 1099-1101 (D.Hawai`i 2002), ER 5, Docket 117, slip op. at 1720.

The District Court properly determined that Arakaki’s taxpayer standing did not allow him to challenge revenue deposited into the state’s general fund from sources other than taxes and then paid to OHA, or monies paid to DHHL and OHA pursuant to prior settlements, or the State’s issuance of bonds in order to pay for those settlements. 299 F. Supp.2d at 1099-1101, ER 5, Docket 117, slip op. at 17-20. The reason for this conclusion is clear -- none of these expenditures results in a direct injury to Arakaki as a state taxpayer. Monies deposited into the State’s general fund from the rental of trust lands and then subsequently paid to OHA are not state taxpayer funds – the State of Hawai`i’s general fund acts merely as a



holding account through which other monies pass. The District Court also properly determined that Arakaki – as a taxpayer – did not have standing to challenge a prior settlement reached by the State and DHHL, because “[t]axpayer standing does not provide an avenue for nullifying a settlement reached years earlier. If it did, no state could ever defer settlement payments by agreement, or agree to any resolution involving the passage of time.” 299 F. Supp.2d at 1100. The same rationale prevents Arakaki – as a taxpayers -- from challenging the 1990 settlement between the State and OHA, which led to the payment of about \$135,000,000 to OHA in 1993.<sup>18</sup> For similar reasons, the District Court ruled that Arakaki, as a taxpayers, did not have standing to challenge the state’s issuance of general obligation bonds in order to fund these settlements. *Id.* Contrary to Arakaki’s contention, Opening Brief at 32-33, these expenditures are unlike those found sufficient to confer taxpayer standing in *Cammack v. Waihee*, 932 F.2d 765 (9<sup>th</sup> Cir. 1991). In *Cammack*, this Court found a direct injury to taxpayers because the statute granting the Good Friday holiday was intertwined with the actual expenditure of tax dollars, which paid state employees’ salaries during the holiday.

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*Id.* at 771-772. Here, the settlements Arakaki wishes to challenge involve no actual expenditure of tax dollars, but at most an indirect impact on state funds generally. The District Court's rulings limiting taxpayer standing are certainly sound and this Honorable Court should, at the very least, reach the same conclusion.<sup>19</sup>

2. **Plaintiffs Have Failed to State a Claim for Relief as Beneficiaries of the Public Land Trust, Because They Are Not Seeking to Enforce the Terms of the Trust.**

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^ As the District Court noted, it may be possible for other individuals who can allege specific personal injuries to challenge these transfers of funds, but taxpayer standing does not provide such a basis. 299 F.Supp.2d at 1101, ER 5, Docket 117.

^ The OHA Trustees argued below, *see* Motion by OHA Defendants to Dismiss and Memorandum in Support, filed 3/7/02, Docket No. 14, that in light of the Supreme Court's plurality opinion in *ASARCO v. Kadish*, 490 U.S. 605 (1989), *Hoohuli v. Ariyoshi* had been effectively overruled. The District Court rejected that argument, noting that the Ninth Circuit has viewed plurality opinions as not sufficiently controlling to overturn a Ninth Circuit precedent, and *Hoohuli* was reaffirmed by this Court in *Cammack v. Waihee*, after the *ASARCO* decision. 299 F.Supp.2d 1090, 1097, ER 5, Docket 117. Nevertheless, a review of the decisions handed down by this Honorable Court indicates that although no Ninth Circuit decision since *ASARCO* has *expressly* limited state taxpayer standing to Establishment Clause cases, the Circuit has found taxpayer standing *only* in the context of Establishment Clause cases. *See, e.g., Cantrell v. City of Long Beach*, 241 F.3d 674 (9<sup>th</sup> Cir. 2001)(no taxpayer standing where birdwatchers asserted state law claims of government funds, improper public gifts, and misuse of trust assets); *PLANS v. Sacramento Unified School Dist.*, 319 F.3d 504 (9<sup>th</sup> Cir. 2003) (taxpayer standing found to challenge state tax funding of school based on religious teachings of Rudolf Steiner).

