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 [*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' OPPOSITION TO KUROIWAS' MOTION FOR INJUNCTION PENDING APPEAL

DECLARATION OF GIRARD D. LAU

EXHIBIT "A"

CERTIFICATE OF SERVICE

MARK J. BENNETT 2672
Attorney General of Hawaii
GIRARD D. LAU 3711
First Deputy Solicitor General
CHARLEEN M. AINA 1899
Deputy Attorney General
State of Hawaii
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360 Fax: (808) 586-1237
e-mail: girard.d.lau@hawaii.gov
charleen.m.aina@hawaii.gov
Attorneys for Governor and Executive Branch Defendants ("State Defendants-Appellees")

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,

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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STATE DEFENDANTS-APPELLEES' OPPOSITION TO KUROIWAS' MOTION FOR INJUNCTION PENDING APPEAL

Defendants 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"), hereby oppose Kuroiwas' Motion for Injunction Pending Appeal, filed March 12, 2009. **Plaintiffs' motion is essentially a repeat of the exact same frivolous arguments that have been rejected multiple times by both district courts and the Ninth Circuit. State Defendants-Appellees Answering Brief filed in this case on January 2, 2009, has already dealt with and refuted plaintiffs' frivolous arguments.**

A. Because the *Arakaki* flaw in plaintiffs suit gives them no chance of success, an injunction pending appeal is barred.

The Ninth Circuit has set forth the following general standard for preliminary injunctions:

> A preliminary injunction is appropriate "where plaintiffs demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in their favor."

E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 990 (9th Cir. 2006). The same standard applies to injunctions pending appeal. See Tribal Village of Akutan v. Hodel, 859 F.2d 662, 663 (9th Cir. 1988). As explained in State Defendants' Answering Brief, filed January 2, 2009, the Ninth Circuit's decision in Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007) -- making the United States an indispensable party to any suit challenging the Admission Act -- unambiguously requires plaintiffs' suit to be dismissed.[1] The District Court below agreed. CR 83 ER 2 at 7-9, 13. Thus, plaintiffs in this case have no chance of success on the merits.[2] Accordingly, plaintiffs' request for a injunction pending appeal must be denied outright. As the Ninth Circuit has made very clear:

> "The irreducible minimum [to obtain an injunction] ... is that the moving party demonstrate a fair chance of success on the merits or questions serious

[1] Rather than repeat here the argument spelled out in detail in that brief at 8-11, we hereby incorporate that brief by reference.

[2] Plaintiffs' claim that Arakaki does not apply outside the Hawaiian Home lands context, Pl. Mot. at 10-12 & n. 6, is frivolous. Although the Arakaki panel also dealt with the Hawaiian Home lands, 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 ... suffers from the same fatal flaw as its challenge to the [Hawaiian Homes Commission Act] lease eligibility requirements").

> enough to require litigation. **No chance of success at all will not suffice.**" *Sports Form, Inc. v. United Press Int'l[],* 686 F.2d [at] 753 (9th Cir. 1982).

E. & J. Gallo Winery, 446 F.3d at 990. Therefore, because Arakaki v. Lingle is fatal to plaintiffs' case here, plaintiffs' motion for injunction pending appeal should be denied at the outset. **There is no need to conduct any balancing of the harms**. See Global Horizons, Inc. v. U.S. Dep't of Labor, 510 F.3d 1054, 1058 (9th Cir. 2007) ("When . . . a party has not shown any chance of success on the merits, **no further determination of irreparable harm or balancing of hardships is necessary**."); Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982) (where movant "failed to show any chance of success on the merits[,] . . . **a determination of potential injury or a balancing of hardships [was] unnecessary"**). Accordingly, plaintiffs' motion for injunction pending appeal must be denied without further inquiry.[3]

B. Even assuming, *arguendo*, that plaintiffs could demonstrate serious questions going to the merits, plaintiffs have not demonstrated that the balance of harms tips sharply in their favor.

