No. 04-15306

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, et al.,

Plaintiffs/Appellants,

v.

LINDA LINGLE, et al.,

Defendants/Appellees.

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

CITIZENS' SUPPLEMENTAL BRIEF ON REMAND RE: IMPACT, IF ANY, OF *DAIMLERCHRYSLER*

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CITIZENS' SUPPLEMENTAL BRIEF ON REMAND

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CITIZENS' SUPPPLEMENTAL BRIEF ON REMAND
RE: IMPACT, IF ANY, OF *DAIMLERCHRYSLER* DECISION

I. Introduction.

This is a case about certain American citizens taxed by their state to support racial discrimination against themselves.[1] Unlike the Ohio taxpayers in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. ___, 126 S.Ct. 1854 (2006), Earl Arakaki and his fellow plaintiffs each incur ongoing, particularized, pocketbook injuries not shared by Hawaii taxpayers generally. These Citizens' claims are like those of the taxpayers in *U.S. v. Butler*, 297 U.S. 1 (1936) whose standing was upheld to challenge the legality of the exaction of taxes from them, not for the general welfare, but for the benefit of another group. These Citizens' claims are judicial in nature; seek to stop the flow of money from their pockets caused by

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1. This case is also about Hawaii's ceded lands trust. The federal and state laws challenged in this case injure each of these Citizens, as trust beneficiaries: by denying them, solely because of their race, any opportunity to obtain homestead leases and cash distributions of trust revenues; and by reducing the value of their share of the equitable ownership of the ceded lands to a fraction of the share of each beneficiary of the favored race. Under F.R.Civ.P. 54(b) this action is not terminated as to those claims until entry of judgment adjudicating all claims. In compliance with this Court's Order filed August 29, 2006, this brief addresses the impact, if any, of *DaimlerChrysler v. Cuno* on this Court's decision in *Arakaki v. Lingle*, 423 F.3d 954 (9th Cir. 2005).

violation of the fundamental right of each to equal protection of the laws; and each is redressable by conventional declaratory and injunctive relief.

II. *DaimlerChrysler Corp. v. Cuno*:

A. **Generalized taxpayer grievances.** The Ohio taxpayers challenged a credit against the state franchise tax given to DaimlerChrysler in exchange for its purchase and installation of "new manufacturing machinery and equipment" at its Jeep plant in Toledo. The plaintiffs claimed the tax credit breached the Commerce Clause, depleted the state treasury, diminished the funds available for lawful purposes and disproportionately increased their tax burden. 126 S.Ct at 1862. The Supreme Court's decision rejecting their standing included the following reasons:

> On several occasions, this Court has denied *federal* taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers. … Standing has been rejected in such cases because the alleged injury is not "concrete and particularized," but instead a grievance the taxpayer "suffers in some indefinite way in common with people generally," … The foregoing rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers. … affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as " 'virtually continuing monitors of the wisdom and soundness' " of state fiscal administration, contrary to the more modest role Article III envisions for federal courts. 126 S.Ct. at 1862-1864. (Internal citations and other language omitted for brevity.)

B. **Depletion of treasury conjectural**. In addition, the Court was skeptical that the injury alleged by the Ohio taxpayers was "actual or imminent," rather than "conjectural or hypothetical." As an initial matter, it is unclear that tax breaks of the sort at issue here do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn *increases* government revenues. 126 S.Ct. at 1862.

C. **Redressability speculative.** The Court at 126 S.Ct. 1863 also said establishing redressability for the alleged injuries requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions.

III. Arakaki v. Lingle:

A. Concrete and particularized pocketbook injuries.

These Citizens sue not "merely because they pay taxes" but because they are required to pay taxes to support racial discrimination against themselves. The State of Hawaii requires these Citizens to pay for, but, on racial grounds,[2] denies them the benefit of the challenged programs.[3] The

2. *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000) held the definitions of "Hawaiian" and "native Hawaiian" as used in the OHA laws and the DHHL laws, to be racial classifications.

State's extraction from them and illegal spending of that money to support the Office of Hawaiian Affairs (OHA) and Department of Hawaiian Home Lands (DHHL) causes a genuine pocketbook injury to each of these Citizens each time he or she buys groceries or medicine or any other goods or services in Hawaii or sends a payment for income or other taxes to the State of Hawaii Department of Taxation.[4] This concrete pocketbook injury is not

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3. In 1921 Congress enacted the Hawaiian Homes Commission Act (HHCA), 42 Stat. 108, setting aside 200,000 acres of the ceded lands for long-term leases of homestead lots (at $1.00 per year) to "native Hawaiians" defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." In 1959, as a condition of statehood, Congress required Hawaii to adopt and to carry out the HHCA. Admission Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4, §§4, 5(f). That mandate to carry out the HHCA remains in effect today. In 1978, the State of Hawaii created the Office of Hawaiian Affairs (OHA) for "native Hawaiians" as defined in the HHCA and for "Hawaiians" (one drop of the blood). Since 1980 the State of Hawaii has been making payments as ceded lands trust revenues to OHA for "native Hawaiians" and payments as tax revenues for "Hawaiians." The State issues no homestead leases to, and makes no cash distributions of ceded lands trust revenues exclusively for non-native Hawaiians; and it distributes no tax moneys exclusively for non-Hawaiians.

4. Taxes are the major source of revenues for the State of Hawaii. About 50% of the tax revenues are from the general excise tax which is levied on gross income from almost all types of business activities in Hawaii. These include sales of tangible personal property at both wholesale and retail, services, contracting, commissions, interest, lease or rental activities, and more. The general excise tax rate varies depending on the business activity; it is 0.15% on insurance commissions, 0.5% on certain activities such as wholesaling, and 4% on most activities at the consumer level. See Appendix Plt. App. 2-124, Schedule of Revenues by Source, Last Ten Fiscal Years; Schedule of Expenditures by Function, Last Ten Fiscal Years, Plt. App. 3-

shared by people in general or by Hawaii state taxpayers generally but only by these Citizens and other Hawaii taxpayers, like these Citizens, who lack the favored ancestry. Hawaii taxpayers of the favored ancestry suffer no such injury, rather they are eligible for the benefits of the racial discrimination, i.e., the benefit of their own taxes as well as the benefit of the taxes paid by these Citizens and others similarly situated.

