NO. 30049

IN THE SUPREME COURT OF THE STATE OF HAWAII

JOHN M. CORBOY and STEPHEN GARO AGHJAYAN,

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

[CAPTION CONTINUED]

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

APPEAL FROM:

1) FINAL JUDGMENT, filed August 7, 2009

2) ORDER GRANTING STATE OF HAWAII'S AND ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT, filed June 26, 2009

3) ORDERS GRANTING EACH COUNTY'S JOINDER IN STATE OF HAWAII'S AND ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT, filed June 15, 2009 and August 7, 2009

4) ORDER DENYING PLAINTIFFS-APPELLANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT, filed July 29, 2009

TAX APPEAL COURT

JUDGE: Gary W.B. Chang

ANSWERING BRIEF OF DEFENDANTS-APPELLEES STATE OF HAWAII AND ITS ATTORNEY GENERAL

STATEMENT OF RELATED CASES

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GARRY P. SMITH and EARL F. ARAKAKI, Plaintiffs-Appellants, vs. MARK J. BENNETT, in his official capacity as Attorney General, State of Hawaii; and the CITY AND COUNTY OF HONOLULU, Defendants-Appellees.	T.A. NO. 07-0099 CONSOLIDATED (Other Civil Action)
J. WILLIAM SANBORN, Plaintiff-Appellant, vs. MARK J. BENNETT, in his official capacity as Attorney General, State of Hawaii; and the COUNTY OF HAWAII, Defendants-Appellees.	T.A. NO. 07-0102 CONSOLIDATED (Other Civil Action)
IN THE MATTER OF THE TAX APPEAL OF STEPHEN GARO AGHJAYAN, Appellant-Appellant, and STATE OF HAWAII, Intervenor-Defendant-Appellee-Appellee.	T.A. NO. 08-0039 CONSOLIDATED (Other Civil Action)
IN THE MATTER OF THE TAX APPEAL OF JOHN M. CORBOY, Appellant-Appellant, and STATE OF HAWAII, Intervenor-Defendant-Appellee-Appellee. [CAPTION CONTINUED]	T.A. NO. 08-0040 CONSOLIDATED (Other Civil Action)

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

ANSWERING BRIEF OF DEFENDANTS-APPELLEES
STATE OF HAWAII AND ITS ATTORNEY GENERAL

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I. INTRODUCTION AND STATEMENT OF THE CASE

Taxpayers-Appellants, apparently aware of the weakness of their appeal, have presented an Opening Brief that relegates the Equal Protection and federal civil rights claims -- the only claims brought in their Complaints -- to a small portion of their Opening Brief, and instead raise new claims and attacks (breach of trust or fiduciary duty, Equal Footing doctrine, Contracts Clause, etc.) that were simply not part of their Complaints. Such new attacks raising claims not part of their Complaints, and also not raised in opposition to the State's summary judgment motion, are totally improper, see Section D, infra, and are, in any event, entirely baseless on the merits. See Section D, infra. The focus of this Answering Brief, however, will properly be on the Equal Protection and federal civil rights claims that formed the basis of plaintiffs' complaints. Plaintiffs below, and in their Opening Brief on appeal, provided no serious rebuttal to the entry of summary judgment rejecting those claims.[1]

We also note that Taxpayers' extended discussion of harm to themselves versus to the governmental defendants, Open. Br. at 3-6, is all beside the point. Although that discussion may have been relevant to their motion for injunction pending appeal, which was appropriately denied

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[1] **It must be emphasized that Taxpayers "Questions Presented" section is inappropriate to the extent it suggests that the issues before this court extend beyond pure tax issues -- here, the singular issue of the validity of the counties' real property tax exemptions reserved for homestead lessees -- to include broad attacks on the Hawaiian Homes Commission Act (HHCA) in general, Section 4 of the federal Admission Act, or Article XII, §§ 1-3, of the Hawaii Constitution. Open. Br. at 8-10. Taxpayers improperly attack, for example, the overall HHCA program for limiting homesteads to native Hawaiians.** The Hawaii Revised Statutes make very clear that the Tax Appeal Court's jurisdiction is limited to issues of taxation only. 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 as shown on the one hand by the amount claimed by the taxpayer or county and on the other hand by the amount of the assessment . . . ."). Taxpayers cannot expand the scope of their appeal beyond the limited jurisdiction of the Tax Appeal Court from which this appeal is brought. It is thus patently improper for Taxpayers to broadly attack the HHCA for limiting homesteads to only native Hawaiians; they may only challenge the HHCA's tax exemption provision (as it relates to the County tax exemptions). Much of their brief, however, focuses not on the tax exemption, but upon the HHCA as a whole, and the fact that homesteads are generally only available to native Hawaiians. Those attacks are jurisdictionally improper and should be ignored.

Furthermore, and for much the same reason explained in section A.2, infra, because Taxpayers admitted below that they did not want to become HHCA homestead lessees, they plainly have no standing to challenge the HHCA's provision of homestead leases to only native Hawaiians.

by this Court, see Order filed 1/14/10, Taxpayers' request for a permanent injunction fails if they do not succeed on the merits, **regardless of the balance of harms**. See K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989) (citing Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987)) ("Where, as here, *permanent* injunctive relief is involved, . . . the movant must show 'actual success' on the merits of the claim, rather than a mere likelihood of such success."). Therefore, because plaintiffs fail on the merits of their claims (as demonstrated in detail below), permanent injunctive relief is inappropriate, even if the balance of harms favored them, which it does not.[2] In short, summary judgment was properly granted against Taxpayers' claims once their claims failed on the merits, making the balance of harms irrelevant. See Idaho Conservation League v. Thomas, 917 F. Supp. 1458, 1469 (D. Idaho 1995) (where "court has ruled against the plaintiffs on the merits of the complaint, . . . the issue of irreparable harm is now irrelevant").

Section 208(8) of the Hawaiian Homes Commission Act (hereinafter "**HHCA**")[3] serves as the basis for the county tax exemptions Taxpayers challenge. It provides: "an original lessee shall be exempt from all taxes for the first seven years after commencement of the term of the lease." As demonstrated below, the tax exemption on its face classifies on the basis of whether one is an HHCA homesteader, not whether one is a native Hawaiian,[4] and thus the exemption plainly involves no suspect classification. Second, as explained in subsection A.2, infra, because Taxpayers below flatly repudiated any interest in becoming homesteaders, they have no standing

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[2] As demonstrated in the State of Hawaii's and Attorney General's Memorandum in Opposition to Appellants' Motion for Injunction Pending Appeal (filed in the Hawaii Supreme Court on 12/28/09) at pp.3-8, Taxpayers' harms analysis is seriously flawed; the balance of harms and the public interest weigh heavily against granting an injunction. By denying Taxpayers' motion, this Court apparently agreed.