As explained above, the Arakaki v. Lingle indispensable party flaw in plaintiffs' case means that the injunction should be denied outright, without any need to balance the harms. But even if this Court were to assume, *arguendo*, that

[3] **To the extent plaintiffs rely in their motion upon their other argument, not part of their Complaint, involving their "no net income" theory, see Pl. Mot. at 15-18, that argument is utterly baseless and improper, as explained in detail in State Defendants-Appellees Answering Brief, filed January 2, 2009, at 25-38, 38-40 & n.20.**

plaintiffs could raise serious doubts as to the applicability of Arakaki v. Lingle to their case, and demonstrate serious questions on the merits of their constitutional and other legal challenges, because plaintiffs have not demonstrated that "**the balance of hardships tips sharply in their favor**," E. & J. Gallo Winery, 446 F.3d at 990, the injunction must still be denied.[4]

[4] Plaintiffs certainly have not demonstrated a **likelihood** of success on the merits which would trigger the more lenient standard requiring plaintiffs to only demonstrate a "possibility of irreparable injury." Id. This is true for two independent reasons: 1) it is certainly not "likely" that plaintiffs can overcome the indispensable party flaw the Arakaki v. Lingle case poses for their case, and 2) in light of 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."), it cannot be said to be "likely" that plaintiffs can overcome these decisions upholding preferences for indigenous native peoples, which Native Hawaiians certainly are. Indeed, the District Court for the District of Hawaii has already upheld native Hawaiian preferences under the Morton v. Mancari theory. 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). Plaintiffs' references to ordinary affirmative action cases, e.g. Shaw v. Reno, simply miss the mark, by ignoring the more relevant line of cases upholding special treatment of native peoples. At the very most, there are "serious questions" on the merits. The decision in Rice v. Cayetano, 528 U.S. 495 (2000), expressly declined to decide whether "Congress may treat the [N]ative 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.).

In any event, even if plaintiffs could show likelihood of success in overcoming both the Arakaki flaw and the caselaw upholding preferences for

1. The Balance of Harms Does Not Tip Sharply in Favor of Plaintiffs.

Plaintiffs' request for injunction must be denied because they cannot establish that "the balance of the hardships tips sharply in their favor." Indeed, the balance of harms actually tips sharply in State defendants' favor, although even a "draw" or slight imbalance in plaintiffs' favor would require denial of the injunction.

a. The Harm to the State of Hawaii, native Hawaiians and Hawaiians, and the public interest would be severe and irreparable.

Issuance of the requested injunction barring OHA from using its monies to support native Hawaiians or Hawaiians,[5] and barring the State of Hawaii from transferring proceeds or income from § 5(f) ceded lands to OHA, would cause irreparable harm to the State of Hawaii in many ways. First, it would prevent the

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native peoples, plaintiffs cannot meet even the more lenient injunction standard, as they cannot demonstrate even a "possibility of irreparable injury." See subsection B.1.b, infra, at 9-14.

[5] In this document, the term "native Hawaiian" (with lower case "n") shall refer to "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." HRS § 10-2 (defining "[n]ative Hawaiian"). The term "Hawaiian" or "Native Hawaiian" (with capital "N") shall refer to "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." HRS § 10-2 (defining "Hawaiian").

State of Hawaii -- which uses OHA to serve Hawaiians and native Hawaiians, see Haw. Const. Art. XII, Section 5;[6] HRS §§ 10-1(a) & 10-3[7] -- from carrying out its own **state** constitutional and statutory responsibility or authority to better the conditions of Hawaiians and native Hawaiians. See Haw. Const. Art. XII, Section 4[8]; HRS § 10-3.[9] An injunction would also prevent the State from exercising **federally** granted authority to "better[] the conditions of native Hawaiians." Admission Act, Section 5(f). For if the State of Hawaii cannot provide funds to OHA, and OHA is enjoined from spending its monies to benefit native Hawaiians or Hawaiians, then clearly both the State's ability to further its special trust

[6] "The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians."

[7] "The people of the State of Hawaii and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, betterment of the conditions for native Hawaiians. The people of the State of Hawaii reaffirmed their solemn trust obligation and responsibility to native Hawaiians and furthermore declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawaii." HRS § 10-1(a). "The purposes of the office of Hawaiian affairs include: (1) The betterment of conditions of native Hawaiians. . . . . (2) The betterment of conditions of Hawaiians." HRS § 10-3(1) & (2).

[8] "The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as 'available lands' by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public."

[9] See footnote 7 quotation of HRS § 10-3(1) & (2).

relationship under State law, as well as its authority to better the conditions of native Hawaiians as specified in the federal Admission Act, are curtailed or destroyed. Moreover, by cutting off all such OHA expenditures, and State transfers to OHA, the damage to the State's interests and responsibilities would be irreparable, as each and every day the State is prevented from helping to better the condition of native Hawaiians and Hawaiians, achievement of that goal is forever diminished. Allowing the State to later restart the funding, and OHA to later restart its programs, cannot fully compensate for the lost assistance to vulnerable Hawaiians and native Hawaiians during the time the injunction is in effect.