B. Depletion of treasury actual, imminent and ongoing.

The Stipulation as to Certain Facts filed in the District Court as Docket 172 (Excerpts of Record, "ER", Vol. I, Item 7, Paragraph 13./47 filed with this Court) stipulated that the State Legislature had appropriated sums from the General Fund for OHA exceeding $2.5 million annually for the six fiscal years beginning July 1, 1997 and ending June 30, 2003. Paragraph 14/60 stipulated that the legislature had appropriated sums from the General Fund for DHHL exceeding $1.298 million annually for the three fiscal years beginning July 1, 1999 and ending June 30, 2002. Also, in the record is undisputed evidence, including financial statements of the State, OHA and DHHL, showing the aggregate injury to the State treasury and to the

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125; and pie charts of revenues, Plt. App. 4-21; also see Q&A's from the State of Hawaii Tax Department website: http://www.state.hi.us/tax/taxfacts/tf96-01.pdf Businesses customarily visibly pass on the general excise tax to their customers.

pocketbooks of these Citizens, and other taxpayers similarly situated, to date as a result of the OHA and DHHL laws, (taking into account moneys paid out, liabilities incurred and earnings foregone) is well over $1 billion, just since 1990, and is ongoing and escalating. (ER 17, FER 3A, 3B, 3C, 3D and 3E.) The State of Hawaii Comprehensive Annual Financial Report for FYE June 30, 2005 ("CAFR 2005"), the latest available, notes that, while OHA continues to pursue litigation against the State for still more money, retroactive to June 30, 1980, the Governor of Hawaii on February 11, 2003 voluntarily issued Executive Order 03-03 directing State agencies to pay 20% of ceded lands trust "revenues" to OHA. (See Appendix, Plt. App. 1-92 and 93. A copy of the Executive Order is in the record as FER 9-2.) In addition, the $30 million per year to the Hawaiian Home Lands Trust fund continues. See Appendix, Plt. App. 1- 96 and 97.) Many, perhaps substantially all, of the payments to OHA and DHHL characterized as "ceded lands trust" payments are financed by general obligation bonds repayable from the pockets of State taxpayers. (See FER 3-A and 3-B.) Unable to predict with reasonable certainty the magnitude of the State's potential liability, CAFR 2005 reports that resolution of all the claims in OHA's favor "could have a material adverse effect on the State's financial condition." See Appendix, Plt. App. 1- 95. The Appendix consists of true

copies of excerpts from CAFR 2005. This is not subject to reasonable dispute and those excerpts are appropriate for judicial notice under Federal Rule of Evidence 201. Absent from the record is any evidence that the point of OHA or DHHL is to bring in private capital to spur economic activity, and thereby *increase* government revenues. The actual result of the appropriations and transfers for OHA and DHHL has been a one way flow out, which, as CAFR 2005 indicates, has an adverse effect on the State's financial condition.

C. Redressable by conventional declaratory & injunctive relief.

These Citizens seek to stop the flow of money from their own pockets, and from the pockets of others similarly situated. In *Warth v. Seldin*, 422 U.S. 490, 501 (1975), a municipal taxpayer action in which the Supreme Court discussed the standing rules in federal courts applicable to federal, state and municipal taxpayers, the Court explained that a plaintiff must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. E.g., *United States v. SCRAP*, 412 U.S. 669 (1973). But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in

support of their claim. E.g., *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972); *FCC v. Sanders Radio Station*, 309 U.S. 470, 477 (1940).

The Court has allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see *Baker v. Carr*, 369 U.S. 186, 300 (1962); a $20 fine, see *McGowan v. Maryland*, 366 U.S. 420, 455 (1961); and a $1.50 poll tax, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, FN 1 (1972).

A favorable declaratory judgment invalidating the OHA and DHHL laws, and enjoining their further implementation, will stop the flow of money out of these Citizens' pockets and redress their injuries; will also automatically redress the injuries of those similarly situated and protect the public *fisc* from further shrinkage.

IV. James Madison: The power to tax and spend, "may sweep away all our fundamental rights." The role of the federal judiciary to fortify those rights against encroachment.

The Supreme Court in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942 (1968) held that federal taxpayers have standing to sue in federal court to enjoin expenditure of federal funds for purchase of textbooks and other instructional materials for use in parochial schools, on the ground that such expenditures were prohibited by the Establishment Clause of the First

Amendment. In support of this decision, the Court at 392 U.S. 103 invoked the words of James Madison,

> James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that 'the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.' 2 Writings of James Madison 183, 186 (Hunt ed. 1901).

Madison wrote his Remonstrance to the Virginia Assembly in 1785, two years after the Treaty of Paris had sealed America's victory in its Revolution against Great Britain. His language, of course, did not imply any diminution of the role of the federal judiciary. Under the Articles of Confederation then in effect, there was no federal judiciary. Nor did Madison's language indicate the only threat from oppressive tax and spending was to religious freedom; rather he said, it "may sweep away all our fundamental rights." Nor did Madison place religious freedom above other fundamental rights; rather, at paragraph 15 of the Memorial and Remonstrance, he said:

> Because, finally, "the equal right of every citizen to the free exercise of his religion according to the dictates of conscience**" is held by the same tenure with all our other rights.** If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the declaration of those rights which pertain to the good people of Virginia as the "basis and foundation of government," it is enumerated with the same solemnity, or rather

> studied emphasis. Either then we must say … **they may sweep away all our fundamental rights** … or we must say they have no authority to enact into law the bill under consideration. (Emphasis added.)

In the Remonstrance, Madison used the notorious words of the British Declaratory Act of 1766, "in all cases whatsoever," to alert his readers that the general assessment act before the Virginia Assembly in 1785 was potentially as dangerous as Great Britain's Stamp Act, which caused riots in the American colonies, and the later Tea Act, to which, in fact, he alluded by mentioning a "three pence" duty, the levy imposed on tea in 1773. The Tea Tax discriminated against British subjects in America[5] and sparked the American Revolution.

On June 8, 1789, four years after he wrote the Remonstrance, and after the Constitution had been drafted, debated and ratified and the first Congress had been elected and convened, Madison described the role of the federal judiciary in the new tripartite system of checks and balances. He

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5. In 1773 Parliament removed the duty on tea coming into London and allowed the British East India Company to be its own exporter to the colonies who were still subject to the duties of three pence a pound of tea. In December 1773 when tea ships began arriving in the four continental ports, the Sons of Liberty were waiting. At Boston, a mob disguised as Mohawk Indians and Negroes rushed on to the ships and emptied 342 big chests of precious tea into the harbor. *The Oxford History of the American People,* Morrison, Oxford University Press 1965 at 203-204.

called the federal judiciary the "guardian," the "impenetrable bulwark to resist every encroachment upon the rights expressly stipulated for in the Constitution." Even though a commanding majority of federalists had been elected in both houses of Congress, Madison proposed the Bill of Rights to the House of Representatives, the first ten amendments to the Constitution, to "render it acceptable to the whole people of the United States as it has been found acceptable to a majority of them." In what has been called, "surely one of the most consequential orations in American political history"[6], Madison listed as one of the reasons for adopting the Bill of Rights,

> If they are incorporated into the Constitution, **independent tribunals of justice** will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment **upon the rights expressly stipulated for in the Constitution by the declaration of rights**. 3 *Annals of America*, Encyclopaedia Britannica, Inc. 1968 at 361. (Emphasis added.)