In the original Complaint and in the Opening Brief at pages 21-30, Arakaki has contended that he also has standing as beneficiary of the Public Land Trust. In its first opinion in this case, however, the District Court carefully explained why Arakaki presented no cognizable cause of action as trust beneficiary. Arakaki has relied upon language in the 1898 Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (Newlands Resolution), 350 Stat. 750 (1898), to argue that as a member of the general public he is a beneficiary of the lands ceded to the United States at the time of the annexation of Hawai`i. The District Court explained, however, that the Newlands Resolution does not appear to ‘have actually created the trust alleged by Plaintiffs,” 198 F.Supp. at 1181, Docket 26, and, in any event, any trust that might have been created has been clarified or modified by subsequent Congressional actions in enacting the Hawaiian Homes Commission Act, 1920, and the 1959 Admission Act. 198 F.Supp. at 1182, Docket 26.

After the Arakaki Appellants had submitted additional briefings, the District Court ruled that they had abandoned their claims based on the 1898 ‘trust’ and were relying exclusively on their status as beneficiaries of the trust created by the 1959 Admission Act. 299 F.Supp.2d 1090, 1101 (D.Hawai`i 2002), ER 5, Docket 117, slip op. at 22. Despite this apparent change in strategy, the District Court

found no greater merit in Arakaki's claim, applied the same analysis, and concluded that the Arakaki Appellants were not bringing an action as trust beneficiaries to enforce the terms of a trust. Instead, they were bringing an action as "inhabitants" of Hawai`i "demanding that the State ignore an express trust purpose, which Plaintiffs say violates the Equal Protection Clause." 299 F.Supp.2d at 1103, slip op. at 26-27. Such a claim is thus "nothing more than a 'generalized grievance'" because "[a]lmost anyone here in Hawaii could conceivably bring these claims" and "[a]llowing such a challenge...would make a nullity of standing requirements." 299 F.Supp.2d at 1103, slip op. at 27 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), and *United States v. Hays*, 515 U.S. 737, 743 (1995)("the rule against generalized grievances applies with as much force in the equal protection context as in any other")).<sup>20</sup>

Arakaki's difficulty is that he is not claiming that the trustee of the trust (the State of Hawai`i) is failing to manage the trust in accordance with the terms

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<sup>20</sup> If Arakaki is relying upon an alleged breach of the 1898 "trust" that allegedly occurred when Congress enacted the Hawaiian Homes Commission Act in 1921 and/or the Admission Act in 1959 (see Opening Brief at 27-28), his suit against the present trustees is misguided. As the District Court noted, "the present trustees were never trustees of the 1898 Newlands Resolution trust. The present trustees are charged with enforcing the present trust...." *Arakaki v. Cayetano*, 198 F.Supp.2d 1165, 1180 (D.Hawai`i 2002), Docket 26. And the statute of limitations

established by Congress when it conveyed the lands in trust to the State in 1959, but rather he is contending that the State's efforts to follow the terms of the Admission Act establishing the trust (which instructs the State to use revenues from these lands "for the betterment of the conditions of native Hawaiians") violate the Equal Protection Clause. The District Court explained that although decisions of this Honorable Court have concluded that beneficiaries of the Public Land Trust can bring claims to ensure that it is being managed according to the language of the Admission Act, no case has ever held that a trust beneficiary has standing to challenge a trustee's actions that are in accordance with the terms of the trust on the ground that such action violates the Equal Protection Clause. At page 24 of the Opening Brief, Arakaki cites *Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission*, 739 F.2d 1467, 1472 (9<sup>th</sup> Cir 1984), but the quote from that case says clearly that "the power *to enforce* that [trust] obligation is contained in federal law" (emphasis added), and it says nothing about giving standing to a putative beneficiary to argue that the trust is unconstitutional. *Pennsylvania v. Bd. of Directors of City Trusts*, 353 U.S. 230 (1957), provides no support for Arakaki's standing claim, because that case was brought by a person asserting the actual injury of having been denied admission based on race.

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has long since expired regarding any possible claim that actions taken in 1921 or

Because Arakaki's goal is to destroy the Public Land Trust, or radically change it beyond recognition from the goals established by Congress, it becomes clear that he is pursuing a generalized political grievance, and allowing standing to mount such a challenge as a supposed trust beneficiary would, as the District Court explained, "make a nullity of standing requirements." 299 F.Supp.2d at 1103, ER 5, Docket 117, slip op. at 27.<sup>21</sup>

**D. ARAKAKI IS WRONG IN CHARACTERIZING THE DHHL AND OHA PROGRAMS AS ONES UTILIZING A RACIAL PREFERENCE REQUIRING STRICT SCRUTINY REVIEW; THESE LONG-ESTABLISHED PROGRAMS ARE BASED ON THE UNIQUE STATUS OF NATIVE HAWAIIANS AND ON**

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1959 allegedly violated rights created in 1898.