In addition, an injunction would not only irreparably harm the State of Hawaii, but it would seriously and irreparably harm the native Hawaiian and Hawaiian people themselves. For an injunction would obviously injure them by stopping a multitude of OHA programs designed to improve native Hawaiian and Hawaiian economic self-sufficiency, health, and education, and to preserve Hawaiian language, culture, and connection to the land. See, e.g. OHA 2008 Annual Report [Exh. "A"] (detailing the numerous OHA programs benefitting native Hawaiians and Hawaiians in a variety of ways).

In sum, issuance of an injunction would yield multiple victims: 1) irreparably injuring the State's own interest in carrying out its federal and state responsibilities and goals, and, at the same time, 2) irreparably harming the native

Hawaiian and Hawaiian people themselves, by threatening their health, education, economic welfare, and culture.

In addition, an injunction would surely have the effect of putting OHA officers and employees out of a job, as they would have little, if anything, to do in the wake of the requested injunction.[10] That loss of jobs is, in and of itself, a severe irreparable harm for the employees so affected. Furthermore, cancelling or not refinancing or renewing OHA loans or grants could mean termination or disruption of loan or grant funded projects, thereby threatening the economic well-being of the native Hawaiian loan/grant recipient, as well as potentially subjecting the recipient to costly legal actions by third parties. The public interest, therefore, which is a key part of any balancing test, see Natural Resources Defense Council v. Winter, 502 F.3d 859, 862 (9th Cir. 2007) (preliminary injunction inquiry requires "the district court [to] consider . . . in appropriate cases, the public

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[10] Although the motion does not seek to bar some general fund monies -- as opposed to ceded land proceeds and income -- from flowing to, or out of, OHA (which monies presumably contribute to salaries of some OHA employees), see Pl. Mot. at 4-5, the practical effect of an injunction barring OHA from expending monies on programs benefitting Hawaiians and native Hawaiians might be to stop most or all salary money as well, given that OHA's officers and employees would have little, if anything, to do.

If plaintiffs seek to also bar state taxpayer monies from being used to support the Akaka Bill, or Kau Inoa, see Pl. Mot. at 5 (seeking to bar "[a]ny further spending of funds **from any source**" to support Akaka Bill or Kau Inoa), plaintiffs' request is barred for lack of standing. See Arakaki, 477 F.3d at 1065 ("we hold that these 'state taxpayers have no standing under Article III to challenge [Hawaii] state tax or spending decision simply by virtue of their status as taxpayers.' *Daimler-Chrysler [v. Cuno]*, 126 S. Ct. at 1864").

interest."), also weighs heavily against the grant of a injunction.

In sum, an injunction would cause direct harm to the State of Hawaii, native Hawaiians and Hawaiians, and the public interest, that would be severe and irreparable.

b. Plaintiffs will suffer no irreparable harm.

On the other side of the balance, plaintiffs cannot establish any irreparable harm to themselves. If a injunction is denied, plaintiffs will not be harmed one iota. Besides pointing out past State or OHA expenditures, which are totally irrelevant to their motion seeking injunctive relief against future action, Plaintiffs' only plausible claim of future harm is their "belief . . . the State [will] continue[] to distribute another $15.1 million more annually in equal quarterly installments to OHA." Pl. Mot. at 19.[11] Even putting aside the flimsy nature of such a "belief" allegation, and even if that transfer were imminent, it would cause no cognizable, much less irreparable, harm, and, at the very least, certainly no harm of any quantitative significance.

[11] Plaintiffs' allegations about bills in the legislature that could transfer land or other monies to OHA are irrelevant. There are literally thousands of bills considered by the Hawaii Legislature each year, most of which ultimately, at one point or another, die or fail to become law. Thus, plaintiffs' reliance upon such bills improperly bases their request for injunction on nothing but pure speculation. See Lydo Enterprises v. City of Las Vegas, 745 F.2d 1211, 1216 (9th Cir. 1984) ("A preliminary injunction is not justified when based mainly on speculation.")

i. Plaintiffs assert no cognizable form of injury.

Plaintiffs' purported injury, although not clearly articulated, is apparently that this transfer of money from the ceded land trust to OHA for it to use for the exclusive benefit of native Hawaiians injures plaintiffs, as trust beneficiaries, because that amount of money taken from the trust is no longer available to be used for the remaining four purposes authorized by Section 5(f) of the Admission Act, which purposes benefit the public generally, of which plaintiffs are a part. This theory of trust beneficiary injury, however, is critically flawed.