V. *DaimlerChrysler*: No absolute bar to state taxpayer suits.

Does *DaimlerChrysler* mean that all state taxpayer suits, other than those under the Establishment Clause, are barred by Article III? That

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6 *James Madison's "Sagacious, Powerful, and Combining Mind"*, Robert Goldwin**,** American Enterprise Institute, Library of Congress 2001.

interpretation would suggest the federal judiciary has abdicated its role as guardian of the rights expressly stipulated for in the Constitution, other than to keep church and state far apart. Here are the reasons these Citizens believe that is not a correct interpretation.

The *DaimlerChrysler* decision is grounded in long-established precedent in those cases where taxpayers have sued 'simply because they pay taxes" and allege no distinct or direct injury to themselves not suffered by taxpayers or people generally. In that context, the "general rule against taxpayer standing" announced in *Bowen v. Kendrick* and reiterated several times in *DaimlerChrysler* as a "general prohibition on taxpayer standing", is sound and appropriate. But that rule would radically change the checks and balances built into the Constitution if it immunizes from court challenge oppressive tax and spending in derogation of other fundamental rights, which causes concrete particularized injury, redressable by conventional declaratory and injunctive relief.

As Chief Justice John Marshall said in *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819), "An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation."

> If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other

> instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. 17 U.S. at 432.

Although the tax and spending challenged in *Arakaki v. Lingle* is not aimed at these Citizens as officers of a federal corporation carrying out the powers of the federal government, *McCulloch v. Maryland* holds truths relevant to this case: That a state's power to tax involves the power to destroy and may be limited by the Constitution; That the federal judiciary is vested with power to adjudicate the validity of state tax laws and, if they are repugnant to the Constitution, to declare them void.

If the *DaimlerChrysler* decision is interpreted as an absolute bar to all state taxpayer suits, other than those under the Establishment Clause, the State of Hawaii could, with impunity, tax non-Hawaiians to economic death. Something akin to that is not so far fetched: The nation's largest charitable trust (operating schools that, although subsidized by taxpayers, admit only students of at least some part Hawaiian ancestry) has so corrupted the political process in Hawaii that the legislative, executive and judiciary powers have been, and still are or may be, concentrated in the hands of those who facilitated "A World Record for Breaches of Trust" by trustees and others of high position, without surcharge or accountability. (See *Broken*

Trust: Greed, Mismanagement & Political Manipulation at America's Largest Charitable Trust by Samuel P. King and Randall W. Roth, University of Hawaii Press 2006. Hear the ThinkTech radio show hosted by attorney Jay Fidell September 6, 2006 http://www.thinktechhawaii.com/./myGrid.aspx?base=Radioshows particularly the AfterShow discussion with the authors.) If federal courts cannot adjudicate racially discriminatory taxing and spending which causes genuine, concrete injuries particular to some but not all citizens, what would prevent any state from subjecting any disfavored racial group to a tax holocaust?

The disavowal of intent by *DaimlerChrysler* to so radically dismantle the tripartite system of checks and balances is found in this sentence:

> Whatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to "contribute three pence ... for the support of any one [religious] establishment." [citing *Flast* quoting James Madison]. *DaimlerChrysler*, 126 S.Ct. at 1864-5.

The Supreme Court, at least since 1938, has presumed the constitutionality of legislation under the Commerce Clause but recognized "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments,

which are deemed equally specific when held to be embraced within the Fourteenth." *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152, fn 4 (1938).

Since then, the Supreme Court has confirmed that all racial classifications by any governmental actor are presumptively invalid and may be approved only if they pass strict scrutiny. *Shaw v. Reno*, 509 U.S. 630, 641 et. seq., 113 S.Ct. 2816, 2823-24, et. seq. (1993); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 496-97 (1989).

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

"Once a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander v. Louisiana*, 405 U,S. 625, 632 (1972). See also *Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2475, 2490 (1995) (to satisfy strict scrutiny, State must demonstrate that its legislation is narrowly tailored to achieve a compelling interest); *University of California Regents v. Bakke*,

438 U.S. 265, 305, 98 S.Ct. 2733, 2756 (1978) (In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary.) State laws which draw racial classifications must be measured by a strict equal protection test: They are presumed unconstitutional until the state can demonstrate that such laws are narrowly tailored to promote a demonstrated compelling interest. *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331 (1969).

Thus, the Equal Protection Clause of the Fifth Amendment (deemed equally specific when held to be embraced within the Fourteenth Amendment), as much a part of the Constitution and the Bill of Rights as the Establishment Clause of the First Amendment, is not a second class right. It is at least as vulnerable to abusive tax and spending, indeed, arguably more so: If government taxes and spends to establish a religion, taxpayers can presumably save themselves from being figuratively burned at the stake by renouncing their "heresy" or converting to the established religion; but when those powers are directed against a race, the disfavored taxpayers, being powerless to change their ancestors are unable to avoid the figurative ovens. The right of citizens not to be taxed to support racial discrimination against themselves is thus, fundamentally like and at least as important, and

worthy of judicial protection, as the right not to be taxed to establish a religion.

The Court in *Flast* at 392 U.S. 101 found no absolute bar in Article III to suits by federal taxpayers and disavowed any implication that the Establishment Clause is the *only* specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, s 8.

> We find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs. Whether the Constitution contains other specific limitations can be determined only in the context of future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress.

The Court, in *DaimlerChrysler*, in rejecting the analogy of the plaintiffs' Commerce Clause claims to the Establishment Clause claim permitted in *Flast*, did note that the plaintiffs "candidly" conceded "only the Establishment Clause" has supported federal taxpayer suits since *Flast*. 126 S.Ct. 1864. But the Court in *DaimlerChrysler* did not overrule the *Flast* Court's holding out the possibility that "other specific [constitutional] limitations" on Art. I, § 8, might surmount the "barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers."

Moreover, *DaimlerChrysler* at 126 S.Ct. 1865 cites with approval Justice Kennedy's plurality decision in *Asarco Inc. v. Kadish*, 490 U.S. 605, 613-614 (1989) in which Justice Kennedy clearly indicated that state taxpayers showing "direct injury" pecuniary or otherwise *do* have standing: "Yet we have likened state taxpayers to federal taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of 'direct injury,'" pecuniary or otherwise, citing *Doremus v. Board of Education of Hawthorne*, 342 U.S. 429, 434, 72 S.Ct. 394, 397, 96 L.Ed. 475 (1952).