<sup>21</sup> The Arakaki Appellants list as one of the questions presented for review whether the three Plaintiffs of Hawaiian ancestry that were dismissed from the case have standing to challenge OHA and DHHL programs that provide benefits exclusively to Hawaiians with 50% Hawaiian blood. Opening Brief at 4. But Appellants appear to have abandoned their objection to the District Court's determination that the plaintiffs of Hawaiian ancestry lack standing, because they failed to argue the issue in any other part of their Opening Brief.

In any event, the District Court acted properly in dismissing the three Plaintiffs of Hawaiian ancestry from the lawsuit. When they were dismissed, the sole claim remaining was an "Equal Protection challenge to programs being administered by OHA for the benefit of all Hawaiians, based on state taxpayer standing." Order Dismissing Plaintiffs Sandra Puanani Burgess, Donna Malia Scaff, and Evelyn C. Arakaki, Jan. 13, 2004, ER 27, Docket 353, slip op. at 4. At an earlier hearing, Plaintiffs' counsel had acknowledged that the three Plaintiffs of Hawaiian ancestry were eligible for the OHA programs they sought to challenge. *Id.* at 1-2. Because these Plaintiffs failed to identify any injury to their Equal Protection rights by the appropriation of state tax revenues to OHA, the District Court properly dismissed their claims for lack of standing. *Id.* at 6.

## **EFFORTS TO REACH PARTIAL SETTLEMENTS OF THEIR LONG-RECOGNIZED CLAIMS.**

Arakaki is challenging programs that have been operating for decades and that have withstood previous constitutional challenges.<sup>22</sup> State<sup>23</sup> and federal courts have consistently ruled that separate and preferential programs for Native Hawaiians are based on a “political” rather than a “racial” categorization, and thus

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<sup>22</sup> The Hawaiian Home Lands program was established in 1921 after Congress debated the constitutional issues and determined that the program was constitutional. U.S. executive-branch officials and members of Congress explicitly recognized that Native Hawaiians had the same rights as other Native Americans in the hearings that led to the passage of the Hawaiian Homes Commission Act in 1921. *See supra* this Brief, Section IV(A)(4). The classifications and definitions utilized in the legislation establishing the Office of Hawaiian Affairs were upheld in *Hoohuli v. Ariyoshi*, 631 F.Supp. 1153 (D.Hawai`i 1986).

<sup>23</sup> State court decisions recognizing the unique indigenous status of Native Hawaiians include *Ahuna v. Dept. of Hawaiian Home Lands*, 64 Hawai`i 327, 339, 640 P.2d 1161, 1168 (1982) (“Essentially we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.”); *Public Access Shoreline Hawai`i v. Hawai`i County Planning Commission*, 79 Hawai`i 425, 903 P.2d 1246 (1995) (recognizing and explaining the traditional and customary rights of Native Hawaiians); *Ka Pa` Makai O Ka` Aina v. Land Use Commission*, 94 Hawai`i 31, 46, 7 P.3d 1068, 1083 (2000) (confirming that, “to the extent feasible when granting a petition for reclassification of district boundaries,” the Land Use Commission must “protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians”); *Office of Hawaiian Affairs v. State*, 96 Hawai`i 388, 401, 31 P.3d 901, 914 (2001) (reaffirming “that the State’s obligation to native Hawaiians is firmly established in our constitution”).

that they must be evaluated under the “rational-basis” level of judicial review that applies to other native people.

