No. 08-16769

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES I. KUROIWA, JR.; PATRICIA A. CARROLL; TOBY M. KRAVET; GARRY P. SMITH; EARL F. ARAKAKI AND THURSTON TWIGG-SMITH,

Plaintiffs-Appellants,

vs.

LINDA LINGLE, in her official capacity as Governor of the State of Hawaii; GEORGINA KAWAMURA, in her official capacity as Director of the Department of Budget and Finance;

[caption continued]

D.C. Civ. No. 08-00153 JMS/KSC

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

STATE DEFENDANTS-APPELLEES ANSWERING BRIEF

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State Defendants-Appellees,

and

HAUNANI APOLIONA, Chairperson, and WALTER M. HEEN, ROWENA AKANA, DONALD B. CATALUNA, ROBERT K. LINDSEY, JR., COLLETTE Y. MACHADO, BOYD P. MOSSMAN, OSWALD STENDER, AND JOHN D. WAIHEE IV, in their official capacities as trustees of the Office of Hawaiian Affairs,

OHA Defendants-Appellees.

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I. STATEMENT OF JURISDICTION AND ISSUES

Defendants-Appellees Linda Lingle, in her official capacity as Governor of the State of Hawaii, Georgina Kawamura, in her official capacity as Director of the Department of Budget and Finance, Russ K. Saito, in his official capacity as State Comptroller, and Director of the Department of Accounting and General Services, Laura H. Thielen, in her official capacity as Chairman of the Board of Land and Natural Resources, Sandra Lee Kunimoto, in her official capacity as Director of the Department of Agriculture, Theodore E. Liu, in his official capacity as Director of the Department of Business, Economic Development and Tourism, and Brennon Morioka, in his official capacity as Director of the Department of Transportation (hereinafter "State Defendants") do not dispute the technical accuracy of the statements made in Plaintiffs-Appellees' Statement of Jurisdiction, except that State Defendants agree with the district court's ruling that the United States was an indispensable party to plaintiffs' suit, and that without the United States as a party, plaintiffs' injuries were not redressable. Accordingly, the federal courts had no Article III jurisdiction to resolve plaintiffs' claims on the merits. Therefore, the district court's judgment should be affirmed.

As to plaintiffs' statement of issues presented for review, it is State Defendants' position that the only issue properly present here on appeal is: whether the District Court erred in granting judgment on the pleadings to the State

Defendants and the Office of Hawaiian Affairs (OHA) trustees? The answer to that question turns on resolution of the following issue: did the district court properly conclude, based upon the Ninth Circuit's decision in Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007), that the United States was an indispensable party to plaintiffs' claims (thereby necessitating dismissal of plaintiffs' claims), because those claims necessarily challenged the constitutionality or legality of the federal Hawaii Admission Act?

II. STATEMENT OF THE CASE AND FACTS

State Defendants do not dispute plaintiffs' statement of the case. As to the statement of the facts, the essential "fact" is that plaintiffs in this suit seek to challenge the legality of the State and OHA using Admission Act Section 5(f) ceded lands (or their proceeds and income) for the benefit of native Hawaiians[1] -- specifically, in support of the Akaka Bill, and a Native Hawaiian registry named Kau Inoa, or their equivalents[2] -- while not devoting equivalent ceded land funds to non-Hawaiians. Complaint (CR 1 ER 16) at 425, Prayer ¶¶ A.1 & A.3. The key

[1] Unless the context suggests otherwise, this brief uses the terms "**Hawaiian**" or "**Native Hawaiian**" to refer to all descendants, regardless of blood quantum, of the indigenous people who inhabited the Hawaiian Islands prior to 1778. The term "**native Hawaiian**" (with **lower case** "n") refers to the subset of Native Hawaiians with 50% or more Hawaiian blood quantum, which is the subset referred to in Admission Act Section 5(f)'s "betterment of the conditions of native Hawaiians."

[2] See Complaint (Clerk's Record [**CR**] 1, Excerpts of Record [**ER**] 16) at 425-426, Prayer ¶¶ B & C.

point is that this challenge necessarily does attack the constitutionality or legality of Section 5(f) of the Admission Act, because that provision expressly authorizes use of the ceded lands (or their proceeds and income) for the "betterment of the conditions of native Hawaiians," without limitation.

Plaintiffs did not sue the United States, and the District Court, following the Ninth Circuit's decision in Arakaki v. Lingle, found that plaintiffs had no standing to sue the United States. Order (CR 83, ER 2) at 17.

III. SUMMARY OF ARGUMENT

Despite claiming that they merely seek to have Section 5(f) of the Admission Act interpreted properly, plaintiffs are necessarily challenging the constitutionality of the Admission Act. Section 5(f), after all, authorizes the State to use the ceded land (and income and proceeds there from) for the "betterment of the conditions of native Hawaiians," which is a clear and unequivocal authorization of what plaintiffs object to in this case: the use of some ceded land (and its proceeds and income) for the exclusive benefit of native Hawaiians.[3]

Because plaintiffs' claims here necessarily do challenge the constitutionality of the Admission Act, this Court's Arakaki v. Lingle decision mandates dismissal of their suit because Arakaki makes clear that the United States is an indispensable

[3] Plaintiffs' claim that the betterment provision only applies to the subset of Section 5(b) land devoted to homesteads governed by the Hawaiian Homes Commission Act (**HHCA**), 42 Stat. 108 (1921), is frivolous.

party to any suit challenging the legality of the Admission Act.

Plaintiffs' attempt to attack Arakaki's indispensable party ruling must be rejected as that ruling is binding upon this three-judge panel. The Grace Brethren Supreme Court decision cannot overcome Arakaki (applying the Miller v. Gammie irreconcilable standard), because it long pre-dates Arakaki, contains no reasoning on the indispensable party point, and because its holding does not conflict with Arakaki's ruling as Grace did not involve trust beneficiaries trying to invalidate a qualification dictated by a federal Admission Act. Moreover, Arakaki follows the earlier Ninth Circuit decision in Carroll v. Nakatani, holding that a challenge to a native Hawaiian qualification mandated by the Admission Act requires the participation of the United States.

The *stare decisis* effect of Arakaki, not *res judicata*, is what puts plaintiffs' claims here to rest, making plaintiffs' "no final judgment" argument irrelevant. Arakaki is not inconsistent with other Ninth Circuit cases (Day, Price, Akaka) allowing trust beneficiaries to bring 5(f) suits without the United States as a party, because in the latter cases plaintiffs sought to **enforce** Section 5(f) of the Admission Act, and thus did not challenge the constitutionality or legality of the Admission Act. Arakaki's indispensable party ruling, like the District Court's decision in the case at bar, rested upon the fact that plaintiffs' suit challenged the legality of the Admission Act.

Plaintiffs claim that the distinction is nowhere to be found in "trust law," but that misses the fact that the Arakaki indispensable party ruling is not rooted in "trust law" per se, but rather in the redressability component of Article III standing doctrine. It is only in those cases where plaintiffs challenge the legality of the Admission Act that the United States is a required party so as to provide redressability. Plaintiffs attempt to undermine the distinction by claiming that preventing trustees from carrying out an unconstitutional trust term is the same thing as "enforcing" the trust. But that argument misses the point because that type of "enforcement" requires challenging the Admission Act, which triggers the Arakaki indispensable party ruling.

The Arakaki ruling, while not expressly mentioning Rule 19, effectively applied Rule 19 analysis: 1) its conclusion that plaintiffs would not be able to obtain redress of their injury without the United States as a party fits Rule 19(a)(1)(A)'s language regarding the court not being able to "accord complete relief among existing parties" "in [the United States'] absence;" 2) the requirement of the first part of Rule 19(b) that the party "cannot be joined" was satisfied by Arakaki's conclusion that the United States could not be joined because plaintiffs lacked standing to sue the United States; and 3) the second part of Rule 19(b) requiring "the court [to] determine whether . . . the action should proceed [without the United States] . . . or should be dismissed" had to be resolved in favor of dismissal given

that the absence of the United States meant no Article III standing, and thus no federal court jurisdiction.

The Carroll case's conclusion that plaintiff's "claim is not redressable because he failed to include the United States as a party" was not dicta, but the holding of the case. Arakaki's extension of Carroll's non-redressability holding beyond the Hawaiian Home lands, so as to cover other Section 5(f) ceded lands as well, is not only binding upon this three-judge court, but legally compelling. After all, both the native Hawaiian qualification for Hawaiian Home lands (challenged in Carroll) and the "betterment of the conditions of native Hawaiians" purpose (challenged in Arakaki, and in the case at bar) are part of the same federal Admission Act.