Perhaps, most importantly for this case, at 126 S.Ct. 1865, *DaimlerChrysler* provides, referring to *Flast*,

> The Court therefore understood the "injury" alleged in Establishment Clause challenges to federal spending to be the very "extract [ion] and spen[ding]" of "tax money" in aid of religion alleged by a plaintiff. And an injunction against the spending would of course redress *that* injury, regardless of whether lawmakers would dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally. (Internal citations omitted.)

This language harks back to *U.S. v. Butler*, 297 U.S. 1 (1936), which upheld the standing of taxpayers (food processors) to challenge the legality of the exaction of taxes as a step in an unauthorized plan under the Agricultural Adjustment Act to take money from them (processors) for the benefit of another group (farmers). Justice O'Connor's dissenting opinion, on other grounds, in *South Dakota v. Dole*, 483 U.S. 203, 216 – 217 (1987),

confirmed that *Butler* remains sound as to the gravity of appropriately limiting the spending power,

> While *Butler's* authority is questionable insofar as it assumes that Congress has no regulatory power over farm production, its discussion of the spending power and its description of both the power's breadth and its limitations remain sound. The Court's decision in *Butler* also properly recognizes the gravity of the task of appropriately limiting the spending power. If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." This, of course, as *Butler* held, was not the Framers' plan and it is not the meaning of the Spending Clause.

The Court in *DaimlerChrysler* at 126 S.Ct. 1865 also cited "those other constitutional provisions that we have recognized constrain governments' taxing and spending decisions. See, *e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987) (invalidating state sales tax under the Free Press Clause)."

Finally, the Court in *DaimlerChrysler* at 126 S.Ct.1860 and again at 1865 touches on the municipal taxpayer standing rule. The State of of Hawaii, with a population under 1.3 million, is much smaller than some cities; and with one centralized statewide Board of Education, like municipalities in general, its largest single item of expense is education (See

Plt. App. 3-125.) The substantive reasons for affording standing to municipal taxpayers also apply to these Citizens.

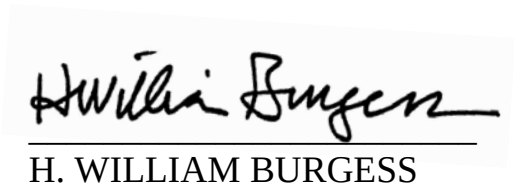
Thus, rather than closing the federal courthouse to all state taxpayers, the Court in *DaimlerChrysler* clarified and restated existing law upholding their standing where they show particularized, pocketbook injuries caused by tax and spending in violation of their fundamental constitutional rights.

VI. Conclusion.

This Court should adhere to its decision upholding these Citizens' standing as state taxpayers in *Arakaki v. Lingle*, 423 F.3d 954 (9th Cir. 2005).[7]

DATED: Honolulu. Hawaii, September 19, 2006.

Respectfully submitted,



H. WILLIAM BURGESS
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7. For the reasons stated in their earlier briefs and petition for rehearing in this Court, these Citizens respectfully continue to request reinstatement of their standing to pursue their trust beneficiary claims and their full taxpayer claims.

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(Excerpts from State of Hawaii Comprehensive Annual Financial Report for Fiscal Year ended June 30, 2005, "CAFR 2005")*

* Source: http://www.hawaii.gov/auditor/Reports/2005%20Audit/

STATE OF HAWAII

COMPREHENSIVE ANNUAL FINANCIAL REPORT

FOR THE FISCAL YEAR ENDED JUNE 30, 2005

PREPARED BY
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

RUSS K. SAITO
COMPTROLLER

C. Contingencies

The State has been named as defendant in numerous lawsuits and claims arising in the normal course of operations. To the extent that the outcome of such litigation has been determined to result in probable financial loss to the State, such loss has been accrued in the basic financial statements. Of the remaining claims, a number of claims may possibly result in adverse judgments against the State. However, such claim amounts cannot be reasonably estimated at this time. The litigation payments relating to the fiscal years ended June 30, 2005, 2004, and 2003 approximated $1,200,000, $6,200,000, and $14,000,000, respectively.

Tobacco Settlement

In November 1998, the State settled its tobacco lawsuit as part of a nationwide settlement involving 46 other states and various tobacco industry defendants. Under the settlement, those tobacco companies that have joined in the Master Settlement Agreement will pay the State approximately $1.3 billion over a 25-year period. Through June 30, 2005, the State has received approximately $38,008,000. The State is to receive proceeds from this settlement in January and April of the subsequent year through 2004 and thereafter on April 15 of each subsequent year. As of June 30, 2005, the State expects to receive $18,700,000 for the first six months of 2005.

Office of Hawaiian Affairs

In 1898, the Republic of Hawaii transferred certain lands to the United States. Upon Hawaii's admission to the Union in 1959, the United States reconveyed title to those lands (collectively, the ceded lands) back to the State to be held as a public trust for five purposes: (1) public education; (2) betterment of the conditions of native Hawaiians; (3) development of farm and home ownership; (4) making public improvements; and (5) provision of land for public use. In 1978, the State Constitution was amended expressly to provide that the ceded lands were to be held as a public trust for native Hawaiians and the general public, and to establish OHA to administer and manage the proceeds and income derived from a pro rata portion of the ceded lands for native Hawaiians.

In 1979, the State Legislature adopted HRS Chapter 10, which, as amended in 1980, specified, among other things, that OHA expend 20% of all funds derived by the State from the ceded lands for the betterment of the conditions of native Hawaiians.

In 1987, in *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154 (1987), the Hawaii Supreme Court concluded that HRS Chapter 10 was insufficiently clear regarding the amount of monies OHA was entitled to receive from the public trust lands.

In 1990, in response to *Yamasaki*, the State Legislature adopted Act 304, SLH of 1990, which (1) defined "public land trust" and "revenue," (2) specified that 20% of the "revenue" derived from the "public land trust" was to be expended by OHA for the betterment of the conditions of native Hawaiians, and (3) established a process for OHA and the Director of Finance to jointly determine the amount of monies which the State would pay OHA to retroactively settle all of OHA's claims for the period from June 16, 1980 through June 30, 1991. Since fiscal 1992, the State, through its departments and agencies, has been paying 20% of "revenue" to OHA on a quarterly basis.

In 1993, the State Legislature enacted Act 35, SLH of 1993, appropriating $136.5 million to pay the amount determined to be OHA's claims, with interest, for the period from June 16, 1980 through June 30, 1991.