[3] The Hawaiian Homes Commission Act was originally a federal law, 42 Stat. 108 (1921), and became a part of state law by mandate of § 4 of the federal 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"). **Thus, the tax exemption of HHCA 208(8) cannot be repealed without consent of the United States.**

[4] The term "native Hawaiian" is used herein to refer to "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA Section 201.

to rely on the fact that only native Hawaiians can become homesteaders. Consequently, these taxpayers have no standing to even attempt to convert the plainly non-suspect tax exemption classification -- one distinguishing between homesteaders and non-homesteaders -- into one which classifies on the basis of whether one is native Hawaiian or not. See subsection A.2, infra.

II. STANDARD OF REVIEW

The State agrees that summary judgment rulings are reviewed de novo. Taxpayers' discussion regarding strict scrutiny review of racial classifications is irrelevant because, as explained below, the challenged tax exemption does not involve a racial classification. Accordingly, and contrary to Taxpayers' assertion, the rational basis test, not strict scrutiny, applies to their Equal Protection challenge to the tax exemptions. See Section B, infra.

III. ARGUMENT

A. The challenged exemptions involve no racial classification, but classify instead on the basis of HHCA homesteader status, a plainly non-suspect classification.

The challenged property tax exemptions do not involve a potentially suspect racial classification, because the tax exemptions are not based upon whether a taxpayer is native Hawaiian or not, but rather whether the taxpayer is a lessee of HHCA homesteads. See Rev. Ord. Honolulu § 8-10.23 ("real property leased under homestead . . . 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 § 19-89.[5] Taxpayers, after all, cannot deny that native Hawaiians who are not lessees of HHCA homesteads also do not receive the tax exemption, just as Taxpayers, who are not lessees of such land, do not receive the tax exemption. Therefore, it is clear that a person's tax exempt status turns not on whether the person is native Hawaiian, but

[5] The Hawaii county 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]."

upon whether the person 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. Because only homestead lessees under the HHCA receive the exemption, and even native Hawaiians who are not homestead lessees do not receive the exemption, the exemption classification is clearly this: homestead lessee or not. That classification plainly does not involve a suspect racial classification.

Taxpayers' reliance on Rice v. Cayetano, 528 U.S. 495 (2000), for support is misplaced. In Rice, the classification for those allowed to vote in elections for OHA trustee was whether or not one was Hawaiian or not. Id. at 499. Hawaiians were eligible to vote, and non-Hawaiians were not. That is an entirely different situation from the case at bar, where the qualification for the tax exemption turns not on whether one is a native Hawaiian or not, but upon whether one is a homestead lessee. Similarly, Taxpayers are off-base in relying upon the quotation from Rice that reads: "Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." Open. Br. at 22. The problem for Taxpayers here is that, unlike in Rice, there is no "class defined by ancestry" with regard to the tax exemption. The tax exemption is not given to native Hawaiians as a class, but only to homestead lessees of HHCA land, who make up only a small fraction of native Hawaiians.[6] In short, the eligible class is defined not by ancestry, but by homesteader status.

Taxpayers' argument that only native Hawaiians can become homestead lessees of HHCA land is irrelevant for two independent reasons, as explained below.

1. Fact that only native Hawaiians can become homestead lessees does **not** convert classification into an ostensibly racial classification.

First, Taxpayers have no answer to the fact that Equal Protection analysis requires, at the outset, "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 lessees of HHCA homesteads** -- a group that includes most native Hawaiians. The disfavored class is thus not those who are not native Hawaiian, but those, including native Hawaiians (and non-native-

[6] The State submitted in its summary judgment motion strong evidence -- which went unrebutted -- that most native Hawaiians are not homestead lessees. See Exhibit "A" to the State's 4/20/09 summary judgment motion at p.4 Table 2 [R. 138], showing that households with native Hawaiians total 54,159, while HHCA homestead lessee households total only 7,049. See State's Reply Memo (filed 5/6/09) at p.2 n.1 [R. 378] (explaining how these numbers were derived).

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 the disfavored group includes both non-native Hawaiians **and** native Hawaiians, there is no racial classification, and strict scrutiny is inapplicable.

Any doubt on this front is eliminated by the United States Supreme Court's decision in Geduldig v. Aiello, 417 U.S. 484 (1974), which flatly rejected an analogous claim that exclusion of pregnancy-related work loss from a disability insurance program effected a gender-based discrimination warranting heightened scrutiny under the Equal Protection Clause.

> [T]his case is ... a far cry from cases like Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), involving discrimination based upon gender as such. . . . **While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification** like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. **Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis**, just as with respect to any other physical condition. The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. **The program divides potential recipients into two groups --pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.** The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

Geduldig, 417 U.S. at 497 n.20 (emphasis added). By perfect analogy, therefore, the fact that only native Hawaiians can become homestead lessees of HHCA lands, does not convert an exemption for homestead lessees into a race-based classification. This is easily seen by simply substituting into the above quotation the relevant language for this case -- i.e., replacing "pregnant" or "pregnancy" with "homesteaders," "women" or "female" with "native Hawaiians," and "sex" with "race." With those appropriate substitutions, the Geduldig Supreme Court ruling translates into the following. "While it is true that only [native Hawaiians] can become [homesteaders], it does not follow that every legislative classification concerning [homesteaders] is a [race]-based classification."

Continuing with the analogy, there is no showing that HHCA "distinctions involving [homesteaders] are mere pretexts designed to effect an invidious discrimination against the

members of one [race] or the other."[7] Thus, "lawmakers are constitutionally free to include or exclude [homesteaders] from the coverage of legislation such as this on any reasonable basis."

Finally, the HHCA "divides potential [tax exemptees] into two groups -- [homesteaders] and [non-homesteaders]. While the first group is exclusively [native Hawaiian], the second includes members of both [races]."[8]

In sum, there is simply no basis for viewing the tax exemption for homestead lessees as effecting a classification based upon race, regardless of the fact that only native Hawaiians can become homestead lessees.