Contrary to plaintiffs' assertion, Arakaki does nothing to bar the overwhelming majority of trust beneficiary suits in which trust beneficiaries seek to enforce the terms of the applicable trust. In those enforcement suits, the beneficiaries will not be challenging federal law, much less the Hawaii Admission Act, and so Arakaki will present no bar to those suits. Indeed, the Day, Price, and Akaka decisions of the Ninth Circuit that plaintiffs claim contradict Arakaki are prime examples of enforcement suits -- that do not challenge the constitutionality of the Admission Act -- that are unaffected by Arakaki.

Plaintiffs' arguments that neither sovereign immunity nor absolute or qualified immunity bars plaintiffs from suing the United States are irrelevant;

plaintiffs are barred by Arakaki's binding holding that plaintiffs lack Article III standing to sue the United States, which has nothing to do with immunity.

Plaintiffs' entirely different claim that the ceded lands generate no net income from which distributions to beneficiaries may lawfully be made fails on multiple independent grounds. First, this claim was not made, nor was relief sought based upon that claim, in plaintiffs' complaint. And this Court may not look beyond the complaint because the trial court did not consider any evidence going to that point and expressly resolved the defendants' motions on the pleadings alone.

Second, the evidence does not support plaintiffs' claim that the State spends more on improving or maintaining the ceded lands than it receives in receipts from those lands. Evidence that the State spends more on Section 5(f) purposes than it receives from the ceded lands does not support plaintiffs' theory because 1) many 5(f) purposes are served without improving or maintaining land, and 2) that portion of spending on 5(f) purposes that does involve improving or maintaining land may involve non-ceded lands.

Third, plaintiffs' "net income theory" -- that 5(f) prohibits the State from expending any ceded land proceeds for 5(f) purposes if the State has spent more improving the ceded lands than it receives from the ceded lands -- is simply invalid. It contradicts the language of 5(f), Ninth Circuit case law giving the State broad discretion to manage the 5(f) ceded lands, and leads to absurd results.

Fourth, even if the "net income theory" were valid, it would do nothing to support the relief plaintiffs seek in this case, which is to bar the State and OHA from expending ceded land receipts on native or Native Hawaiians to the exclusion of non-Hawaiians. Plaintiffs' theory, after all, does not differentiate between 5(f)'s "betterment of the conditions of native Hawaiians" purpose -- which plaintiffs attack in this case -- and the other four 5(f) purposes that plaintiffs believe are the only valid and operative purposes.

Plaintiffs' argument about income and remainder beneficiaries has no applicability here. Plaintiffs' citation to a brief the State filed 11 years ago does not support plaintiffs' theory because it dealt only with the meaning of a state statutory provision, not the meaning of Section 5(f) of the Admission Act. Plaintiffs' arguments about impartiality are frivolous because Section 5(f) explicitly authorizes "partiality" by allowing the State to use the ceded lands for "the betterment of the conditions of native Hawaiians."

IV. ARGUMENT

A. Plaintiffs are **necessarily** challenging the constitutionality of the Admission Act; the United States is therefore an indispensable party to their suit.

The argument that plaintiffs are not challenging the constitutionality of Section 5(f) of the Admission Act, but rather are merely seeking to have it construed or interpreted properly -- to disallow use of any of the ceded land income and proceeds for the exclusive benefit of native Hawaiians -- is frivolous.

Section 5(f), by its plain and unequivocal language, expressly authorizes use of some or all of the ceded lands (and its income and proceeds) for the exclusive benefit of native Hawaiians.

> The lands granted to the State of Hawaii by subsection (b) . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust [1] for the support of the public schools . . . , [2] **for the betterment of the conditions of native Hawaiians** . . . , [3] for the development of farm and home ownership . . . , [4] for the making of public improvements, and [5] for the provision of lands for public use.

Admission Act § 5(f). It is clear, therefore, that plaintiffs cannot seriously argue that the Admission Act does not authorize the State to use any ceded land proceeds or income for the exclusive benefit of native Hawaiians, when that Act expressly authorizes the State to do just that: to "better[] the conditions of native Hawaiians."[4] Thus, if plaintiffs wish to obtain the relief they seek -- enjoining the

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[4] Plaintiffs frivolously assert that § 5(f)'s reference to the betterment of the conditions of native Hawaiians only applies to the **subset** of § 5(b) land devoted to the homestead lands governed by the Hawaiian Homes Commission Act (**HHCA**). Open. Br. at 19-21. But the plain language of § 5(f) does not limit itself (or any of its five prescribed purposes) to the homestead lands; it encompasses all "lands granted to the State of Hawaii by subsection (b)." § 5(f). Subsection 5(b), of course, expressly includes "all the public lands," in addition to the homestead lands governed by the Hawaiian Homes Commission Act. See Admission Act 5(b) (transferring United States title "to all the public lands and other public property, **and** to all lands defined as 'available lands' by section 203 of the Hawaiian Homes Commission Act . . . , within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union.").

Plaintiffs' attempt, therefore, to read the "betterment of the conditions of native Hawaiians" purpose as only applying to homestead lands is flatly contra-

State and OHA from using any ceded land proceeds and income for the exclusive benefit of native Hawaiians -- they necessarily must challenge the constitutionality of Section 5(f) of the Admission Act.

Any such challenge to the Admission Act, of course, must fail, as Arakaki v. Lingle makes clear that the United States is an indispensable party to any such challenge to the Admission Act.

> the United States remains an indispensable party to a suit challenging the [Admission Act Section 5(f)] trust, and Plaintiffs have no standing to sue the United States.
> . . . .

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dicted by the plain language of Sections 5(b) and 5(f). Although this conclusion is so obvious as to require no case support, the Supreme Court has essentially confirmed the obvious point as well, stating that "these lands" -- referring to "the 200,000 acres set aside under the Hawaiian Homes Commission Act **and** almost 1.2 million additional acres of land" -- and "the proceeds and income they generated, were . . . to be 'managed and disposed of for one or more of ' [the] five purposes." Rice v. Cayetano, 528 U.S. 495, 507-08 (2000).

The mere fact that the State voluntarily chose for the first roughly 20 years after statehood to use only homestead lands in furthering the "betterment of the conditions of native Hawaiians" purpose -- and used the proceeds and income from the other ceded lands by and large for public school educational purposes -- of course, does not in any way indicate that the other ceded lands could not also be used to better the conditions of native Hawaiians. Section 5(f), after all, clearly leaves it completely up to the State to decide which of the five purposes it will further with the ceded lands and their proceeds and income, and when to do so. Indeed, Ninth Circuit cases have assumed that the "betterment" purpose (along with the other four purposes) applies to **non**-homestead lands (and their income) as well. See, e.g., Price v. Akaka, 928 F.2d 824, 826 (9th Cir. 1990) ("lands conveyed to Hawaii in § 5(b), and the income produced by them, 'shall be managed and disposed of for one or more' of five stated purposes. . . . Because the OHA share of 'public trust' income at issue in this case derives directly from the § 5(b) lands, § 5(f)'s limitation on uses applies to that income.").

> Any challenge to the expenditure of trust revenue brought by alleged trust beneficiaries must challenge the substantive terms of the trust, which are found in the Admission Act. . . . [T]he United States is an indispensable party to any challenge to the Admission Act. Accordingly, . . . the United States . . . remains indispensable with respect to challenges to the expenditure of *trust* revenue.

477 F.3d at 1061, 1065.

B. This Circuit's *Arakaki v. Lingle* ruling forecloses plaintiffs' claim that the United States is not an indispensable party to plaintiffs' challenge to the constitutionality of the Admission Act.

Plaintiffs claim that the United States is not an indispensable party to their Equal Protection constitutional challenge, as trust beneficiaries, to the State's (and OHA's) use of ceded trust land (and the proceeds and income therefrom) for the betterment of the conditions of native Hawaiians. Open. Br. at 21-23. This argument is baseless, because this Circuit in Arakaki v. Lingle ruled precisely to the contrary, as quoted above, and repeated here:

> Any challenge to the expenditure of trust revenue brought by alleged trust beneficiaries must challenge the substantive terms of the trust, which are found in the Admission Act. . . . [T]he United States is an indispensable party to any challenge to the Admission Act. Accordingly, . . . the United States . . . remains indispensable with respect to challenges to the expenditure of *trust* revenue.