In January 1994, OHA and its Board of Trustees (the Plaintiffs) filed suit against the State (*OHA, et al. v. State of Hawaii, et al.*, Civil No. 94-0205-01 (First Circuit) (*OHA I*)), claiming that the amount paid to OHA was inadequate and alleging that the State had failed to properly account for and fully pay the pro rata share of proceeds and income derived from the public land trust. Among other things, the Plaintiffs seek an accounting of all proceeds and income, funds and revenue derived from the public land trust since 1978, and restitution or damages amounting to 20% of the proceeds and income derived from the public land trust, as well as interest thereon. In its answer to OHA's complaint, the State denied all of the Plaintiffs' substantive allegations, and asserted its sovereign immunity from suit and other jurisdictional and claim-barring defenses.

The Plaintiffs thereafter filed four motions for partial summary judgment as to the State's liability to pay OHA 20% of monies it receives from (1) Airports' in-bond duty-free airport concession (including receipts from the concessionaire's off-airport sales operations); (2) the state-owned and operated Hilo Medical Center; (3) the State's public rental housing projects and affordable housing developments; and (4) interest income, including investment earnings (collectively, the Sources). In response, the State filed a motion to dismiss on the basis of sovereign immunity and opposed Plaintiffs' four motions on the merits and raised several affirmative defenses.

On October 24, 1996, the Circuit Court of the First Circuit of the State of Hawaii (First Circuit Court) filed an order denying the State's motion to dismiss and rejecting its affirmative defenses. Also on October 24, 1996, the First Circuit Court filed an order granting the Plaintiffs' four motions for partial summary judgment with respect to the State's liability to pay OHA 20% of the monies it receives from each of the Sources, and deferred establishing amounts owed from those Sources for further proceedings or trial. The State's motion for leave to file an interlocutory appeal from both the order denying its motion to dismiss and the order granting the Plaintiffs' four motions for partial summary judgment was granted, and all proceedings in the suit have been stayed pending the Hawaii Supreme Court's disposition of the State's appeal.

On September 12, 2001, the Hawaii Supreme Court concluded *OHA I* by holding in *OHA v. State of Hawaii,* 96 Haw., 388 (2001) that Act 304 was effectively repealed by its own terms, and that there were no judicially manageable standards by which to determine whether OHA was entitled to the revenue it sought from the Sources because the repeal of Act 304 revived the law which the Hawaii Supreme Court in *Yamasaki* had previously concluded was insufficiently clear to establish how much OHA was entitled to receive from the ceded lands. See *OHA v. State*, 96 Haw., 388 (2002). The Hawaii Supreme Court dismissed the case for lack of justiciability noting that it was up to the State Legislature to enact legislation to give effect to the right of native Hawaiians to benefit from the ceded lands under the State Constitution. The State Legislature took no action during the 2002 legislative session, and the State's payments of 20% of "revenue" were discontinued as of the first quarter in fiscal 2002.

The State Legislature took no action during the 2002 and 2003 legislative sessions to establish a new mechanism for establishing how much OHA was entitled to receive from the ceded lands. On January 10, 2003, and pending legislative action to establish such a mechanism, the Governor issued

Executive Order No. 03-03 directing state agencies to resume transferring 20% of receipts from leases, licenses, and permits indisputably paid for the use of improved or unimproved parcels of ceded lands to OHA, if federal or state law did not preclude all or any portion of the receipts from being used to better the conditions of native Hawaiians, and the transfer of all or any portion of the receipts to OHA would not cause the state agency to renege on a preexisting pledge, rate covenant, or other preexisting obligation to holders of revenue bonds or other indebtedness of the State or state agency. During the 2003 legislative session, the State Legislature appropriated monies from the various funds into which the ceded lands receipts had been deposited after the decision in *OHA I* was issued and the state agencies ceased making payments to OHA, and directed the state agencies to pay them to OHA.

OHA continues to pursue its claims for a portion of the revenues from the Sources and other ceded lands that it made in *OHA I*. On July 21, 2003, OHA filed a new lawsuit, *OHA, et al. v. State of Hawaii, et al.*, Civil No. 03-1-1505-07 (*OHA II*). There follows additional background information pertinent to *OHA II*. In September 1996, the Office of the Inspector General of the U.S. Department of Transportation (DOT) issued a report (the IG Report) concluding that from 1992 to 1995, the Hawaii Department of Transportation's payment to OHA of $28.2 million was a diversion of airport revenues in violation of applicable federal law as OHA provided no airport services in return. The Hawaii Attorney General disagreed with the IG Report's conclusion, stating in November 1996 that the payments to OHA were simply an operating cost of the airports, and thus not a diversion of airport revenues in violation of federal law. In April 1997, the Acting Administrator of the FAA concurred in writing (the FAA Memorandum), with the IG Report and opposed the Hawaii Attorney General's position. In support of its appeal of the First Circuit Court's *OHA I* decision to the Hawaii Supreme Court, but differing with the original position of the Hawaii Attorney General, the State noted in its May 1997 amended opening brief that "unless the federal government's position, set forth in the IG Report, changes, Act 304 prohibits the State from paying OHA airport-related revenues." In its June 1997 reply, the State stated that the "DOT Inspector General's determination shows that the federal government is on its way to finding such payments illegal and requiring the State to reimburse past payments of airport-related revenues to OHA." In October 1997, Public Law 105-66, 1997 HR 2169 (the Forgiveness Act) was enacted into federal law. The Forgiveness Act essentially provides that in exchange for there being no further payments of airport revenues for claims related to ceded lands, any such payments received prior to April 1, 1996 need not be repaid. The Hawaii Attorney General submitted the Forgiveness Act to the Hawaii Supreme Court (Court) in December 1997, "for the Court's use" in conjunction with the *OHA I* appeal, whereupon the Court requested the parties submit supplemental briefs to address whether the Forgiveness Act affected the Court's interpretation of Act 304. The State, in its March 1998 supplemental brief, stated, inter alia, that paying OHA a pro rata share of airport monies violated federal law, and that there was no live, ripe controversy regarding those payments because the Forgiveness Act relieved the State and OHA of any obligation to return improper past payments.

Despite the adverse *OHA I* decision, the Plaintiffs in *OHA II* have now sued the State for alleged breaches of fiduciary duties as purported trustee of the ceded lands public trust, alleged violations of Act 304, Chapter 10, and Article XII, Sections 4, 5, and 6 of the Hawaii Constitution, alleged violations of the Contract Clause of the U.S. Constitution, and alleged misrepresentation and non-disclosure, by the following alleged acts (but not limited to these acts): (1) failing to oppose positions set forth in the FAA Memorandum; (2) resolving its dispute with the FAA by obtaining a forgiveness

of the prior $28.2 million payments in exchange for a promise not to make future airport revenue payments to OHA and not to appeal the positions set forth in the FAA Memorandum; (3) breaching the trust duty of impartiality by not opposing the positions set forth in the FAA Memorandum in order to use as a sword in *OHA I*; (4) failing to timely advise OHA that the State was not going to continue to oppose the positions set forth in the FAA Memorandum or IG Report, and that it was planning to settle with the federal government, in order to provide OHA with a fair opportunity to take measures to step into the State's position to oppose the FAA; and (5) failing to obtain instructions from the Court on how to proceed given the State's conflict between defending the State against OHA in *OHA I*, and having a duty to oppose the positions set forth in the FAA Memorandum.