U.S. District Court decisions recognizing the unique status of Native Hawaiians and/or upholding programs established for them include *Hoohuli v. Ariyoshi*, 631 F.Supp. 1153, 1160, 1161, 1162 (D.Hawai`i 1986)(utilizing the rational basis level of judicial scrutiny to uphold the constitutionality of the definitions used in the legislation establishing OHA, explaining that these definitions were adopted after “careful consideration and social and historical research,” and noting that “Indian cases clearly indicate that a minimum blood quantum is not a constitutional prerequisite to valid legislation”); *Nalielua v. State of Hawai`i* 795 F. Supp. 1009 (D. Haw. 1990), *aff’d*, 940 F.2d 1535 (9th Cir. 1991)(ruling that rational basis scrutiny should apply for programs for Native Hawaiians and that the preference for Native Hawaiians given by the Department of Hawaiian Home is constitutional because of its link to self-governance and self-sufficiency); *Pai ‘Ohana v. United States*, 875 F. Supp. 680, 697 n. 35. (D. Haw. 1995), *aff’d*, 76 F.3d 280 (9th Cir. 1996)(quoting from *Nalielua* that “[a]lthough Hawaiians are not identical to the American Indians whose lands are protected by the Bureau of Indian Affairs, the court finds that for purposes of equal protection analysis, the distinction ... is meritless. Native Hawaiians are people indigenous to



the State of Hawai`i, just as American Indians are indigenous to the mainland United States ...”); *Kahawaiola` a v. Norton*, 222 F.Supp.2d 1213, 1220 n.9 and 1223 n. 14 (D.Hawai`i 2002) *appeal pending*, 9<sup>th</sup> Cir. No. 02-1739 (recognizing Native Hawaiians as a “pe ople indigenous to the United States” and explaining, even after the Supreme Court’s decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), that the rational basis standard announced in *Morton v. Mancari*, 417 U.S. 535 (1974), should apply to benefits and programs established for Native Hawaiians).

This Honorable Court has consistently recognized that the Native Hawaiians are a distinct native people and has upheld and enforced the programs that have been established for them. In a section of its *Rice v. Cayetano* opinion that was not addressed in the reversal by the Supreme Court (because the Supreme Court determined that it need not address this issue and could “stay far off that difficult terrain,” 528 U.S. at 519), this Court concluded that the “special treatment” of the Native Hawaiians by the U.S. Congress “is similar to the special treatment of Indians that the Supreme Court approved in *Morton v. Mancari*, 417 U.S. 535 (1974).” 146 F.3d at 1081. *See also Arakaki v. Hawai`i*, 314 F.3d 1091, 1093 (9<sup>th</sup> Cir. 2002)(explaining that “[i]n 1978, Hawai`i amended its Constitution to establish the OHA to ‘address the needs of the aboriginal class of people of Hawaii.’ Haw. Rev. Stat. Sec. 10-1.”); *Pai` Ohana v. United States*, 75 F.3d 280

(9<sup>th</sup> Cir. 1996)(recognizing the existence and legitimacy of Native Hawaiian tenant rights created under the Hawai`i State Constitution and state statutes); *United States v. Nuesca*, 945 F.2d 254, 257-58 (9<sup>th</sup> Cir. 1991)(recognizing Native Hawaiians as “indigenous to regions now part of the United States” and thereby applying rational-basis scrutiny to a Congressional classification that differentiated between the rights of Native Hawaiians and Native Alaskans); *Napeahi v. Paty*, 921 F.2d 897 (9<sup>th</sup> Cir. 1990)(concluding that the submerged lands surrounding the Hawaiian islands were included in the public land trust, the proceeds of which should be used for the benefit of Native Hawaiians pursuant to the 1959 Admission Act).

This Court has also repeatedly observed that the ceding of land to the new State of Hawai`i in the 1959 Admission Act gave rise to a “trust obligation” between the United States and Native Hawaiians. *See, e.g., Price v. Akaka*, 928 F.2d 824 (9<sup>th</sup> Cir. 1991) and 3 F.3d 1220 (9<sup>th</sup> Cir. 1993)(holding that Native Hawaiians had standing to bring claims under 42 U.S.C. sec. 1983 to challenge expenditures of the Trustees of the Office of Hawaiian Affairs, because of the “trust obligations” established by Congress in section 5(f) of the 1959 Admission Act; *see, e.g.,* 3 F.3d at 1225: “Congress enacted the Admission Act, a federal public trust...”); *Price v. Hawai`i*, 764 F.2d 623, 627 (9<sup>th</sup> Cir. 1985)(examining the

applicability of the federal court original jurisdiction statute for Indian tribe cases, and observing that “native Hawaiians *in general* may be able to assert a longstanding aboriginal history” sufficient to give rise to standing under the statute, and that the 1959 Admission Act codified “a trust obligation” between the United States and the Native Hawaiian people “that constitutes a ‘compact with the United States’”); *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216 (9<sup>th</sup> Cir. 1978) and 739 F.2d 1467 (9<sup>th</sup> Cir. 1984)(finding the same right of action for the same reasons in a claim filed by Native Hawaiians concerning a county’s alleged appropriation of trust lands; *see also* 739 F.2d at 1471: “The Admission Act clearly mandates establishment of a trust for the betterment of native Hawaiians.”).

