

NO. 30049

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Tax Appeals

of

JOHN M. CORBOY, STEPHEN GARO  
AGHJAYAN, GARRY P. SMITH, EARL F.  
ARAKAKI and J. WILLIAM SANBORN

Appellants

vs.

MARK J. BENNETT, in his official capacity  
as Attorney General, State of Hawaii; the  
COUNTY OF MAUI; the COUNTY OF  
KAUAI; the CITY AND COUNTY OF  
HONOLULU; the COUNTY OF HAWAII  
and the STATE OF HAWAII,

Appellees

) TAX APPEAL CASE NOS.  
) 07-0086; 07-0099; 07-0102; 08-0039;  
) 08-0040; 08-0041; 08-0042; 08-0043  
) (CONSOLIDATED)

) APPEAL FROM:

- ) 1) FINAL JUDGMENT August 7, 2009;
- ) 2) ORDER GRANTING STATE'S AND  
ATTORNEY GENERAL'S MOTION FOR  
SUMMARY JUDGMENT June 26, 2009;
- ) 3) ORDERS GRANTING EACH  
COUNTY'S JOINDER IN STATE'S  
MOTION FOR SUMMARY JUDGMENT  
June 15, 2009 and August 7, 2009; and
- ) 4) ORDER DENYING PLAINTIFFS-  
APPELLANTS' COUNTER MOTION  
FOR SUMMARY JUDGMENT July 29,  
2009

) JUDGE GARY W. B. CHANG  
)

APPELLANT'S OPENING BRIEF,

APPENDIX, STATEMENT OF RELATED CASES AND CERTIFICATE OF SERVICE

KHAMAKAUI  
COURT OF APPEALS  
STATE OF HAWAII  
200 JAN 20 PM 12:37

FILED

H. WILLIAM BURGESS #833  
2299C Round Top Drive  
Honolulu, Hawaii 96822  
Telephone: (808) 947-3234  
Fax: (808) 947-5822  
Email: [hwburgess@hawaii.rr.com](mailto:hwburgess@hawaii.rr.com)  
Attorney for Appellants

**TABLE OF CONTENTS**

	<u><b>PAGE</b></u>
<b>TABLE OF AUTHORITIES</b> .....	iii
<b>I. Statement of the Case</b> .....	1
A. Introduction.....	1
B. Irreparable harm-benefit analysis of special exemption .....	3
Appellants’ irreparable losses.....	3
The counties would benefit, not lose .....	5
<b>II. Standard of Review</b> .....	7
A. De novo review of summary judgments .....	7
B. All racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed under strict scrutiny .....	7
C. Strict scrutiny applies here .....	8
<b>III. Questions Presented</b> .....	8
A. Legality of HHCA adopted by Congress in 1921 .....	8
B. Imposition of HHCA compact on the new State of Hawaii in 1959.....	10
C. Adoption of HHCA by State in 1959 and continuing to implement it .....	10
D. The counties’ special exemptions for Hawaiian homestead lessees .....	10
E. The Tax Appeal Court’s final judgment and several orders .....	11
<b>IV. Summary of Argument</b> .....	11
<b>V. Argument</b> .....	12
A. The definitions “native Hawaiian” and “Hawaiian” are racial classifications .....	12
B. The HHCA: Explicitly racial in both purpose and effect.....	12

C. The Equal Footing doctrine.....	13
D. Hawaii’s Ceded Lands Trust.....	16
E. Trustees of Dartmouth College v. Woodward .....	18
F. Refutation of defenses by the State and counties .....	21
(1) Sec. 208(7) still requires the Lessees to pay all taxes .....	21
(2) No native Hawaiians are disfavored from competing.....	21
(3) To seek equal treatment in the taxation of their real property, taxpayers are not required to first make futile applications.....	22
(4) Lessees generally are not exempt from real property taxes .....	24
(5) Hawaii’s own Constitution negates any compelling interest in discriminating between homeowners based on their race .....	25
(6) The public Interest requires a halt to any further deprivation of equal tax exemptions.....	26
(7) The <i>Parens Patriae</i> supports the breach of trust.....	28
(8) Setting aside Hawaiian home lands raises grave constitutional concerns.....	29
<b>VI. Conclusion.....</b>	<b>30</b>

## TABLE OF AUTHORITIES

<b><u>CASES</u></b>	<b><u>PAGES</u></b>
<i>7’s Enterprises, Inc. v. Del Rosario</i> , 111 Haw. 484, 496 n. 17, 143 P.3d 23 (2006) .....	4
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200, 227 (1995).....	8
<i>Alexander v. Sandoval</i> , 532 U.S. 275, 280-81 (2001) .....	27
<i>Biodiversity Legal Foundation v. Badgley</i> 284 F.3d 1046, 1053 (C.A.9 (Or.),2002) .....	5
<i>California, et al v. Grace Brethren Church</i> , 457 U.S. 393, 417 FN 37, 38 (1982).....	8
<i>Carroll v. Nakatani</i> , 342 F.3d 934 (9 <sup>th</sup> Cir. 2003) .....	22, 23, 28
<i>Child Support Enforcement Agency v. Doe</i> , 109 Hawai’i 240, 249, 125 P.3d 461, 470 (Hawai’i, 2005) .....	7
<i>City of Richmond v. J.A. Croson</i> , 488 U.S. 469, 496-97 (1989).....	8
<i>County of Kauai v. Office of Information Practices, State of Haw.</i> 120 Hawai’i 34, 39-40, 200 P.3d 403, 408 - 409 (Hawai’i App. 2009).....	7
<i>Coyle v. Smith</i> , 221 U.S. 559 (1911) .....	13, 14, 15
<i>Hawaii v. Office of Hawaiian Affairs</i> , 129 S.Ct. 1436, 1439 -1440 (2009) .....	29
<i>Hawaii Community Federal Credit Union v. Keka</i> , 94 Hawaii 213, 221, 11 P.3d 1, 9 (2000) .....	7
<i>Hawaii Insurers’ Council v. Lingle</i> , 117 Hawaii 454, 462-3, 184 P.3d 769, 777-8 (2008) .....	5
<i>Idaho v. Coeur d’Alene Tribe of Idaho</i> , 521 U.S. 261, 273-274 (1997) .....	5
<i>Kapiolani Park Preservation Society v. City &amp; County of Honolulu</i> , 69 Haw. 569, 572, 751 P.2d 1022 (1988) .....	28
<i>Lau v. Nichols</i> , 414 U.S. 563, 569 (1974).....	27
<i>Light v. United States</i> , 220 U.S. 523, 536 (1911).....	18
<i>Norwood v. Harrison</i> , 413 U.S. 455, 466 (1973) .....	28
<i>Pele Defense Fund v. Paty</i> , 73 Haw. 578, 594, 837 P.2d 1247 (1992).....	28

<i>Pennsylvania v. Board of City Trusts</i> , 353 U.S. 989, 77 S.Ct. 1281 (1957).....	16
<i>Rice v. Cayetano</i> 528 U.S. 495, 494, 508, 514-517 (2000) .....	12, 15, 16, 22, 26, 27, 28
<i>Saenz v. Roe</i> , 526 U.S. 489 (1999) .....	15
<i>Shapiro v. Thompson</i> , 394 U.S. 618, 641 (1969).....	15
<i>Shaw v. Reno</i> , 509 U.S. 630, 643-44 (1993).....	8, 27
<i>State v. Zimring</i> , 58 Hawaii 106, 124, 566 P.2d 725 (1977) .....	17
<i>Stearns v. Minnesota</i> , 179 U.S. 223, 245 (1900) .....	14
<i>Townsend v. Swank</i> , 404 U.S. 282, 291 (1971) .....	15
<i>Trustees of Dartmouth College v. Woodward</i> , 17 U.S. 518 (1819).....	18, 19, 20
<i>United States v. Gardiner</i> , 107 F.3d 1314 (9 <sup>th</sup> Cir. 1996) .....	14, 18
<i>Wright v. Rockefeller</i> , 376 U.S. 52, 67 (1964).....	27
<i>OHA v. Yamasaki</i> , 69 Haw.154,159, 737 P.2d 446, 449 (1987).....	17