477 F.3d at 1065. Plaintiffs cite to California v. Grace Brethren Church, 457 U.S. 393 (1982). But Arakaki was decided long after the Grace case, and so even if Grace were irreconcilable with Arakaki, this three-judge panel would still be bound by Arakaki. See Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003)

(en banc) (allowing three-judge panel to overrule prior circuit decision only where **intervening** Supreme Court decision "undercut the theory or reasoning underlying the **prior** circuit precedent in such a way that the cases are clearly irreconcilable").

Moreover, even if the Arakaki decision had come before the Grace ruling, because the section of Grace quoted by plaintiffs contains no "reasoning," but rather is conclusory only -- it simply cites another case, St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981), that does not even address the issue of indispensable parties -- it would not allow this three-judge panel to override Arakaki. See Miller, 335 F.3d at 900 (allowing three judge panel to disregard prior circuit precedent where "inconsistency [would arise] between our circuit decisions and the **reasoning** of . . . authority embodied in a decision of a court of last resort."). Because neither Grace nor St. Martin provide **any** "reasoning," much less reasoning demonstrating a "clearly irreconcilable" conflict, Arakaki is binding on this three-judge panel.

Finally, and as a separate and independent point, there is no conflict between Grace and Arakaki (or the case at bar) in any event. Grace simply did not involve the unique situation present in Arakaki and in the case at bar, where alleged trust beneficiaries were, and are, respectively, trying to invalidate a qualification -- being native Hawaiian -- that is dictated by a federal Admission Act. Moreover, Arakaki is not a one of a kind discordant case within the Ninth Circuit. This

Circuit in an even earlier case, Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003), took the same position holding the United States to be a required party for a challenge to a native Hawaiian qualification dictated by the federal Admission Act. See Carroll, 342 F.3d at 944 (Because the "native Hawaiian [qualification] is a . . . federal requirement," "any change in the qualification requires the participation of . . . the United States.").

Plaintiffs then cite Green v. Dumke, 480 F.2d 624 (9th Cir. 1973), which has no relevance to the matter at hand. Green simply ruled that the **"under color of [State law]"** jurisdictional prerequisite to a Section 1983 action is satisfied by a state actor because it is a state institution, and that this point is not undermined by the fact that such a state institution acts pursuant to federal law. Of course, the State has never argued that plaintiffs do not satisfy the "under color of [State law]" jurisdictional prerequisite to a Section 1983 action. And the District Court, in dismissing plaintiffs' claims pursuant to Arakaki, did **not** rely upon any such position either. Accordingly, Green's ruling regarding the "under color of [State law]" issue is manifestly irrelevant to this case and provides no basis for reversing the District Court's ruling.[5]

Nothing in Green, of course, says anything about indispensable parties. Green rejected a wholly unrelated argument attempting to narrow the "under color of [state

[5] As Green explained further, "[t]he 'under color of law' component of section 1983 is the equivalent of the **state action** requirement of the Fourteenth Amendment." The District Court's dismissal of the claims had absolutely nothing to do with any claim of no state action, and we have not argued any such position to this date.

law]" prerequisite to Section 1983 actions, which has nothing to do with the District Court's ruling here rejecting plaintiffs' claims because the U.S. is an indispensable party.

C. Plaintiffs' "no final judgment" res judicata argument is irrelevant; the *stare decisis* effect of *Arakaki v. Lingle* forecloses plaintiffs' claims. *Arakaki* is fully consistent with other Ninth Circuit precedent.

Plaintiffs continue to assert that the Arakaki ruling is not a final decision and thus not entitled to *res judicata* effect. The argument is irrelevant as *stare decisis*, not *res judicata*, is sufficient to render Arakaki binding upon this Court. Plaintiffs' quotation from Payne v. Tennessee, 501 U.S. 808, 828 (1991), noting that *stare decisis* "is not an inexorable command" refers, of course, to the Supreme Court's obligation to follow its own past precedents. A three-judge panel of the Ninth Circuit, of course, must follow prior Ninth Circuit decisions -- like Arakaki v. Lingle -- unless the Miller v. Gammie standard is satisfied, which is not the case here, as explained supra at 11-12.

Plaintiffs argue that Arakaki is inconsistent with established Ninth Circuit precedents authorizing suits by 5(f) trust beneficiaries even though the United States was not a party in those cases. Open. Br. at 34-38. Plaintiffs, however, wrongly dismiss the obvious distinguishing factor in those cases: plaintiffs in those cases did not challenge the constitutionality of Section 5(f) of the Admission Act, or otherwise call into question the legality of the Admission Act. The challenges in those cases, therefore, did not implicate the legality of the Admission

Act, and thus in no way fell within the indispensable party ruling adopted in Arakaki v. Lingle. The Arakaki Court made very clear, after all, that its indispensable party ruling rested upon the fact that the Admission Act's legality was being called into question. See Arakaki, 477 F.3d at 1065 ("the United States is an indispensable party to any challenge to the Admission Act."). Plaintiffs' argument that this distinction "is nowhere to be found in trust law," Open. Br. at 28, of course, highlights plaintiffs' misunderstanding. The distinction is not going to be found in what plaintiffs call "trust law," but rather the distinction arises out of what is essentially the redressability component of the standing doctrine. See Arakaki, 477 F.3d at 1059 (explaining Carroll required party ruling as flowing from the fact that without the United States as a party, plaintiff's "injury was not redressable.");[6] see also Carroll, 342 F.3d at 944 (plaintiff "lacks standing to challenge the native Hawaiian eligibility requirement for Hawaiian Homestead leases because his injury is not redressable" because "he failed to include the United States as a party to the action "). Because plaintiffs in the case at bar are

[6] Although the Arakaki panel was dealing with the Hawaiian Home lands at that point, it made the same ruling, relying on the same rationale, with respect to the other non-Hawaiian Home lands ceded lands as well (i.e., those lands off of which OHA derives a portion of its revenues). See Arakaki, 477 F.3d at 1065-66 (applying same rationale to plaintiffs' challenge to trust funds going to, and expended by, **OHA**, and stating that "Plaintiffs' attempt to challenge OHA's expenditure of trust revenue thus suffers from the same fatal flaw as its challenge to the [Hawaiian Home lands HHCA] lease eligibility requirements").

necessarily challenging the constitutionality of the Admission Act, the United States, as explained in both Carroll and Arakaki, is a required party so as to provide redressability. But because plaintiffs have no standing to sue the United States,[7] the suit must be dismissed on indispensable party grounds.

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[7] The district court below, see CR 83 ER 2 at 17, correctly ruled that Arakaki makes clear that Plaintiffs have no standing to sue the United States. See Arakaki, 477 F. 3d at 1066 ("Plaintiffs cannot establish standing to sue the United States either as taxpayers or as trust beneficiaries."). Plaintiffs cannot sue the United States under a **trust beneficiary** theory, as the United States is not a trustee of the 5(f) trust. See Arakaki, 477 F.3d at 1057-59 ("Any lingering doubt over the United States' role as trustee was eliminated entirely in the Admission Act when the United States 'grant[ed] to the State of Hawaii, effective upon its admission in the Union, the United States' title to **all** the public lands and other public property, . . . title which is held by the United States immediately prior to its admission into the Union.' . . . . '[t]he United States has only a somewhat tangential supervisory role of the Admission Act, rather than the role of trustee.' . . . . [Accordingly], Plaintiffs lack standing to sue the United States").

Nor could plaintiffs sue the United States as **taxpayers**. They could not sue as federal taxpayers, as there is no such federal taxpayer standing (except for the narrow exception provided in Establishment Clause challenges), see Daimler-Chrysler Corp. v. Cuno, 547 U.S. 332, 347-49 (2006), nor could they sue the United States (or the State, for that matter) as **state** taxpayers, given the main ruling of DaimlerChrysler, which held that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." See DaimlerChrysler, 547 U.S. at 346.