OHA further alleges that these alleged "breaches, errors, and omissions" were substantial factors that resulted in the passing of the Forgiveness Act and the issuance of the Hawaii Supreme Court's opinion in *OHA I*. Plaintiffs claim that, accordingly, the State is liable to OHA for damages including, but not limited to: (1) the damages alleged by OHA in *OHA I* and (2) amounts payable under Act 304 that have not been paid, including but not limited to, airport landing fees. Plaintiffs also seek declaratory and injunctive relief ordering the State to reinstate Act 304, pay airport-related revenues to OHA from sources other than airport revenues (and enjoining the State and its agents, employees, and officials from opposing any of the above), and seeks appointment of an independent trustee to temporarily replace the State as trustee of the native Hawaiian public trust with respect to matters relating to reinstatement of Act 304 and the payment of airport-related revenues to OHA from the sources other than airport revenues. The State filed a motion to dismiss OHA's complaint in *OHA II* which the court granted in an order filed on December 26, 2003. The court entered a final judgment on May 19, 2004, encompassing the order dismissing the complaint and several procedural orders. On June 8, 2004, OHA filed a notice of appeal from the portions of the May 19, 2004 judgment dismissing its complaint in *OHA II*, denying leave to amend the complaint and denying a request for bifurcation of OHA's claims for liability and damages. The Court affirmed the First Circuit Court's order dismissing OHA's complaint in a decision issued September 9, 2005. On December 23, 2005, the Court granted OHA's motion for reconsideration.

In a second lawsuit, OHA filed a complaint for declaratory and injunctive relief on November 4, 1994 (*OHA v. Housing Finance and Development Corporation, et al.,* Civil No. 94-4207-11 (First Circuit)) to enjoin the State from alienating any ceded lands or, alternatively, to preclude the extinguishing of any rights native Hawaiians may have in ceded lands which may be alienated.

Alternatively, OHA sought a declaration that the amounts the Housing Finance and Development Corporation (the Corporation) and the State paid to OHA for ceded lands the Corporation planned to use to develop and sell housing units pursuant to Act 318, SLH of 1992, were insufficient. Act 318 established a separate process for valuing the ceded lands the Corporation used for its two housing developments at Kealakeke and Lahaina, and quantifying the amounts of income and proceeds from the ceded lands that the Corporation and State were required to pay OHA for conveying and using the parcels for the Corporation's two projects.

In December 2002, following a trial on the issues, the trial court confirmed the State's authority to sell ceded lands, denied the declaratory ruling that the sale of ceded lands did not directly or indirectly release or limit native Hawaiians' claim to those lands which the Plaintiff requested, and ordered that judgment be entered in the State's and the Corporation's favor as to Counts I, II, and III of the Amended Complaint. The Plaintiffs moved for and were granted leave to file immediate appeals from the trial court's ruling to the Hawaii Supreme Court. Those appeals are now pending. Trial to determine the sufficiency of the proceeds paid to OHA by the Corporation and the State from the sale of particular parcels of ceded lands at issue has not been scheduled.

In a third lawsuit, OHA filed suit against the Hawaii Housing Authority (the HHA), the executive director of the HHA, the board members of the HHA, and the Director of Finance on July 27, 1995 (*OHA v. HHA, et al.*, Civil No. 95-2682-07 (First Circuit)) to secure additional compensation and an itemized accounting of the sums previously paid to OHA for five specifically identified parcels of ceded lands which were transferred to the HHA for its use to develop, construct, and manage additional affordable public rental housing units under HRS Chapter 201G. On January 11, 2000, all proceedings in this suit were stayed pending the Hawaii Supreme Court's decision in the State's appeal in *OHA v. State of Hawaii*, Civil No. 94-0205-01 (First Circuit). The repeal and revival of the pre-*Yamasaki* law by the Hawaii Supreme Court's September 12, 2001 decision in *OHA v. State* should also require dismissal of the claims OHA makes in *OHA v. HHA*, and the case remains pending.

The State intends to vigorously defend against all of OHA's claims. It is currently unable to predict with reasonable certainty the magnitude of its potential liability for such claims, if any. Accordingly, no estimate of loss has been made in the accompanying basic financial statements. However, resolution of all of OHA's claims in OHA's favor could have a material adverse effect on the State's financial condition.

Department of Education and Department of Health

Felix v. Lingle, Civil No. 93-00367 (U.S. District Court for the District of Hawaii) (Felix). This case involves the State's responsibility under federal law to provide mental health services as a related service to children and adolescents who need such services to benefit from special education. After the U.S. District Court granted partial summary judgment as to liability in the Plaintiffs' favor, the parties entered into a consent decree which allowed the State to plan and implement a new system of care. Under the consent decree and the supervision of the U.S. District Court, the State has been implementing a plan to improve the provision of such services. Because of the failure of the State to timely complete the implementation plan approved by the U.S. District Court, the State was held in contempt of court and the consent decree was extended to June 30, 2001 for completion of infrastructure to support the delivery of services and December 31, 2001 for substantial compliance with the consent decree.

The State avoided the U.S. District Court's imposition of a federal court-appointed receiver by meeting the court's revised benchmarks and conditions which the State was ordered to fulfill. At a hearing held on November 30, 2001, the U.S. District Court determined that the State had made significant progress in meeting the terms of the consent decree and, therefore, that a federal receiver was not necessary. On September 10, 2002, the court ruled that the State was in substantial compliance with the consent decree as of June 30, 2002. However, the court ordered the federal court supervision to continue until December 31, 2003.

Due to the scheduling needs of the U.S. District Court and the parties, stipulations were entered into by the parties extending U.S. District Court oversight and control over the Revised Consent Decree until April 30, 2004. At a hearing on April 8, 2004, the U.S. District Court approved the parties' stipulation, which provides for the termination of jurisdiction 30 days after the publication of the State's fifth quarterly sustainability report (anticipated to be on or about May 30, 2005). The federal court's oversight of special education (Felix) ended with the securing of a judgment and dismissal of the Felix case. The federal court's jurisdiction terminated on May 31, 2005. The case has been resolved.

