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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.

T.A. NO. 07-0086 CONSOLIDATED
(Other Civil Action)

STATE OF HAWAII'S AND ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF STATE OF HAWAII'S AND ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT; DECLARATION OF MICAH A. KANE & EXHIBIT "A"; NOTICE OF HEARING; 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.

T.A. NO. 07-0099 CONSOLIDATED
(Other Civil Action)

J. WILLIAM SANBORN,

Plaintiff, [*caption continued*]

T.A. NO. 07-0102 CONSOLIDATED
(Other Civil Action)

vs. MARK J. BENNETT, in his official capacity as Attorney General, State of Hawaii; and the COUNTY OF HAWAII, Defendants.	
IN THE MATTER OF THE TAX APPEAL OF STEPHEN GARO AGHJAYAN, Appellant, and STATE OF HAWAII, Intervenor-Defendant-Appellee.	T.A. 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.	T.A. 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. [*caption continued*]	T.A. NO. 08-0041 CONSOLIDATED (Other Civil Action)

IN THE MATTER OF THE TAX APPEAL OF WILLIAM J. SANBORN, Appellant, and STATE OF HAWAII, Intervenor/ Defendant-Appellee.	T.A. 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.	T.A. NO. 08-0043 CONSOLIDATED (Other Civil Action)

STATE OF HAWAII'S AND ATTORNEY GENERAL'S
MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendant-Appellee State of Hawaii, and Defendant-Appellee Mark J. Bennett, in his official capacity as Attorney General of Hawaii (hereinafter collectively referred to as "the State") hereby move this Honorable Court for entry of Summary Judgment in full for the State, and against Appellant Taxpayers, in all eight consolidated cases

This motion is made pursuant to HRCP Rules 7 and 56, Tax Appeal Court Rule 15, Circuit Court Rule 7, and supported by the attached memorandum in support, declaration and exhibit, and the entire records and files in this case.

DATED: Honolulu, Hawaii, April 17, 2009.

MARK J. BENNETT
Attorney General of Hawaii

GIRARD D. LAU
CHARLEEN M. AINA
Deputy Attorneys General
Attorneys for Intervenor-Defendant-Appellee
State of Hawaii, and Defendant-Appellee
Mark J. Bennett, in his official capacity
as Attorney General of Hawaii

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

MEMORANDUM IN SUPPORT OF STATE OF HAWAII'S AND ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT

The summary judgment filed herein by Intervenor-Defendant-Appellee State of Hawaii, and Defendant-Appellee Mark J. Bennett, in his official capacity as Attorney General of Hawaii (hereinafter collectively referred to as "the State") seeks judgment in full for the State, and against Appellant Taxpayers on the ground that the alleged discriminatory 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.[1] Assuming this court accepts that premise, this case will be very simple, as the State will need only to demonstrate a conceivable rational basis for the tax exemption. The State demonstrates in this motion that many such conceivable rational bases exist to uphold the tax exemption. The State also shows that Taxpayers' federal civil rights claims are without merit.

In the unlikely (in the State's belief) event this Court decides that the tax exemption involves an ostensibly racial classification that taxpayers have standing to attack, then this Court would likely deny this motion for summary judgment. In that unlikely event, the State will file a subsequent and different summary judgment motion -- and a much more legally complex one -- arguing that even if the classification generating the differential tax treatment is deemed to be based upon whether the taxpayer is native Hawaiian or not, Taxpayers' Equal Protection challenge is still not subject to strict scrutiny, but rather to the deferential *Morton v. Mancari* "tied rationally" standard of review applicable to native peoples. See Morton v. Mancari, 417 U.S. 535, 555 (1974). The State would then demonstrate that the tax exemptions satisfy that Mancari standard. Because the State, however, believes that this case can be resolved on the much simpler basis stated in the first paragraph, there is no need to burden this Court, or plaintiffs for that matter, with the *Mancari* argument at this time.

Section 208(8) of the Hawaiian Homes Commission Act (hereinafter "**HHCA**"), now a state law,[2] serves as the basis for the county tax exemptions, stating that "an original lessee shall be exempt from all taxes for the first seven years after commencement of the term of the lease."

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[1] As explained later in this motion, this classification is distinctly different from the tax exemption being based upon whether the taxpayer is native Hawaiian or not.

[2] The Hawaiian Homes Commission Act is now also state law. However, it was originally a federal law, 42 Stat. 108 (1921), and became a state law by mandate of § 4 of the federal

A. Taxpayers' Equal Protection Challenge to the Counties' Tax Exemptions should be subjected to deferential Rational Basis Review because the differential tax treatment is based upon a taxpayer being a homestead lessee of HHCA land, versus not being such a lessee, a characteristic that is plainly not a suspect classification.

