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TAX APPEAL COURT
STATE OF HAWAII
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IN THE TAX APPEAL COURT OF THE STATE OF HAWAII

JOHN M. CORBOY and STEPHEN GARO AGHJAYAN, Plaintiffs, vs. MARK J. BENNETT, in his official capacity as Attorney General, State of Hawaii; the COUNTY OF MAUI; and the COUNTY OF KAUAI, Defendants.	TA NO. 07-0086 CONSOLIDATED (Other Civil Action) PLAINTIFFS'–APPELLANTS' MEMORANDUM IN OPPOSITION TO STATE'S MOTION FOR SUMMARY JUDGMENT; DECLARATION OF SANDRA P. BURGESS; EXHIBITS A – E; CERTIFICATE OF SERVICE HEARING DATE: May 11, 2009 TIME: 9:00 a.m. JUDGE: Gary W.B. Chang
GARRY P. SMITH and EARL F. ARAKAKI, Plaintiffs, vs. MARK J.BENNETT, in his official capacity as Attorney General, State of Hawaii; and the CITY AND COUNTY OF HONOLULU, Defendants. [*caption continued*]	TA NO. 07-0099 CONSOLIDATED (Other Civil Action)

J. WILLIAM SANBORN, Plaintiff, vs. MARK J.BENNETT, in his official capacity as Attorney General, State of Hawaii; and the COUNTY OF HAWAII, Defendants.	TA NO. 07-0102 CONSOLIDATED (Other Civil Action)
IN THE MATTER OF THE TAX APPEAL OF STEPHEN GARO AGHJAYAN Appellant, and STATE OF HAWAII, Intervenor–Defendant–Appellee.	TA NO. 08-0039 CONSOLIDATED (Other Civil Action)
IN THE MATTER OF THE TAX APPEAL OF JOHN M. CORBOY, Appellant, and STATE OF HAWAII, Intervenor–Defendant–Appellee. [*caption continued*]	TA NO. 08-0040 CONSOLIDATED (Other Civil Action)

IN THE MATTER OF THE TAX APPEAL OF GARRY P. SMITH Appellant, and STATE OF HAWAII, Intervenor–Defendant–Appellee.	TA NO. 08-0041 CONSOLIDATED (Other Civil Action)
IN THE MATTER OF THE TAX APPEAL OF J. WILLIAM SANBORN, Appellant, and STATE OF HAWAII, Intervenor–Defendant–Appellee.	TA NO. 08-0042 CONSOLIDATED (Other Civil Action)
IN THE MATTER OF THE TAX APPEAL OF EARL F. ARAKAKI, Appellant, and STATE OF HAWAII, Intervenor–Defendant–Appellee.	TA NO. 08-0043 CONSOLIDATED (Other Civil Action)

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PLAINTIFFS'–APPELLANTS' MEMORANDUM IN OPPOSITION TO STATE'S MOTION FOR SUMMARY JUDGMENT

In this memorandum, Plaintiffs-Appellants (collectively "Appellants") in all eight of the above captioned consolidated cases oppose the Intervenors-Defendants-Appellees State of Hawaii's and Attorney General's (collectively "the State's") motion for summary judgment filed April 20, 2009.[1]

The State's Arguments in Support of its Motion.

1. **Race neutrality?** The State's primary argument is that "No suspect classification is involved in the HCCA homestead real property tax exemption." Rather, argues the State, the tax exemption is "based upon the indisputably non-suspect classification of whether one is a homestead lessee (pursuant to the Hawaiian Homes Commission Act, 42 Stat. 108 (1921)) or not." and therefore only the deferential "rational basis" standard of scrutiny is applicable. (State memo in supp at 1,2.)