Department of Hawaiian Home Lands

Hawaiian Home Lands Trust Fund

Act 14, Special SLH of 1995, was approved by the Governor on June 29, 1995 and obligates the State to make 20 annual deposits of $30,000,000, or their discounted value equivalent, into the Hawaiian Home Lands Trust Fund beginning in the fiscal year ended June 30, 1996. The primary purpose of Act 14 is to resolve controversies and claims related to the Hawaiian Home Lands trust which arose between August 31, 1959 and July 1, 1988. Act 14 also established in the State Treasury a trust fund known as the Hawaiian Home Lands Trust Fund.

The State transferred $30,000,000 to the Hawaiian Home Lands Trust Fund during the fiscal year ended June 30, 2005.

As of June 30, 2005, the State has transferred approximately $300,000,000 to the Hawaiian Home Lands Trust Fund. The State's remaining $300,000,000 obligation discounted at 6% and assuming annual payments of $30,000,000 over the remaining term of the obligation is approximately $220,800,000. Such amount has been included in claims and judgments payable in the accompanying statement of net assets.

Transfer of Property

Act 95, SLH of 1996, authorizes the transfer of certain parcels of land to the DHHL. The properties were conveyed in fiscal 1997 and the allocated costs were charged against contributed capital. The estimated future costs of those parcels will be recognized as contributions returned to the State and others when costs are incurred. The estimated allocated project costs incurred to date of those parcels of land were approximately $18,740,000.

Individual Claims

In 1991, the State Legislature enacted HRS Chapter 674, entitled "Individual Claims Resolution Under the Hawaiian Home Lands Trust," which established a process for individual beneficiaries of the Hawaiian Homes Commission Act of 1920 to file claims to recover actual economic damages they believed they suffered from a breach of trust caused by an act or omission of an official of the State between August 21, 1959, when Hawaii became a state, and June 30, 1988. Claims were required to be filed no later than August 31, 1995. There were 4,327 claims filed by 2,753 individuals.

The process was a three-step process which (1) began with informal proceedings presided over by the Hawaiian Home Lands Trust Individual Claims Review Panel (the Panel) to provide the State Legislature with non-binding findings and advisory opinions for each claim; (2) provided for the State Legislature's review and consideration of the Panel's findings and advisory opinions, and appropriations of funds to pay the actual economic damages the State Legislature deemed appropriate by October 1, 1999; and (3) allowed claimants to bring de novo civil actions by December 31, 1999 if they were not satisfied with the Panel's findings and advisory opinions, or the State Legislature's response to the Panel's recommendations.

Legislation to allow the Panel and the State Legislature until September 30, 2000 to act on all claims, and postpone the deadline for unsatisfied claimants to file suit until December 31, 2000, was adopted by the State Legislature, but vetoed by the Governor in the 1999 legislative session, and the Panel unseated on December 31, 1999. As of September 30, 1999, claims from 1,376 claimants had not been reviewed by the Panel, and all but the claims of two claimants had not been acted upon by the State Legislature. In 1997, the State Legislature declared it to be its intent to postpone acting upon the Panel's recommendations until all claims had been reviewed and forwarded to it.

On September 30, 1999, three claimants filed a suit for declaratory and injunctive relief in the U.S. District Court to secure an injunction prohibiting the enforcement of the notice and suit filing deadlines specified in HRS Chapter 674. *Kalima, et al. v. Cayetano*, Civil No. 99-00671HG/LEK. A motion for preliminary injunction was heard on November 15, 1999 and denied as moot on September 28, 2000. By stipulation filed on November 13, 2000, the action was dismissed without prejudice.

On December 29, 1999, the same three claimants filed a class motion lawsuit in the First Circuit Court for declaratory and injunctive relief and for general, special, and punitive damages for breach of trust or fiduciary duty under HRS Chapters 674 and 673, violation of the due process, equal protection and native rights clauses of the State Constitution, and breach of contract under HRS Chapter 661. *Kalima, et al. v. State of Hawaii, et al.*, Civil No. 99-4771-12VSM (First Circuit Court) (*Kalima I*). Five other claimants filed similar individual claims actions for themselves on or before December 31, 1999. *Aguiar v. State of Hawaii, et al.*, Civil No. 99-612 (Third Circuit Court); *Silva v. State of Hawaii, et al.*, Civil No. 99-4775-12 (First Circuit Court); *Wilhelm v. State of Hawaii, et al.*, Civil No. 99-4774-12 (First Circuit Court); *Williamson v. State of Hawaii, et al.*, Civil No. 99-4773-12 (First Circuit Court); *Hanohano v. State of Hawaii, et al.*, Civil No. 99-4775-12 (First Circuit Court). The Plaintiffs in these other actions have stipulated to stay all proceedings in their actions pending

the resolution of all questions of law in *Kalima I* that are common to the questions of law presented in their suits. Plaintiff Hanohano has since stipulated to the dismissal of her action without prejudice.

On March 30, 2000, the three named-plaintiffs in *Kalima I* filed a second class action lawsuit in the First Circuit Court for declaratory and injunctive relief, and for damages under HRS Chapter 673, for the Panel's and the State Legislature's alleged failure to remedy their breach of trust claims under HRS Chapter 674. *Kalima, et al. v. State of Hawaii, et al.*, Civil No. 00-1-1041-03 (First Circuit Court) (*Kalima II*). All proceedings in this action were stayed by stipulation, pending the resolution of those questions of law in *Kalima I* that are common to both *Kalima I* and *Kalima II*.

On August 30, 2000, the First Circuit Court entered an order in *Kalima I* granting Plaintiffs' motion for summary judgment and declaratory relief as to Count I of the Complaint, and denying Defendants' motion for judgment on the pleadings. Essentially, the First Circuit Court rejected Defendants' sovereign immunity, lack of subject matter jurisdiction, and no-cause of action defenses, and ruled that the Plaintiffs and those similarly situated to them (by an order filed on August 29, 2000, a class was so certified for purposes of Count I) could pursue their claims for damages and other relief under HRS Chapters 674 and 661.

The First Circuit Court allowed the State to take an interlocutory appeal from the August 30, 2000 order to the Hawaii Supreme Court, and entered an order staying all proceedings in *Kalima I* pending the Hawaii Supreme Court's disposition of the appeal. By an order entered on September 20, 2001; however, that appeal was dismissed by the Hawaii Supreme Court for lack of appellate jurisdiction. Since then, the State has secured a certification of finality for the August 30, 2000 order from the court, and filed another notice of appeal of the orders so that the questions of law the court decided can be reviewed by the Hawaii Supreme Court prior to trial. All briefs have been filed and the parties are awaiting oral argument or a decision from the court in this second appeal. All proceedings in *Kalima I* in the court remain stayed, and no trial date has been set in either *Kalima I* or any of the other individual claims cases.