In order to trigger strict scrutiny, Taxpayers must demonstrate that the disparate treatment rests on a suspect classification, or impinges upon a fundamental right. See Child Support Enforcement Agency v. Doe, 109 Haw. 240, 249, 125 P.3d 461, 470 (2005). Because the absence of a property tax exemption plainly does not impact a fundamental right, any demand for strict scrutiny must rest upon an alleged suspect classification.

1. No suspect classification is involved in the HHCA homestead real property tax exemption.

The challenged homestead real property tax exemptions do not turn on a suspect classification because the tax exemptions are not based upon whether a taxpayer is native Hawaiian[3] or not, but rather whether the taxpayer is a **homestead lessee of HHCA land**. This becomes very clear when one recognizes that native Hawaiians who are not homestead lessees of HHCA land also do not receive the tax exemption, just as Taxpayers, who are not lessees of such land, do not receive the tax exemption. See Rev. Ord. Honolulu § 8-10.23 ("real property leased under home-stead . . . pursuant to the authority granted the Department of Hawaiian Home Lands by Section 207 of the [HHCA], shall be exempt from real property taxes, the seven-year limitation on the exemption afforded by Section 208 of the [HHCA], notwithstanding."); Maui County Code § 3.48.555 (same); Kauai County Code § 5A-11.23(a) (same); Hawaii County Code § 19-

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Admission Act, 73 Stat. 4 (1959), which required Hawaii, upon its admission as a State, to adopt the HHCA as a provision of the Hawaii Constitution. See Admission Act § 4 ("As a compact with the United States . . . the Hawaiian Homes Commission Act . . . shall be adopted as a provision of the Constitution of said State . . . subject to amendment or repeal only with the consent of the United States").

[3] Unless the context suggests otherwise, this memorandum 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, the subset eligible for original leases under the Hawaiian Homes Commission Act. See Hawaiian Homes Commission Act §§ 201, 207(a), & 208(1).

89 (see footnote[4]). Therefore, a taxpayer's tax exempt status turns not on whether the taxpayer is native Hawaiian, but upon whether the taxpayer is a homestead lessee pursuant to the HHCA. Those native Hawaiians who own ordinary real property of the type Taxpayers own, pay the same real property taxes as Taxpayers. Only homestead lessees under the HHCA receive the exemption.

Because the status of being a homestead lessee versus not being one is plainly not a suspect classification, the tax exemptions are not subject to strict scrutiny, but rather to the rational basis test. See Daoang v. Dep't of Educ., 63 Haw. 501, 507, 630 P.2d 629, 633 (1981) ("in cases involving neither suspect classifications nor fundamental rights, we will uphold the constitutionality of a statutory presumption if it has a rational basis").

Taxpayers may argue, however, that because only native Hawaiians can become homestead lessees of HHCA land, that a suspect classification is involved after all. This argument fails. Equal Protection analysis requires, first, "delineation of the disfavored class," San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 19 (1973), which in this case are those taxpayers who are not **homestead lessees of HHCA land** -- a group that includes most native Hawaiians. The disfavored class is not those who are not native Hawaiian, but those, including native Hawaiians, who are not HHCA homestead lessees. See Lazy Y Ranch v. Behrens, 546 F.3d 580, 589 (9th Cir. 2008) ("The first step in equal protection analysis is to identify the [defendants'] classification of groups"). Because such a disfavored group -- which includes both non-native Hawaiians **and** native Hawaiians -- on its face involves no racial classification, strict scrutiny is inapplicable.

But even if Taxpayers could somehow get around the above problems, and be deemed to have challenged a suspect classification because only native Hawaiians are eligible to become homestead lessees of HHCA lands, Taxpayers lack standing to make that challenge because there

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[4] The provision reads: "Hawaiian home lands . . . , real property, exclusive of buildings, leased and used as a homestead (houselots, farm lots, and pastoral lots), pursuant to section 207(a) and subject to the conditions of sections 208 and 216 of the [HHCA], shall be exempt from real property taxes, except for the minimum tax, and as provided for by this section. Disposition of Hawaiian home lands for other than homestead purposes is deemed fully taxable and will not qualify for the exemption granted by this section. The respective homestead lessee of Hawaiian home lands shall continue to qualify and receive other personal exemptions, provided that claims for the exemptions are timely filed, including the seven-year limitation on the exemption afforded by section 208 of the [HHCA]."

is no allegation, much less evidence, that Taxpayers actually desire to become homestead lessees of HHCA lands. This is explained in the following subsection.[5]

> 2. Because Taxpayers do not allege and prove that they actually desire to become homestead lessees of HHCA lands, they have no standing to rely on the fact that only native Hawaiians are eligible to homestead lease HHCA lands as the basis for characterizing their challenge to the tax exemption as resting upon a suspect classification.