## **CONSTITUTIONS**

United States Constitution, Art. 1, § 10 .....	19
United States Constitution, Fifth Amendment.....	9, 10, 18, 23
United States Constitution, Fourteenth Amendment .....	9, 10, 11, 15, 18, 26
Constitution of the State of Hawaii	
Article I, Section 5 .....	26
Article I, Section 9 .....	26
Article I, Section 21 .....	26
Article XI, Section 5 .....	26
Article XII, Sections 1-3 .....	2, 9, 13, 18, 24
Article XII, Sections 1-4.....	13

## **FEDERAL STATUTES**

28 U.S.C. § 2403(a) .....	23
42 U.S.C. § 1981 .....	9
42 U.S.C. § 1983.....	9
42 U.S.C. § 1985(3).....	9
42 U.S.C. § 1986.....	9
42 U.S.C. § 2000d.....	9

The Admission Act [73 Stat. 4], 1959 .....	23
Section 4 .....	2, 9, 10, 12, 23
Section 5(f) .....	18
Apology Resolution, Pub. L. 103-150, 107 Stat. 1510 (1993) .....	29
Civil Rights Act 1964, Title VI.....	28
Organic Act of April 30, 1900, c 339, 31 Stat. 141 .....	17, 18
Resolution No. 55 of July 7, 1898, 30 Stat. 750 (known as the “Annexation Act” or “Newlands Resolution”).....	8, 9, 16, 17, 18, 20, 29
Treaty of Annexation (1897) .....	8, 9, 19

**RULES**

Federal Rules of Evidence, Rule 201.....	24
F.R.A.P. 19(a).....	23

**HAWAII STATUTES**

Hawaiian Homes Commission Act, 42 Stat. 108 (1921) (“HHCA”) .....	<i>passim</i>
Sec. 201(7).....	1, 12, 13
Sec. 207.....	12
Sec. 208.....	12
Sec. 208(1).....	1, 13
Sec. 208(2).....	13
Sec. 208(5).....	13
Sec. 208(7).....	21
Sec. 208(8).....	21
Sec. 209.....	13
Haw. Rev. Stat.	
§ 602-58(b) .....	3
§ 708-830(6)(a).....	29
§ 708-974 .....	29
Haw. Rules App Procedure	
29 .....	3

**OTHER AUTHORITIES**

Black’s Law Dictionary, Third Pocket Edition, 1996, West Publishing Co.....	26
Hawaii Attorney General Opinion 95-03 July 17, 1995 .....	17
Restatement (Third) of Trusts	
§ 64 .....	20
§ 65 .....	20
§ 68 .....	20
Schmitt, Historical Statistics of Hawaii, University Press of Hawaii, 1977 .....	17
TRIBE, AMERICAN CONSTITUTIONAL LAW .....	14
Warren, <i>Federal and State Court Interference</i> , 43 Harv.L.Rev. 345, 377-378 (1930) .....	4

## **APPELLANTS' OPENING BRIEF**

### **I. Statement of the Case.**

**A. Introduction.** Appellants are five citizens of the United States and the State of Hawaii. Each of them is a homeowner and real property taxpayer in the county of the State of Hawaii in which he resides. None of them are "native Hawaiian" as defined in the Hawaiian Homes Commission Act ("HHCA") §201(7), i.e., none is a "descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." (Declarations of each Appellant filed May 1, 2009 in the Tax Appeal Court with Plaintiffs-Appellants' counter-motion for summary judgment. (Record "Rec" at VI 319-353, VII 400-405; True copies of the declarations are in Appellants' Appendix, Appx R.1-5.)

Since none of them are "native Hawaiian," under HHCA §208(1) none of Appellants is, or ever can be, eligible to compete for award of a Hawaiian homestead lease. And, because none of them are at least one-quarter Hawaiian, none are eligible to become a Hawaiian homestead lessee by transfer or succession. Thus, solely because they lack the favored racial ancestry, Appellants and the thousands of other home-owners similarly situated in each of the four counties of the State of Hawaii, are deprived of the equal protection, privileges and immunities under the Constitution and laws of the United States to which they are entitled from their respective counties.

Each Appellant filed a timely complaint in the Tax Appeal Court for refund of real property taxes paid under protest to his county for tax year 2007-2008 (Rec III 1-11 amended Rec IV 62-69; Rec X 1-19 corrected cover page Rec X 26; Rec XVII 1-10) and also a timely notice of appeal of real property tax assessment for tax year 2008-2009. (Rec XXV 1-6; XXXI 1-6; XXXVII 1-5; XLIV 1-4; LI 1-4.) The complaint of Appellants Smith and Arakaki (*supra* R.

III 1-11 amended Rec IV 62-69) also timely sought refund from the City and County of Honolulu for taxes paid under protest for tax year 2006-2007. (True copies of the five notices of appeal and three complaints are included in Appx H - O.)

The relief sought in each of the consolidated cases is a refund, declaratory and injunctive relief against further such deprivations, costs, attorney's fees and such other and further relief as is just.

Because each of the consolidated cases draws into question the constitutionality of State of Hawaii laws (including Hawaii Constitution Art. XII §§ 1-3 and the Hawaiian Homes Commission Act of July 9, 1921, 42 Stat 108 ("HHCA"))<sup>1</sup> and federal laws (including §4 of the 1959 Admission Act, March 18, 1959, 73 Stat. 4, which is the compact requiring as a condition of statehood that the new State of Hawaii adopt the HHCA subject to amendment or repeal only with the consent of the United States and mandating that all proceeds and income of the "available lands" [the approximately 200,000 acres of the ceded lands set aside as Hawaiian home lands] shall be used only in carrying out the provisions of said Act), Appellants gave Notice of Constitutional Question to the Attorney General of the United States and the Attorney General of the State of Hawaii. (The notices are attached to the three complaints cited above and true copies are in Appx M-O.) Similar notices of constitutional question were also sent in each of the five appeals of real property tax assessment for tax year 2008-2009. (Rec XXV 11-13; XXXI 11-13; XXXVII 10-11; XLIV 9-11; LI 9-11.) The State and/or State Attorney General (collectively "State") intervened in each of the consolidated cases. The United States did not intervene to defend the constitutionality of the federal (or any other) laws or governmental conduct in question.

---

<sup>1</sup> HHCA, originally a federal law, is now a state law. Haw. Const. Art. XII, Sec.1.

The Tax Appeal Court, without a trial, evidentiary hearing or written findings of fact or conclusions of law, granted the State's motion for summary judgment and each county's joinder in that motion; denied Appellants' counter-motion for summary judgment; and entered final judgment on August 7, 2009. (Appx A-G.) Appellants timely appealed September 8, 2009. (Rec VIII 508-559.)