First, it requires this Court to ignore the holding of Arakaki v. Lingle, which held that plaintiffs have no standing to sue on such a trust beneficiary theory of injury, where the suit challenges the constitutionality or legality of the Admission Act, because "the Plaintiff's failure to sue the United States meant that his injury was not redressable." 477 F.3d at 1059.[12] If the claimed injury is not redressable in this suit, it certainly provides no injury for injunction purposes either.

Second, even putting aside the special Arakaki v. Lingle flaw, plaintiffs' asserted injury here is of a type that is analogous to state taxpayer injury, which the

[12] Although this quotation is from the portion of the Arakaki opinion dealing with the Hawaiian Homes Commission Act, and Section **4** of the Admission Act, rather than with **OHA** expenditures and Section **5(f)** of the Admission Act involving the ceded lands trust generally, Arakaki reached the same conclusion as to the latter as well. See 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 DHHL/HHC lease eligibility requirements").

Supreme Court in Daimler-Chrysler Corp v. Cuno, 547 U.S. 332 (2006), found insufficient to even confer standing. Because the 5(f) trust runs to, at the very least, all residents of Hawaii -- given that four of the 5(f) purposes are extremely broad and benefit the public generally -- the beneficiaries of this 5(f) trust consist of an even larger group of people than state taxpayers (as not all residents are taxpayers). Consequently, if state taxpayer injury is insufficient to confer standing because "the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally,'" DaimlerChrysler, 547 U.S. at 344, then, ***a fortiori***, plaintiffs' theory of injury here is certainly equally, if not even more, inadequate.

To elaborate, the same flaw that undermines state taxpayer standing applies equally well to plaintiffs' trust beneficiary theory here. The Supreme Court in DaimlerChrysler stated:

> A taxpayer-plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him. To the contrary, the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the "broad and legitimate discretion" of lawmakers, which "the courts cannot presume either to control or to predict."

547 U.S. at 344-45. By perfect analogy, plaintiffs here cannot insist that the State of Hawaii dispose of any increased available trust funds (resulting from an injunction barring the State from transferring any 5(f) trust funds to OHA) by bolstering programs that benefit plaintiffs. For example, the State could choose to

use the savings to transition the homeless into homes, build a public park on Lanai, or make any number of other uses of the money (consistent with the four other 5(f) purposes) that might yield no benefit whatsoever to the six particular plaintiffs in this case. As explained in DaimlerChrysler, "the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the 'broad and legitimate discretion' of lawmakers, which 'the courts cannot presume either to control or to predict.' " Id.

In sum, plaintiffs would suffer no cognizable form of injury from denial of the injunction.

ii. Even if one assumes, contrary to the above, that plaintiffs would suffer cognizable injury, the harm would not be irreparable.

But even if this Court were to ignore the above flaws, and accept plaintiffs' asserted injury as a valid one, any harm caused would not be irreparable. Because the harm to plaintiffs as individuals would be purely economic, it is not irreparable. Rent-A-Center v. Canyon Television, 944 F.2d 597, 603 (9th Cir. 1991) ("economic injury alone does not support a finding of irreparable harm."). Plaintiffs thus have failed to demonstrate any irreparable injury to themselves.[13]

[13] Finally, although not clearly articulated, plaintiffs may be claiming that the alleged violation of their constitutional rights is irreparable harm. See Pl. Mot. at 27-29. First, as noted earlier, see footnote 4, supra, there is likely no violation of any constitutional rights. See Rendish v. City of Tacoma, 123 F.3d 1216, 1225-26 (9th Cir. 1997) (where plaintiff fails to show likelihood of success on his

> c. Even if one assumes, contrary to the above, that plaintiffs would suffer *irreparable* injury, the harm to each individual plaintiff would be miniscule.