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Finally, as demonstrated in the following subsection, even if, contrary to the above, the

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[7] Taxpayers assert that there is an express racial purpose for the homesteader tax exemption without providing any evidence to that effect. Open. Br. at 12-13. Even if there were a racial purpose in providing homesteads to native Hawaiians (a proposition we dispute), there is certainly no evidence that the tax exemption in particular is provided for a racial purpose, as opposed to for one of the non-racial rational bases discussed in the State's summary judgment motion at 6-8, R. 124-26, and this Answering Brief at 10-12, infra, including the severe alienation and testamentary restrictions on homestead land, or the fact that homestead lessees are, on average, financially less well-off than non-homestead lessees.

[8] In General Electric v. Gilbert, 429 U.S. 125 (1976), the Supreme Court held that exclusion of pregnancy from a disability insurance plan also did not constitute sex discrimination in violation of **Title VII**. In response to Gilbert, Congress in 1978 enacted the Pregnancy Discrimination Act (PDA), making it a violation of Title VII to discriminate on the basis of pregnancy. See Carney v. Martin Luther Home, 824 F.2d 643, 645-46 (8th Cir. 1987). Of course, nothing in Congress' PDA overrode the constitutional **Equal Protection** ruling in Geduldig. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271 (1993) (reaffirming Geduldig's constitutional Equal Protection holding even post-PDA). Indeed, Congress cannot overrule a constitutional holding of the United States Supreme Court. Thus, Geduldig's constitutional Equal Protection analysis remains good law today.

And as to Taxpayers' federal civil rights claims (discussed in detail later), rather than Congress doing something analogous to the PDA for non-homesteaders (e.g., expressly making discrimination on the basis of homesteader status discrimination on the basis of race under federal civil rights statutes), Congress did precisely the opposite, by enacting and maintaining throughout the years the HHCA Section 208(8) homesteader tax exemption. Thus, federal statutory law not only does not invalidate the homesteader exemption, but itself mandates the exemption (via Section 208(8) of the HHCA, and Section 4 of the Admission Act, requiring adoption of the HHCA. See footnote 3, supra). Thus, unlike the situation involving pregnancy and the PDA, Congress has confirmed the federal law validity of the HHCA tax exemption for homesteaders. See also discussion, infra, at 14-15 (explaining that federally-mandated homesteader tax exemption necessarily cannot violate general federal civil rights laws).

fact that only native Hawaiians can become homestead lessees could turn the tax exemption classification into a suspect one, as explained below, these Taxpayers have no standing to urge such a position because they conceded in the Tax Appeal Court that they have no desire to become homestead lessees.

2. Taxpayers' reliance upon the fact that only native Hawaiians can become homesteaders is flawed for an additional reason: they have no standing to raise that homestead qualification because they affirmatively deny wanting a homestead.

It is blackletter standing doctrine that persons not wanting a particular benefit have no standing to challenge any qualification for receiving that benefit, because the challenged qualification causes them no injury in fact. Cf. Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989) (injury in fact requires plaintiff to show, inter alia, that "(1) he suffered actual or threatened injury as a result of defendant's conduct; (2) the injury is traceable to the challenged action."). In their opposition to summary judgment, **Taxpayers conceded that they do not want to become homestead lessees.** Not only did Taxpayers not submit any declaration stating that they actually desire to become homestead lessees, they affirmatively stated that they do not want to become homestead lessees. See Taxpayers' Opp. Mem. (filed May 1, 2009) at 7 & 9 [R. 233-35] ("None of the five Appellants in these eight consolidated cases ask for award of a homestead lease." Each Taxpayer admits that he or she is "one who does *not* seek a homestead lease."). Instead, they simply want an exemption for their non-homestead property, equivalent to the one for homesteaders. See id. at 7 [R. 233] ("Rather each of these citizens [seeks] the benefit of an exemption equivalent to that given to Hawaiian homestead lessees.").

Because Taxpayers, therefore, do not even want a homestead, the fact that there is a native Hawaiian requirement for becoming a homesteader (and the fact that Taxpayers are not native Hawaiian) plainly has absolutely nothing to do with why Taxpayers are not receiving the exemption. Taxpayers are not homesteaders, and do not receive the corresponding tax exemption, for the simple reason that they do not want to become homesteaders. They thus have no standing to raise the fact that only native Hawaiians can become homesteaders, as that fact plainly has nothing to do with their not receiving the tax exemption. In the words of the Hawaii Supreme Court in Hawaii's Thousand Friends, Taxpayers' injury -- not receiving the tax exemption -- is not "traceable to the challenged action": the native Hawaiian qualification for becoming a homesteader. Taxpayers do not receive the tax exemption because they are not

homesteaders; and the reason they are not homesteaders is because they do not want to be homesteaders, not because they are not native Hawaiian.

The Ninth Circuit in Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003), confirmed this basic standing principle as applied in a very similar context, when it rejected standing by a plaintiff (Mr. Carroll, who was not Hawaiian) -- challenging Hawaiian qualification for OHA programs -- because Mr. Carroll "**has not even identified [an OHA] program that he would be interested in receiving.**" Carroll, 342 F.3d at 947. See also id. (Mr. Carroll had no standing to challenge Hawaiian qualification for OHA programs because "he has never identified any particular OHA program that he would like to participate in."). Taxpayers here are just like (or worse than) Mr. Carroll, as they affirmatively deny being interested in becoming homestead lessees. They thus have no standing to challenge, or rely upon, the fact that only native Hawaiians can become homestead lessees. Basic standing doctrine, exemplified by Carroll and Hawaii's Thousand Friends, is thus fatal to Taxpayers' attempt to rely upon the native Hawaiian requirement for becoming a homestead lessee as the basis for claiming the tax exemption rests upon a suspect classification.[9]

Taxpayers then attempt to skirt Carroll by arguing that they need not apply for a homestead when doing so would be futile. Open. Br. at 22-23. That argument entirely misses the point. We are not arguing that Taxpayers must file an application for a homestead when doing so would be futile. We are simply arguing that Taxpayers must, at the very least, actually desire a homestead, if they are to have standing to attack or raise the fact that only native Hawaiians are eligible for a homestead.