Arakaki contends (Opening Brief at 7-8) that programs for Native Hawaiians must be evaluated pursuant to the strict scrutiny level of judicial review, based on a misleading understanding of *Rice v. Cayetano*, 528 U.S. 495 (2000); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); and *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989). Arakaki takes language from *Rice* out of context and contends that it leads inexorably to the conclusion that any and all governmental programs designed to compensate Native Hawaiians for the wrongs done to them and the lands taken from them, or to assist with their rehabilitation in

light of the earlier efforts by the U.S. government to destroy their culture and autonomy as a people, must now be deemed to violate the Equal Protection Clause of the Fourteenth Amendment. The *Rice* holding is, however, a narrow one, and the Supreme Court carefully avoided writing with a broad brush in a manner that would have supported Arakaki's contentions.

The *Rice* majority emphasized that "[t]he validity of the voting restriction is the only question before us," *id.* at 521, and rested on the narrow ground of the Fifteenth Amendment. The Court explicitly avoided addressing the argument that programs for Native Hawaiians should be evaluated under the rational-basis level of judicial scrutiny pursuant to *Morton v. Mancari*, 417 U.S. 535 (1974). The Court did not reject this argument, ruling simply that even if *Mancari* applies to Native Hawaiians, under the Fifteenth Amendment "Congress may not authorize a State to create a voting scheme of this sort." *Id.* at 519.

The *Rice* holding is thus limited to the Fifteenth Amendment. The Court was careful to refrain from commenting on how the Fourteenth Amendment should be interpreted and applied to programs for Native Hawaiians, stating that "we assume the validity of the underlying administrative structure and trusts, without intimating any opinion on that point." *Id.* at 521-22. *See also American Federation of Government Employees (AFL-CIO) v. United States*, 195 F.Supp.2d

4, 19 (D.D.C. 2002)(“*Rice* only dealt with the right to vote.... *Rice* involved neither a Fifth Amendment due process claim nor a Fourteenth Amendment equal protection claim.”); *Arakaki v. Lingle*, 305 F.Supp.2d 1161, 1170 n. 7 (D.Hawai`i 2004), ER 28, Docket 354 (explaining that *Rice* was “distinguishable” from the present case because it involved a challenge to an election “under the Fifteenth Amendment, not preferences and/or benefits being provided to native populations allegedly based on their political, as opposed to racial, status.”)

It should be noted again that the *Rice* majority opinion repeatedly acknowledged that Native Hawaiians are native people by referring regularly and without qualification or limitation to “the native Hawaiian people,” 528 U.S. at 507, “the native Hawaiian population,” *id.*, and “the native population.” *Id.* at 506. The Court explained that this “people” share a common “culture and way of life,” that they have experienced a common “loss” that has had effects that have “extend[ed] down through generations,” *and that it has been appropriate for the State of Hawai`i “to address these realities.” Id.* at 524 (emphasis added). The *Rice* opinion thus provides the essential underpinning for the conclusion that Native Hawaiians are entitled to the same legal status as other native people within the United States, and Arakaki is mistaken in contending that *Rice* holds that all

programs for the benefit of Native Hawaiians are racial classifications that are inevitably subject to strict scrutiny analysis.

Arakaki also misleads this Honorable Court by ignoring the cases that have been decided after *Adarand* and *Croson*, particularly *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325 (2003), which utilized a new and more flexible approach toward classifications linked to race. In her opinion for the majority upholding the admissions policy utilized by the University of Michigan Law School which used race as a relevant admission factor, Justice O'Connor stressed that "context matters" even "when reviewing race-based governmental action under the Equal Protection Clause." 123 S.Ct. at 2338.

**E. THE DISTRICT JUDGE CORRECTLY DECLINED TO ADDRESS ARAKAKI'S COUNTER MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE OF THE PROCEDURAL BARRIERS BLOCKING HIS CLAIM.**

**1. Substantive Issues Are Never Addressed If the Claim Cannot Be Brought Because of Procedural Barriers.**

The District Court quite properly addressed the procedural issues raised by Arakaki's Complaint before addressing the substantive issues, and its rulings dismissing the claims based on the indispensable party and political question doctrines made it unnecessary to reach the merits of Arakaki's claims. Arakaki now contends that he was entitled to have a ruling on the Motion for Partial Summary Judgment, filed on December 15, 2003, ER 25, Docket 332, but he cites no authority for the proposition that a party is entitled to a ruling on an issue that need not be reached because of the procedural context of a case.