The U.S. Supreme Court rejected a similar line of argument by the State in *Rice v. Cayetano,* 528 U.S. 495, 514 (2000):

> The State maintains this is not a racial category at all but instead a

---

[1] Unless the context suggests otherwise, this memorandum uses the term **"Hawaiian"** to refer to any descendant, regardless of blood quantum, of the inhabitants of the Hawaiian Islands previous to 1778. The term **"native Hawaiian"** (whether with a capital or lower case "n") refers to "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778 as defined in the HHCA. See HHCA §§ 201(7), 207(a) and 208(1).

> classification limited to those whose ancestors were in Hawaii at a particular time, regardless of their race. Brief for Respondent 38-40. The State points to theories of certain scholars concluding that some inhabitants of Hawaii as of 1778 may have migrated from the Marquesas Islands and the Pacific Northwest, as well as from Tahiti. *Id.,* at 38-39, and n. 15. Furthermore, the State argues, the restriction in its operation excludes a person whose traceable ancestors were exclusively Polynesian if none of those ancestors resided in Hawaii in 1778; and, on the other hand, the vote would be granted to a person who could trace, say, one sixty-fourth of his or her ancestry to a Hawaiian inhabitant on the pivotal date. *Ibid.* These factors, it is said, mean the restriction is not a racial classification. We reject this line of argument.

And at 528 U.S. 515,

> In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics." Saint Francis College v. Al--Khazraji, 481 U.S. 604, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987). The very object of the statutory definition in question *and of its earlier congressional counterpart in the Hawaiian Homes Commission Act* is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose. (Emphasis added.)
>
> As for the further argument that the restriction differentiates even among Polynesian people and is based simply on the date of an ancestor's residence in Hawaii, this too is insufficient to prove the classification is nonracial in purpose and operation. *Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral.* Here, the State's argument is undermined by its express racial purpose and by its actual effects. *Id.* at 516-517. (Emphasis added.)

The county tax exemptions for HHCA homestead lessees at issue here effectively single out for eligibility solely because of their ancestry, an identifiable

class of persons, **native Hawaiians**[2] (and, upon their death, their designated close relatives who are "at least one-quarter Hawaiian," see HHCA §209) who own an interest in real property leased from the Department of Hawaiian Home Lands ("DHHL") as a homestead. All other owners of interests in real property, *including all other persons who lease Hawaiian home lands from DHHL*, are excluded from even competing for this valuable exemption. As in *Rice*, the State's claim of racial neutrality is undermined by its express racial purpose, (to benefit descendants of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778 as defined in the HHCA) and its actual effects (for 88 years only native Hawaiians or, under a later amendment, after their demise, their at least one quarter Hawaiian close relative designees) have been eligible to enjoy the exemption. The State's memo itself at page 3, fn 4 undercuts any suggestion of race neutrality by quoting the county ordinance: "Disposition of

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[2] The next definition in Hawaii's compilation of statutes incorporates the new definition of "Hawaiian" and preserves the explicit tie to race:

" 'Native Hawaiian' means 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." Haw.Rev.Stat. § 10-2 (1993).

This provision makes it clear: "[T]he descendants ... of [the] aboriginal peoples" means "the descendants ... of the races." *Rice v. Cayetano*, 528 U.S. at 516.

Hawaiian home lands for other than homestead purposes is deemed fully taxable and will not qualify for the exemption granted by this section."

The 2007 DHHL annual report (the most recent currently available online from the DHHL website as of April 27, 2009) Land Use Summary shows 45,566 acres used for homestead purposes; 14,809 acres for general leases; 24,924 acres for Licenses and 117,852 acres for "Others." (See page 28 of the DHHL 2007 Annual Report attached as EXH A to the Declaration of Sandra P. Burgess hereinafter "SPB" filed herewith.) The DHHL's general leases, revocable permits, licenses and other arrangements other than for homestead purposes are shown as generating income of $9,848,110. As the State's footnote 4 establishes, these Hawaiian home lands leased for other than homestead purposes are "fully taxable and will not qualify for the exemption granted by" the counties. This snapshot as of June 30, 2007 illustrates the express racial purpose of the State, its officials, the State agency DHHL and the counties acting in concert (to benefit only select native Hawaiian lessees by giving them almost free rent and charging them almost no real property taxes) and the actual effect of their common plan (for perhaps over 8 decades *only native Hawaiians and their at least one quarter Hawaiian relatives have received this generosity).*

Under HHCA §208(7) "The lessee shall pay all taxes assessed upon the tract and improvements thereon." Under §208(8) the Lessee shall perform such other

conditions as the department may stipulate in the lease "provided that an original lessee shall be exempt from all taxes for the first seven years after commencement of the term of the lease."