Even if Taxpayers' theory relying upon the fact that only native Hawaiians can become homestead lessees of HHCA land were wrongly accepted as converting their challenge to the tax exemption -- which distinguishes between homesteaders and non-homesteaders, not Hawaiians and non-Hawaiians -- into one raising a suspect classification (contrary to the argument given above in subsection 1, supra), Taxpayers cannot take advantage of that theory. That is because they have not alleged, much less proven, that any of them actually desire to become homestead lessees of HHCA lands. Rather, Taxpayers only allege that they want the tax exemption without having to become homestead lessees. See, e.g. **in 2007 tax cases:** Amended Complaints for Refund of Real Property Taxes [etc.] at ¶¶ 1, 4, 5, Prayer ¶¶ A.1, B & C; **in 2008 tax cases:** Notice of Appeal to Tax Appeal Court, Section VI, and Clear and Concise Statement of Basis for Appeal. Taxpayers are therefore complaining about an alleged racial classification (prerequisite to their becoming a HHCA homestead lessee) that has no effect upon them personally given that none of them have shown any desire to become HHCA homestead lessees. They therefore lack standing to complain about the native Hawaiian qualification for becoming HHCA homesteaders. As explained in Carroll v. Nakatani, 342 F.3d 934, 947 (9th Cir. 2003):

> In Carroll's deposition, he acknowledged that **he has never identified any particular OHA program that he would like to participate in**, and that he has never applied for any OHA program. Instead, Carroll offers only the general assertion that OHA discriminates against him on the basis of race through the operation of the OHA program.
>
> Carroll does not provide any evidence of an injury from the OHA programs other than the classification itself. He offers no evidence that he is "able and ready" to compete for, or receive, an OHA benefit. *Northeastern Florida*, 508 U.S. at 666, 113 S.Ct. 2297; *see also Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 707 (9th Cir.1997) (finding injury in fact from plaintiff being forced to compete on an unequal basis for government construction contracts because of a racial preference). **He has not even identified a program that he**

---

[5] Moreover, if Taxpayers wish to challenge the fact that they cannot become Hawaiian homestead lessees (because they are not native Hawaiian), they must file such a complaint in another court, as the Tax Appeal Court only has jurisdiction over tax matters, see HRS 232-13 ("The jurisdiction of the tax appeal court is limited to the amount of valuation or taxes, as the case may be, in dispute . . . ."), not non-tax matters such as who can become a HHCA homestead lessee.

would be interested in receiving. *See* Wooden v. Board of Regents of Univ. Sys. of Georgia, 247 F.3d 1262, 1284-85 (11th Cir.2001) **(student challenging race-based admissions policy lacked standing where there was no evidence that he actually intended to reapply for admission).**

> Carroll only claims the government is not acting in accordance with the United States Constitution. This kind of claim has been rejected as an appropriate basis for standing by the Supreme Court . . . .
>
> We conclude that Carroll lacks standing because he fails to show an injury from the allocation of benefits to native Hawaiians and Hawaiians. He presents only a generalized grievance, requesting the State to comply with his interpretation of the United States Constitution.

As in Carroll, Taxpayers here have presented no evidence (and have not even alleged) that they sought, or desired, to obtain a HHCA homestead lease. And while it is sometimes unnecessary for a plaintiff to actually apply for a program where it may be futile to do so, if the plaintiff has shown no desire to even participate in the program, plaintiff surely lacks standing to challenge any qualification for the program. See bold-faced portions of above quotation.

Put another way, absent any evidence of desire to become HHCA homestead lessees, Taxpayers suffer **no "actual . . . injury"** from the HHCA's limiting homestead leases to native Hawaiians; for the same reason, Taxpayers would obtain **no "relief"** (indeed, they would be wholly unaffected) were the HHCA's native Hawaiian qualification for homestead leases struck down, and non-native-Hawaiians became eligible for homestead leases. See Mottl v. Miyahira, 95 Haw. 381, 389, 23 P.3d 716, 724 (2001) (setting forth 3-part standing test). In short, eliminating the native Hawaiian qualification to become a HHCA homestead lessee would have no effect upon Taxpayers as they would still not become HHCA homesteaders. Given that, Taxpayers' challenge to the tax exemptions rests clearly upon only the classification distinguishing homesteaders from non-homesteaders, a plainly non-suspect classification.

*** *** ***

In sum, because Taxpayers' challenge to the tax exemptions on its face involves no suspect classification, and any indirect challenge attempting to create a suspect classification -- resting on the fact that only native Hawaiians can become HHCA homestead lessees -- cannot be made by Taxpayers (as they have no desire to become HHCA homestead lessees), Taxpayers' Equal Protection challenge must be reviewed under the rational basis standard. Their challenge must fail, therefore, if there is any conceivable rational basis for the tax exemption for HHCA homestead lessees. See Child Support, 109 Haw. at 249, 125 P.3d at 470 (test is "whether any

reasonable justification can be found for the legislative enactment"). As shown in the next section, the County tax exemptions easily satisfy this deferential standard, and thus Taxpayers' Equal Protection challenge fails.