Moreover, even if DaimlerChrysler had come out the opposite way, and authorized state taxpayer standing suits in general, plaintiffs would have no standing to bring such a taxpayer suit against the **United States** because the expenditure of state taxpayer moneys by the State (or OHA) is not mandated by the Admission Act or any other federal law. Cf. Arakaki, 477 F.3d at 1060 (concluding that "[a]s state taxpayers, Plaintiffs have no basis for suing the United States," in large part because the expenditure of state taxpayer money "in support of the [HHCA] lease program is not mandated by the Admission Act or any **(cont. =>)**

In the very different cases that plaintiffs rely upon, the challengers there were seeking to enforce Section 5(f) of the Admission Act, and thus were not mounting any challenge to the Admission Act. Here, by contrast, plaintiffs necessarily seek to have a part of the Admission Act -- Section 5(f)'s "betterment of the conditions of native Hawaiians" provision -- not enforced on the ground that it is unconstitutional, thereby challenging the Admission Act. Indeed, the Arakaki panel specifically noted this very distinction:

> Although the United States cannot be sued on Plaintiffs' trust beneficiary theory, Plaintiffs nevertheless argue that they may at least sue the state defendants on the same theory. Plaintiffs point to several cases in which we have held that native Hawaiians, as trust beneficiaries, could bring suit under 42 U.S.C. § 1983 against the State to enforce the terms of the trust. *E.g. Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990); []; *Price v. Akaka*, 3 F.3d 1220, 1223-25 (9th Cir. 1993). Those cases involved claims that the state was improperly administering the trust and sought to enforce the trust's terms.
>
> We believe that this argument is disposed of easily. Those cases differ from the present challenge in a fundamental way: although those previous § 1983 cases have involved suits to enforce the express terms of the trust, this suit, by contrast, asks the court to prohibit the enforcement of a trust provision. That is, Plaintiffs now raise a § 1983 claim that is unique in that it does not seek to *enforce* the substantive terms of the trust, but instead challenges at least one of those terms as constitutionally *unenforceable*.

Arakaki, 477 F.3d at 1058. Of course, the reason the distinction above is a valid one is not because of any "trust law" distinction, but simply because suits to

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other federal law."). While Arakaki in that section was discussing the Hawaiian Home lands, the point applies equally well to the other § 5(f) ceded lands, too. Nothing in the Admission Act or any other federal law requires the State (or OHA) to expend state taxpayer money on programs for native Hawaiians.

enforce Section 5(f) do not raise challenges to the Admission Act, whereas suits seeking to bar enforcement of Section 5(f) do challenge the Admission Act.[8]

Plaintiffs attempt to undermine the distinction by suggesting that preventing trustees from carrying out an unconstitutional trust term is the same thing as "enforcing" the trust. But plaintiffs miss the key point, which is not enforcement or non-enforcement per se, but rather whether plaintiffs challenge the Admission Act in the process. Even if preventing trustees from carrying out an unconstitutional trust term is characterized as "enforcement" of the trust, doing so requires challenging the Admission Act, whereas in the other cases plaintiffs rely upon (Day, Price, and Akaka, discussed more fully infra at 22-23), enforcing the trust did not involve challenging the Admission Act.

Moreover, as explained elsewhere, at 12-13, 20-22, Arakaki actually followed and applied the earlier Ninth Circuit decision in Carroll v. Nakatani. In sum, Arakaki makes sense, is fully consistent with other Ninth Circuit decisions, and actually follows the earlier Carroll decision of this Circuit. Therefore, not only is Arakaki binding on this three-judge panel, see Miller v. Gammie, supra, but there is little reason for this Court to consider a potential later en banc review, were

[8] The same distinction applies with equal force to plaintiffs' citation of Day v. Apoliona, 496 F.3d 1027 (9th Cir. 2007), in which plaintiffs there likewise sued to enforce Section 5(f) of the Admission Act, not to challenge the Admission Act as legally unenforceable.

plaintiffs to later seek it. Indeed, plaintiffs sought certiorari review of the Arakaki decision for essentially the same reasons as provided in this appeal, but the United States Supreme Court denied their certiorari petition. See 547 U.S. 1200 (2006).

D. Rule 19 analysis was inherent in *Arakaki v. Lingle* ruling.

Plaintiffs argue that the Arakaki v. Lingle ruling lacked proper Rule 19 analysis. Again, this three-judge panel is bound by the Arakaki indispensable party ruling, and that by itself negates plaintiffs' attack. But plaintiffs' argument is substantively without merit in any event. The Arakaki court effectively applied Rule 19 analysis by first concluding that without the United States as a party, plaintiffs would not be able to obtain redress of their injury. See See Arakaki, 477 F.3d at 1059 (relying upon, and explaining Carroll indispensable party ruling as flowing from the fact that without the United States as a party, plaintiff's "injury was not redressable."). This fits perfectly into Rule 19(a)(1)(A)'s language that a party should be joined "if . . . in that person's absence, the court cannot accord complete relief among existing parties."

And the first part of subsection (b) of Rule 19, which requires that the needed party "cannot be joined," was also satisfied in Arakaki by the panel's conclusion that the United States could not be joined because plaintiffs lacked

standing to sue the United States.[9] The answer to the second part of Rule 19(b) -- requiring "the court [to] determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed" -- was also clear given that absent the United States, Article III standing, which requires redressability,[10] would be missing. In other words, if the court lacks Article III jurisdiction over the case where the United States is not a party, then surely the "action . . . should be dismissed." Lack of Article III standing, after all, leaves no choice but dismissal; no amount of countervailing "equity and good conscience" could give the federal courts jurisdiction where none exists. See Gerlinger v. Amazon.com Inc., 526 F.3d 1253, 1256 (9th Cir. 2008) ("Article III standing is required to establish a justiciable case or controversy within the jurisdiction of the federal courts.").

E. The *Carroll* case's holding was not dicta; in any event, the indispensable party ruling in *Arakaki* was certainly not dicta; it is binding precedent.

Plaintiffs' argument in their Open. Br. at 31-33 is confusing because they mischaracterize their own argument. The Carroll case's conclusion that plaintiff's "claim is not redressable because he failed to include the United States as a party to

[9] See Arakaki, 477 F. 3d at 1066 ("Plaintiffs cannot establish standing to sue the United States either as taxpayers or as trust beneficiaries.").

[10] See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) ("irreducible constitutional minimum of standing" requires "that the injury will be 'redressed by a favorable decision.'")

the action," 342 F.3d at 944, was certainly not dicta; indeed, it was the holding of the case. What plaintiffs are really objecting to is that Arakaki extended the non-redressability holding in Carroll beyond the Hawaiian Home lands, applying it to other Section 5(f) ceded lands as well. See Arakaki, 477 F.3d at 1065-66 ("Plaintiffs' attempt to challenge OHA's expenditure of trust revenues . . . suffers from the same fatal flaw as its challenge to the [HHCA's Home lands] lease eligibility requirements"). Of course, the fact that Arakaki extended Carroll's logic to the other ceded lands as well does not make it any less binding; as a critical holding in Arakaki, it is undeniably binding upon this three-judge court.

In any event, the extension is legally compelling, as it would have been illogical to limit the required party ruling in Carroll to the Hawaiian Home lands. Both the native Hawaiian qualification for Hawaiian Home lands (challenged in Carroll),[11] **and** the "betterment of the conditions of native Hawaiians" purpose (challenged in Arakaki and in the case at bar),[12] are part of the same federal Admission Act. Thus, because Carroll held that the fact that the "native Hawaiian

[11] See Admission Act, Section 4 (requiring Hawaii to adopt the Hawaiian Homes Commission Act, which contains native Hawaiian qualification for homestead lessees in Section 208(1), and stating that "the qualifications of lessees shall not be changed except with the consent of the United States").

[12] As discussed in footnote 4, supra, this purpose applies to all Section 5(f) ceded lands, including lands not part of the Hawaiian Home lands. See Admission Act, Sections 5(b) & 5(f). [Note that Plaintiffs' references to Sections 4, 5, and 6, see Open. Br. at 33, refer **not** to sections of the federal Admission Act, but rather to sections of Article XII of the Hawaii Constitution.]

classification is . . . a federal requirement" means that "any change in the qualification requires the participation of . . . the United States," 342 F.3d at 944, then necessarily the fact that the "betterment" purpose is also a federal requirement -- in the same federal Admission Act, no less -- means that any challenge to that purpose "requires the participation . . . of the United States."

In sum, there is no reason not to extend Carroll's required party holding to the other 5(f) ceded lands as well. Arakaki's indispensable party ruling, therefore, was logically compelled by Carroll. In any event, it is binding.

F. *Arakaki* does *not* bar substantially all trust beneficiary suits; nor does it change established law of the Ninth Circuit.

Plaintiffs are simply misrepresenting Arakaki when they falsely claim that it bars substantially all trust beneficiary suits. In fact, Arakaki does nothing to bar the overwhelming majority of trust beneficiary suits in which trust beneficiaries seek to enforce the terms of the applicable trust. In those cases, the trust beneficiaries will not be challenging federal law, much less the federal Hawaii Admission Act, and thus Arakaki and Carroll will have no bearing whatsoever upon such suits, and will certainly not bar such suits.