On September 4, 2009, Appellants moved in the Tax Appeal Court for a stay and injunction pending appeal. (Rec. VIII 474-507.) The Tax Appeal Court heard the motion and oppositions on November 23, 2009 and orally denied the motion. The written order denying stay and injunction pending appeal was filed in the Tax Appeal Court December 24, 2009. On December 16, 2009 Appellants moved this Court for an injunction pending appeal, which this Court denied January 14, 2010. On December 29, 2009 this Court accepted transfer of this appeal to it pursuant to HRS § 602-58(b).

Pursuant to HRAP 29, upon Appellants' oral request, the appellate clerk extended, for 30 days, the time for filing this opening brief to January 20, 2010.

**B. Irreparable harm-benefit analysis of special exemption.**

**Appellants' irreparable losses.** At the 11/23/2009 hearing in the Tax Appeals Court on Appellants' motion for stay and injunction pending appeal, Appellants' counsel provided to the Tax Appeal Court and opposing counsel, as a visual aid to oral argument, his "Irreparable harm-benefit analysis" which applied simple arithmetic to data filed 10/23/09 (Rec. IX pp 714-718) in the Declaration by Gary Kurokawa, City and County of Honolulu ("City") Real Property Tax Administrator; and information from the DHHL report of the number of homestead leases on Oahu as of FYE 6/30/2008. (See Appx P.1 and 2.) The analysis shows the City's projected real property tax revenues from the 253,185 residential parcels on Oahu for 2009-2010 will

average approximately \$1,817 per year per residential parcel; but the 3,933 Hawaiian homestead lessees on Oahu will be charged only \$100 per year for their residential parcels. This establishes that the deprivation of equal privileges and immunities (i.e. annual exemptions from real property taxes comparable to those for Hawaiian homestead lessees) will cost the average Oahu non-homestead homeowner approximately \$1,717 for tax year 2009-2010.

The analysis also shows that residential Hawaiian homesteads make up less than 2% of all residential parcels on Oahu. Mr. Kurokawa acknowledged that real property taxes are the City's primary source of revenues. When and if Appellants ultimately prevail, in order for the City to pay refunds to them and other homeowners similarly situated, the City would have to levy additional real property taxes, about 98% of which would have to come out of the pockets of the homeowners who are to receive the refunds. In other words, the injured taxpayers would be assessed more real property taxes to compensate for their losses caused by the unjust deprivation of the real property tax exemption. Rather than compensation, this would add insult to their injuries and make 98% of their loss permanently irreparable. As Maui County's Joinder also filed 10/23/2009 (Rec. IX pp 719-724) said at pages 2 and 3, citing *7's Enterprises, Inc. v. Del Rosario*, 111 Haw. 484, 496 n. 17 (2006) "[A]n injury is irreparable, within the law of injunctions, where ... it cannot be readily, adequately, and completely compensated for with money."

Moreover, without declaratory relief and permanent injunction against future deprivation of the special exemption, a multiplicity of lawsuits could not be avoided.<sup>2</sup> Hundreds, even

---

<sup>2</sup> In many situations, as in the above-cited cases, the exercise of a federal court's equitable jurisdiction was necessary to avoid "excessive and oppressive penalties, [the] possibility of [a] multiplicity of suits causing irreparable damage, or [the] lack of proper opportunities for [state] review." Warren, *Federal and State Court Interference*, 43 Harv.L.Rev. 345, 377-378 (1930).

thousands of homeowners, to obtain the equal privileges and immunities assured by the Fourteenth Amendment and federal civil rights laws, would be required to file new suits every year.

**The counties would benefit, not lose.** In striking contrast to the ongoing irreparable losses facing Appellants and the thousands of other homeowners in the same boat, the City & County of Honolulu (and no doubt other counties as well) would not have to incur any loss but could *benefit* from the injunction.

Appellants ask this Court to permanently enjoin each county from **depriving** each and every Appellant and each and every other homeowner similarly situated, of the benefit of the same exemption as his or her county provides for Hawaiian homestead lessees. (Appellants do not seek to prevent or restrict the counties from acting in their legislative capacities. The power of taxation is essentially a legislative power. *Hawaii Insurers' Council v. Lingle*, 117 Hawaii 454, 462-3, 184 P.3d 769, 777-8 (2008). Nor do Appellants seek to prevent or restrict the counties from assessing and collecting real property taxes. Rather the injunction Appellants seek is directed against the counties only in their executive or administrative capacities (where the power to tax does not reside) and would only require the counties to refrain from directly or indirectly depriving any real property taxpayer of exemption equivalent to that provided to

---

*Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 273-274, 117 S.Ct. 2028, 2036 (U.S. (Idaho),1997)

The [Declaratory Judgment] Act was also intended to help defendants, like the Service, who have faced numerous lawsuits, “avoid a multiplicity of actions by affording an adequate, expedient, and inexpensive means for declaring in one action the rights and obligation[s] of the litigants.” *Id.*

*Biodiversity Legal Foundation v. Badgley* 284 F.3d 1046, 1053 (C.A.9 (Or.),2002)

Hawaiian homestead lessees. The injunction would apply to each county, its officials, employees, attorneys, agents and affiliates and persons and entities acting in concert with or under the control of the counties or any of them.

The injunction would not prohibit the counties from changing the exemption for homestead lessees, so long as the revised exemption is equivalent for all owners of residential, pastoral or agricultural parcels in the particular county. If a county chooses to adopt an ordinance, for example, that eliminates the special exemption for Hawaiian homestead lessees, the county would not only comply with the Constitution and civil rights laws of the United States but would enjoy *increased* revenues. For example, the 3,993 parcels on Oahu leased at \$1 per year to Hawaiian homesteaders would finally be paying their share for the City and County of Honolulu's services and infrastructure. Simple arithmetic shows that, if the 3,933 residential homestead parcels on Oahu were brought up from \$100 per year to the average of \$1,817 per year charged to other residential homeowners, the City & County of Honolulu would take in approximately an additional \$6,752,961 per year.

The other counties have not yet provided the data to calculate the average annual magnitude of the deprivation to their Appellants and others similarly situated. But it cannot be disputed that, if non-homesteaders are treated equally for the past years in question, significant refunds will be payable to them; and, if each county decides to eliminate the special exemption and require every homeowner to pay his or her share in the future, revenues will rise. The exact increase would depend on the rates per square foot and actual values of the homestead parcels; but whatever that figure is, it would surely produce additional real property tax revenues to every county. This negates that the injunctive relief requested by Appellants would impose *any* hardship on *any* of the counties.

## II. Standard of Review.

**A. De novo review of summary judgments.** We review the circuit court's grant or denial of summary judgment de novo. *Hawaii Community Federal Credit Union v. Keka*, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000). The standard for granting a motion for summary judgment is settled:

[S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn there from in the light most favorable to the party opposing the motion. (Citations and internal quotation marks omitted).

*County of Kauai v. Office of Information Practices, State of Haw.* 120 Hawai'i 34, 39-40, 200 P.3d 403, 408 - 409 (Hawai'i App. 2009).

**B. All racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed under strict scrutiny.**

“Whenever a denial of equal protection of the laws is alleged, as a rule our initial inquiry has been whether the legislation in question should be subjected to ‘strict scrutiny’ or to a ‘rational basis’ test.” We have applied strict-scrutiny analysis to laws classifying on the basis of suspect categories or impinging upon fundamental rights expressly or impliedly granted by the constitution, in which case the laws are presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications, and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights. (Internal citations and quotation marks omitted).