Thus the "special" exemption from real property taxes at issue in this case is not based merely on being a lessee of Hawaiian home lands. It is limited to DHHL *homestead* leases for which only one class of persons selected using a racial classification is eligible; and the HHCA only requires the exemption for the first seven years after commencement of the term of each original homestead lessee. Each county is free of any federal mandate and can eliminate the discriminatory assessments after the first seven years of the original lease of each tract by simply enacting an ordinance.

2. **Most native Hawaiians are disfavored?** The State argues at page 3 of its memo in support, that the disfavored group, which it defines as those who are not presently HHCA homestead lessees, "includes most native Hawaiians." Since there is no evidence in the record, or anywhere else to Appellants' knowledge, of any impartial count or census of all native Hawaiians either in Hawaii or elsewhere, there is no way to determine the accuracy or falsity of that assertion. However, there can be no genuine dispute that any **native Hawaiian** citizen of Hawaii is more favored than Appellants, simply because he or she is eligible to compete on an equal basis for the exemption in question. Indeed,

according to DHHL official Lloyd Yonenaka, in 2004, A "vast majority of people on the waiting list for a residential lot have been offered a property at least once." EXH B to SPB Dec. On February 11, 2007 Mr. Yonenaka was quoted in the Honolulu Advertiser as follows: "Yonenaka said that what's more important than the raw numbers is that, at this point, those on the list 10 years or more have had at least one or two opportunities at a home or lot, while those on the list for two decades may have seen half a dozen. EXH C to SPB Dec.

Neither DHHL nor any other State or County office has favored Appellants or any of them with an offer of a residential lot for 99 years at $1.00 per year for 99 years exempt from most or all real property taxes. The favored treatment of the class of persons defined openly and expressly as of "not less than one half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778, i.e., **native Hawaiians,** began in 1921 when Congress enacted the HHCA. Before then every citizen of the Territory of Hawaii, whatever his or her ancestry, equitably "owned" about 5.471 acres of the corpus of the Ceded Lands Trust. (The calculation is in paragraph 18 of the Legal History of Hawaii's Ceded Lands Trust, taken from an earlier brief. EXH D to SPB Dec.). Immediately after enactment of the HHCA, the pro rata portion equitably owned by each native Hawaiian increased to about 9.48 acres; and the share for each of the other beneficiaries decreased to about 4.689 acres.

3. **Appellants have not applied for homestead leases?** The State argues at page 4 of its memo that Appellants do not allege and prove they actually desire to become homestead lessees of DHHL lands; therefore they lack standing to seek equal treatment in the assessment of their real property taxes; and the alleged racial classification "has no effect on them personally." This breathtaking *non-sequitur* is unsupported by evidence or logic.

Each of the Appellants is affected personally by the challenged exemption because, if he was accorded the equal privileges and immunities to which he is entitled, i.e. exemption equivalent to that for homesteaders, his real property taxes would be no more than $100 per year and he would be entitled to a refund for the two or three most recent years at issue.

None of the five Appellants in these eight consolidated cases ask for award of a homestead lease. Rather each of these citizens comes to this Court for redress of the assessment of his real property taxes without the benefit of an exemption equivalent to that given to Hawaiian homestead lessees. On March 20, 2007, over four months before the filing of the first of these cases, TA No. 07-0099, Appellants' attorney "applied for and demanded" for the two plaintiffs in that case "and for other Hawaii residents similarly situated," among other things, "The exemption from real property taxes now given by the City and County of Honolulu and some other counties exclusively to Hawaiian Homesteaders must be extended

to all real property owners in the City and County of Honolulu and other counties. (EXH E to SPB Dec.)