B. There are many conceivable rational bases to uphold the tax exemption for HHCA homestead lessees.

Under the rational basis test, as long as a rational basis can be conceived to explain the line drawn by the legislature, that decision must be respected. Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 260, 861 P.2d 1, 7 (1993), *quoting* Nagle v. Bd. of Educ., 63 Haw. 389, 393, 629 P.2d 109, 112 (1981) (Court need only "determine whether any reasonable justification can be conceived to uphold the legislative enactment.").

Indeed, the government's discretion as to taxation, including tax exemptions, is especially broad. See In re Yerian, 35 Haw. 855, 891 (1941), *quoting* Beers v. Glynn, 211 U.S. 477, 484 (1909) ("The power of the State in respect to the matter of taxation is very broad . . . . It may exempt certain property from taxation while all other is subjected thereto."), and *quoting* Rogers v. Hennepin County, 240 U.S. 184, 192 (1916) ("The State has broad discretion as to tax exemptions.").

Thus, the challenged tax exemptions must be upheld if any rational basis can be "conceived" for giving HHCA homestead lessees the exemption but not giving it to non-HHCA homesteaders. See Kaneohe Bay Cruises, supra; Matter of Simpson., 57 Haw. 1, 8, 548 P.2d 246, 251 (1976) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. at 364) ("'**(I)n taxation**, even more than in other fields, legislatures possess the greatest freedom in classification.' . . . '**The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.**'"). Although only one rational basis is required, there are many conceivable rational bases to justify giving the exemption to HHCA homestead lessees, and not to non-homesteaders like Taxpayers.

The first conceivable rational basis is that the HHCA land leased to homestead lessees, unlike Taxpayers' land, cannot be freely alienated by the homestead lessee. HHCA Section 208(5) imposes the following severe restrictions, which are simply not applicable to Taxpayers' property:

> The lessee shall not in any manner transfer to . . . any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or agree so to transfer . . . the lessee's interest in the tract;

> except that the lessee, with the approval of the department, also may transfer the lessee's interest in the tract to the following qualified relatives of the lessee who are at least one-quarter Hawaiian: husband, wife, child, or grandchild. . . . The lessee shall not sublet the lessee's interest in the tract or improvements thereon [with limited exception].

Because the HHCA lands that are leased for homesteads are subject to these significant alienation restrictions, restrictions not applicable to Taxpayers' properties, this substantial difference alone provides a rational basis for exempting HHCA homestead leased land while not exempting Taxpayers' properties. As the United States Supreme Court has stated:

> We have long held that '(w)here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359. A state tax law is not arbitrary although it 'discriminate(s) in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution. *Allied Stores v. Bowers*, 358 U.S. 522, 528.

Kahn v. Shevin, 416 U.S. 351, 355 (1974). Surely the substantial alienation restrictions on HHCA homestead land provides a "reasonable distinction" justifying the differential tax treatment.

Although the above alienation restrictions are sufficient to uphold the tax exemptions, there are other restrictions on homestead lands, not applicable to Taxpayers' lands, which would also provide a rational basis for giving a tax exemption to HHCA homestead lessees, while not giving it to Taxpayers. For example, HHCA § 209(a) severely limits who may succeed to a homestead lease upon the lessee's death. With limited exceptions, a spouse, child, or sibling may not succeed to the lease unless he or she is at least "one-quarter Hawaiian," a parent may not succeed unless he or she is "native Hawaiian," and other non-relatives may not succeed at all. See HHCA § 209(a). This is a significant restriction on a homestead lessee's interest in the land not applicable to Taxpayers' interests in their lands, which they may generally pass on to whomever they choose without restriction. This HHCA testamentary restriction thus provides an additional rational basis for providing HHCA homestead lessees with an exemption not available to Taxpayers.

It is important to remember that even if the tax exemptions may not perfectly or precisely align with conceivable rational bases (although here the exemptions align perfectly), equal protection doctrine does not require any such perfect alignment. It is black letter law that the

legislature is not required to draw perfect lines, just reasonable ones. See Daoang, 63 Haw. at 506-07, 630 P.2d at 632 ("constitutionality of a statute . . . does not depend upon whether it provides a perfect solution to a problem"; "a reasonable, although not a precise, relationship" is sufficient). Thus, a mandatory age retirement provision will survive equal protection challenge because there is a "reasonable, although not a precise, relationship between advanced age and declining physical and mental skills," even though many older people are more skilled than many younger persons. Id.