In asserting that the doctrine of issue preclusion or collateral estoppel entitles him to a partial summary judgment on some of his claims, he misrepresents the decisions in *Rice v. Cayetano*, 528 U.S. 495 (2000), and *Arakaki v. Hawai`i* 314 F.3d 1091 (9<sup>th</sup> Cir. 2002). Most particularly, Arakaki fails to acknowledge the significance of this Court's opinion in *Arakaki v. Hawai`i* which decided that controversy on narrower grounds than those invoked by the District Court and which instructed the District Court to issue a new opinion excluding a significant portion of its previous language. It is, therefore, most definitely *not* the case, as Arakaki asserts on page 12 of the Opening Brief, that "key facts relating to the *Mancari* defense have been conceded by Defendants-Appellees or are not genuinely disputed." The facts related to *Mancari* and the conclusions that should be drawn from these facts are most certainly in dispute, as evidenced by the U.S. Supreme Court's characterization of this issue as "difficult terrain" that it wished to stay clear of. *Rice v. Cayetano*, 528 U.S. at 519.

In *Arakaki v. Hawai`i* *supra*, this Court followed the Supreme Court's lead from *Rice*, applying the Supreme Court's Fifteenth Amendment analysis but explicitly vacating that portion of the District Court's opinion addressing Fourteenth Amendment issues and instructing the District Court to revise its opinion:

Because Arakaki lacks standing to raise the appointments issue, the district court was without jurisdiction to decide this issue and, therefore, erred in reaching its merits. *We therefore vacate that portion of the district court's judgment concluding that Hawaii violated the Fourteenth Amendment and remand for dismissal of that claim without reaching its merits.*

*Id.* at 1098 (emphasis added).

Arakaki is squarely wrong, therefore, in contending that *Mancari* rational-basis review does not apply to Native Hawaiians. *See also Kahawaiola`a v. Norton, supra*, 222 F.Supp.2d at 1223 n.14 (addressing the applicability of *Mancari* to Native Hawaiians, after the *Rice* decision, and explaining that *rational basis review should apply* to programs established for their benefit).

2. **Even If the Procedural Barriers Did Not Block Arakaki's Claims, Issue Preclusion or Collateral Estoppel Would Not Apply Because the Issues Raised in This Case Are Not Identical to Those of *Rice v. Cayetano* or *Arakaki v. Hawai'i*.**

Even if Arakaki were somehow able to overcome the procedural doctrines that make adjudication of his claims inappropriate, his arguments that some issues have been previously resolved pursuant to the issue preclusion or collateral estoppel doctrines would fail. The essential elements for "issue - preclusion/ collateral-estoppel" are that the parties and the issues be identical. The parties in the present case are clearly not identical with those in *Rice v. Cayetano*. Mr. Rice is not a plaintiff in the present case. The Office of Hawaiian Affairs and its



Trustees were not parties in *Rice*, and participated only as an *amicus curiae* at the appellate levels. Some of the parties in the present case overlap with those in *Arakaki v. Hawai`i* but these two cases have some significant differences in their configuration. More importantly, the issues raised by the two challenges are substantially different, because *Arakaki v. Hawai`i* involved a challenge under the Fifteenth Amendment, and the present case involves a challenge under the Fourteenth Amendment.

“The party asserting collateral estoppel must first show that the estopped issue is identical to an issue litigated in a previous action.” *Steen v. John Hancock Life Ins. Co.*, 106 F.3d 904, 912 (9<sup>th</sup> Cir., 1997). “For issue preclusion to bar relitigation, the issues must be ‘identical,’ *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1399 (9<sup>th</sup> Cir. 1992), ‘actually litigated,’ and ‘necessarily decided.’ *United States v. Weems*, 49 F.3d 528, 532 (9<sup>th</sup> Cir. 1995).” *Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 553 (9<sup>th</sup> Cir. 2003). The doctrine of issue-preclusion/collateral-estoppel is inapplicable if the issues are merely similar. *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1399 (9<sup>th</sup> Cir., 1992)(citing *Shapley v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404, 408 (9<sup>th</sup> Cir. 1985)). This Court has been clear in explaining that: “The doctrine applies only to issues that are identical in both actions. Issues are not identical if the second action involves

application of a different legal standard, even though the factual setting of both suits be the same.” *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9<sup>th</sup> Cir., 1971)(citing 1B MOORE'S FEDERAL PRACTICE para. 0.443[2]).

