NO. 30049

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Tax Appeals of JOHN M. CORBOY, STEPHEN GARO AGHJAYAN, GARRY P. SMITH, EARL F. ARAKAKI and J. WILLIAM SANBORN Plaintiffs-Appellants vs. MARK J. BENNETT, in his official capacity as Attorney General, State of Hawaii; the COUNTY OF MAUI; the COUNTY OF KAUAI; the CITY AND COUNTY OF HONOLULU; the COUNTY OF HAWAII and the STATE OF HAWAII, Defendants-Appellees.	TAX APPEAL CASE NOS. 07-0086; 07-0099; 07-0102; 08-0039; 08-0040; 08-0041; 08-0042; 08-0043 (CONSOLIDATED) REPLY BRIEF OF PLAINTIFFS-APPELLANTS; CERTIFICATE OF SERVICE

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Like the dog that didn't bark in the Sherlock Holmes mystery[1], the most important clue in the State's and Attorney Generals' answering brief (joined in by the counties), is in what it does not say: it does not dispute the accuracy of any of the following facts or conclusions:

- The definition of "native Hawaiian" as used in the Hawaiian Homes Commission Act (HHCA), "any descendant of not-less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," is a racial classification;
- "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227, 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." *Shaw v. Reno,* 509 U.S. 630, 643-44 (1993);
- In 1921 Congress, by enacting the HHCA, imposed that racial classification on the Territory of Hawaii and its citizens and on the approximately 200,000 acres of the ceded lands set aside as "available lands" for the HHCA;
- Under the Equal Footing doctrine, the equality of the new state with the other states will "forbid a compact between a new state and the United States 'limiting or qualifying political rights and obligations'" (quoting *Stearns v. Minnesota,* 179 U.S. 223, 245 (1900). Thus, Congress cannot require or bargain for a state to promise that it will not change the location of its capital previous to 1913; and any such requirement or bargain is void. *Coyle v. Smith*, 221 U.S. 559, 564, 557-578 (1911).
- Congress, by §4 of the Admission Act required as a condition of statehood and as a compact with the United States, that the new State of Hawaii adopt the HHCA and continue to carry it out.

Rather than address the above major points, the Answering Brief offers multiple assertions, inconsistent with the State's and Attorney General's prior positions and this Court's

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[1] Inspector Gregory: "Is there any other point to which you would wish to draw my attention?"
Holmes: "To the curious incident of the dog in the night-time."
Inspector Gregory: "The dog did nothing in the night-time."
Holmes: "That was the curious incident."
From "The Adventure of Silver Blaze" by Arthur Conan Doyle

jurisprudence; and fails to prove the HHCA and its special exemption from real property taxes for Hawaiian homestead lessees are race neutral and pass strict scrutiny. This brief replies to each of the State's, Attorney General's and counties' arguments, collectively "State", as follows:

1. The jurisdiction of the Tax Appeal Court. The State asserts in the Answering Brief in footnote 1,

> See HRS § 232-13 ("The jurisdiction of the tax appeal court is limited to the amount of valuation or taxes, as the case may be, in dispute as shown on the one hand by the amount claimed by the taxpayer or county and on the other hand by the amount of the assessment ..."). Taxpayers cannot expand the scope of their appeal beyond the limited jurisdiction of the Tax Appeal Court from which this appeal is brought. It is thus patently improper for Taxpayers to broadly attack the HHCA for limiting homesteads to only native Hawaiians; they may only challenge the HHCA's tax exemption provision (as it relates to the County tax exemptions). (Underlining in the original.)

Plaintiffs-Appellants' Reply: As this Court has held, the limitation of the jurisdiction of the Tax Appeal Court (to the allowance or disallowance of exemptions and the increasing or decreasing of assessments) has not been applicable for many years.