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[9] **The State is not arguing that Taxpayers do not have standing to challenge the tax exemption in general -- i.e., to challenge the fact that homesteaders receive the tax exemption, while non-homesteaders do not. That challenge rests, of course, upon the plainly non-suspect classification of homesteader versus non-homesteader (and corresponding application of the rational basis test). What the State is arguing is that Taxpayers have no standing to attempt to convert that plainly non-suspect classification into a suspect one by relying upon the fact that only native Hawaiians can become homesteaders, when Taxpayers affirmatively disclaim any interest in becoming homesteaders.**

Of course, as explained in the previous section, even putting aside the standing problem, there is no suspect classification in any event because the exemption classification is based not upon race, but upon homesteader status. Most native Hawaiians, as non-homesteaders, also do not receive the exemption. Geduldig put to rest any doubt on this point.

For all of the above reasons, Taxpayers' attempt to claim that a suspect classification is involved in their challenge to the tax exemption is frivolous. We note, for the sake of completeness, that had Taxpayers' case been of a different nature, one in which they actually had some basis for claiming a native Hawaiian classification exists (and causes them injury), the State would have raised a comprehensive defense arguing against strict scrutiny in any event, based upon, among other things, the doctrine enunciated in Morton v. Mancari, 417 U.S. 535 (1974). That case validates special treatment of indigenous native peoples of America by removing otherwise ostensibly racial classfications from strict scrutiny review. Under Mancari, an equal protection challenge to special benefits for native peoples is not subject to strict scrutiny, and instead must be rejected "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward" the native people. See Morton, 417 U.S. at 555.[10]

The Mancari doctrine, however, is not involved in this particular appeal. That is because Taxpayers' case, for the reasons given earlier, did not present even an ostensibly racial classification -- as the exemption classifies on the basis of homesteader status, not native Hawaiian status (and Taxpayers had no standing to rely upon the native Hawaiian qualification for becoming a homesteader in any event) -- eliminating the need for the State to even present the Mancari defense. The State instead deferred any potential presentation of that defense, see footnote below,[11] and that defense is not, therefore, before the appellate courts in this appeal.

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[10] The decision in Rice v. Cayetano, 528 U.S. 495 (2000), expressly declined to decide whether "Congress may treat the native Hawaiians as it does the Indian tribes." 528 U.S. at 518-19. (It should also be noted that Rice upheld only a unique Fifteenth Amendment voting rights claim, not a Fourteenth Amendment equal protection claim, the type of claim rejected in Mancari.).

[11] The State's memorandum in support of summary judgment (filed April 20, 2009) at p.1 [R. 119], sought summary judgment:

> 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. 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

B. Plaintiffs did not even attempt to rebut any of the three rational bases presented by the State.

Because, as demonstrated above, the tax exemption is awarded based upon a non-suspect classification, summary judgment had to be granted in full against Taxpayers if any conceivable rational basis exists to support the classification. 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 [statute] if it has a rational basis"); 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."). [12] Taxpayers did not even attempt to rebut or dispute the State's demonstration (in its summary judgment motion) that there were numerous conceivable rational bases for providing the property tax exemptions to homestead lessees of HHCA land, while not providing the exemption to those who are not. These rational bases included, as explained in more detail below, the severe alienation, and separate testamentary, restrictions unique to homestead lands, and homesteaders' lower average income.

Accordingly, because Taxpayers could not -- and did not even try to -- refute a single one of the three conceivable rational bases provided by the State, their Equal Protection claim failed. For the sake of completeness, however, we now set forth the three rational bases posited by the

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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.**

[12] Taxpayers' argument, Open. Br. at 25-26, that the Hawaii Constitution "negates any compelling interest" is thus irrelevant; only a conceivable rational basis need be provided. Moreover, the Hawaii Constitution not only does not negate the compelling importance of the homesteader tax exemption, it incorporates the tax exemption into the Constitution itself! See Art. XII, Section 3 ("As a compact with the United States . . . , the Hawaiian Homes Commission Act [which includes the tax exemption] shall be adopted as a provision of the constitution of this State . . . , subject to amendment or repeal only with the consent of the United States . . . .").

State below, each of which went unchallenged by 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 provide 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, grandchild, or sibling may not succeed to the lease unless he or she is at least "one-quarter Hawaiian," a parent, niece, or nephew may not succeed unless he or she is "native Hawaiian" (at least one-half Hawaiian), and other relatives or unrelated persons, whether native Hawaiian or not, may not

succeed at all. See HHCA § 209(a).[13] This is a significant restriction on a homestead lessee's interest in the land not applicable to Taxpayers' interests in their lands, which Taxpayers may generally devise to whomever they choose without restriction. Cf. Hodel v. Irving, 481 U.S. 704, 715 (1987) ("the right to pass on valuable property to one's heirs is itself a valuable right. Depending on the age of the owner, much or most of the value of the parcel may inhere in this 'remainder' interest."). This HHCA testamentary restriction thus provides an additional rational basis for providing HHCA homestead lessees with an exemption not available to Taxpayers.

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" attached to State's 4/20/09 summary judgment motion) at 4 [R. 138], and Table 2 [R. 138] ("**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 44.4% had incomes below 80% of their county median, while nearly 33.8% had incomes above 120 percent of median. See Table 2, last row). Accordingly, it would be rational for government to provide a tax exemption to HHCA homesteaders, who are on average less well-off financially than the general population, if for no other reason than that they are likely less able to afford to pay property taxes. The fact that a few homesteaders may be financially above average, or better off than one or more of the Taxpayers, is irrelevant, for it is blackletter 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, as a perfect analogy, a mandatory age retirement provision will survive an 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 persons are more skilled than many younger persons. See id.

In sum, because there are at least three conceivable rational bases to justify providing the

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[13] HHCA § 209(a) reads: "Upon the death of the lessee, the lessee's interest in the tract . . . shall vest in the relatives of the decedent as provided in this paragraph. From the following relatives of the lessee who are (1) at least one-quarter Hawaiian, husband, wife, children, grandchildren, brothers, or sisters, or (2) native Hawaiian, father and mother, . . . or nieces and nephews."

tax exemptions to HHCA homestead lessees, while not providing the exemptions to non-homestead lessees like Taxpayers, the tax exemptions easily satisfy the rational basis test, and thus do not violate the Equal Protection clause.

C. Taxpayers' federal civil rights claims are entirely without merit.

As to Taxpayers' federal civil rights claims, the State showed below that the federal civil rights laws could in no way bar the county tax exemptions, authorized by the HHCA.

1. 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 asserted in their complaints, 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, supra, 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**[14] & **1985(3),**[15] do not create independent substantive prohibitions, but simply

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[14] 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 . . . "

[15] 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

provide a cause of action to enforce certain constitutional violations.[16] 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**[17] requires a § 1985 violation as a predicate element, and thus provides no relief for Taxpayers either.