At the present time, the State is not able to estimate with any reasonable certainty the magnitude of the potential liability related to these individual claims cases. Accordingly, no estimate of loss has been made in the accompanying basic financial statements. However, an ultimate decision against the State could have a material adverse effect on the financial position of the State.

STATE OF HAWAII

Schedule of Revenues by Source – All Governmental Fund Types

Last Ten Fiscal Years

(Amounts in millions)

Source	For the Fiscal Year Ended June 30, 2005	2004	2003	2002	2001	2000	1999	1998	1997	1996
Taxes:										
General excise	$ 2,146	$ 1,900	$ 1,780	$ 1,651	$ 1,642	$ 1,542	$ 1,448	$ 1,417	$ 1,430	$ 1,426
Income	1,485	1,254	1,051	1,082	1,187	1,132	1,110	1,128	1,023	1,046
Inheritance and estate	13	10	16	17	18	23	29	20	22	17
Liquor	44	41	41	39	38	39	39	39	38	38
Public service companies	109	100	114	93	135	119	121	120	114	104
Tobacco	85	79	72	65	55	42	42	36	36	40
Insurance companies' premiums	85	79	74	69	72	69	53	87	75	85
Franchise	37	1	23	5	—	7	10	16	13	16
Transient accommodations	111	102	92	87	108	93	55	26	26	24
Liquid fuel	83	81	77	75	74	71	70	70	71	71
Motor vehicle	98	88	85	78	81	75	39	38	37	37
Hospital and nursing facility(1)	—	—	—	—	—	—	—	3	12	10
Other	21	18	13	13	13	14	34	32	34	33
Total Taxes	4,317	3,753	3,438	3,274	3,423	3,226	3,050	3,032	2,931	2,947
Non-taxes:										
Interest and investment income	58	42	61	71	150	69	91	89	82	92
Charges for current services	299	229	215	165	236	240	220	233	207	204
Intergovernmental	1,575	1,528	1,362	1,258	1,120	1,070	1,091	1,080	1,170	1,128
Rentals	29	31	28	31	29	23	22	24	22	29
Fines, forfeitures, and penalties	27	30	24	24	23	25	23	23	21	18
Licenses and fees	27	26	27	24	23	22	20	19	16	16
Other	143	151	215	253	146	165	134	90	118	116
Total Revenues – All Governmental Fund Types	$ 6,475	$ 5,790	$ 5,370	$ 5,100	$ 5,150	$ 4,840	$ 4,651	$ 4,590	$ 4,567	$ 4,550

(1) Effective July 1, 1993, the hospital and nursing facility tax levied was authorized by Act 315, SLH of 1993.

See accompanying independent auditors' report.

STATE OF HAWAII

Schedule of Expenditures by Function – All Governmental Fund Types

Last Ten Fiscal Years

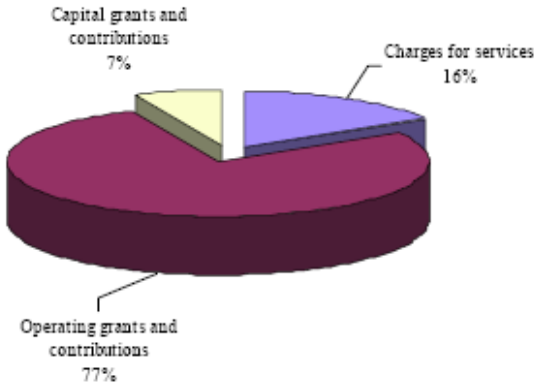
(Amounts in millions)

Function	For the Fiscal Year Ended June 30, 2005	2004	2003	2002	2001	2000	1999	1998	1997	1996
General government	$ 508	$ 451	$ 429	474	$ 483	$ 442	$ 489	$ 413	$ 404	$ 404
Public safety	291	265	257	240	201	203	199	185	165	164
Highways	302	223	255	236	131	115	111	111	115	94
Conservation of natural resources	74	65	66	57	51	41	45	37	36	33
Health	565	519	513	500	431	399	386	329	311	279
Welfare	1,615	1,545	1,418	1,334	1,248	1,226	1,222	1,210	1,278	1,236
Education	2,377	2,262	2,321	2,134	1,050	1,035	1,007	949	888	891
Culture and recreation	74	67	71	68	57	56	52	52	55	57
Urban redevelopment and housing	53	55	17	12	10	10	11	15	21	26
Economic development and assistance	214	215	231	267	200	192	166	155	163	176
Social security and pension contributions	—	—	—	—	91	85	159	222	226	222
Intergovernmental	—	—	—	—	—	—	—	—	3	3
Debt service	322	302	394	363	402	384	390	406	426	416
Capital outlay	—	—	—	—	335	376	376	373	611	488
Other	5	3	—	—	13	9	28	28	20	16
Total Expenditures – All Governmental Fund Types	$ 6,400	$ 5,972	$ 5,972	$ 5,685	$ 4,703	$ 4,573	$ 4,641	$ 4,485	$ 4,722	$ 4,505

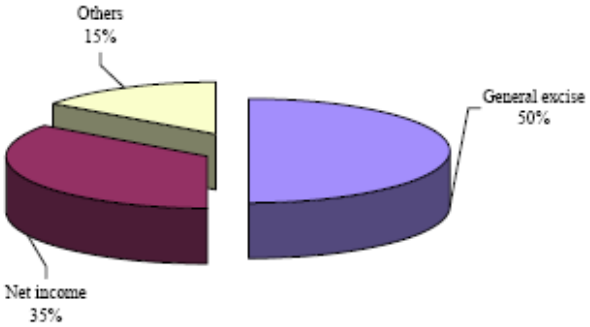
See accompanying independent auditors' report.

The following charts depict revenues of the governmental activities for the fiscal year:

Program Revenues By Source – Governmental Activities
Fiscal Year Ended June 30, 2005



Tax Revenues By Source – Governmental Activities
Fiscal Year Ended June 30, 2005



CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the page limit set in this Court's Order filed August 29, 2006, the type-volume limitation of Circuit Rule 32-3 and Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains less than 4,200 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

DATED: Honolulu, Hawaii, September 19, 2006.

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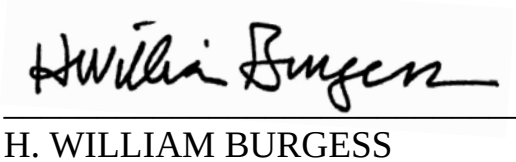
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, two copies of the foregoing supplemental brief and appendix were served upon each of the parties in the attached service list via U.S. Mail or certified U.S. Mail, postage prepaid. (In addition to the two copies sent to Mr. Avila for Defendant-Appellee United States, single courtesy copies were sent to the Solicitor General and to the U.S. Attorney in Hawaii.)

DATED: Honolulu, Hawai`i this 19th day of September, 2006.



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