*Child Support Enforcement Agency v. Doe*, 109 Hawaii 240, 249, 125 P.3d 461, 470 (Hawaii, 2005).

“Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”

*Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 229-30 (1995); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 496-97 (1989). "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993).

**C. Strict scrutiny applies here.** Thus, although summary judgments are generally reviewed *de novo*, because the federal issues presented for adjudication in all these consolidated cases all allege and focus primarily on the federal, state and local governments' imposition of racial classifications on individual citizens, strict scrutiny is the standard.

### III. Questions Presented.

Taking the path recommended by *California, et al v. Grace Brethren Church*, 457 U.S. 393, 417 FN 37, 38 (1982) Appellants respectfully present for this Court's adjudication the following federal questions.

**A. Legality of HHCA adopted by Congress in 1921.** Whether the Hawaiian Homes Commission Act "HHCA" violated and still violates the Equal Protection component of the Fifth Amendment and the fiduciary duty of the United States as Trustee of the Ceded Lands Trust created in 1898 by the Annexation Act<sup>3</sup>.

---

<sup>3</sup> Hawaii's Ceded Lands Trust originated in 1898 when the United States accepted the Treaty of Annexation signed June 16, 1897 in Washington, D.C. by the President of the United States by John Sherman, Secretary of State, and the President of the Republic of Hawaii by his representatives; and ratified by the Senate of the Republic of Hawaii on September 19, 1897. (Exhibits A attached to Appellants' motion for injunction pending appeal filed in the Tax Appeal Court September 4, 2009. Appx Q.1.) In the 1897 Treaty, the Republic of Hawaii offered to cede absolutely and without reserve to the U.S. all rights of sovereignty of whatsoever kind; and ceded and transferred to the U.S. the absolute fee and ownership of all public, government or crown lands and all other public property belonging to the Government of the Hawaiian Islands. The Treaty however, provided that all revenues and proceeds, except as to that part of the lands used for the civil, military or naval purposes of the U.S. or assigned for local government, "shall

**Where point of error raised below:** The prayer of each of the three complaints (Corboy and Aghjayan Rec. III 1-11; Smith and Arakaki X 1-19 amended XI 49-56; and Sanborn XVII 1-10) in paragraph A.2. asked the Tax Appeal Court, “in the absence of equivalent homestead leases and benefits for every Hawaii citizen without regard to race or ancestry” to declare the HHCA, the Compact in Admission Act § 4 and Hawaii Constitution Art. XII, §§ 1-3 “ violate the Fifth and Fourteenth Amendments and/or 42 U.S.C. § 1981, 1983, 1985(3), 1986 and 2000d et seq. or other federal statutory and common law and are invalid.” At the hearing in the Tax Appeal Court June 8, 2009 Plaintiffs-Appellants’ counsel argued, among other points, “In 1921 when Congress enacted that [HHCA] act, it was in violation of the duty of the United States as trustee to hold the proceeds and revenues from those ceded lands for the benefit of all the inhabitants. ... And that act injected race for the first time in 1921 into the Hawaiian Homes Commission Act. ... That again, we believe, was a violation not only of the trust but also of the constitution, the equal protection component of the Fifth Amendment, the trust law, the basic trust law, and also the equal footing doctrine.” (Transcript 6/8/2009 pp 4-5)

---

be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes. The Treaty also provided that the public debt of the Republic of Hawaii, existing on the date of exchange of ratifications, be assumed by the U.S. not to exceed \$4 million. The Treaty was ratified by the Senate of the Republic of Hawaii September 9, 1897. (Appx Q.2.)

The *Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States*, Resolution No. 55, known as the *Newlands Resolution*, approved July 7, 1898; Annexation Act, 30 Stat 750 (1898) (reprinted in 1 Rev. L. Haw. 1955 at 13-15), (specifically “accepted, ratified and confirmed” the cession, including the proviso that the “revenues and proceeds”, with the exceptions noted, “*shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes;*” and also expressly assumed the public debt of the Republic of Hawaii not to exceed \$4 million. Emphasis added. (Exhibit C attached to Appellants’ motion for injunction pending appeal filed in the Tax Appeal Court September 4, 2009. (Appx Q.3.)

**B. Imposition of HHCA compact on the new State of Hawaii in 1959.**

Whether the United States, by §4 of the Admission Act of March 18, 1959, Pub L 86-3, 73 Stat. 4, (which required, as a condition of statehood and as a compact with the United States, that the new State of Hawaii adopt the HHCA and continue to carry it out) also violated the Fifth Amendment and the fiduciary duty of the United States as Trustee of the Ceded Lands Trust as well as the Equal Footing doctrine;

**Where point of error raised below:** Same as for **Question A..**

**C. Adoption of HHCA by State in 1959 and continuing to implement it.**

Whether the State of Hawaii, by agreeing to the compact and adopting the HHCA, incorporating it into Hawaii's Constitution and continuing to implement it, violates the Fourteenth Amendment, federal civil rights laws, and the State's fiduciary duty as Trustee of the federal Ceded Lands Trust;<sup>4</sup>

**Where point of error raised below:** Same as for **question A** and also paragraph 1.A of the three complaints (Corboy and Aghjayan Rec. III 1-11; Smith and Arakaki X 1-19 amended XI 49-56; and Sanborn XVII 1-10) "violate the Fourteenth Amendment of the United States Constitution: and the same federal civil rights law as listed in the first point.

**D. The counties' special exemptions for Hawaiian homestead lessees.**

Whether each of the four counties of the State of Hawaii, by giving Hawaiian homestead lessees special exemption from real property taxes and depriving Appellants and other homeowners

---

<sup>4</sup> As citizens of the State of Hawaii each Appellant is also a beneficiary and equitable owner, along with all other citizens of the State, of the approximately 1.4 million acres of Hawaii's ceded lands (including the approximately 200,000 acres set aside as available lands for the Hawaiian Homes Commission Act in 1921) now held by the State as Trustee of the Ceded Lands Trust created by the Annexation Act in 1898 "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

similarly situated of the same exemption, violates the Fourteenth Amendment and other provisions of the Constitution and laws of the United States as well as each of the county's fiduciary duties as political subdivisions of the State of Hawaii, Trustee of the Ceded Lands Trust.

**Where point of error raised below:** Same as for **Question C** and numerous other proceedings before the Tax Appeal Court.

**E. The Tax Appeal Court's final judgment and several orders.** Whether the Tax Appeal Court erred in granting the State's motion for summary judgment and the counties' joinders in that motion; and in denying Appellants' counter-motion for summary judgment.

**Where point of error raised below:** Same as for **Question D**.

#### **IV. Summary of Argument**

The answer to all the Questions Presented is "YES" because: The HHCA imposes a racial classification on all citizens of Hawaii who happen to lack the favored ancestry; and the counties' adoption and expansion of the HHCA's special exemption for Hawaiian homestead lessees impose a racial classification on all real property owners in their respective counties who lack the favored ancestry. Such impositions are presumed to be invalid and can be upheld only if they pass strict scrutiny. Neither the State nor the counties, nor any of them, has or can show such impositions are narrowly tailored to satisfy a compelling governmental interest. The State of Hawaii's own constitution negates that the State or any of its political subdivisions have a compelling governmental interest in diverting some 200,000 acres of the ceded lands from

benefitting all the people of Hawaii or in depriving some citizens of equal privileges and immunities or that the escalating invidious discrimination is narrowly tailored.