Finally, although more conceivable rational bases are not necessary, there is an additional rational justification for the homestead lessee tax exemption. HHCA homestead lessee households have below-average household income. See Housing Policy Study, 2006: Housing of Native Hawaiians (Exhibit "A") at 4 and Table 2 ("**DHHL lessees** . . . had very low household incomes adjusted for household size. Nearly 70 percent had incomes below 80 percent of their county median and only 16 percent had incomes above 120 percent of median." This compares to **overall households in Hawaii** where only 44% had incomes below 80% of their county median, while nearly 34% had incomes above 120 percent of median.). Accordingly, it would be rational for government to provide a tax exemption to HHCA homesteaders, who are on average less well-off financially, if for no other reason than that they are likely less able to afford to pay the tax. The fact that a few homesteaders may be financially above average, or better off than one or more of the Taxpayers, is irrelevant. As just explained above, a perfect correlation between the triggering criteria (HHCA homestead lessee) and the rationale (lesser financial capability) is not required, as long as there is a "reasonable" relationship between the two. Given the facts as demonstrated by the housing study, the relationship between HHCA homestead lessees and financial disadvantage is surely "reasonable."

In sum, because there are many conceivable rational bases to justify providing the tax exemptions to HHCA homestead lessees, while not providing them to non-homestead lessees like Taxpayers, the tax exemptions easily satisfy the rational basis test and do not violate equal protection guarantees.

C. Taxpayers' federal civil rights claims fail because the tax exemptions are *not* based upon any ostensibly racial criteria, but rather upon whether one is a HHCA homesteader or not.

Taxpayers assert, apart from their equal protection claims, federal civil rights violations under 42 U.S.C. §§ 1981, 1983, 1985(3), 1986, & 2000d. But because the tax exemptions, as

explained in Section A, are not based upon race, but upon whether or not one is an HHCA homestead lessee, none of those civil rights statutes are triggered. See, e.g. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 609 (1987) ("Although **§ 1981** does not itself use the word 'race,' the Court has construed the section to forbid all **'racial'** discrimination in the making of private as well as public contracts."); 42 U.S.C. § **2000d** ("No person in the United States shall, **on the ground of race**, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). The remaining federal civil rights statutes, including 42 U.S.C. §§ **1983**[6] & **1985(3)**,[7] do not create independent substantive prohibitions, but simply provide a cause of action to enforce certain constitutional violations.[8] Because Taxpayers fail to establish any such constitutional violations as demonstrated above, those statutes provide no relief to Taxpayers. Finally, 42 U.S.C. § **1986**[9] requires a § 1985 violation as a predicate element, and thus provides

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[6] 42 U.S.C. § 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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 . . . "

[7] 42 U.S.C. § 1985(3) reads: "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of **the equal protection of the laws**, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory **the equal protection of the laws**; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

[8] See Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1574 (5th Cir. 1989) ("Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates. Thus, an underlying constitutional or statutory violation is a predicate to liability under § 1983."); Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (Necessary element of § 1985(3) claim is a "deprivation of a constitutionally protected right or privilege").

[9] 42 U.S.C. § 1986 reads: "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in **section 1985** of this title, are about to be committed, and

no relief for Taxpayers either.

D. Taxpayers' federal civil rights claims also fail because the *more specific* **federally** mandated Hawaiian Homes Commission Act expressly authorizes the county tax exemptions.

Taxpayers' federal civil rights claims fail for an additional reason. Because the HHCA, which includes the Section 208(8) tax exemption provision, is a federally mandated law, see supra footnote 2?,[10] it cannot itself violate *another* more general federal law. That is because a specific statute like HHCA § 208(8) cannot be invalidated by a far more general statute, which the federal civil rights statutes certainly are. See Mancari, 417 U.S. at 550-51 ("a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment;" "when two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective"). In short, because federal law specifically authorizes, indeed requires, the tax exemptions, that specific federal requirement cannot violate other general federal laws.[11]

CONCLUSION

For the foregoing reasons, Taxpayers' equal protection and federal civil rights claims are without merit. Accordingly, the State respectfully requests that this Court grant the State's motion for summary judgment in full, and enter judgment in full against Taxpayers.

DATED: Honolulu, Hawaii, April 17, 2009.

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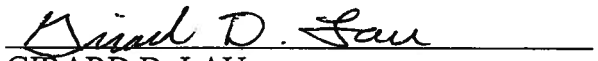
having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; . . . ."

[10] The tax exemption under HHCA 208(8) cannot be eliminated without congressional approval. See Admission Act Section 4, and Haw. Const. art. XII, sect. 3 (amendment of HHCA requires consent of the United States; eliminating 208(8) tax exemption does not fall within exceptions allowing amendment via ordinary state legislation).

[11] To the extent some of the County tax exemptions extend beyond 7 years, and are thus not mandated by federal law, they still cannot possibly violate the federal civil rights laws. For if the tax exemptions do not violate federal civil rights laws for the first seven years, it is impossible to understand why years eight and beyond of the exact same tax exemptions suddenly violate those same civil rights laws. Nothing in those laws, or their history, after all, even remotely suggests that after 7 years their substantive bans suddenly become broader, prohibiting practices that were perfectly legal earlier.