Indeed, the prime example of such suits that are unaffected by Arakaki are the very cases plaintiffs cite as proving Arakaki wrong -- namely, those suits in which beneficiaries of Admission Act Section 5(f) sue to enforce the terms of the trust. See, e.g., Day v. Apoliona, 496 F.3d 1027 (9th Cir. 2007) (where native

Hawaiians sued to enforce "betterment of the conditions of native Hawaiians" provision claiming State improperly spent for the benefit of Hawaiians who were not "native Hawaiians" because they lacked the required 50% Hawaiian blood quantum); Price v. Hawaii, 764 F.2d 623, 625-26 (9th Cir. 1985) (seeking to enforce 5(f) betterment provision by requiring State to expend funds for the benefit of native Hawaiians); Price v. Akaka, 928 F.2d 824, 826 (9th Cir. 1991) (suit alleging "the trustees have expended the income on purposes other than those listed in § 5(f) . . . states a claim to enforce the provisions of § 5(f) of the Admission Act.").

As explained in Section C, supra, those cases were already distinguished in Arakaki itself, which differentiated between suits to enforce the trust (which do not challenge the constitutionality of the Admission Act's trust terms), versus suits challenging the constitutionality or legality of the Admission Act's trust terms. In sum, although this three-judge panel is bound by Arakaki in any event, Arakaki is fully consistent with past Ninth Circuit precedents, and does not bar most trust beneficiary suits in general, or under the Hawaii Admission Act, in particular.

G. Plaintiffs do not have standing to sue the United States.

Plaintiffs make two arguments attacking Arakaki's holding that plaintiffs do not have standing to sue the United States. Open. Br. at 39-42. Of course, because Arakaki did in fact hold that plaintiffs do not have standing to sue the United States, see Arakaki, 477 F. 3d at 1066 ("Plaintiffs cannot establish standing to sue

the United States either as taxpayers or as trust beneficiaries."), this three-judge panel is bound by that holding.

But plaintiffs' arguments in support of standing are, irrespective of Arakaki's binding holding, without merit in any event. Plaintiffs first appear to argue that because sovereign immunity is no longer available to the United States in certain instances, the United States can be made a party to the case. But the sovereign immunity of the United States had absolutely nothing to do with Arakaki's conclusion that plaintiffs could not sue the United States. Plaintiffs in Arakaki, as well as in the case at bar, could not sue the United States because they lacked standing to sue the United States, not because the United States had sovereign immunity from suit. Sovereign immunity had nothing whatsoever to do with Arakaki's indispensable party ruling.

Next, plaintiffs argue that suits brought directly under the Constitution against federal officials are "roughly comparable to suits brought against state officials under § 1983," and that Butz v. Economou, 438 U.S. 478 (1978), as a consequence, held both state and federal officials to comparable levels of either absolute or qualified immunity. But the fact that United States officials may have no greater immunity -- be it absolute or qualified immunity -- than state officials has nothing to do with Arakaki's indispensable party ruling. As with plaintiffs' sovereign immunity theory, plaintiffs' qualified immunity theory is equally

irrelevant. Plaintiffs in Arakaki, and in the case at bar, were precluded from suing the United States because they lacked Article III standing to sue the United States, not because the United States (or its officials) had absolute or qualified immunity from their suit. Plaintiffs' theories are patently frivolous.

H. Plaintiffs' argument that the Ceded Lands trust generates no net income from which distributions to beneficiaries may lawfully be made should be rejected for multiple independent reasons.

Unable to get around the Arakaki indispensable party ruling, plaintiffs launched an entirely new claim out of the blue, arguing (incorrectly) that the State has conceded that the ceded land trust generates no net income, and that the State is therefore barred from making any distributions from the trust to its beneficiaries. This claim must be rejected on many different, yet independent, grounds.

1. Plaintiffs do not even assert this claim in their Complaint.

First, this claim should be rejected because it has nothing to do with their Complaint, which does not make such a claim, and does not seek any such relief. Complaint (CR 1 ER 16) at pp. 424-426. See North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983) (In a "review on an appeal from a dismissal for failure to state a claim" "[o]ur inquiry is limited to the content of the complaint." "We need not reach issues for which there is no foundation in the

complaint.").[13] Although the above point by itself eliminates this claim from consideration, we note that the only amendment to the complaint plaintiffs would have sought was adding the United States as a party defendant, not adding their claim regarding an alleged lack of net income. See 7/1/08 Transcript (ER 3) at 49-50.

Plaintiffs' attempt to inject material outside of the complaint, see CR 74 State Defendants' Supp. Excpt. Rec. 74 (plaintiffs' motion for leave to file supplemental brief referencing additional evidence purporting to demonstrate that ceded lands generate no net income), was rejected, see CR 81 & 7/1/08 Transcript (ER 3) at 51 ("The motion for supplemental briefing . . . is denied"), and the district court, in any event, never considered that evidence in granting the State's and OHA's motions for judgment on the pleadings. See CR 83 ER 2 (not mentioning any evidence[14]). In addition, the district court specifically stated that it was granting motions for judgment on the pleadings (which "doesn't entail any evidence"), not motions for summary judgment. CR 83 ER 2 at 3 & 17-18; 7/1/08 Transcript (ER 3) at 50-51. For these reasons, plaintiffs cannot force this appellate Court to look

[13] Although the district court granted the State's and OHA's motions for judgment on the pleadings, rather than motions to dismiss, the standard is the same. McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988) ("motion for judgment on the pleadings faces the same test as a motion under Rule 12(b)(6)").

[14] Although the district court did note plaintiffs' "assert[ion] that they recently learned that the § 5(f) trust generates no income net of expenses," CR 83 ER 2 at 12 n.3, the district court never referenced any evidence regarding that claim, which is not surprising as the court had, at the 7/1/08 hearing, rejected plaintiffs' motion for leave to file their supplemental brief, which referenced the evidence.

beyond the Complaint, and to the additional material they sought to include by way of their motion to file a supplemental brief. As made clear in North Star, 720 F.2d at 581-82, an appellate court will not consider a claim not made in the complaint -- and will not deem a trial court's 12(b)(6) dismissal order to be one for summary judgment instead -- even though additional evidence going to that claim was submitted to trial court by plaintiff, where the trial court did not rely upon that evidence, and the trial court expressly treated defendants' motions as motions for judgment on the pleadings, not as motions for summary judgment.

> a motion to dismiss is not automatically converted into a motion for summary judgment whenever matters outside the pleading happen to be filed with the court and not expressly rejected by the court. In *Lodge 1380*, we held that the district court properly dismissed for failure to state a claim upon which relief could be granted because nothing in the record suggested reliance on the affidavit and the district court had expressly indicated that it was dismissing for failure to state a claim upon which relief could be granted. . . . . Here, as in *Lodge 1380*, there is no indication that the district court relied on the documents filed with North Star's earlier filed trial memorandum in ruling on the Arizona Commission's motion to dismiss. . . . Moreover, the order of dismissal expressly states that it is for failure to state a claim upon which relief can be granted. Under these circumstances, we hold that the district court properly treated the motion as a motion to dismiss and was not required to follow summary judgment procedures.

Id. As in the North Star case, the district court here did not consider plaintiffs' evidence (regarding their theory about the ceded lands generating no net income), see footnote 14, supra, and specifically treated defendants' motions as motions for judgment on the pleadings, not for summary judgment, as noted above.

In addition, Plaintiffs' attempt below to even submit the evidence (going to a

claim not made in the Complaint) to the district court was rejected (as court denied their motion to file a supplemental brief referencing such evidence).[15] Plaintiffs here do not appeal that rejection. For this reason, plaintiffs' motion to supplement the record on appeal (dated November 20, 2008) -- to put in the record material going to a claim not made in the Complaint, and which material was never admitted into evidence by the district court -- should therefore be denied.

In sum, because plaintiffs never brought their no-net-income theory claim in their complaint, it should be ignored. Furthermore, because no evidence supporting that claim was ever admitted, much less considered, by the district court, the claim was properly rejected in the court's grant of judgment on the pleadings.

But even if this Court, contrary to the above, were to consider plaintiffs' no-net-income theory claim (despite its absence from their complaint), and accept as record evidence the evidence they wanted to submit below regarding that claim (despite the district court's not admitting any such evidence), the claim fails on the merits, for the many independent reasons demonstrated below.

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[15] In addition, plaintiffs' attorney, although apparently bringing some of that evidence with him to the July 1, 2008 hearing, never had any of that evidence admitted into evidence, see 7/1/08 Transcript (ER 3) (nowhere in the transcript is evidence admitted into evidence by the district court), and, in fact, the district court expressly refused to admit any evidence. 7/1/08 Transcript (ER 3) at 50-51 (refusing to accept offer of proof, and stating "I'm granting the motion for judgment on the pleadings. That doesn't entail any evidence.").