Appellants timely filed their appeals in compliance this Court's rules of procedure, none of which require that they first make a futile demand for a homestead lease. It is Appellants' understanding that this Court has jurisdiction to hear and determine such matters; and that Appellants have standing to present them to this Court.

None of the cases cited by the State on pages 4 and 5 of its memo are suits by municipal taxpayers; none challenge assessments of real property taxes; and none are decisions of a state tax appeal forum. In one of the cases cited by the State, *Carol v. Nakatani*, 188 F.Supp 2d 1219, 1229-30 (2001) in which one of the plaintiffs, Patrick Barrett, a non-Hawaiian, sought a Hawaiian Homestead lease, but had not applied for one before filing the complaint, the trial court said,

> SCHHA's argument that Plaintiff does not have the requisite history of applying for HHC benefits necessary to confer standing is unavailing. One does not "regularly" apply for homestead leases the way a contractor regularly applies for contracts. Moreover, it would have been futile for him to have made prior applications given the racial criteria, even if he indeed had a genuine and sincere desire for a homestead lease. It would be ludicrous to hold that because Plaintiff had not in the past applied for benefits to which he was clearly not entitled, he cannot now bring a challenge. Plaintiff, then, has made the necessary showing of injury in this instance.

(Ultimately, the trial court entered summary judgment against Barrett finding his claim for a homestead lease was not redressable. He had testified in a deposition that he did not challenge the constitutionality of the Admission Act which forbids change of lessee qualifications without the consent of the United States. The court reasoned that without the consent of the U.S. it could not grant the relief he sought.) The relevance is this: If a plaintiff seeking award of a homestead lease is not required to first make a futile application for such a lease; there cannot be any such requirement for one who does *not* seek a homestead lease.

The Fourteenth Amendment, among other protections of the rights of individual citizens, provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ... nor deny to any person within its jurisdiction the equal protection of the laws." The Civil Rights Act, 42 U.S.C. § 1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects ... any citizen of the United States ... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

When sued for prospective injunctive relief, a state official in his official capacity *is* considered a "person" for § 1983 purposes. *Will v. Michigan*

Department of State Police, 491 U.S. 58, 71 n. 10 (1989). (quoting Kentucky v. Graham, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985)). This exception recognizes the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), that a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity. See also *Flint v. Dennison,* 488 F3d 816, 825 (9th Cir. 2007).

"State Courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell*, 428 U.S. 465, 494, n. 35 (1976). ... as *St. Martin Evangelical Lutheran Church v. South Dakota*, demonstrates, the Federal Government need not be a party in order for the appellees to litigate their statutory and constitutional claims. Footnotes 37 and 38, *California et al. v. Grace Brethren Church*, 457 U.S. 393, 417 (1982).

4. **Exemptions federally mandated?** The State argues at page 10 of its memo that Appellants' federal civil rights claims fail because the HHCA, including the exemption from real property taxes, was specifically mandated by the federal Admission Act and "cannot itself violate *another* more general federal law."

As noted earlier, under HHCA §208(7) "The lessee shall pay all taxes assessed upon the tract and improvements thereon." However §208(8) adds, "provided that an original lessee shall be exempt from all taxes for the first seven

years after commencement of the term of the lease." Thus, the HHCA mandates the exemption for the first seven years of each homestead lease; but mandates that thereafter the lessee "shall pay all taxes assessed upon the tract and improvements thereon."

The State offers no explanation for its inconsistent positions: The counties are bound to comply with the HHCA §208(8) mandate to exempt homestead lessees from real property taxes for the first 7 years of each homestead lease; but free to ignore the HHCA §208(7) mandate requiring them to pay their fair share for the remaining 92 years.