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

Taxpayers' federal civil rights claims fail for an additional dispositive reason. Section 4 of the federal Admission Act requires Hawaii to adopt the HHCA, which includes the Section 208(8) tax exemption provision. See footnote 3, supra. Indeed, the tax exemption under HHCA 208(8) cannot be eliminated without congressional approval.[18] Because the HHCA's Section 208(8) tax exemption provision is, therefore, a federally mandated law, it cannot itself violate *another* more general federal law. That is because a specific statute like HHCA § 208(8) -- specifically mandating the tax exemption -- cannot be invalidated by far more general statutes, 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

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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."

[16] 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").

[17] 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 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; . . . ."

[18] 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).

mandates, the tax exemptions, that specific federal requirement cannot violate other general federal laws, including federal civil rights laws.

To the extent some counties' tax exemptions extend beyond 7 years, and are thus, to that extent, 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.

Taxpayers argue that because HHCA § 208(8) only mandates a tax exemption for the first seven years, then § 208(7), which states that the homestead "lessee shall pay all taxes **assessed** upon the tract and improvements thereon," means that the counties cannot extend the exemption beyond 7 years. Open. Br. at 21. That argument is frivolous. The counties have simply chosen, as a voluntary matter, not to **assess** ordinary property taxes upon homestead properties for later years as well. Nothing in HHCA § 208(7) prohibits the counties from extending the exemption beyond 7 years by simply not **assessing** taxes on homestead property for the additional years as well. (§ 208(7) simply denotes who -- the lessee, not the lessor -- pays any assessed taxes.).

In sum, the County tax exemptions do not violate any of the federal civil rights statutes.

D. Although Taxpayers' Breach of Trust/Fiduciary Duty, Contracts Clause, and Equal Footing claims are not properly here on appeal, they are, in any event, wholly without merit.

As noted in the introduction, Taxpayers, apparently aware of the weakness of their Equal Protection and federal civil rights claims, have improperly sought to change the subject on appeal, by raising new claims that were never asserted in their complaints (or any amendment to their complaints). The breach of trust/fiduciary duty and Contracts Clause claims, moreover, were never raised even in opposition to the State's summary judgment motion.[19] It is thus patently improper for Taxpayers to raise these claims now, on appeal, to attack the trial court's grant of summary judgment against them.

But even if these new claims could be considered on appeal, they are all without merit.

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[19] Taxpayers' Opening Brief refers only to some of these issues having been raised at the hearing on their counter-motion for summary judgment (when the State's summary judgment motion was already under advisement); the claims were not raised, however, in opposition to the State's summary judgment motion, which had previously been heard.

We note first, however, that it is difficult to grasp the essence of these particular claims because they are not clearly articulated. Most also improperly attack non-tax matters. See footnote 1.

Plaintiffs appear to claim that the tax exemptions violate the purported "trust" created by the 1898 Newlands Resolution, annexing Hawaii. Open. Br. at 16-21. There is serious question, first of all, whether a true "trust" was created by that resolution. There is nothing in the language of the Newlands Resolution -- stating that the **revenue and proceeds from the ceded lands "be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes"** -- that suggests that a trust of any kind was being created. The word "trust" was never used in the Resolution. Rather, this language is no different than any other kind of statutory command dictating that the revenues from a particular parcel of land be used for public purposes. Nor is there any reason to infer a "trust" given that the purposes for which the revenue could be used are so broad (for "public purposes" that benefit "inhabitants") that they contradict any notion of a "trust."[20]

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[20] Contrast the Newlands Resolution with the following: **1)** the **Hawaiian Homes Commission Act** in 1920, setting aside 200,000 acres of the lands ceded by the Republic to the United States in 1898 for the rehabilitation of native Hawaiians, see Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 336-38, 640 P.2d 1161, 1167-68 (1982); Admission Act, Section 4 (requiring Hawaii to adopt HHCA as part of its Constitution and barring changes in the qualifications of the lessees without the consent of the United States); Haw. Const. Article XII, Sections 1, 2 & 3, and Article XVI, Section 7 (together adopting HHCA as part of Hawaii's constitution, and mandating compliance with it); and **2)** the **Admission Act** in 1959, which created a public land trust out of the ceded lands as a whole. See Section 5(f) (stating that the "lands granted to the State of Hawaii by subsection (b) . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust.").

Unlike the 1898 Newlands Resolution, Section 5(f) of the Admissions Act specifically proclaims that the ceded lands and the proceeds and income therefrom "shall be held by said State as a public **trust** [for five purposes.]" The Newlands Resolution says nothing about a "trust," public or otherwise. And Section 5(f) constrains permissible uses to five limited purposes, unlike the Newlands Resolution's allowance of any public purpose that benefits the inhabitants of Hawaii.

Similarly, the HHCA has a well-defined limited purpose of rehabilitating native Hawaiians, principally through the provision of homesteads. And the Hawaii Supreme Court has explained that because "the State of Hawaii entered a compact with the United States to assume the management and disposition of the Hawaiian home lands and to adopt the HHCA as a provision of the State Constitution," Admission Act § 4, and "[t]he State and its people reaffirmed [the federal-state] compact by adding another provision [namely, art. XII, Sect. 2] to the [Hawaii] Constitution whereby they accepted specific **trust** obligations relating to the management of the Hawaiian home lands imposed by the federal government," that "(1) ... the federal government

But even assuming the Newlands Resolution did create a legal "trust" over the ceded lands, that "trust" was subsequently modified by the settlor United States, through its passage of the HHCA in 1921, as to a subset of the ceded lands, denoted the "available lands," which were set aside for Hawaiian homesteading purposes. See HHCA Sections 203, 204, 207. Included within the HHCA's modification is Section 208(8), which expressly requires the tax exemption for homestead lessees. In short, even if the Newlands Resolution did create a "trust" for the benefit of all inhabitants of the Hawaiian Islands, the settlor United States, through the HHCA, modified that trust to mandate the homesteader tax exemption.[21] Obviously then, the tax exemption cannot violate the modified trust, when that exemption is itself required by the terms of the modified trust. (Taxpayers' claim that the modification is illegal, of course, hinges upon their ability to establish that such modification violates the Equal Protection clause or federal civil rights statutes, which they cannot do, as explained in earlier sections of this brief.).