## **V. Argument**

**A. The definitions “native Hawaiian” and “Hawaiian” are racial classifications.** The key and overriding issue presented in this appeal has already been adjudicated by the Supreme Court of the United States. The high court held in *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000) that the definitions of “native Hawaiian” as defined in the HHCA (“any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778”) and “Hawaiian” (“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. [Sec. 10-2](#)) are racial classifications.

### **B. The HHCA: Explicitly racial in both purpose and effect.**

From July 9, 1921 when it was enacted by Congress (42 Stat.108), the HHCA Sec. 207 authorized homestead leases of tracts of Hawaiian home lands to, and only to, “native Hawaiians” (defined in Sec. 201(7) as “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.”) Sec. 208, also from the inception, required, “whether or not stipulated in the lease: (1) The lessee shall be native Hawaiian. (2) The lessee shall pay a rental of \$1 a year for the tract and the lease shall be for a term of ninety-nine years; “

Congress by §4 of the 1959 Admission Act required as a condition of statehood and as a compact with the United States that the new State of Hawaii adopt the HHCA as a provision of its constitution subject to amendment or repeal only with the consent of the United States and

mandated that all proceeds and income of the “available lands” [the approximately 200,000 acres of the ceded lands set aside as Hawaiian home lands] shall be used only in carrying out the provisions of said Act. In compliance, the State amended and adopted what is now Article XII Sections 1 – 4 of its Constitution. Section 2 agreed and declared, “that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects *for the further rehabilitation of the Hawaiian race* shall be faithfully carried out.” (Emphasis added.)

Today, 88 years later: the express agreement and declaration of the racial purpose of HHCA: “for the further rehabilitation of the Hawaiian race” remains in full force and effect in Hawaii Constitution Art. XII, Sec 2; the definition of “native Hawaiian” in Sec. 201(7) remains unchanged; Sec. 208(1) still requires the lessee to be native Hawaiian; and Sec. 208(2) still requires rental of \$1 per year and a term of 99 years and also allows the Department of Hawaiian Home Lands (“DHHL”) to extend the term provided that the aggregate term shall not be for more than 199 years.<sup>5</sup>

Thus for 89 years, the HHCA has restricted the award of original homestead leases to “descendants of not less-than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.”

### **C. The Equal Footing doctrine.**

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

---

<sup>5</sup> Under current HHCA Sec. 208(5) the Homestead lessee may, with approval of the department [of Hawaiian home lands] transfer the lessee’s interest in the tract to the lessee’s husband, wife, child or grandchild who is “at least one-quarter Hawaiian;” and under current Sec. 209, upon the lessee’s demise, the lessee’s husband, wife or children who are “at least one-quarter Hawaiian” may succeed to the lessee’s interest. Since Appellants do not and cannot qualify to receive a lessee’s interest as transferees or successors, they remain unable to ever qualify for the real property tax exemption in question.

admitted on equal footing with all others. Congress' 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 than 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 (9<sup>th</sup> 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 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 nor the county 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.

#### **D. Hawaii's Ceded Lands Trust**

Hawaii's Ceded Lands Trust originated in 1898 with the Annexation Act, also known as the Newlands Resolution. The Republic of Hawaii ceded all its public lands (about 1.8 million acres formerly called the Crown lands and Government lands of the Kingdom of Hawaii) to the United States with the requirement that all revenue from or proceeds of these lands except for those used for civil, military or naval purposes of the U.S. or assigned for the use of local government "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes". *Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States*, Resolution No. 55, known as the *Newlands Resolution*, approved July 7, 1898; Annexation Act, 30 Stat. 750 (1898). (Appx Q.3.)

As part of the Annexation Act, "The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars." At the end of 1892, the last full year of the Kingdom of Hawaii, its bonded debt

was \$2,314,000. (Schmitt, Historical Statistics of Hawaii, University Press of Hawaii, 1977 Table 25.13, Funded debt, 1856 to 1976.) (Appx T.) The bonded debt of the Republic of Hawaii at the end of 1897, the last full year before annexation, was \$4,489,000. The bonded debt of the Territory of Hawaii in 1901 was \$940,000, (*Id.*) suggesting that the United States between 1897 and the end of 1901, may have paid off something over \$3.5 million of the public debt accumulated by the Kingdom and Republic.

The Organic Act of April 30, 1900, c 339, 31 Stat. 141 reiterated that “All funds arising from the sale or lease or other disposal of public land shall be applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation approved July 7, 1898.”

The *Newlands Resolution* established the Ceded Lands Trust. Such a special trust was recognized by the Attorney General of the United States in Op. Atty. Gen. 574 (1899). (Appx Q.4.) The special trust for the people of Hawaii has also been recognized several times by the Hawaii Supreme Court.

The federal government has always recognized the people of Hawaii as the equitable owners of all public lands; and while Hawaii was a territory, the federal government held such lands in ‘special trust’ for the benefit of the people of Hawaii. *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977).

Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in the public trust since that time. *Id* at 125.

*Yamasaki*, 69 Haw. 154, 159, 737 P.2d 446, 449 (1987); see also Hawaii Attorney General Opinion 95-03 July 17, 1995 (Appx S.) to Governor Benjamin J. Cayetano from Margery S. Bronster, Attorney General,

Section 5 [Admission Act] essentially continues the trust which was first established by the Newlands Resolution in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, Congress served as trustee; under the Organic Act, the Territory of Hawaii served as Trustee.

The insistence of the Republic of Hawaii in 1898 that the United States hold the ceded lands solely for the benefit of the inhabitants of Hawaii was based on historic precedent and had significant, long-reaching consequences for the future State of Hawaii. The United States had held a similar trust obligation as to the lands ceded to it by the original thirteen colonies. Once those new states were established, the United State's authority over the lands would cease. Other future states, Nevada for example, did not have such an arrangement. As this court held in *U.S. v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997), citing *Light v. United States*, 220 U.S. 523, 536, 31 S.Ct. 485, 488, 55 L.Ed. 570 (1911), the United States still owns about 80% of the lands in Nevada and may sell or withhold them from sale or administer them any way it chooses.

**E. Trustees of Dartmouth College v. Woodward.**

Buttressing Appellants' argument that: Congress, by adopting the HHCA in 1921; and imposing it on the State of Hawaii in 1959 subject to amendment or repeal only with the consent of the United States and still requiring the State to use the revenues and proceeds of the about 200,000 acres of the ceded lands set aside as Hawaiian home lands "only in carrying out the provisions of said Act;" and the State of Hawaii by adopting HHCA and incorporating it into the Hawaii Constitution now Art. XII §§ 1-3, and by continuing to carry it out; and the four counties of the State of Hawaii, by adopting and expanding the HHCA's special exemption for Hawaiian homestead lessees, breach not only the Constitution's Equal Protection clauses and Equal Footing doctrine but also the fiduciary duties of the State and its political subdivisions under the Ceded Lands Trust, is *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

In 1819, Chief Justice John Marshall wrote that the charter granted by the British Crown to the trustees of Dartmouth College, in New Hampshire, in the year 1769, was a contract within the meaning of that clause of the Constitution of the United States (Art. 1, § 10), which declares, that no state shall make any law impairing the obligation of contracts.

The state of Vermont was a principal donor to Dartmouth College. The lands given lie in that state and are of “great value.” The State of New Hampshire also donated lands of “great value.” *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 574 (1819).

After the trustees had operated the college beneficially for nearly 50 years and after the American revolution, the New Hampshire legislature, controlled by Republican supporters of Thomas Jefferson, passed a bill revising the charter of Dartmouth College, adding new trustees and a board of overseers. The trustees refused to accept the changes and filed suit to invalidate them.