> We hold that *In re Taxes Maui Agr. Co.*, supra, decided in 1938, is no longer applicable authority in the determination of the Tax Appeal Court's jurisdiction in real property tax appeals. Since 1939 the Legislature has expressly provided that an appeal from a final decision of the Board to the Tax Appeal Court 'shall bring up for determination all questions of fact and all questions of law, including constitutional questions involved in the appeal.' 1939 S.L.H. c. 208, s 7:[FN1] HRS § 232-17 (Supp.1974).
>
> Whereas the Tax Appeal Court had been previously limited to reviewing real property tax assessment appeals, the present court is charged with hearing all appeals relating to taxes.[FN2] See Standing Committee Report No. 706, 1967 House Journal 749. Furthermore, while the Board is expressly prohibited from determining or declaring an assessment to be illegal or void, HRS § 232-7(b) (Supp.1974), there is no such restriction upon the jurisdiction of the Tax Appeal Court.
>
> HRS s 232-13, limiting the jurisdiction of the Tax Appeal Court to 'the amount of valuation or taxes, as the case may be, in dispute as shown on the one hand by the amount claimed by the taxpayer or county or on the other hand by the amount of the assessment, or if increased by the board the assessment as so increased,' was not a limitation on the power of the Tax Appeal Court to determine whether the Board exceeded its authority in increasing the amount of the assessment. This is consonant with the statutory appellate scheme, whereby appeals are taken from the Board to the Tax Appeal Court on all issues of fact and all questions of law, including constitutional questions, and from the latter tribunal to this court. HRS §§ 232-17,

232-19 (Supp.1974).

In re Valley of Temples Corp. 56 Haw. 229, 230-232, 533 P.2d 1218, 1219 - 1220 (Hawaii 1975)

2. The Equal Footing Doctrine. The State asserts in its Answering brief beginning at the bottom of page 18 that Taxpayers' discussion of the Equal Footing Doctrine "has absolutely no relevance to this case, much less to the State's summary judgment motion."

Plaintiffs-Appellants' Reply: It is undisputed that Congress, by §4 of the Admission Act, required as a condition of statehood and as a compact with the United States, that the new State of Hawaii adopt the HHCA and continue to carry it out. This compact and the HHCA and incorporation of both the compact and the HHCA into the State Constitution violate the Equal Footing doctrine and are void because they constitutionally diminish, impair, limit or qualify the State of Hawaii's (and its agencies' and political subdivisions') political rights and obligations with respect to the approximately 200,000 acres of the ceded lands set aside for the HHCA and with respect to the State's and counties' ability to manage those 200,000 acres for the benefit of all the citizens of Hawaii.

The impairment of the State's and counties' political power to use the 200,000 acres for the benefit of all the citizens of Hawaii is illustrated by *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Com'n*, 739 F.2d 1467, 1469, 1472 (9th Cir. 1984). In the early 1970s, the County of Hawaii constructed a flood control project that used approximately twenty-five and one-half acres of the Hawaiian home lands. The Hawaiian Homes Commission agreed to convey at least a part of that land to the County in exchange for equivalent acreage, but no such exchange had occurred.

A group of native Hawaiians brought suit pursuant to 42 U.S.C. § 1983 against the Hawaiian Homes Commission, and other agencies and officials, to remedy the loss of the approximately 25 acres of the Hawaiian home lands. The Ninth Circuit Court of Appeals held that plaintiffs have stated a federal cause of action under 42 U.S.C. § 1983.

The relevance to this case is that because the HHCA violates the Equal Footing doctrine and is void, the special exemption from real property taxes for Hawaiian homestead lessees it mandates is also void. The diminishment of the State's and counties' political power to manage (and tax) 200,000 acres of Hawaii's public trust lands for the benefit of all the citizens of Hawaii, is at least as significant as the restriction in the 1906 enabling act for Oklahoma which

diminished that state's ability to change the location of the state capital "previous to 1913" (invalidated on Equal Footing grounds in *Coyle, supra*). Indeed the insult to the State of Hawaii's political competence implicit in the compact in this case is far more significant because, in addition to violating the Equal Footing doctrine, it also requires the State and its political subdivisions to perpetually violate the Equal Protection, privileges and immunities provisions of the Constitution and civil rights laws of the United States.