Moreover, even putting aside the modification effected by the HHCA, there is no breach of the unmodified trust in any event (assuming, arguendo, the Newlands Resolution created a "trust" for the benefit of the inhabitants for educational and other public purposes), as the HHCA's homestead program, along with the homesteader tax exemption, are "for the benefit of the inhabitants," as homesteaders are surely inhabitants of the Hawaiian islands. (And no one can seriously deny that the homestead program serves a public purpose.). And there are rational

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[under the HHCA] set aside certain public lands to be considered Hawaiian home lands to be utilized in the rehabilitation of native Hawaiians, thereby undertaking a **trust** obligation benefiting the aboriginal people; and (2) that the State of Hawaii assumed this fiduciary obligation upon being admitted into the Union as a state." Ahuna, 64 Haw. at 338, 640 P.2d at 1168.

[21] Taxpayers thus cite to the wrong sections of the Restatement (Third) of Trusts. Open. Br. at 20-21. The relevant section, if there is a common law trust at all, would be Section 63, which provides that "(1) The settlor of an inter vivos trust has power to revoke or modify the trust to the extent the terms of the trust . . . so provide. (2) If the settlor has failed expressly to provide whether the trust is subject to a retained power of revocation or amendment, the question is one of interpretation. (See presumptions in Comment *c*.)" Comment c explains that "[i]f . . . the settlor has failed expressly to provide whether the trust is revocable or amendable but has retained an interest in the trust (other than by resulting trust), the presumption is that the trust is revocable and amendable by the settlor." In the Newlands Resolution, of course, the United States certainly retained an interest in the public lands. See Newlands Resolution [attached as Appendix Q.3 to Opening Brief] (noting that the United States holds "the absolute fee and ownership of all public, Government or Crown lands," and that "the Congress of the United States shall enact special laws for [the public lands'] management and disposition").

reasons to allow homesteader inhabitants, and not other inhabitants who are not homesteaders, the tax exemption: namely, the severe alienation and testamentary restrictions unique to homestead property, and the lower average income of homesteaders, as already discussed in the Equal Protection rational basis section above. See Section B, supra.

In addition, the Newlands Resolution itself calls for Congress to "enact special laws for [the public lands'] management and disposition." See Newlands Resolution [attached as Appendix Q.3 to Opening Brief]. The HHCA, including its tax exemption provision, is precisely such a special law providing for the special management and disposition of a portion of the public lands (the roughly 200,000 acres set aside for homesteading). It therefore makes no sense to say the HHCA violates the Newlands Resolution when the latter asks Congress to enact just such laws.

Finally, non-homesteaders certainly benefit from the remaining ceded lands (not set aside for the HHCA homesteading program), pursuant to Section 5(f) of the Admission Act. The 200,000 acres available for homesteads are only a small fraction of the total ceded lands. Thus, it is absurd to suggest that non-homesteader inhabitants are precluded from sharing in the benefits of the ceded lands as a whole.

In sum, for the above multiple independent reasons, neither the HHCA, or its tax exemption, violates any trust obligations under the Newlands Resolution, or anything else. Accordingly, the State and counties violate no trust or fiduciary duties in allowing or implementing the tax exemptions prescribed by the HHCA.[22]

Taxpayers' discussion of the Equal Footing Doctrine, Open. Br. at 13-15, has absolutely

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[22] Taxpayers in their Open. Br. at 18-21, raise for the first time a **Contracts Clause** issue, that not only was **not raised** in their Complaint, but also was **not raised** in opposition to the State's summary judgment motion. This Court should thus ignore it. However, the claim lacks merit in any event, because the Contracts Clause, by its own terms ("[n]o **State** shall ... pass any ... Law impairing the Obligation of Contracts ...."; U.S. Const. art. I, § 10, cl. 1), has no application to the United States. See Ames v. Merrill Lynch, 567 F.2d 1174, 1179 (2nd Cir. 1977) ("The obligation of contracts clause does not, of course, apply to the federal government"). Thus, even if the Newlands Resolution created an enforceable contract (which is doubtful), and the federal government, in passing the HHCA, substantially impaired that contract (which is also doubtful), the federal government could not have violated the Contracts Clause, because it is not subject to that Clause. (Furthermore, the State of Hawaii undertook no obligations under the Newlands Resolution, only the United States did.). Finally, as explained above with respect to the breach of trust claim, the HHCA, and its tax exemption, in no way impaired the Newlands Resolution, but actually fulfilled it (as the Resolution called on Congress to enact just such special laws).

no relevance to this case, much less to the State's summary judgment motion.[23] Taxpayers' argument that Hawaii is admitted on an unequal footing because Congress "authoriz[ed] it to deny on account of race the right to receive public benefits," Open. Br. at 14-15, is difficult to fathom. That argument surely does not suggest any impairment of the State's rights. In any event, the United States voluntarily gave the State, upon its admission in 1959, title to certain federal lands (to be used for homesteading), see Admission Act § 5(b), which title the federal government did not have to give in the first place. It surely cannot be a violation of the Equal Footing Doctrine for the United States to give Hawaii title to home lands subject to certain conditions when the United States did not have to give Hawaii title to those lands at all. See Branson School Dist. v. Romer, 958 F. Supp. 1501, 1513-14 (D. Colo. 1997) (rejecting Equal Footing Doctrine challenge to trust conditions imposed on land granted by federal government to Colorado on its admission because "[t]he federal government was under no obligation to grant [its] land to the new state. . . . [T]he federal government had the power to grant something less than a fee simple interest in school lands to Colorado []. Because the United States had the power to grant nothing at all, it had the power to grant some but not all of its fee simple interest to the newly created state.").

Taxpayers also argue that neither Congress, nor a trust, can authorize a violation of the Equal Protection Clause or otherwise immunize an unconstitutional program from judicial scrutiny. Open. Br. at 15-16. Because the State does not make, nor rely upon, any argument to the contrary, Taxpayers' discussion is irrelevant.[24]

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[23] In addition, Taxpayers do not have the right to even assert the Equal Footing doctrine, as the "right" asserted belongs to the States (here, Hawaii), not to Taxpayers. And the State of Hawaii is certainly not in this case asserting the Equal Footing doctrine to deny Congress's power to mandate the challenged tax exemption. Taxpayers thus run afoul of the jus tertii doctrine limiting third-party standing to assert other parties' rights. For example, the State of Hawaii is fully capable of asserting its own rights under the Equal Footing doctrine. See Caplan & Drysdale, Chartered v. U.S., 491 U.S. 617, 624 n.3 (1989) (ability of rights-owner to advance its own rights counsels against third party jus tertii standing). Nor is there any special relationship between Taxpayers and the State of Hawaii that would provide any reason to allow Taxpayers to assert the State of Hawaii's right, much less assert it in a way the State expressly disclaims. Id.