Congress cannot immunize HHCA's exemption from judicial review

For its defense to Appellants' civil rights claims, the State at page 10 cites *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) which noted repeals by implication are not favored; and held the 1972 extension of the Civil Rights Act to Government employment did not, by implication, repeal the Bureau of Indian Affairs' ("BIA") long-standing employment preference given to members of federally recognized Indian Tribes. "Any other conclusion," said the high court, "ignores ... the unique legal relationship between the Federal Government and tribal Indians." "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes." *Id.* 417 U.S. at 554, fn 24. "Senator Wheeler described the BIA as 'an entirely

different service from anything else in the United States.'" *Id.* fn 25.

The essential error of the *Mancari* defense is that it mistakes *Mancari* for an exception to the rule that racial classifications trigger strict scrutiny. However, there are no exceptions to the rule that racial classifications by federal, state or local governments trigger strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 229-30 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 496-97 (1989). In *Rice*, the Supreme Court rejected the *Mancari* defense because *Mancari* did not involve a racial class but rather a political class:

> Although the classification had a racial component, the Court found it important that the preference was "not directed towards a 'racial' group consisting of 'Indians,' " but rather "*only to members of 'federally recognized' tribes*." 417 U.S., at 553, n. 24, 94 S.Ct. 2474. "In this sense," the Court held, "the preference [was] *political rather than racial* in nature." *Ibid.;* see also *id.,* at 554, 94 S.Ct. 2474 ("The preference, as applied, is granted to Indians *not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities* whose lives and activities are governed by the BIA in a unique fashion").

Rice, 528 U.S. at 519-20 (emphasis added). *Mancari* applies only to federally recognized Indian tribes, their members, and regulation of Indian tribes and members by the Bureau of Indian Affairs, an agency the Court described as "*sui generis*" and distinguished from OHA and other state agencies.

On the Supreme Court's reading of *Mancari* in *Rice*, there is no need to reach the issues of "indigenous" status and "special relationships." Because DHHL and OHA are state agencies, not an Indian tribe or the BIA, this Court need

not consider whether Congress has treated or may treat Hawaiians or native Hawaiians as an Indian tribe or whether it may delegate that power to the State.

The Hawaiian Homes Commission Act is no longer a federal statute. *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216, 1226 (9th Cir. 1978). When Hawaii became a State the HHCA was removed from the United States Code. *Id.* The Admission Act, § 4, required the State to adopt the HHCA as state law. The State adopted it and incorporated it by reference into the State Constitution, Article XII. Admission Act, § 4 still prohibits the State from amending or repealing the HHCA without the consent of the United States and still requires that the proceeds and income from the about 200,000 acres of "available lands" (i.e., the Hawaiian home lands) be used "only in carrying out the provisions of said Act." By Admission Act §5(f) the United States reserves the right to bring suit against the State for breach of trust if it fails to carry out the trust.

Admission Act, § 5(f) lists five purposes, four of them directed at the betterment of the general public, without any racial restrictions (public education, farm and home ownership, public improvements and public use) and one "for the betterment of conditions of native Hawaiians, as defined in the" HHCA. §5(f) goes on to provide that the "lands, proceeds and income shall be managed and disposed of for *one or more* of the foregoing purposes." (Emphasis added.) Thus,

Admission Act § 5 is not a federal requirement that the state discriminate among its citizens based on whether or not they fall within the racial class "native Hawaiian."

> In the first decades following admission, the State apparently continued to administer the lands that had been set aside under the Hawaiian Homes Commission Act for the benefit of native Hawaiians. The income from the balance of the public lands is said to have "by and large flowed to the department of education." Hawaii Senate Journal, Standing Committee Rep. No. 784, pp. 1350, 1351 (1979).

Rice v. Cayetano 528 U.S. 495, 508 (2000).