3. Plaintiffs-Appellants' Standing. The answering brief also argues in footnote 23 that Taxpayers do not have the right to assert the Equal Footing doctrine "as the 'right' asserted belongs to the State" citing *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 624 n. 3 (1989).

Plaintiffs-Appellants' Reply: That case does not hold that the right to assert the Equal Footing doctrine "belongs" to, or may only be exercised by, the State. It does not mention that doctrine. Nor is there anything in the nature of the Equal Footing doctrine that would justify limiting its enforcement only to the state. Most of the Constitution and Bill of Rights are designed to protect individuals against the power of governments. If only the state, a party to the compact in question, can challenge the validity of the terms it agreed to, there would be no check and balance; and state and federal officials would be more free to bargain away fundamental rights of individuals and increase their own powers.

Caplan & Drysdale upheld the *jus tertii* standing of the law firm. To the extent that the case (involving forfeiture of a drug dealer's ill-gotten property instead of applying the property to pay the wrongdoer's legal fees) applies here, it would also uphold Plaintiffs-Appellants' standing to advance the Equal Footing doctrine.

> FN3. The United States argues that petitioner lacks *jus tertii* standing to advance Reckmeyer's Sixth Amendment rights. See Brief for United States 35, and n. 17. Though the argument is not without force, we conclude that petitioner has the requisite standing.
>
> When a person or entity seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement; and second, do prudential considerations which we have identified in our prior cases point to permitting the litigant to advance the claim? As to the first inquiry, there can be little doubt that petitioner's stake in $170,000 of the forfeited assets-which it would almost certainly receive if the Sixth Amendment claim it advances here were vindicated-is adequate injury-in-fact to meet the constitutional minimum of Article III standing.
>
> The second inquiry-the prudential one-is more difficult. To answer this question, our

> cases have looked at three factors: the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests. The second of these three factors counsels against review here: a criminal defendant suffers none of the obstacles discussed in *Wulff, supra,* to advancing his own constitutional claim. We think that the first and third factors, however, clearly weigh in petitioner's favor. The attorney-client relationship between petitioner and Reckmeyer, like the doctor-patient relationship in *Baird,* is one of special consequence; and like *Baird,* it is credibly alleged that the statute at issue here may "materially impair the ability of" third persons in Reckmeyer's position to exercise their constitutional rights. Petitioner therefore satisfies our requirements for *jus tertii* standing. (Internal citations omitted.)

Caplin & Drysdale, Chartered v. U.S., 491 U.S. 617, 624 n. 3 (1989).

Plaintiffs-Appellants here each allege an injury-in-fact, deprivation of an exemption from real property taxes equivalent to that his county gives to Hawaiian homestead lessees. (See Appendices H through O, the five notices of appeal and three complaints in the Tax Appeal Court which initiated these eight cases later consolidated.)

App. P.1 is one of the exhibits used as a visual aid at the hearing in the Tax Appeal Court November 23, 2009. It calculates based on information filed in the record by the City and County of Honolulu and the DHHL annual report, the average harm to each residential homeowner in the City and County of Honolulu deprived of the special exemption for fiscal year 2009-2010: $1,717. Thus, as in *Caplin & Drysdale*, as to the first inquiry, there can be little doubt that Plaintiffs-Appellants' stake in receiving refunds averaging $1,717 for that year which they would almost certainly receive if the claim to equivalent exemption is vindicated - is adequate injury-in-fact to meet the constitutional minimum of Article III standing.

The HHCA inflicts additional injury-in-fact on each and every Plaintiff-Appellant by depriving them, for example, of sharing in the benefits of the annual $10.369 million income received by the Department of Hawaiian Home Lands "DHHL" from industrial, commercial and other non-homestead leases, permits and licenses of Hawaiian Home lands as shown on the Land Use Summary from page 25, of the DHHL Annual Report for 2008. Of even greater magnitude, because the HHCA excludes them, Plaintiffs-Appellants have been deprived of any share in the $30 million per year the State has been paying to the Hawaiian Home Lands trust since 1995 pursuant to Act 14, SpSLH 1995.