MARK J. BENNETT
Attorney General of Hawaii



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IN THE TAX APPEAL COURT OF THE

STATE OF HAWAII

JOHN M. CORBOY, et al., Plaintiffs, vs. MARK J. BENNETT, et al., Defendants.	T.A. NO. 07-0086 T.A. NO. 07-0099 T.A. NO. 07-0102 CONSOLIDATED (Other Civil Action)
IN THE MATTER OF THE TAX APPEALS OF STEPHEN GARO AGHJAYAN, et al. Appellant, and STATE OF HAWAII, Intervenor- Defendant-Appellee.	T.A. NO. 08-0039 T.A. NO. 08-0040 T.A. NO. 08-0041 T.A. NO. 08-0042 T.A. NO. 08-0043 CONSOLIDATED (Other Civil Action)

DECLARATION OF MICAH A. KANE

Pursuant to Circuit Court Rule 7(g), I, Micah A. Kane, hereby declare that:

1. I am the Chairperson of the Hawaiian Homes Commission, and have been serving in that position since 2003.

2. Attached are the cover and introductory pages, and first three sections of the "Housing Policy Study, 2006: Housing of Native Hawaiians" report prepared for the Hawaii Department of Hawaiian Home Lands by SMS Research & Marketing Services, Inc., dated May 2007.

I, Micah A. Kane, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, on April 17, 2009.

Micah Kane

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HOUSING POLICY STUDY, 2006: HOUSING OF NATIVE HAWAIIANS

Prepared for the:

Hawaii Department of Hawaiian Home Lands

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International Survey Research
Solutions Pacific, LLC
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Prepared by:
***SMS* Research & Marketing Services, Inc.**
May, 2007

EXHIBIT A

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Bob Freitas
Planner
Department of Hawaiian Home Lands
Planning Office
1099 Alakea Place, #2000
Honolulu, Hawaii 96813

Dear Mr. Freitas:

It is with pleasure that SMS Research presents this report of the findings of the Hawaii Housing Policy Study Update, 2006. We believe the results will be an important tool to be used by those who will plan for and develop new housing opportunities for Hawaii's people in the remainder of this decade.

It has been a pleasure serving you during the course of this project, and we look forward to working with you in the future.

Sincerely,

James E. Dannemiller
Executive Vice President

SMS Affiliations and Associations:

Alan Barker Associates
Warren Dastrup – Kauai Affiliate
Experian
International Survey Research
Solutions Pacific, LLC
3i Marketing & Communications

CONTENTS

LIST OF TABLES

LIST OF FIGURES

HOUSING FOR NATIVE HAWAIIANS

Since 1997, the Hawaii Housing Policy Study has included in the Housing Demand Survey a set of items to identify Native Hawaiian households of several types. In 2006 the survey included questions to identify Native Hawaiians and households that included a Department of Hawaiian Home Lands beneficiary to support analysis of housing conditions among this population. Specifically, the data were to be used to establish a base of information that could be used to support research on Native Hawaiian housing needs for the next three years. Those data appear in the tables at the end of this report. They are particularly rich in information and will support detailed analyses in support of housing planning and policy. In this report we briefly described the types of information available and present a brief overview of the condition of Native Hawaiian households.

In 2006 we also separated Native Hawaiian households with more than 50 percent from those with less than 50 percent Hawaiian ancestry. These households will be of particular interest to the State Department of Hawaiian Home Lands.

DEFINITIONS

The following are the definitions used in the tables and analysis for this study.

Native Hawaiian: A Native Hawaiian person is any person who reports being Hawaiian or Part-Hawaiian in the survey. Only respondents were asked to self-report ethnicity. A Hawaiian household is any household in which any resident member is Hawaiian or Part-Hawaiian. Respondents were asked to identify any Hawaiian or Part-Hawaiian persons in the household.

Lessee Only Households: Households occupied by virtue of a Department of Hawaiian Home Lands lease, and having no adult member who is on a DHHL awards applicant list.

Applicant and Lessee Households: Households occupied by virtue of a Department of Hawaiian Home Lands lease, and having one or more members who are on DHHL awards applicant lists.

Applicant Only Households: Households in which at least one adult member has applied for, but has not yet been awarded, land by the Department of Hawaiian Home Lands.

50 Percent Hawaiian: An individual is 50 percent Hawaiian if they claimed that status in the survey. Only Respondents were asked to self-report ethnic status. A 50 percent Hawaiian household is one that includes at least one adult member who is 50 percent or more Hawaiian. Respondents were asked if there were other members of the household who were 50 percent or more Hawaiian. Note for the analyses reported here, 50 percent Hawaiian households did not include DHHL beneficiaries (lessees or applicants).