2. The State's submissions in the *Day* case do **not** show that the State spends more on improving or maintaining the ceded lands than it receives in money from the ceded lands.

First, plaintiffs' theory is premised entirely on the claim that the State's submissions in the Day v. Apoliona case establish that "the Ceded Lands Trust costs the State many times more annually than the 1.2 million acres bring in." Open. Br. at 42. Although entirely irrelevant (as demonstrated in subsection 3, infra), this claim is patently false. The State's submissions in the Day case only establish that the State appropriated more total state monies for some **5(f) purposes**,[16] like public education, than it received from use of the ceded lands.[17] It does not establish that the **ceded lands** has cost the State more than it receives from their use. Spending on 5(f) purposes is plainly not the same as spending on improving or maintaining the ceded lands, for two simple reasons: 1) some 5(f)

[16] For example, the State's Concise Statement of Facts in Day (filed June 4, 2008) indicates multi-billion dollar average annual appropriations of general funds on "primary, elementary, and secondary education in the State's public schools," and "for the University of Hawaii system." See Plaintiffs' Supp. Excpt. Rec. 3 at 47 ¶¶ 1-3. Such spending falls within Section 5(f)'s "for the support of the public schools and other public educational institutions." Also, the concise statement establishes issuance of an average annual $200 million in general obligation bond proceeds for "capital or public improvement projects." See id. at ¶ 4 ($1.0 billion divided by 5 fiscal years = $200 million) Such spending falls within Section 5(f)'s "for the making of public improvements." As explained in the text, these figures say little about what the State spends on improving or maintaining the ceded lands.

[17] The State's concise statement indicates that in fiscal years 2006 and 2007 "State agencies . . . reported collecting over $116.3 and $128.4 million, respectively, from the use of ceded lands." Plaintiffs' Supp. Excpt. Rec. 3 at 47-48 ¶5.

purposes may be served fully, or in part, without improving or maintaining any land (e.g., "support of the public schools"), and 2) some of the land improved or maintained to serve 5(f) purposes may be non-ceded lands. For example, expenditures to fund the salaries of public school teachers or University of Hawaii professors who may teach classes on ceded lands are not expenditures for improving or maintaining the ceded lands. Rather, such expenditures are spent on providing students with a public education.

In addition, there is nothing in the material plaintiffs cite to prove that even those expenditures that could properly be characterized as improving or maintaining land were necessarily accomplished on ceded lands, as opposed to non-ceded lands.[18] In sum, plaintiffs' "evidence" -- even if it were admitted and considered part of the record (of course, in fact, it was not admitted or considered below, see discussion supra at 26-28) -- does not establish that the State has spent more on the ceded lands than those lands have generated in receipts. Plaintiffs' theory, therefore, has no evidentiary leg to stand on.

[18] For example, plaintiffs point to the State Director of Finance's declaration and exhibit showing $237.5 million interest paid for fiscal year 2007 on general obligation bonds "to fund various capital improvement projects." Plaintiffs' Supp. Excpt. Rec. 3 at 51 ¶ 6 & at 70 Exh. "H." Plaintiffs simply assume those capital improvement projects were entirely for improvements to ceded lands. See Open. Br. at 44 ("**presumably** for capital improvement projects to the ceded lands"). But there is no evidence that the referenced capital improvement projects were on ceded lands; some of the improvements could have been on non-ceded lands.

3. Even if plaintiffs had established that the State spends more on the ceded lands than it receives in money from the ceded lands, that would do nothing to support plaintiffs' claims in this case.

Even if the plaintiffs had proven that the State spends more on improving or maintaining the ceded lands than it receives in money from the ceded lands, that fact would be entirely irrelevant and does nothing to support plaintiffs' claims in this case. This is true for two separate and independent reasons. **First**, plaintiffs' theory that Section 5(f) somehow prohibits the State from expending any ceded land receipts for 5(f) purposes if the State has spent more money on the ceded lands than it receives in monies from the ceded lands is simply an invalid theory. We shall refer to plaintiffs' theory as the "**net income theory**."

Second, even if the net income theory were correct, it does nothing to revive plaintiffs' claims in this case, which seek to prevent trust monies from being spent on Native or native Hawaiians to the exclusion of non-Hawaiians.

a. Plaintiffs' net income theory is invalid.

Nothing in the language of 5(f) suggests that only "net income" from the ceded lands be used for the five purposes. Indeed, the language suggests the opposite. First, 5(f) requires that "proceeds from the sale or other disposition of any such lands" be used for one or more of the five purposes, including for the betterment of the conditions of native Hawaiians. This requirement is entirely independent of whether or not the ceded lands as a whole generate a profit. This proves

that "net income" is not the standard under 5(f) for what can be used for the five purposes. Rather, proceeds from the "sale or other disposition" of a parcel of ceded lands can be so used for the five purposes regardless of whether the ceded lands as a whole generate a "profit." Thus, the "proceeds" language of 5(f) contradicts plaintiffs' "net income" theory. To take a simple example: if the ceded lands consisted of parcels A and B, with parcel B "losing" $10 million each year (i.e., monies spent improving or maintaining parcel B exceed revenue generated by parcel B by $10 million each year), and parcel A was then sold for $2 million, the plain language of 5(f) would authorize the State to use the $2 million dollars (which are surely "proceeds from the sale . . . of any such lands") for the five purposes, even though there may be, in plaintiffs' view, a trust "net loss" for the year of at least $8 million (and maybe more, if the sale revenue is not considered all "profit").

Furthermore, 5(f) requires that "the income" from the ceded lands be used for the five specified purposes. Because the term "income" was used, rather than the distinctly different term "net income," plaintiffs' net income theory is directly contradicted. The term "income" is defined as "the monetary payment received for goods or services, or from other sources, such as rents or investments; revenue; receipts." Random House Webster's College Dictionary (1991) (emphasis added). This is to be contrasted with the definition of "net income" which is "the excess of revenues over expenses and losses." Id.

In sum, the language of 5(f) directly contradicts plaintiffs' net income theory. Moreover, nothing in the Admission Act even remotely forbids the State from paying for the upkeep or improvement of ceded lands from general tax revenues for example, and spending ceded lands receipts for 5(f) purposes. The State could, for example, spend billions in general tax revenues for public education (even if it involves improving or maintaining the ceded lands), and still spend all of its receipts from the ceded lands (even though only in the millions) for farm and home ownership, for provision of lands for public use, for more public education, or for the betterment of the conditions of native Hawaiians. Indeed, section 5(f) gives the State the discretion to do as it pleases in this regard, as it states that "[s]uch lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide . . . ." That the State spends huge sums on public education (even assuming those expenditures involve improving or maintaining ceded lands) does not forbid the State from spending ceded land receipts (even if much lower) for the betterment of the conditions of native Hawaiians, or the other four purposes.

In short, the State can pay for improving or maintaining the ceded lands any way it chooses, and can distribute receipts from the ceded lands any way it wishes, so long as it chooses one or more of the five purposes set out in section 5(f). See discussion of Price case below. Indeed, the imposition of a net income theory,

which would severely cabin the State's discretion in managing 5(f) ceded land proceeds, is wholly inconsistent with Ninth Circuit jurisprudence recognizing the State's broad discretion in managing the 5(f) trust.

> Under the [Admission] Act, the ceded lands are to be held upon a public trust, and under section 5(f) the United States can bring an action if that trust is violated. However, nothing in that statement indicates that the parties to the compact agreed that all provisions of the common law of trusts would manacle the State as it attempted to deal with the vast quantity of land conveyed to it for the rather broad, although not all-encompassing, list of public purposes set forth in section 5(f). . . . .
>
> Here the language of section 5(f) declares that the State is to have the power to manage the property and its income in a manner that the constitution and laws of the State provide. That confers a broad authority upon the State. . . . . Given that, it would be error to read the words "public trust" to require that the State adopt any particular method and form of management for the ceded lands. All property held by a state is held upon a "public trust." Those words alone do not demand that a state deal with its property in any particular manner . . . . Those words betoken the State's duty to avoid deviating from section 5(f)'s purpose. They betoken nothing more.
>
> Therefore, it is not for us to declare that certain methods of holding, managing, and accounting for the ceded lands and income must be followed by the State and its officials. Whether the trust administration paradigm or some other paradigm informs the management method selected is a matter for the State's determination.
>
> That does not mean that the State can do what it likes with the property and the income. Rather, the federal courts must ultimately determine whether the property has been diverted from section 5(f) purposes. . . . .
>
> . . . . [O]ur reading of section 5(f) rests on the apparent decision by the parties involved in the Act that the State and its officials would proceed with a certain degree of good faith and need not be held to strict trust administration standards. Our reading also helps assure that the federal courts will not become involved in the micro management of the government of the State. While we must stand ready to correct diversions of funds from the listed purposes, we need not and

> should not immerse ourselves in the day-to-day activities of state officials as they struggle with the immense task of managing the resources of the State for public purposes.