Finally, even if we were to ignore the above problems, and assume that plaintiffs had established both cognizable and irreparable harm, the dollar amount of loss per plaintiff would be negligible. Because there are roughly 1.3 million

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constitutional claim, that claim cannot establish irreparable harm). Second, it is only in areas like the First Amendment, right of privacy, or the Eighth Amendment, involving harms that are often irreparable, that violations of constitutional rights sometimes amount to irreparable harm. See Gutierrez v. Municipal Court, 838 F.2d 1031, 1045 (9th Cir. 1988) (citing Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (8th Amendment) and Elrod v. Burns, 427 U.S. 347, 373 (1976) (1st Amendment)). Contrary to plaintiffs' argument, courts have flatly rejected the contention that "a violation of constitutional rights always constitutes irreparable harm." Siegel v. LePore, 234 F.3d 1163, 1177-78 (11th Cir. 2000); see also Hohe v. Casey, 868 F.2d 69, 73 (3d Cir. 1989) ("Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction.").

Indeed, as explained by the Eleventh Circuit, in the very context of an equal protection challenge as we have here:

> No authority from the Supreme Court . . . has been cited to us for the proposition that the irreparable injury needed for a preliminary injunction can properly be presumed from a substantially likely equal protection violation. . . . The only area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury is in the area of first amendment and right of privacy jurisprudence. The rationale behind these decisions was that chilled free speech and invasions of privacy, because of their intangible nature, could not be compensated for by monetary damages . . . . The facts of this case do not fit the rationale of these decisions [because] the damage to plaintiff here is chiefly, if not completely economic.

Northeastern Florida Chapter v. City of Jacksonville, 896 F.2d 1283, 1285-86 (11th Cir. 1990).

people in the State of Hawaii, there are roughly 1.3 million beneficiaries of the 5(f) trust. Accordingly, the injury (ignoring the above discussion showing that there is no injury at all, and that even if there were injury, it would not be irreparable) from an annual $15.1 million transfer of trust assets to OHA would be at most less than **$12** per plaintiff. Obviously, therefore, the balance of harms would not tip sharply in plaintiffs' favor.

2. Other factors cut against issuance of an injunction pending appeal as well.

It is important to remember that OHA and the State have been engaging in much of the same activity of which plaintiff complains for 30 years. The notion, therefore, that OHA's programs and State transfers to OHA must suddenly be stopped (before a final ruling is issued) after all these years in order to avoid significant harm to plaintiffs is all the more unavailing. Indeed, because plaintiffs are seeking an injunction to alter the status quo, they are seeking a **mandatory** injunction, not a **prohibitory** injunction. See Stanley v. Univ. of Southern Calif., 13 F.3d 1313, 1320 (9th Cir. 1994) ("A prohibitory injunction preserves the status quo."). Accordingly, plaintiffs' request for a **mandatory** injunction is held to an even higher standard. Id. ("A **mandatory** injunction 'goes well beyond simply maintaining the status quo *pendente lite* [and] is **particularly disfavored**.'"); LGS Architects, Inc. v. Concordia Homes of Nevada, 434 F.3d 1150, 1158 (9th Cir. 2006) (same). As the Ninth Circuit has made very clear, the district court should

deny a request for a **mandatory** injunction "unless the facts and law clearly favor the moving party." Stanley, 13 F.3d at 1320. Because plaintiffs' request does not even come close to satisfying the ordinary standard for injunctions pending appeal, *a fortiori*, it surely fails the even higher standard for **mandatory** injunctions.

C. CONCLUSION

For the foregoing reasons, State Defendants-Appellees respectfully ask that plaintiffs' motion for injunction pending appeal be denied.

DATED: Honolulu, Hawaii, March 20, 2009.

MARK J. BENNETT
Attorney General of Hawaii

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

No. 08-16769

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES I. KUROIWA, JR, et al., Plaintiffs-Appellants, vs. LINDA LINGLE, in her official capacity as Governor of the State of Hawaii, et al., State Defendants-Appellees, and HAUNANI APOLIONA et al., OHA Defendants-Appellees.	D.C. Civ. No. 08-00153 JMS/KSC ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

DECLARATION OF GIRARD D. LAU

Pursuant to 28 U.S.C. § 1746, I, Girard D. Lau, hereby declare that:

1. I am a Deputy Attorney General for the State of Hawaii, and also counsel for State Defendants-Appellees in the above-entitled case.

2. Attached as Exhibit "A" is a true and correct copy of pages 2-41 from the Office of Hawaiian Affairs 2008Annual Report, downloaded from the Office of Hawaiian Affairs website **http://www.oha.org/pdf/OHA_Annual_Report_2008.pdf** on March 16, 2009.

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

Executed in Honolulu, Hawaii, on March 20, 2009.

/s/ Girard D. Lau
Girard D. Lau

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 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 in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: Honolulu, Hawaii, March 20, 2009.

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