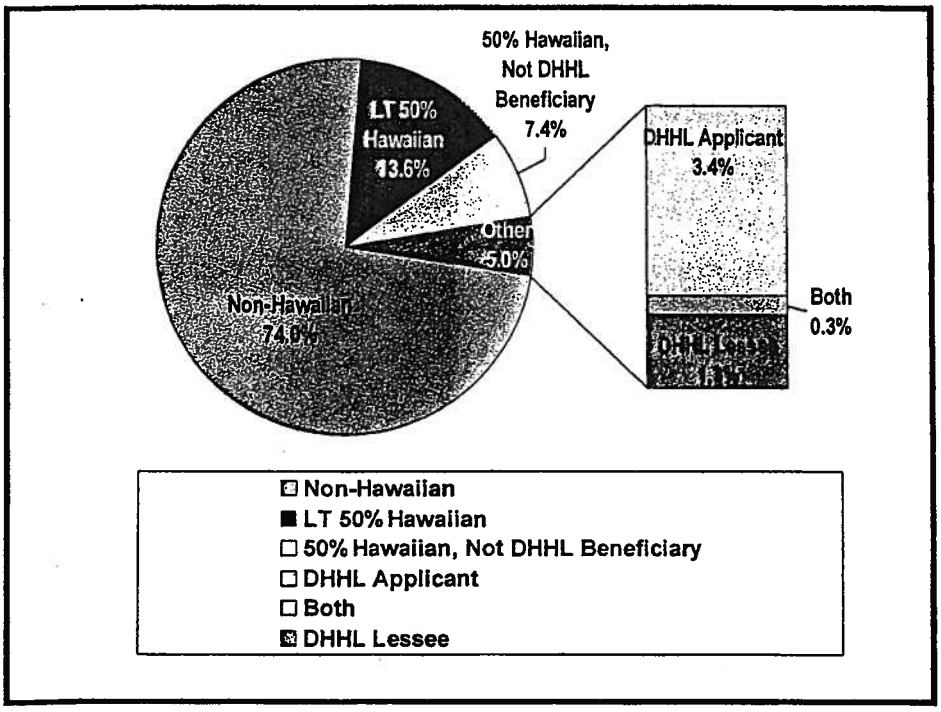
Other Hawaiian: Other Hawaiian individuals are those who claimed some Hawaiian ethnicity in the survey, but were not 50 percent or more Hawaiian, and therefore were not DHHL beneficiaries. Other Hawaiian households are households that include no individual with more than 50 percent Hawaiian ancestry, and include at least one individual who is less than 50 percent Hawaiian.

Non-Hawaiian: A non-Hawaiian individual is a person that reports no Hawaiian ancestry at all. A Non-Hawaiian household is one in which no individual members are any part Hawaiian.

HOUSEHOLDS

There were about 435,818 households in Hawaii in 2006. Of those, about 26 percent included at least one household member of Hawaiian ancestry[1]. Among those Native Hawaiian households, about half were households in which none of the Native Hawaiian members were more than 50 percent Hawaiian. The other half (54,160 households) had at least one member who was 50 percent or more Hawaiian. Persons who can establish Native Hawaiian ancestry at the level of 50 percent or more are eligible to become Hawaii Department of Hawaiian Home Lands (DHHL) beneficiaries. Survey data found that about 40 percent (21,700 households) reported that they were DHHL beneficiaries and 60 percent of them (32,460 households) were not beneficiaries. The distribution of Native Hawaiian households in 2006 is shown in Figure 1.

Figure 1: Native Hawaiian Household Types, State of Hawaii, 2006



[1] According to definitions used for the study a Native Hawaiian household is one in which at least one person identified as Hawaiian or Part-Hawaiian resides. The figures will not match Census or American Community Survey (ACS) Data which define a Native Hawaiian Household as one in which the householder (head of household) is all or any part Hawaiian. The most recent data, ACS 2005, reports household data of Native Hawaiian and Other Pacific Islander homes only.

Native Hawaiian households with at least one DHHL beneficiary were classified in three groups: (1) lessees only (5,635 households), (2) applicants only (14,651 households) and (3) households with both a lessee and an applicant present (1,414 households).