However, the creation of OHA at the 1978 Constitutional Convention, and subsequently purportedly ratified by the voters, changed the understanding that had prevailed since statehood and provided that "Section 5(f) of the Admission Act created a trust of these public lands *separate and apart from the lands defined as "available lands"* by Section 203 of the HHCA, 1920, as amended. "Your Committee found that the Section 5(f) trust created two types of beneficiaries and several trust purposes one of which is native Hawaiians of one-half blood." (emphasis added.) Volume I, Proceedings Constitutional Convention of Hawaii 1978, page 643, SCR 59.

Congress' exercise of its power under the Admission Clause to admit Hawaii as a State of the Union does not immunize the challenged programs from judicial review.

In *Coyle v. Smith*, 221 U.S. 559 (1911) the Supreme Court held that Congress's power under Admission Clause is limited by the Equal Footing Doctrine: a new state can only be admitted on equal footing with all others. Congress's admission power "is not to admit political organizations which are less or greater, or different in dignity or power from those political entities which constitute the Union"; rather, it is the "power to admit *states*." *Coyle*, 221 U.S. at 566 (emphasis added). There is only one class of states. In Prof. Tribe's terminology, the Equal Footing Doctrine is an "internal" or "structural" limit on Congress' power to admit states, arising from the nature of that power itself and the nature of the federal union. TRIBE, AMERICAN CONSTITUTIONAL LAW at 794-95. This limit is additional to the "external" limitations of the Bill of Rights, including equal protection, that restrain all of Congress' powers.

Because being a state is all or nothing, Congress cannot condition a prospective new state's admission on its agreement to enter the Union on terms different that the original states did. In *Coyle*, the Supreme Court ruled that the power of the new state "may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union which would not be valid and effectual if the subject of congressional legislation after admission." 221 U.S. at 573. In *United States v. Gardiner*, 107 F.3d 1314 (9th Cir. 1996), the court explained that the

equality of the new state with the other states will "forbid a compact between a new state and the United States 'limiting or qualifying political rights and obligation'" (quoting *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). Thus, Congress cannot require or bargain for a state to promise that it will not change its capital; and any such requirement or bargain is void. *Coyle*, 221 U.S. at 577-78. The Equal Footing Doctrine and the rule that Congress cannot authorize a state to violate the Equal Protection Clause both lead to the conclusion that a congressional admission act could not put a new state on an unequal footing by authorizing it to deny on account of race the right to receive public benefits. See *Rice v. Cayetano*, 528 U.S. at 520 (Congress cannot authorize state to limit electorate by race).

Congress' exercise of its power under the Admission Clause and any "compact" agreed to by the new state add nothing to the scope of Congress' other constitutional powers in the new state. Beyond the decision to admit the new state, Congress can only exercise powers in an admission act that that it could exercise in an already admitted state. *Coyle v. Smith*, 221 U.S. at 570. An admission act may include provisions disposing of public lands or regulating Indian tribes, but "such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject." *Coyle,* 221 U.S. at 574.

If, as Appellants contend, the challenged exemptions violate the Equal Protection Clause, no federal legislation can save them. Congress cannot authorize a State to violate the Equal Protection Clause, nor can it immunize an unconstitutional program from judicial scrutiny. "Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *Townsend v. Swank*, 404 U.S. 282, 291 (1971). In *Saenz v. Roe*, 526 U.S. 489, the Supreme Court held that a state statute violated the Fourteenth Amendment by discriminating against recent immigrants to the state in receiving welfare benefits. The federal government had expressly authorized states to engage in such discrimination and had authorized federal property – money – to be used to support the state's program. The Supreme Court held that "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation." *Id.* at 508.

Nor can Congress immunize governmental conduct from judicial review by declaring a trust or making an unconstitutional contract.

A trust cannot trump the Constitution. A term of a public trust which violates the Constitution is illegal and unenforceable. *Pennsylvania v. Board of City Trusts*, 353 U.S. 989, 77 S.Ct. 1281 (1957). Neither the federal nor the state

government can write itself an exemption from constitutional equal protection by agreeing to act as a trustee for a racially discriminatory trust. Even if a trust is assumed to be valid, the courts can still consider and invalidate State's use of race-based classifications to promote trust purposes. *Rice*, 528 U.S. at 521-23.