Arakaki asserts on pages 48-50 of the Opening Brief that 11 ‘key issues’ have been previously adjudicated in *Rice v. Cayetano* and by the District Court in *Arakaki v. Hawai`i*. But, as explained in the previous section, Arakaki fails to acknowledge the different issues raised by Fifteenth Amendment and Fourteenth Amendment challenges, and almost completely ignores this Court’s opinion in *Arakaki v. Hawai`i* where the Court explained carefully that “[i]n *Rice*...the Court held that the voting scheme which allowed only Hawaiians to vote in OHA trustee elections violated the Fifteenth Amendment, regardless of whether the *Mancari* rule applied.” 314 F.3d at 1094 (*citing* 528 U.S. at 518-19). This Court therefore ordered the District Court to vacate the sections of its opinion referring to the Fourteenth Amendment. 314 F.3d at 1097-98 and n.8. The District Court did then reissue its opinion in *Arakaki v. Hawai`i* with all references to the Fourteenth Amendment excised. *Arakaki v. Hawai`i* Civ. No. 00-00514 HG-BMK, Second Amended Order Granting in Part and Denying in Part Plaintiffs’ Cross Motion for Summary Judgment and Denying Defendants’ Motion for Summary Judgment (D. Hawai`i Aug. 22, 2003.)

Because the analysis required by a Fourteenth Amendment challenge is different from that required by a Fifteenth Amendment challenge, the statements and rulings found in *Rice* and in the District Court's opinion in *Arakaki v. Hawai`i* cannot be applied without further examination to the present action, and the issues addressed in those earlier cases cannot by any stretch of the imagination be characterized as "identical" with those of the present case. It is particularly significant to note that the District Court in *Arakaki v. Hawai`i* explicitly declined to address the applicability of *Mancari* to programs established for the benefit of Native Hawaiians, and that it did not reject the notion that the Hawaiians are indigenous people or that a unique trust relationship exists. "This Court is not finding that Hawaiians may not share the same status as tribal Indians. This Court only holds that OHA elections are the affairs of the State and not of a quasi-sovereign and that Congress has not expressly authorized the prohibition against non-Hawaiian trustees." *Arakaki v. Hawai`i*, Second Amended Summary Judgment Order, *supra*, at 30. It is almost unfathomable that Arakaki appears to continue to assert that Native Hawaiians are not the indigenous people of Hawai`i and to contend that the District Court in *Arakaki v. Hawai`i* agreed with that notion. Nothing in the District Court's opinion supports this conclusion.

**F. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION  
IN MANAGING THIS CASE.**

Arakaki complains at length (Opening Brief at 55-66) about what he characterizes as the protracted proceedings below, but he fails to cite a single case in which a decision was overturned based on docket scheduling by a judge in a civil case. The reason for such an absence is that judges are “. . . vested with considerable discretion to regulate the proceedings in a manner consistent with equity and fairness and that will ensure such an outcome . . . . [T]he court has inherent power to manage the case before it . . .” MOORE’S FEDERAL PRACTICE, *Civil* § 1.21 (3<sup>rd</sup> ed., 2004). In the present case, the proceedings below were lengthy in part because of the complexity of the issues, and additional time was required by the untimely death of one of the Arakaki’s attorney and a need to brief the implications of this Court’s relevant opinion in *Carroll v. Nakatani*, 342 F.3d 934 (2003), which was handed down at a key point in the briefing process.

*In Ad Hoc Committee on Judicial Administration, Etc. v. Commonwealth of Massachusetts*, 488 F.2d 1241 (1<sup>st</sup> Cir. 1973), an unincorporated group of attorneys and an elderly civilian filed suit seeking an order to enlarge and restructure the state court system. Plaintiffs complained that the length of time it took to get to

court deprived civil litigants of liberty and property without due process of law.

