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April 14, 2009

Ms. Molly Dwyer
Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119

RE: State Defendants-Appellees[1] Response to Plaintiffs' 28(j) letter in Kuroiwa v. Lingle, **No. 08-16769**

Dear Ms. Dwyer:

Pursuant to FRAP 28(j), State Defendants-Appellees hereby respond to Plaintiffs' 28(j) letter filed 4/5/09. The Supreme Court's Hawaii v. Office of Hawaiian Affairs ruling (hereinafter, "OHA"), has no relevance to the issues in this case, and raises no doubts as to the correctness of the decision below.

OHA ruled that the federal Apology Resolution, Pub. L. 103-150, 107 Stat. 1510 (1993), did not strip the State of Hawaii of its ability to sell its §5(f) ceded

[1] "State Defendants-Appellees" consist of 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.

lands. It did not undermine the fact that §5(f) of the federal Admission Act, by its plain language, authorizes the State of Hawaii to use the ceded lands for "one or more" of five purposes, including the betterment of the conditions of native Hawaiians. Indeed, the ruling confirmed that the Apology Resolution "reveals no indication ... that Congress intended to amend or repeal the State's rights ... under the Admission Act." Slip Op. at 11. The ruling also said nothing about the constitutionality of the Admission Act's authorizing the State of Hawaii to use the ceded lands for the separate benefit of native Hawaiians. Therefore, plaintiffs' statement in their 28(j) letter that "the highest court of the land has now validated Kuroiwas' first claim for relief and their motion for injunction pending appeal" -- claims which depend upon that constitutional challenge -- is preposterous.

Moreover, the district court below ruled that Plaintiffs cannot even pursue their primary claim on the merits because the United States is an indispensable party to that claim. Nothing in OHA addresses, much less undermines, that dispositive ruling.

Finally, the doctrine of constitutional avoidance only applies as to "competing **plausible** interpretations." OHA, Slip Op. at 11-12; Salinas v. U.S., 522 U.S. at 59-60 (1997) (court may not "rewrite language" or construe statute to "the point of disingenuous evasion even to avoid a constitutional question"). The Admission Act cannot plausibly be construed as not authorizing use of ceded lands for the separate benefit of native Hawaiians, when its plain language -- "one or more," "betterment of the conditions of native Hawaiians" -- so dictates. See also Answ.Br. at 9-10 n.4.

Sincerely,
/s/ Girard D. Lau

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cc: all counsel, via the appellate CM/ECF system