[24] As demonstrated above, the tax exemption readily survives Equal Protection review by satisfying the applicable rational basis test. And, as explained in footnote 1, supra, any attack on the HHCA in general (e.g., its provision of homesteads to only native Hawaiians) is improper as beyond the scope of the Tax Appeal Court's jurisdiction (which is limited to deciding tax issues), and also beyond the standing of these Taxpayers, who do not desire a homestead.

Finally, Taxpayers cite to Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009), and its noting that the Apology Resolution would raise grave constitutional concerns if it purported to cloud Hawaii's title to the ceded lands. Taxpayers then suggest that the HHCA -- and presumably its tax exemption -- therefore, must also raise constitutional concerns by clouding Hawaii's title to the Hawaiian home lands. The argument is without merit for many independent reasons. First, the Hawaii case did not address the constitutionality of the HHCA's homestead program for native Hawaiians, nor the constitutionality of the tax exemption for homesteaders. The constitutional issue discussed briefly in Hawaii dealt with an entirely different issue: whether Congress, having given the State title to the ceded lands upon its admission, could subsequently cloud that title. 129 S. Ct. at 1445.

Second, the reason plaintiff OHA's claim in Hawaii raised "grave constitutional concerns" was because its claim would have the Apology Resolution retroactively "cloud" or cut back on the title Hawaii originally received upon its admission as a state. See Hawaii, 129 S. Ct. at 1445 (expressing concern over "retroactive 'cloud' " and citing cases barring Congress from "reserv[ing] . . . lands that have already been bestowed upon a State," and disapproving Congress subsequently "diminish[ing] what has already been bestowed" at admission). Here, on the contrary, the HHCA, and its tax exemption provision in Section 208(8), preceded statehood, and the transfer of federal title to the State of Hawaii. Thus, there is no retroactive "clouding" of any Hawaii State title. Indeed, the federal government admitted Hawaii as a state (and transferred federal title to it) on the condition that it adopt the HHCA, including its tax exemption, as part of the Hawaii Constitution. See Admission Act, Section 4 ("As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the [HHCA] shall be adopted as a provision of the Constitution of said State . . . .").

Moreover, as noted before, the Newlands Resolution itself called for Congress to "enact special laws for [the public lands'] management and disposition." The HHCA, including its tax exemption provision, is precisely such a special law providing for the management and disposition of a portion of the public lands. See discussion, supra at 18. It therefore makes no sense for Taxpayers to claim that the HHCA, and its tax exemption, "clouded" anything received under the Newlands Resolution. To the contrary, the HHCA, and its tax exemption, implemented the Newlands Resolution -- by following through on its directive that Congress enact special laws to manage the public lands. Taxpayers' claim is baseless.

CONCLUSION

For the above reasons, the State respectfully requests that this Court AFFIRM the judgment below in favor of the State and counties.

DATED: Honolulu, Hawaii, April 5, 2010.

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APPENDIX CONTAINING RELEVANT PARTS OF
CONSTITUTIONAL PROVISIONS, STATUTES, OR RULES

THE ADMISSION ACT

An Act to Provide for the Admission of the State of Hawaii into the Union

(Act of March 18, 1959, Pub L 86-3, 73 Stat 4)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 7(c) of this Act, the State of Hawaii is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Hawaii entitled "An Act to provide for a constitutional convention, the adoption of a State constitution, and the forwarding of the same to the Congress of the United States, and appropriating money therefor", approved May 20, 1949 (Act 334, Session Laws of Hawaii, 1949), and adopted by a vote of the people of Hawaii in the election held on November 7, 1950, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

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§4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

§5. (a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.

(d) Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States. [Am July 12, 1960, Pub L. 86-624, 74 Stat 422]

(e) Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and (d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

(g) As used in this Act, the term "lands and other properties" includes public lands and other public property, and the term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

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HAWAIIAN HOMES COMMISSION ACT, 1920

(Act of July 9, 1921, c 42, 42 Stat 108)

TITLE 2: HAWAIIAN HOMES COMMISSION

§201. Definitions. (a) When used in this title:

"Commission" means the Hawaiian homes commission.

"Fund" means the Hawaiian home loan fund.

"Hawaiian home lands" means all lands given the status of Hawaiian home lands under the provisions of section 204 of this title.

"Irrigated pastoral land" means land not in the description of the agricultural land but which, through irrigation, is capable of carrying more livestock the year through than first-class pastoral land.

"Native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

"Public land" has the same meaning as defined in paragraph (3) of subdivision (a) of section 73 of the Hawaiian Organic Act.

"State" means the State of Hawaii.

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§203. Certain public lands designated "available lands." All public lands of the description and acreage, as follows, excluding (a) all lands within any forest reservation, (b) all cultivated sugar-cane lands, and (c) all public lands held under a certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement, are hereby designated, and hereinafter referred to, as "available lands":

(1) On the island of Hawaii: Kamaoa-Puueo (eleven thousand acres, more or less), in the district of Kau; Puukapu (twelve thousand acres, more or less), Kawaihae 1 (ten thousand acres, more or less), and Pauahi (seven hundred and fifty acres, more or less), in the district of South Kohala; Kamoku-Kapulena (five thousand acres, more or less), Waimanu (two hundred acres, more or less),

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§204. Control by department of "available lands," return to board of land and natural resources, when; other lands, use of. (a) Upon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the department to be used and disposed of in accordance with the provisions of this Act, except that:

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§207. Leases to Hawaiians, licenses. (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not more than forty acres of agriculture lands or lands used for aquaculture purposes; or (2) not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands; or (3) not more than one acre of any class of land to be used as a residence lot; provided that in

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§208. Conditions of leases. Each lease made under the authority granted the department by section 207 of this Act, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(1) The original lessee shall be a native Hawaiian, not less than eighteen years of age. In case two lessees either original or in succession marry, they shall choose the lease to be retained, and the remaining lease shall be transferred, quitclaimed, or canceled in accordance with the provisions of succeeding sections.

(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; except that the department may extend the term of any lease; provided that the approval of any extension shall be subject to the condition that the aggregate of the initial ninety-nine year term and any extension granted shall not be for more than one hundred ninety-nine years.