In the decision written by C.J. Marshall, the Supreme Court held that the royal charter had “every ingredient of a complete and legitimate contract.” He ruled that the trustees’ powers continued forever and “could not be abridged by legislative acts.”

Hawaii’s Ceded Lands Trust, for “educational and other public purposes” was also endowed with public lands and also founded with every ingredient of a complete and legitimate contract. On June 16, 1897 the Republic of Hawaii, by its proposed Treaty of Annexation, (Appx Q.1.) offered to cede to the United States its public lands (about 1.8 million acres formerly called the Crown lands and Government lands of the Kingdom of Hawaii) with the requirement that all revenue from or proceeds of the lands, except those parts used for civil, military or naval purposes of the United States or assigned for the use of local government, “shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational

and other public purposes.” Another condition of the Republic’s offer was that the “The public debt of the Republic of Hawaii” was to be “assumed by the government of the United States , but the liability of the United States in this regard shall in no case exceed \$4,000,000.” Appx Q.1.

A year later, on July 7, 1898, by the Newlands Resolution, the United States accepted the offer, expressly including the conditions that it hold the lands in trust and that it assume the debts accumulated by the Kingdom and Republic up to \$4 million. (Appx Q.3.)

As the Supreme Court held, “Where there is a charter, vesting proper powers of government in trustees or governors, they are visitors; and there is no control in anybody else; except only that the courts of equity or of law will interfere so far as to preserve the revenues, and prevent the perversion of the funds, and to keep the visitors within their prescribed bounds.” 17 U.S. 565.

That basic principle of trust law enforcing legitimate contractual obligations under which a state holds public lands of great value in a perpetual trust is now found in Restatement (Third) of Trusts § 64 (2003) Current through August 2009,

§ 64. Termination Or Modification By Trustee, Beneficiary, Or Third Party

**(A) Except as provided in §§ 65<sup>6</sup> and 68, the trustee or beneficiaries of a trust have only such power to terminate the trust or to change its terms as is granted by the terms of the trust.**

---

<sup>6</sup> § 65 covers termination or modification by consent of beneficiaries, inapplicable in the case of perpetual public trusts such as Dartmouth College or Hawaii’s Ceded Lands Trust.

§ 68 covers dividing and combining trusts “if doing so does not adversely affect the rights of any beneficiary.” Again, inapplicable because dividing the Ceded Lands Trust by giving native Hawaiians the exclusive benefit of 200,000 acres while still retaining their full rights in the remaining trust corpus would adversely affect the other beneficiaries.

**(B) The terms of a trust may grant a third party a power with respect to termination or modification of the trust; such a third-party power is presumed to be held in a fiduciary capacity.**

Since the terms of the offer and acceptance gave no trustee, beneficiary or third party any right to modify or change the terms of the Ceded Lands Trust, except in a fiduciary capacity, as a matter of law, neither the State of Hawaii, nor the counties, nor Congress, whether by the Apology resolution or any other law, has the power to impair the obligations to all the people of Hawaii undertaken by the United States in 1898 in the Annexation Act, and assumed by the State of Hawaii in 1959.

**F. Refutation of defenses by the State and counties.**

**(1) Sec. 208(7) still requires the Lessees to pay all taxes.** HHCA Sec. 208(7) has always and still provides: “The lessee shall pay all taxes assessed upon the tract and improvements thereon.” The proviso in Sec. 208(8) only exempts the original lessee from taxes for the first 7 years after commencement of the term of the lease. Sec. 208(7) has not been amended or repealed in Hawaii’s Constitution or in the manner provided for state legislation.

Therefore, the counties’ exemptions of homestead lessees from most real property taxes after the first seven years of the term of each homestead lease, are inconsistent with the Federal mandate in HHCA Sec. 208(7) which is incorporated into the Hawaii Constitution. Absent from the record is any proof that any county has a compelling governmental interest in discriminating between its real property owners on the basis of race during the first 7 years of the term of each homestead lease, much less an interest in prolonging the invidious discriminations for the entire 99 or 199 year term of each homestead lease.

**(2) No native Hawaiians are disfavored from competing**

The State and counties argued in the Tax Appeal Court that because the disfavored group “includes most native Hawaiians” and “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.” (See for example Rec. V 111-140, the State’s memo in support of summary judgment filed 4/20/09 at page 3. Emphasis in State’s memo.)

That argument was and is mistaken. The HHCA permits any “native Hawaiian” not less than 18 years of age to compete for the limited number of Hawaiian homestead leases. The fact that only some native Hawaiians are awarded original leases, does not signify that native Hawaiians are in the disfavored group, much less that the award of homestead leases is race neutral. When a plaintiff brings an equal protection challenge to a race-conscious program and seeks forward-looking relief, (as Appellants here do) the injury is not the inability to obtain the benefit, but the inability to compete on an equal footing. *Carroll v. Nakatani*, 342 F.3d at 941. As the Supreme Court said in *Rice*, 528 U.S. at 516-517, “Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral.”

**(3). To seek equal treatment in the taxation of their real property, taxpayers are not required to first make futile applications.**

The State cites *Carroll v. Nakatani*’s denial of Carroll’s standing for the proposition that Appellants here lack standing because “none of them have shown any desire to become HHCA homestead lessees.” (State’s memo in supp of motion for summary judgment filed 4/20/2009 at 4, 5, Rec. V, pp. 111-114 ). However in that case, it was Patrick Barrett, not John Carroll, who challenged the HHCA leasing program, and the court held that, given the racial criteria, it would have been futile for Barrett to have made prior application, and upheld his right to bring the

challenge (but denied it for lack of redressability.) The federal District Court decision, later affirmed by the Ninth Circuit, provided:

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.

*Carroll v. Nakatani*, 188 F. Supp. 2d 1219, 1229-30 (Dist. Ct. Hawaii 2001), Judgment Affirmed 342 F.3d 934, 944-945 (9<sup>th</sup> Cir. 2003). (The district court denied Barrett's motion for reconsideration because he failed to advance these arguments in a timely manner. . . . Barrett invokes § 2403(a) and Rule 19(a) to remedy his own legal and strategic shortcomings of standing. His claim, on its own, presented without the United States as a party and never challenging the constitutionality of the Admissions Act renders his claim not redressable. . . . We affirm . . . the district court's holding that Barrett's claim challenging the HHC homestead lease program is not redressable because he failed to join the United States or challenge the Admissions Act.)

It would be one giant step more ludicrous to hold that: (1) because Appellants have not in the past made futile applications for homestead leases, to which because of the racial criteria they were clearly not entitled, they cannot now seek equal privileges and immunities in the assessment of their real property taxes; and (2) that the United States, bound by the Equal Protection component of the Fifth Amendment, simply by not showing up in court, can deprive municipal taxpayers of their fundamental right to equal protection, privileges and immunities under the law.

Unlike Barrett, Appellants here, from the inception of each of the eight consolidated cases, challenged the HHCA compact in the Admission Act and the HHCA provisions incorporated into the Hawaii Constitution. They raised and gave prompt notice of the constitutional questions as to Art. XII §§ 1-3 of the State Constitution and the HHCA compact in Sec. 4 of the 1959 Admission Act to the Attorneys Generals of both the United States and the State of Hawaii. The State Attorney General has not only intervened but carried the laboring oar for the counties. The United States has not, at least so far, chosen to intervene to defend the constitutionality of the Admission Act's racial compact imposing the HHCA on the citizens of Hawaii. Unlike Barrett, Appellants' claims against the counties for refund, declaratory and injunctive relief against further deprivation of equal exemptions from real property taxes, costs, and attorneys fees are fully redressable.