As mentioned in the Legal History of Hawaii's Ceded Lands Trust (EXH D Dec SPB) the adoption of the HHCA by Congress in 1921 for the first time injected partiality and race into the previously impartial and race-neutral Ceded Lands Trust.

Claims to Hawaiian home lands raise grave constitutional concerns

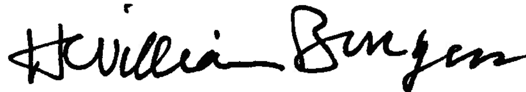
On March 31, 2009 the Supreme Court of the United States, in *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436, 1439 -1440 (2009) reversed the Hawaii Supreme Court's January 31, 2008 injunction against sale or exchange of any of the State of Hawaii's 1.2 million acres of ceded lands until the claims of native Hawaiians to those lands have been resolved; and held that the Apology Resolution would raise grave constitutional concerns if it purported to "cloud" Hawaii's title to its sovereign lands ..." Although the decision does not directly address them, the about 200,000 acres of Hawaiian home lands, were ceded along with the other 1.2 million acres in absolute fee, free and clear of any claims of any nature whatsoever, to the United States pursuant to the 1898 Annexation Act (Newlands resolution). The HHCA clearly "purports" to cloud the title now held by the State

of Hawaii and casts grave doubts about the future of HHCA's scheme of racial segregation. Appellants think of these tax appeal cases as an important first step toward a true global settlement one part of which must be that the homesteaders become fee simple home owners with the same joys and responsibilities and equal protection of the laws as all the citizens of Hawaii.

Conclusion

For the above reasons, Appellants respectfully request that the State's motion be denied.

DATED: Honolulu, Hawaii, May 1, 2009.



H. WILLIAM BURGESS
Attorney for Plaintiffs-Appellants

DECLARATION OF SANDRA PUANANI BURGESS IN SUPPORT OF PLAINTIFFS'–APPELLANTS' OPPOSITION TO STATE'S MOTION FOR SUMMARY JUDGMENT

1. I am a citizen, registered voter, and taxpayer of the State of Hawaii and of the United States and I am over the age of 18.

2. For over 10 years I have assisted my husband in his *pro bono* litigation; am familiar with the files, pleadings, exhibits, correspondence and other papers in his cases; and have personal knowledge of the facts stated in this declaration.

3. EXH A is a true and correct copy of Department of Hawaiian Home Lands 2007 Annual Report downloaded April 27, 2009 from their web site: Cover page, 1/16/08 Letter from Chairman Micah Kane, Table of Contents, pg 4 Mission Statement, pgs 8 – 9, pgs 13 – 28, pgs 34 – 36, pgs 39 – 46, pg 52 and the last cover page.

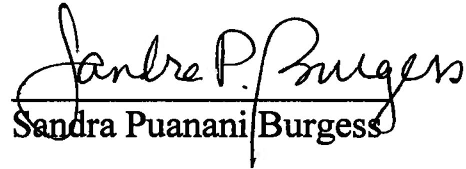
4. EXH B is a true copy of the article in Honolulu Weekly 6/30/04 'The New Homestead'.

5. EXH C is a true copy of Honolulu Advertiser report 2/11/07 'More are Realizing Homestead Dreams'.

6. EXH D is a true copy of the 'Legal History of Hawaii's Ceded Lands Trust' file-stamped pages 6 – 14 of Six Non-Ethnic Hawaiians' Complaint for Breach of Trust in Kuroiwa v. Lingle, et al & OHA, et al CV 08-00153.

7. EXH E is a true copy of Plaintiffs-Appellants counsel's March 20, 2007 letter to President Bush, Governor Lingle and Mayor Hannemann demanding the same exemption from property taxes as given to Hawaiian Homestead lessees.

DATED: Honolulu, Hawaii April 30, 2009.



Sandra Puanani Burgess