Table 1. Households by Native Hawaiian Classification, by County

Native Hawaiian Household Type	County of Residence				
	Hawaii	Honolulu	Kauai	Maui	State
Lessee only	1.2%	1.2%	2.4%	1.6%	1.3%
Lessee & Applicant	0.7%	0.2%	1.2%	0.4%	0.3%
Applicant only	4.8%	3.0%	2.9%	4.0%	3.4%
50% Hawaiian	10.1%	6.9%	7.7%	7.7%	7.4%
Other Hawaiian	18.0%	12.9%	12.1%	13.1%	13.6%
Non-Hawaiian	65.3%	75.9%	73.5%	73.2%	74.0%
Total Households	61,213	303,149	21,971	49,483	435,818

Table 1 shows the distribution of Native Hawaiian Households by County. The County of Hawaii had a larger number of Native Hawaiian households than other islands (35% vs. 25%). They also had more households with members who were less than 50 percent Hawaiian (18% vs. 12%) and more households with members who were 50 percent or more Hawaiian (10% vs. 7-8%). The City and County of Honolulu had the lowest percentage of DHHL beneficiaries (4% vs. 6-7%).

HOUSEHOLD INCOME

The ability to secure appropriate housing depends primarily on a household's ability to afford monthly payments for rent or mortgage. Past research has shown that using household income for housing analyses is problematic in Hawaii and especially so for Native Hawaiian households. Native Hawaiian households are typically larger than households in other major ethnic groups. When we need to compare incomes across households of different sizes, it is more effective to use some measure of income per household member. The U.S. Department of Housing and Urban Development (HUD) provides a set of income guidelines that adjust income to make them comparable across different household sizes. Table 2 shows household incomes by HUD classifications for each of the household types used in this report.

The majority of Hawaii households are non-Hawaiian. Those households are distributed as expected across the HUD definitions. About half of all households were below their respective county median incomes, and half are above the median.

Native Hawaiian households with no members more than 50 percent Hawaiian (59,341 households) were even better off than non-Hawaiian households by this measure. Less than 40 percent of that group had incomes below 80 percent of their county's median income and the group had the largest percentage of households with incomes above 120 percent of median (38.5%). Still, the group below 80 percent of the median represents more than 23,000 households that will be candidates for housing assistance programs under HUD guidelines.

Table 2. Household Income by HUD Guidelines, All Hawaii Households, 2006

	Households at HUD Income Guidelines								
	Less than 80%[a]		81% to 120%		Over 120%		No data[b]	Total Households	
	Num	Pct	Num	Pct	Num	Pct	Num	Num	Pct
Lessees	4,851	69.2	1,043	14.9	1,112	15.9	43	7,049	100.0
Applicants	6,262	44.1	4,006	28.2	3,917	27.6	465	14,651	100.0
50% Hawaiian	17,357	53.5	6,648	20.5	8,454	26.0	0	32,459	100.0
Other Hawaiian	23,452	39.5	13,006	21.9	22,858	38.5	24	59,341	100.0
Not Hawaiian	141,453	43.9	69,892	21.7	110,931	34.4	41	322,318	100.0
Total Households	193,375	44.4	94,596	21.7	147,272	33.8	574	435,818	100.0

Source: Hawaii Housing Demand Survey, 2006.

a. Households with total household incomes less than 80 percent of the median income for the county in which they resided in 2006.

b. Cases for which survey respondents failed to report either household income or household size.

Native Hawaiian households with members who were 50 percent or more Hawaiian (32,459 households) had lower incomes. Just over a quarter of them (26%) had incomes greater than 120 percent of their county median and about 54 percent of them had incomes below 80 percent of the median. Many of these households would qualify for housing programs under HUD guidelines.

Among DHHL beneficiaries, incomes differed substantially. Applicant-only households (14,651 households) had higher incomes than households with members who were more than 50 percent Hawaiian but were not on DHHL lists. Closer analysis of the distribution suggested that the applicants included two groups – one with very low incomes and one with higher incomes. This is consistent with previous beneficiary surveys. Applicants had the greatest percentage of households in the middle-income group (80 to 120 percent of median).

DHHL lessees on the other hand, had very low household incomes adjusted for household size. Nearly 70 percent had incomes below 80 percent of their county median and only 16 percent had incomes above 120 percent of median. This is also consistent with past research and demonstrates that Hawaiian Home Lands programs have been successful in providing homes to households with incomes that would preclude them from home ownership using standard financing.

Lessee households (7,049 households) were significantly more likely than applicant households to be large (eight or more members). Native Hawaiian households of all types were more likely than non-Hawaiian households to have children. Those with more Hawaiian ancestry were even more likely to have children. Among Hawaiian households children were found in 64 percent of lessee households, 52 percent of applicant households, and 49 percent of households with at least one person who was 50 percent or more Hawaiian. Only 26 percent of non-Hawaiian households had children under 18 living in the household.

NOTICE OF HEARING

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Please take notice that the preceding motion will come on for hearing before the Honorable Gary W.B. Chang, Tax Appeal Court Judge, in his courtroom at Kaahumanu Hale, 777 Punchbowl Street, Honolulu, HI 96813, on _____ 2009, at _____ __.m.

DATED: Honolulu, Hawaii, April 17, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on April 17, 2009, by U.S. mail, first class, postage prepaid, on the following persons as addressed below:

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