Price v. State of Hawaii, 921 F.2d 950, 955-56 (9th Cir. 1990) (emphasis added). Preventing the State from using gross income or proceeds (limiting it to using net income) to further the trust purposes would be the ultimate in "micro management of the government of the State," and would amount to "declar[ing] that certain methods of holding, managing, and accounting for the ceded lands and income must be followed by the State and its officials." Plaintiffs' net income theory is flatly contradicted by Price's holding that 5(f) does "not demand that a state deal with its property in any particular manner," and that the trust duty "betoken[ed] the State's duty [only] to avoid deviating from section 5(f)'s purpose[;] . . . nothing more." Id.

Finally, plaintiffs' interpretation of 5(f) makes no sense and yields absurd results. For example, if the State were to set aside a parcel of ceded land as a public park (with no admission charge) -- which surely qualifies as "the provision of lands for public use," a listed 5(f) purpose -- yet spend $1,000,000 a year to maintain the park, the park would provide a clear public benefit that is measured not in terms of monetary receipts (of which there are none), but in terms of the improved quality of life for the park-going members of the public. If the State were to one day decide to charge an admission fee to the park, and raised $200,000

annually by doing so, surely it could use that $200,000 of income to further one or more of the five 5(f) purposes. Yet plaintiffs' net income theory would absurdly prohibit using the $200,000 for one or more of the five purposes because there is no net monetary income.

Moreover, if the State could not use the $200,000 for the five purposes, would that mean the State would have to put the money aside, potentially forever, until there is a net monetary income? That result would surely not better effectuate the purpose of the 5(f) public trust, which was to provide lands for the support of the five specified purposes; requiring the gross income generated from the lands to sit idle, or at least not be used until some future date (and possibly ever) could not be the mandate of 5(f). Alternatively, are plaintiffs suggesting that the $200,000 must be returned to, say, the State's general fund (out of which the $1,000,000 in park upkeep may have been paid) to reimburse it for those disbursements? Although that, too, may be a permissible outcome, benefitting the State's general fund, Congress did not in any way mandate such a result. Surely the decision as to what to do with the $200,000 in receipts falls within the State's "broad authority" under Price to manage the 5(f) lands and their income and proceeds. The only obligation Price imposed on the State was to ensure that the State not "deviat[e] from section 5(f)'s purpose;" a State's decision to expend the $200,000 on the 5(f) purposes (rather than to hold on to it, or return it to the general fund) plainly falls

within that mandate.

In sum, plaintiffs' net income theory must be rejected because it violates the language of 5(f), contradicts Ninth Circuit case law giving the State broad discretion to manage the 5(f) ceded lands, and leads to absurd results.

b. Even if Plaintiffs' net income theory were valid, it does not further the relief they seek of barring trust monies from being spent on Native or native Hawaiians to the exclusion of non-Hawaiians.

Even if plaintiffs' net income theory were valid, it does not in any way support the relief plaintiffs seek in this case. Plaintiffs in this suit, after all, are not seeking to prevent 5(f) ceded land receipts from being expended at all; rather, they seek only to prevent the State and OHA from expending those receipts on Native or native Hawaiians to the exclusion of non-Hawaiians.[19] It is therefore impossible to understand how plaintiffs' net income theory -- which seeks to bar the State from expending any ceded land receipts for any of the 5(f) purposes, including

[19] See Complaint (CR 1 ER 16) at 424-426, Prayer ¶ A (seeking declaratory relief that "giv[ing] persons of Hawaiian ancestry . . . rights, privileges and immunities" or "title or interest in the ceded lands trust, or the income or proceeds there from" not given "equally to other citizens of Hawaii" violates the "common law of trusts . . . and the Equal Protection [clause.]"); ¶ B (seeking to "enjoin the OHA defendants from spending any further public monies" in support of various legislation or programs benefiting Native or native Hawaiians); ¶ C (seeking to "enjoin the State defendants from spending any further public moneys " in support of various legislation or programs benefiting Native or native Hawaiians, or from "making . . . further transfers of public moneys . . . to or for OHA and from otherwise carrying out . . . the OHA laws"); ¶ D (seeking an order requiring "OHA defendants to transfer to the appropriate State defendants all . . . property of any kind, and all earnings thereon and growth thereof, held by or for OHA").

supporting the public schools, developing farm or home ownership, for public improvements, or for the provision of lands for public use -- would in any way support the relief plaintiffs seek. Plaintiffs' net income theory, after all, does not differentiate between 5(f)'s "betterment of the conditions of native Hawaiians" purpose -- which plaintiffs attack in this case -- and the other four purposes, which plaintiffs essentially contend are the only valid, and thus, operative purposes.

*** *** ***

In sum, plaintiffs' net income theory is not supported by evidence, wrong as a matter of law, and of no consequence to the relief they seek in any event.

I. Plaintiffs' trust arguments regarding income beneficiaries, a prior State brief, and impartiality are frivolous.

Plaintiffs' citation to trust laws dealing with income and remainder beneficiaries who are distinct -- along with the proposition that income beneficiaries can only receive "net income" -- has no relevance to the Admission Act's Section 5(f) provision. The Admission Act's 5(f) provision does not create separate or distinct income and remainder beneficiaries. It provides only that the land, and the income and proceeds generated, be used for up to five purposes. There is no basis, therefore, for barring the State from using all revenues derived from the ceded land trust (even if there is no "net income") for the five purposes.

Plaintiffs' citation to a brief filed by the State of Hawaii over 11 years ago in the Hawaii Supreme Court, Open. Br. at 47-49, is not to the contrary. That brief

dealt not with the meaning of Admission Act Section 5(f), but rather with the meaning of Hawaii **state** statutory provisions, which specified the State's voluntarily chosen method at that time of implementing Section 5(f)'s authorization to use ceded land for the betterment of the conditions of native Hawaiians. The Hawaii statute, Haw. Rev. Stat. § 10-13.5 (1993), directed that 20% of "revenue" derived from the public land trust be expended by OHA for the betterment of the conditions of native Hawaiians, with "revenue" having a specific statutory definition at Haw. Rev. Stat. § 10-2 (1993). The State in that brief was not arguing the meaning of Admission Act Section 5(f), but only the meaning of the state statutory provisions. There is therefore no inconsistency at all in the State defending a narrow definition under the state statutes, while urging a broad definition under the federal Admission Act. The two laws are very different, and serve different purposes. The Admission Act, as explained in Section H.3.a, supra at 31-37, gives the State broad discretion to use the ceded lands, and its income and proceeds -- and to even use gross revenue, if it so chooses -- for the five purposes. The Hawaii state statute, on the other hand, was focused on setting aside to OHA a certain amount of "revenue" (20%) to serve the one particular purpose of bettering the conditions of native Hawaiians. The State's brief simply argued that the 20% set aside for that purpose should be calculated on "net income," not gross income. That argument in no way contradicts the State's argument here that Section 5(f) authorizes the State to use

gross income or revenue for one or more of the five purposes.[20]

Plaintiffs then argue that 5(f) does not authorize the distribution of principal. Open. Br. 49-50. Although nothing in the language of 5(f) clearly supports such a position, there is no basis for plaintiffs' implicit claim that the State has distributed "principal." Even if we assume, *arguendo*, that the State uses taxpayer monies from the general fund to improve a parcel of ceded land, and that the parcel generated less receipts than those taxpayer monies input, the distribution of those receipts would not constitute the distribution of principal. The principal, namely the ceded land, would still remain.

Plaintiffs also argue that 5(f) does not authorize distribution of income to "some beneficiaries at the expense of others." Open. Br. at 50. This claim is frivolous. Section 5(f), by its plain language authorizing use of the ceded land and its proceeds and income "for the betterment of the conditions of native Hawaiians," authorizes the State to distribute income to benefit native Hawaiians, which may obviously be at the "expense of" (in plaintiffs' view) non-native Hawaiians. Section 5(f), after all, expressly states that the ceded land and its proceeds and income may

[20] Take the example set forth, supra, at 35-36, where the State spends $1,000,000 a year to maintain a public park, which generates $200,000 in admission fees. The State's argument in this case is simply that the State is permitted by Section 5(f) to use the $200,000 in admission fees for the five purposes, even though the park generates no net income. The State's argument made in the brief filed 11 years ago is not inconsistent with that position. Rather, that brief's argument simply means that OHA would not be entitled to 20% of the $200,000, but rather only 20% of the net income, which is negative $800,000, leaving OHA entitled to nothing.

be used for "one **or** more" of the five purposes, which means the State could lawfully decide to use all of the assets for the native Hawaiian betterment purpose, to the exclusion of the other four purposes.