More in point as to the second inquiry is *Warth v. Seldin*, 422 U.S. 490, 501 (1975), a municipal taxpayer action which discussed the standing rules in federal courts applicable to federal, state and municipal taxpayers, the high 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 injunction Plaintiffs-Appellants seek requiring the counties to provide equivalent exemptions from real property taxes for Plaintiffs-Appellants and all other homeowners similarly situated would be huge in the aggregate. But if the counties decide to eliminate the special exemptions and treat all residential homeowners equally, the savings to each Plaintiff-Appellant would be much smaller but still measurable. And would still be sufficient vindicate the right to equal privileges and immunities under the law. 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).

4. The State's "modification" of the Ceded Lands Trust. The State at Ans. Brf. 17 and 18 argues that "even assuming the Newlands Resolution did create a legal 'trust' over the ceded lands, that "trust" was subsequently modified by the settlor United States, through its passage of the HHCA in 1921, ..." (Underlining in original.)

Plaintiffs-Appellants' Reply: First, The United States was not the settlor. It first acquired an interest in the ceded lands in 1898 when the Republic of Hawaii ceded all its public, Government or Crown lands to the United States. The Republic of Hawaii was the settlor and the United States was the first trustee.

Like the perpetual public trust for educational purposes at issue in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), Hawaii's Ceded Lands Trust, for "educational and other public purposes" was also endowed with public lands and also founded with every

ingredient of a complete and legitimate contract. On June 16, 1897 the Republic of Hawaii, by its proposed Treaty of Annexation, (App. Q.1.) offered to cede to the United States all its public lands (about 1.8 million acres formerly called the Crown lands and Government lands of the Kingdom of Hawaii) with the requirement that all revenue from or proceeds of the lands, except those parts used for civil, military or naval purposes of the United States or assigned for the use of local government, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Another condition of the Republic's offer was that the "The public debt of the Republic of Hawaii" was to be "assumed by the government of the United States, but the liability of the United States in this regard shall in no case exceed $4,000,000." App Q.1.

A year later, on July 7, 1898, by the Newlands Resolution, the United States accepted the offer, expressly including the conditions that it hold the lands in trust and that it assume the debts accumulated by the Kingdom and Republic up to $4 million. (Appx Q.3.)

As the Supreme Court of the United States held, "Where there is a charter, vesting proper powers of government in trustees or governors, they are visitors; and there is no control in anybody else; except only that the courts of equity or of law will interfere so far as to preserve the revenues, and prevent the perversion of the funds, and to keep the visitors within their prescribed bounds." 17 U.S. 565.

That basic principle of trust law enforcing legitimate contractual obligations under which a state holds public lands of great value in a perpetual trust is now found in Restatement (Third) of Trusts § 64 (2003) Current through August 2009,

§ 64. Termination Or Modification By Trustee, Beneficiary, Or Third Party

(A) Except as provided in §§ 65[2] and 68, the trustee or beneficiaries of a trust have only such power to terminate the trust or to change its terms as is granted by the terms of the trust.

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[2] § 65 covers termination or modification by consent of beneficiaries, inapplicable in the case of perpetual public trusts such as Dartmouth College or Hawaii's Ceded Lands Trust.

§ 68 covers dividing and combining trusts "if doing so does not adversely affect the rights of any beneficiary." Again, inapplicable because dividing the Ceded Lands Trust by giving native Hawaiians the exclusive benefit of 200,000 acres while still retaining their full rights in the remaining trust corpus would adversely affect the other beneficiaries.

(B) The terms of a trust may grant a third party a power with respect to termination or modification of the trust; such a third-party power is presumed to be held in a fiduciary capacity.

Since the terms of the offer and acceptance gave no trustee, beneficiary or third party any right to modify the terms of the Ceded Lands Trust, *except in a fiduciary capacity*, as a matter of law, neither the State of Hawaii, nor the counties, nor Congress, whether by the HHCA or any other law, had or has the power to impair the obligations to all the citizens of Hawaii undertaken by the United States in 1898 in the Annexation Act, and assumed by the State of Hawaii in 1959.