**(4). Lessees generally are not exempt from real property taxes.**

Lessees of Hawaiian home lands and other State-owned lands generally are required to pay all real property tax on the leased parcels and improvements. The general rule in all four counties is that "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." (Rec. V 111-140 State's Memorandum in Support of State of Hawaii's and Attorney General's Motion for Summary Judgment filed in the Tax Appeal Court April 20, 2009 at pages 2 and 3) citing the county ordinances. Both public and private land leases in Hawaii customarily require the lessee to pay all real property taxes assessed against land and improvements; and the four counties all customarily collect real property taxes paid by lessees. This customary real estate practice in Hawaii is suitable for judicial notice under the Federal Rules of Evidence, Rule 201, and capable

of accurate and ready determination on the counties' web sites showing the particulars of assessed value for every parcel of land and improvements and persons responsible for payment. For example, assessments of the parcels of State land on Sand Island in Honolulu leased to private parties and land leases from Bishop Estate are readily verifiable online at [www.realpropertyhonolulu.com](http://www.realpropertyhonolulu.com) and at the Neighbor Island web sites..

Thus the exemption in question is not based on whether the real property taxpayer owns the fee simple or a leasehold interest in the land. The general rule is that lessees are "fully taxed" the same as fee owners, on the assessed value of the land and improvements. Although the counties' exemptions do not mention the word "race," by restricting the exemption to homestead lessees, all four counties automatically and by definition, exclude all persons who lack the favored ancestry, the very ancestry the Supreme Court held to be a proxy for race: "Not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."

**(5). Hawaii's own Constitution negates any compelling interest in discriminating between homeowners based on their race.** Neither the State, nor the Attorney General, nor the counties have shown or can show that the counties, or any of them, have a compelling governmental interest in depriving most of their citizens of exemptions from real property taxation comparable to the exemptions given to those comparatively few citizens of the favored ancestry. Hawaii's own Constitution negates the existence of any such compelling interest.

■ Immediately after the Preamble, the Constitution of the State of Hawaii adopts the Constitution of the United States of America "on behalf of the people of Hawaii."

■ Haw. Const. Art. I, Sec. 5, “No person shall be ... denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or discriminated against in the exercise thereof because of race ... or ancestry.”

■ Haw. Const. Art. I, Sec. 9 “No citizen shall be ... deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.”

■ Haw. Const. Art. I, Sec. 21, “The power of the State to act in the general welfare shall never be impaired by the making of any irrevocable grant of special privileges or immunities.”

■ Haw. Const. Art. XI, Sec. 1, “... the State and its political subdivisions shall conserve ... all natural resources, including land .... All public natural resources are held in trust by the State for the benefit of the people.”

■ Haw. Const. Art. XI, Sec. 5, “The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, ,,” (exceptions inapplicable to the counties’ special real property tax exemptions given to homestead lessees at issue in this appeal.)

Thus, because the counties’ special real property tax exemptions restricted to homestead lessees, by definition are restricted using a racial classification, they are presumed to be invalid and may be upheld only if they pass strict scrutiny.

**(6). The public interest requires a halt to any further deprivation of equal tax exemptions.** The Fourteenth Amendment 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.”

Black's Law Dictionary, Third Pocket Edition, 1996, West Publishing Co., defines "immunity" as "1. any exemption from a duty, liability or service of process." Oxford Pocket Dictionary and Thesaurus, Second American Edition, 2002, Oxford University Press, defines "immunity" as "2 freedom or exemption from an obligation, penalty, etc." As noted above, by restricting the real property tax exemption to homestead lessees, the counties automatically restrict it to the racial class of "native Hawaiians."

Racial distinctions are especially "odious to a free people," *Rice* 528 U.S. at 517 where they undermine the democratic institutions of a free people by instigating racial partisanship. This was the fundamental evil that the *Rice* Court detected in Hawaii's law: "using racial classifications" that are "corruptive of the whole legal order" of democracy because they make "the law itself . . . the instrument for generating" racial "prejudice and hostility." *Rice*, 528 U.S. at 517.

Eliminating OHA's racial restrictions on voting and holding office did not entirely root out this evil. It will remain as long as governmental actors in Hawaii are required to be racial advocates or give special entitlements based on race. It "is altogether antithetical to our system of representative democracy" to create a governmental structure "solely to effectuate the perceived common interests of one racial group" and to assign officials the "primary obligation . . . to represent only members of that group." *Shaw v. Reno*, 509 U.S. 630, 648 (1983). *Shaw* quoting Justice Douglas:

When racial or religious lines are drawn by the State, the multi-racial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan. Since that system is at war with the democratic ideal, it should find no footing here.

*Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, dissenting).

In *Shaw*, the racial partisanship was fostered indirectly by gerrymandering legislative districts. Here the counties foster invidious discrimination by restricting the exemption to homestead lessees. By doing so, they advance “the perceived common interests of one racial group,” *Shaw*, 509 U.S. at 648. This cannot stand: “Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.” *Lau v. Nichols*, 414 U.S. 563, 569 (1974) (quoting Senator Humphrey during the floor debate on Title VI of the Civil Rights Act of 1964, a provision that is coextensive with the Equal Protection Clause, *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001)). The government is even forbidden to give money to private parties “if that aid has a significant tendency to facilitate, reinforce and support private discrimination.” *Norwood v. Harrison*, 413 U.S. 455, 466 (1973). Norwood instructed the District Court to enjoin state subsidies for private schools that advocated the “private belief that segregation is desirable” and that “communicated” racial discrimination as “an essential part of the educational message.” *Id.* at 469. *A fortiori*, a state’s political subdivisions cannot bestow exemptions from contributing to the common county expenses onto some citizens and deny it to other citizens using racial classifications that are “odious to a free people” and “corruptive” of democracy. *Rice*, 528 U.S. at 517.

**(7). The *Parens Patriae* supports the breach of trust.** In *Kapiolani Park Preservation Soc. v. City and County of Honolulu*, 69 Haw. 569, 572-573, 751 P.2d 1022, 1024 - 1025 (Hawaii 1988) this Court held that, where a governmental agency is the trustee of a charitable trust and

will not seek instructions of the court as to its duties, even though there is a genuine controversy as to its power to enter into a particular transaction and where the attorney general as *parens patriae* has actively joined in supporting the alleged breach of trust, the citizens of this State would be left without protection, or a

remedy, unless we hold, as we do, that members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court.

This Court later cited that ruling with approval in *Pele Defense Fund v. Paty*, 73 Haw. 578, 594, 837 P.2d 1247 (1992), a suit to enforce the State's compliance with the 5(f) trust provisions. In the decision by Justice Klein, (counsel for the State Council of Hawaiian Homestead Associations in the *Carroll* case and now counsel for the OHA Trustees), he said, "Additionally, unless members of the public and native Hawaiians, as beneficiaries of the trust, have standing, the State would be free to dispose of the trust res without the citizens of the State having any recourse."

Appellants' standing is based on their status as municipal taxpayers. Because the State and its Attorney General will not seek instructions of the court as to their conflicting duties as Trustee and *parens patriae* over the federally-created public Ceded Lands Trust, but instead actively support special privileges and immunities for one racial group as to part of the ceded lands, at the expense of all property owners who do not happen to have the favored ancestry, it is especially important that this Court call a permanent halt to the deprivations.