For this same reason, plaintiffs' arguments regarding trusts having to be managed impartially is equally frivolous. Section 5(f), as just described, explicitly authorizes the State to engage in "partiality" in favor of native Hawaiians. Indeed, plaintiffs cite, Open. Br. at 51-52, a statutory provision that says that "a fiduciary shall administer a trust or estate impartially . . . except to the extent that the terms of the trust . . . clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." Haw. Rev. Stat. § 557A-103.[21]

Finally, plaintiffs argue that the State has a duty not to comply with trust terms that are illegal or violate public policy. Open. Br. at 52-54. As already explained earlier, plaintiffs cannot challenge the constitutionality or legality of Section 5(f) because the United States, under Arakaki, is an indispensable party to

[21] Although, as just explained, the State is authorized by 5(f) to be "partial" in favor of native Hawaiians, and even to do so 100% to the complete exclusion of non-native Hawaiians, plaintiffs falsely suggest in their Open. Br. at 52 that the State is in fact engaged in such a complete exclusion. In fact, the State devotes at most 20% of the "funds derived from the public land trust" for native Hawaiians. See HRS § 10-13.5 (Supp. 2008). The remainder is used for "one or more of" the other four purposes. See Admission Act Section 5(f).

such a challenge.[22] To the extent plaintiffs are attacking the State's alleged

[22] Plaintiffs, therefore, should not even be discussing the merits of their Equal Protection challenge in this appeal. But because they do, see Open. Br. at 53-54, we simply note that the State strongly disagrees with that analysis. First, there is serious doubt that plaintiffs even assert a classification based on distinctions between ethnic groups; for example, spending on the Akaka Bill versus spending against the Akaka Bill or spending the money on other matters, presents at best a classification involving legislative priorities, not a classification distinguishing ethnic groups.

Second, even putting that aside, and assuming, *arguendo*, that plaintiffs do challenge a classification distinguishing native Hawaiians (or Native Hawaiians) from non-Hawaiians, it is State Defendants' strongly held position that such a classification does not involve a suspect classification, given existing precedents upholding preferences for Native Americans and Alaska Natives. See, e.g., Morton v. Mancari, 417 U.S. 535, 555 (1974) (upholding preferences for American Indians where "tied rationally to the fulfillment of Congress' unique obligation toward the Indians"), Alaska Chapter v. Pierce, 694 F.2d 1162, 1168 (9th Cir. 1982) (upholding preference for Indians and Alaska Natives because it "furthers Congress' special obligation, [and is thus] a political rather than racial classification, even though racial criteria might be used in defining who is an eligible Indian."). These cases, among many, support upholding preferences for indigenous native peoples, which Native Hawaiians certainly are. See Naliielua v. State of Hawaii, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990) (ruling that native Hawaiians are subject to the Mancari doctrine, and that Congress's authority over Indian affairs extends to native Hawaiians); Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982) (Because "we are dealing with relationships between the government and aboriginal people . . . [r]eason . . . dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.").

Plaintiffs' reference to ordinary affirmative action cases, e.g. Adarand Constructors v. Pena, 515 U.S. 200 (1995), simply misses the mark, by ignoring the more relevant line of cases upholding special treatment of native peoples. The decision in Rice v. Cayetano, 528 U.S. 495 (2000), expressly declined to decide whether "Congress may treat the native Hawaiians as it does the Indian tribes." 528 U.S. at 518-19. (Also, Rice decided only a Fifteenth Amendment voting rights claim, not a Fourteenth Amendment Equal Protection claim.).

distributions beyond "net income," that claim was disposed of above in Section H, supra.

CONCLUSION

For the foregoing reasons, the judgment below should be AFFIRMED.

DATED: Honolulu, Hawaii, January 2, 2009.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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s/Girard D. Lau
GIRARD D. LAU
Deputy Attorney General

Attorney for State Defendants-Appellees

Dated: January 2, 2009.

STATEMENT OF RELATED CASES

State Defendants-Appellees are unaware of any cases, not already mentioned in Plaintiffs' Opening Brief, pending in this Court that are related to this case.

DATED: Honolulu, Hawaii, January 2, 2009.

s/Girard D. Lau
GIRARD D. LAU
CHARLEEN M. AINA
Deputy Attorneys General
Attorneys for State Defendants-Appellees

[Addendum separator distinctively colored page]

ADDENDUM INDEX

THE ADMISSION ACT

An Act to Provide for the Admission of the State of Hawaii into the Union

(Act of March 18, 1959, Pub L 86-3, 73 Stat 4)

* * * *

§4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the ''available lands'', as defined by said Act, shall be used only in carrying out the provisions of said Act.

Law Journals and Reviews

Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts. 14 UH L. Rev. 519.

The Native Hawaiian Trusts Judicial Relief Act: The First Step in an Attempt to Provide Relief. 14 UH L. Rev. 889.

Case Notes

In setting aside Hawaiian home lands, federal government undertook trust obligation benefitting aboriginal people. State assumed fiduciary obligation upon being admitted as a state. 64 H. 327, 640 P.2d 1161.

§5. (a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as ''available lands'' by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.

(d) Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States. [Am July 12, 1960, Pub L 86-624, 74 Stat 422]

(e) Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

* * *

Hawaiian Homes Commission Act (HHCA)

§208. Conditions of leases. Each lease made under the authority granted the department by section 207 of this Act, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(1) The original lessee shall be a native Hawaiian, not less than eighteen years of age. In case two lessees either original or in succession marry, they shall choose the lease to be retained, and the remaining lease shall be transferred, quitclaimed, or canceled in accordance with the provisions of succeeding sections.

Hawaii Revised Statutes

Haw. Rev. Stat. § 10-13.5 (1993)

§10-13.5 Use of public land trust proceeds. *[Validity of 1990 amendment and retroactivity to June 16, 1980. L 1990, c 304, §§16, 18.]* Twenty per cent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians. [L 1980, c 273, §1; am L 1990, c 304, §7]

Haw. Rev. Stat. § 10-2 (1993)

§10-2 Definitions. *[Validity of 1990 amendment and retroactivity to June 16, 1980. L 1990, c 304, §§16, 18.]* In this chapter, if not inconsistent with the context:

* * *

''Revenue'' means all proceeds, fees, charges, rents, or other income, or any portion thereof, derived from any sale, lease, license, permit, or other similar proprietary disposition, permitted use, or activity, that is situated upon and results from the actual use of lands comprising the public land trust, and including any penalties or levies exacted as a result of a violation of the terms of any proprietary disposition, but excluding any income, proceeds, fees, charges, or other moneys derived through the exercise of sovereign functions and powers including:

(1) Taxes;
(2) Regulatory or licensing fees;
(3) Fines, penalties, or levies;
(4) Registration fees;
(5) Moneys received by any public educational institution, including the University of Hawaii, and the community college system, from its educational programs and ancillary services, such as tuition, registration fees, meals, books, grants, or scholarships;
(6) Interagency and intra-agency administrative fees or assessments;
(7) Moneys derived from or provided in support of penal institutions and programs;
(8) Grants, carry-overs, and pass-throughs;
(9) Federal moneys, including federal-aid, grants, subsidies, and contracts;
(10) Moneys collected from the sale or dissemination of government publications;
(11) Department of defense proceeds on state-improved lands; and
(12) Moneys derived from the development of housing projects as defined under section 201E-2 after the conveyance of the public land trust to the housing finance and development corporation except as provided under section 10-13.6. [L 1979, c 196, pt of §2; am L 1990, c 304, §3; am L 1992, c 318, §2]

Haw. Rev. Stat. § 10-13.5 (Supp. 2008)

§10-13.5 Use of public land trust proceeds. Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter. [L 1980, c 273, §1; am L 1990, c 304, §§7, 16]

Federal Rules of Civil Procedure

Rule 19. Required Joinder of Parties

(a) **Persons Required to Be Joined if Feasible.**

(1) ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) **When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) **Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) **Exception for Class Actions.** This rule is subject to Rule 23.

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: Honolulu, Hawaii, January 2, 2009.

/s/ Girard D. Lau
GIRARD D. LAU