The State's argument at Ans. Brf. 17 and footnote 21 that the HHCA properly modified the Ceded Lands Trust "(And no one can seriously deny that the homestead program serves a public purpose)" disregards the charitable nature of the Ceded Lands Trust. HHCA's explicit exclusion of potential beneficiaries on the basis of membership in a particular racial group, is invidious and non-charitable and therefore unenforceable.

> Current through June 2009, Copyright © 2003-2010 by the American Law Institute
> Part 3. Elements Of Trusts, Chapter 6. Trust Purposes
>
> REST 3d TRUSTS § 28. Charitable Purposes
>
> Charitable trust purposes include:
> (a) the relief of poverty;
> (b) the advancement of knowledge or education;
> (c) the advancement of religion;
> (d) the promotion of health;
> (e) governmental or municipal purposes; and
> (f) other purposes that are beneficial to the community.
>
> When a scholarship or other form of assistance or opportunity is to be awarded on a basis that, for example, explicitly excludes potential beneficiaries on the basis of membership in a particular racial, ethnic, or religious group, the restriction is ordinarily invidious and therefore unenforceable. Thus, a trust to provide land and maintenance for a playground from which Black children are excluded, or a trust to support a scholarship program for which no Roman Catholic may apply, is not enforceable under those terms as a charitable trust. Similarly, although the exclusions are not explicit, a trust to provide research grants for which only "white, Anglo–Saxon Protestants" may apply is invidious and noncharitable.

5. Serious question of whether trust was created by Annexation Act. The State asserts at Ans. Brf. 16 "There is a serious question, first of all, whether a 'true' trust was created by that [the 1898 Newlands] resolution." "The word 'trust' was never used in the Resolution."

Plaintiffs-Appellants' Reply: This is inconsistent with the prior positions of the Attorneys General of the United States and the State of Hawaii and the jurisprudence of this Court. Please see Appellants' Opening Brief, D. Hawaii's Ceded Lands Trust at 16 – 18.

As to the absence of the word "trust, " no formal or technical language is required. All that is necessary is that the settlor express an intent that the trustee have the functions and duties incident to trusteeship. Thus, in some cases, courts have found that settlors expressed intent to create a trust even though they did not use the words "trust" or "trustee," and did use language seemingly appropriate to an absolute gift, the creation of a life tenancy, the assignment of a chose in action, the creation of an interest on condition subsequent, the making of a contract, or executorship, agency, guardianship, or partnership. Likewise, the use of words of trusteeship is not conclusive as to the expression of an intent to have a trust, where the settlor apparently contemplated incidents foreign to the trustee-beneficiary relationship.
BOGERT, The Law Of Trusts And Trustees § 45.

6. No racial classification? The State's argument that the special exemption involves no racial classification, is refuted in Appellants' Opening Brief in the middle paragraph on page 1; Parts F(1) and (2) on pages 21 and 22.

7. Do not seek a homestead lease. The State's assertion that Plaintiffs-Appellants do not "want" a homestead lease is incorrect. Plaintiffs-Appellants have not *applied* for a homestead lease. Please see Appellants' Opening Brief at pages 22-24 under the heading, **(3). To seek equal treatment in the taxation of their real property, taxpayers are not required to first make futile applications.**

8. Where points of error raised below. Opening Brief at 9 describes where the points of error were raised below.

Conclusion

For the foregoing reasons and for the reasons stated in Appellants' Opening Brief, the Tax Appeal Court's judgment and orders should be reversed and judgment entered in favor of Plaintiffs-Appellants on their counter motion for summary judgment.

Dated: Honolulu, Hawaii, April 21, 2010.

Respectfully submitted,

H. William Burgess
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that 2 copies of the foregoing document was served upon the following parties through their attorneys as addressed below via First Class U. S. Mail, postage prepaid on April 21, 2010:

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