**(8). Setting aside Hawaiian home lands raises 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 later set aside as Hawaiian home lands, were ceded to the United States in 1898 along with the other 1.6 million acres of former Crown and Government lands in

absolute fee, free and clear of any claims of any nature whatsoever as of the date of the 1898 Annexation Act (Newlands resolution). As noted earlier, the Newlands Resolution in 1898 established the Ceded Lands Trust for the benefit of all the people of Hawaii. Diverting some 200,000 acres of those ceded lands held in trust for all the people of Hawaii, to the exclusive use of one group of the beneficiaries, defined explicitly by their racial ancestry, would appear to meet the definitions of HRS §708-974 (Misapplication of entrusted property, a misdemeanor) or Theft, HRS §708-830(6)(a) (Failure to make required Disposition of funds, a felony).

The adoption of HHCA by Congress in 1921 and the continuous implementation of its invidious discrimination since then by the United States and, since 1959 by the State and, since 1978 by the counties has to say the least, “purported” to cloud the title now held by the State of Hawaii as Trustee for all the people of Hawaii and casts grave doubts about the future of HHCA’s scheme of racial segregation.

**VI. Conclusion.**

The Tax Appeal Court’s judgment and orders should be reversed and judgment entered in favor of Appellants on their counter motion for summary judgment.

Dated: Honolulu, Hawaii, January 20, 2010.

Respectfully submitted,

---

H. WILLIAM BURGESS  
Attorney for Appellants

## **APPENDIX TO APPELLANTS' OPENING BRIEF FILED 1/20/2010**

- A. 08/07/09 Final Judgment
- B. 08/07/09 Order Granting Def. City & County's Joinder in State and A.G.'s MSJ
- C. 08/07/09 Order Granting Def. Maui County's Joinder in State and A.G.'s MSJ
- D. 08/07/09 Order Granting Appellee Kauai and State and A.G.'s MSJ
- E. 07/29/09 Order Denying Plaintiffs'-Appellants' Counter-MSJ
- F. 06/26/09 Order Granting State and A.G.'s MSJ
- G. 06/15/09 Order Granting Def. Hawaii County's Joinder in State and A.G.'s MSJ
- H. 04/09/08 Notice of Appeal to Tax Appeal Court **No. 08-0039 Stephen Garo Aghjayan**
- I. 04/09/08 Notice of Appeal to Tax Appeal Court **No. 08-0040 John M. Corboy**
- J. 04/09/08 Notice of Appeal to Tax Appeal Court **No. 08-0041 Garry P. Smith**
- K. 04/09/08 Notice of Appeal to Tax Appeal Court **No. 08-0042 J. William Sanborn**
- L. 04/09/08 Notice of Appeal to Tax Appeal Court **No. 08-0043 Earl F. Arakaki**
- M. 02/11/08 **No. 07-0099 Garry P. Smith and Earl F. Arakaki**, Amended Complaint for Refund of R.P. Taxes Paid under protest and for Declaratory and Injunctive Relief, Notice of Constitutional Question.
- N. 09/11/07 **No. 07-0102 J. William Sanborn**, Complaint for Refund of R.P. Taxes paid under protest and for Declaratory and Injunctive Relief, Notice of Constitutional Question.
- O. 08/31/07 **No. 07-0086 John M. Corboy and Stephen Garo Aghjayan**, Complaint for Refund of R.P. Taxes paid under protest and for Declaratory and Injunctive Relief, Notice of Constitutional Question.
- P. 11/23/09 Four exhibits or visual aids used at hearing in Tax Appeal Court November 23, 2009:
  - 1. Irreparable harm/benefit analysis of special exemption
  - 2. DHHL Lease Report 6/30/2008
  - 3. Honolulu Advertiser 11/23/2009 County Budget Shortfalls
  - 4. Honolulu Advertiser 11/23/2009 Hawaii counties see budget crunch

- Q. 09/04/09 Four exhibits to Appellants' motion in the Tax Appeal Court for Stay or injunction pending appeal:
1. June 16, 1897 Treaty of Annexation negotiated and signed in D.C. on behalf of President of U.S. by John Sherman, Sec of State of U.S. and on behalf of President of Hawaii by Francis Mark hatch, Lorrin A. Thurston and William A. Kinney.
  2. September 9, 1897 Resolution of Senate of Republic of hawaii ratifies, advises and consents to the ratification by the President of the treaty between the Republic of Hawaii and the U.S.
  3. July 7, 1898 Joint Resolution to provide for annexing the Hawaiian Islands to the United States.
  4. September 9, 1899 Opinion of Attorney General of U.S. Effect of clause in resolution of annexation is to subject the public lands (except for parts used for military or naval purposes or local government) to a special trust, limiting the revenues or proceeds to the uses of the inhabitants of the Hawaiian Islands for educational or other public purposes.
- R. 05/01/09 Declaration of each Appellant filed with Appellants' Counter Motion for Summary Judgment:
1. **Dr. John M. Corboy**
  2. **Stephen Garo Aghjayan**
  3. **Garry P. Smith**
  4. **Earl F. Arakaki**
  5. **J. William Sanborn**
- S. 07/17/95 Hawaii Attorney General Opinion 95-03 to Governor Benjamin J. Cayetano from Margery S. Bronster, Attorney General
- T. 1977 Schmitt, Historical Statistics of Hawaii, 1977 University Press of Hawaii, Table 25.13 Funded debt, 1856 to 1976

## STATEMENT OF RELATED CASES

To the best of counsel's knowledge there are no related cases pending in the courts of the State of Hawaii.

Dated: Honolulu, Hawaii, January 20, 2010.

A handwritten signature in cursive script that reads "H. William Burgess".

---

H. WILLIAM BURGESS  
Attorney for Appellants

## CERTIFICATE OF SERVICE

I hereby certify that 2 copies of the foregoing document was served upon the following parties through their attorneys as addressed below via First Class U. S. Mail, postage prepaid on January 20, 2010:

MARK J. BENNETT, ESQ.  
Attorney General State of Hawaii  
GIRARD D. LAU, ESQ.  
CHARLEEN M. AINA, ESQ.  
Deputy Attorneys General  
425 Queen Street  
Honolulu, Hawaii 96813

Attorneys for Appellee State of Hawaii, and  
Appellee Mark J. Bennett, in his official  
capacity as Attorney General of Hawaii

ALFRED B. CASTILLO, JR., ESQ.  
JENNIFER S. WINN, ESQ.  
Office of the Kauai County Attorney  
4444 Rice Street, Suite 220  
Lihue, Kauai, Hawaii 96766

Attorneys for Appellee County of Kauai

BRIAN T. MOTO, ESQ.  
RICHARD B. ROST, ESQ.  
Office of Maui Corporation Counsel  
200 South High Street  
Wailuku, Maui, Hawaii 96793

Attorneys for Appellee County of Maui

LINCOLN S.T. ASHIDA, ESQ.  
CRAIG T. MASUDA, ESQ.  
Office of Hawaii Corporation Counsel  
101 Aupuni Street, Suite 325  
Hilo, Hawaii 96720

Attorneys for Appellee County of Hawaii

CARRIE OKINAGA, ESQ.  
LEE M. AGSALUD, ESQ.  
Real Property Tax Division  
842 Bethel St. Fl. 2  
Honolulu, Hawaii 96813

Attorneys for Appellee  
City & County of Honolulu

DATED: Honolulu, Hawaii, January 20, 2010.



H. WILLIAM BURGESS  
Attorney for Appellants