*Id.* at 1243. The First Circuit explained that:

. . . whether delay is a violation of due process depends on the individual case. Delay *per se* is not unconstitutional; it may become such only when an injured plaintiff, ready and eager for trial, or a defendant seeking vindication and himself ready for trial, are denied too long his day in court. If a five year delay in a civil action reflects simply the parties' utilization of pre-trial discovery or settlement negotiations there is no constitutional violation. To codify the myriad elements into timetables of general application having constitutional force may well be impossible.

*Id.* at 1244.

The case at hand is complex, with numerous parties and many attorneys, and transcendent economic, political, and cultural ramifications for Native Hawaiians and all residents of Hawai`i. The docket sheet records 359 filings and 26 hearings and status conferences. The District Court exercised the broad discretion given to it in an appropriate, fair, and reasonable manner.

28 U.S.C. § 1657 (2004) gives the court wide discretion to organize its dockets in civil actions, with an applicable exception that temporary or preliminary injunctive relief shall be expedited. In this case, the District Court heard the motion for a temporary restraining order on March 12, 2002, only eight days after the original complaint was filed. Docket 25. The District Court scheduled the preliminary injunction hearing a few months later, but Arakaki withdrew the

motion before the hearing took place. Docket 164. Arakaki complains in the Opening Brief at page 62 that the District Court caused further delay by bringing the United States back in as a party before dismissing them again. But the Court did so in response to the ruling by this Court in *Carroll v. Nakatani*, 342 F.3d 934 (9<sup>th</sup> Cir. 2003), in order to allow parties to argue the impact, if any, on claims against the United States. Docket 273. The District Court did not abuse the discretion given to it under 28 U.S.C. § 1657 (2004), nor did it violate the intent of Rule 1 of the Federal Rules of Civil Procedure. Arakaki's appeal based on allegations of delay should be denied.

**G. THE DISTRICT COURT ACTED PROPERLY IN AWARDING COSTS TO DEFENDANTS-APPELLEES.**

Arakaki challenges the award of rather modest costs to Defendants-Appellees, asserting that such awards will discourage challenges to governmental programs brought by private attorney generals. Opening Brief at 14. The award of costs in civil rights cases is, however, commonplace and fully warranted by federal statutes and rules.

Unlike attorney's fees under Title VII or 42 U.S.C. sec. 1988, which are ordinarily awarded only to prevailing plaintiffs, either side that prevails is presumptively entitled to costs under Rule 54(d) of the Federal Rules of Civil

Procedure. *See, e.g., Barry v. Fowler*, 902 F.2d 770, 773 (9<sup>th</sup> Cir. 1990)(awarding the defendant costs but not attorney's fees in a case in which the plaintiff was unsuccessful in pursuing a 42 U.S.C. sec. 1983 case, because the court could not conclude that the plaintiff's filing of her claim was frivolous); *Singer v. St. Helena Unified Sch. Dist.*, 45 Fed.Appx 657, 659 (9<sup>th</sup> Cir. 2002)(citing *Barry* in a Title VII case); *Chavez v. Tempe Union High Sch. Dist.*, 565 F.2d 1087 (9<sup>th</sup> Cir. 1997)(awarding costs to defending school district in a civil rights case); *Cosgrove v. Sears, Roebuck & Co.*, 191 F.3d 98 (2d Cir. 1999); *Croker v. Boeing Co.*, 662 F.2d 975, 998-99 (3d Cir. *en banc*, 1981); *Cherry v. Champion Int'l Corp.*, 186 F.3d 442 (4<sup>th</sup> Cir. 1999); *Jersey v. City of San Antonio*, 568 F.2d 1224, 1226 (5<sup>th</sup> Cir. 1978); *Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 906 (5<sup>th</sup> Cir. 1987); *Poe v. John Deere Co.*, 695 F.2d 1103, 1108 (8<sup>th</sup> Cir. 1982).

## V. CONCLUSION.

For the reasons presented above, the District Court's Orders dismissing Arakaki's claims should be affirmed.

DATED: Honolulu, Hawai`i, August 3, 2004.

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that pursuant to Federal Rules of Appellate Procedure Rule 32 and Ninth Circuit Rule 32, the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 13,916 words.

DATED: Honolulu, Hawai`i, August 3, 2004.

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## CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing document were duly served upon the following persons by mail, postage paid, first class, in a United States post office at Honolulu, Hawaii, as indicated below on August 3, 2004, addressed as set forth below:

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