(3) The lessee may be required to occupy and commence to use or cultivate the tract as the lessee's home or farm or occupy and commence to use the tract for aquaculture purposes, as the case may be, within one year after the commencement of the term of the lease.

(4) The lessee thereafter, for at least such part of each year as the department shall prescribe by rules, shall occupy and use or cultivate the tract on the lessee's own behalf.

(5) The lessee shall not in any manner transfer to, or otherwise hold for the benefit of, 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, or otherwise hold, 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. A lessee who is at least one-quarter Hawaiian who has received an interest in the tract through succession or transfer may, with the approval of the department, transfer the lessee's leasehold interest to a brother or sister who is at least one-quarter Hawaiian. Such interest shall not, except in pursuance of such a transfer to or holding for or agreement with a native Hawaiian or Hawaiians or qualified relative who is at least one-quarter Hawaiian approved of by the department or for any indebtedness due the department or for taxes or for any other indebtedness the payment of which has been assured by the department, including loans from other agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet the lessee's interest in the tract or improvements thereon; provided that a lessee may be permitted, with the approval of the department, to rent to a native Hawaiian or Hawaiians, lodging either within the lessee's existing home or in a separate residential dwelling unit constructed on the premises.

(6) Notwithstanding the provisions of paragraph (5), the lessee, with the consent and approval of the commission, may mortgage or pledge the lessee's interest in the tract or improvements thereon to a recognized lending institution authorized to do business as a lending institution in either the State or elsewhere in the United States; provided the loan secured by a mortgage on the lessee's leasehold interest is insured or guaranteed by the Federal Housing Administration, Department of Veterans Affairs, or any other federal agency and their respective successors and assigns, which are authorized to insure or guarantee such loans, or any acceptable private mortgage insurance as approved by the commission. The mortgagee's interest in any such mortgage shall be freely assignable. Such mortgages, to be effective, must be consented to and approved by the commission and recorded with the department.

Further, notwithstanding the authorized purposes of loan limitations imposed under section 214 of this Act and the authorized loan amount limitations imposed under section 215 of this Act, loans made by lending institutions as provided in this paragraph, insured or guaranteed by the Federal Housing Administration, Department of Veterans Affairs, or any other federal agency and their respective successors and assigns, or any acceptable private mortgage insurance, may be for such purposes and in such amounts, not to exceed the maximum insurable limits, together with such assistance payments and other fees, as established under section 421 of the Housing and Urban Rural Recovery Act of 1983 which amended Title II of the National Housing Act of 1934 by adding section 247, and its implementing regulations, to permit the Secretary of Housing and Urban Development to insure loans secured by a mortgage executed by the homestead lessee covering a homestead lease issued under section 207(a) of this Act and upon which there is located a one to four family single family residence.

(7) The lessee shall pay all taxes assessed upon the tract and improvements thereon. The department may pay such taxes and have a lien therefor as provided by section 216 of this Act.

(8) The lessee shall perform such other conditions, not in conflict with any provision of this Act, as the department may stipulate in the lease; provided that an original lessee shall be exempt from all taxes for the first seven years after commencement of the term of the lease. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26, 1941, c 544, §2, 55 Stat 783; Aug. 21, 1958, Pub L 85-710, 72 Stat 706; am L 1963, c 207, §2; am L 1967, c 146, §§1, 2; am L 1973, c 66, §1; am L 1974, c 175, §1; am L 1978, c 229, §5; am L 1981, c 90, §2; am L 1985, c 60, §2 and c 284, §1; am L 1990, c 305, §1; am L 1997, c 196, §3; am L 1999, c 17, §1; am L 2002, c 12, §1; am L 2005, c 53, §1]

§209. Successors to lessees. (a) Upon the death of the lessee, the lessee's interest in the tract or tracts and the improvements thereon, including growing crops and aquacultural stock (either on the tract or in any collective contract or program to which the lessee is a party by virtue of the lessee's interest in the tract or tracts), shall vest in the relatives of the decedent as provided in this paragraph. From the following relatives of the lessee who are (1) at least one-quarter Hawaiian, husband, wife, children, grandchildren, brothers, or sisters, or (2) native Hawaiian, father and mother, widows or widowers of the children, widows or widowers of the brothers and sisters, or nieces and nephews,—the lessee shall designate the person or persons to whom the lessee directs the lessee's interest in the tract or tracts to vest upon the lessee's death. The Hawaiian blood requirements shall not apply to the descendants of those who are not native Hawaiians but who were entitled to the leased lands under section 3 of the Act of May 16, 1934 (48 Stat. 777, 779), as amended, or under section 3 of the Act of July 9, 1952 (66 Stat. 511, 513). In all cases that person or persons need not be eighteen years of age. The designation shall be in writing, may be specified at the time of execution of the lease with a right in the lessee in similar manner to change the beneficiary at any time and shall be filed with the department and approved by the department in order to be effective to vest the interests in the successor or successors so named.

In case of the death of any lessee, except as hereinabove provided, who has failed to specify a successor or successors as approved by the department, the department may select from only the following qualified relatives of the decedent:

(1) Husband or wife; or
(2) If there is no husband or wife, then the children; or
(3) If there is no husband, wife, or child, then the grandchildren; or
(4) If there is no husband, wife, child, or grandchild, then brothers or sisters; or
(5) If there is no husband, wife, child, grandchild, brother, or sister, then from the following relatives of the lessee who are native Hawaiian: father and mother, widows or widowers of the children, widows or widowers of the brothers and sisters, or nieces and nephews.

The rights to the use and occupancy of the tract or tracts may be made effective as of the date of the death of the lessee.

In the case of the death of a lessee leaving no designated successor or successors, husband, wife, children, grandchildren, or relative qualified to be a lessee of Hawaiian home lands, the land subject to the lease shall resume its status as unleased Hawaiian home lands and the department is authorized to lease the land to a native Hawaiian as provided in this Act.

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NO. 30049

IN THE SUPREME COURT OF THE STATE OF HAWAII

JOHN M. CORBOY and STEPHEN GARO AGHJAYAN, [and others] Plaintiffs, vs. MARK J. BENNETT, in his official capacity as Attorney General, State of Hawaii; the COUNTY OF MAUI; and the COUNTY OF KAUAI, [and others] Defendants.	T.A. Nos. 07-0086, etc. CONSOLIDATED (Other Civil Action) STATEMENT OF RELATED CASES TAX APPEAL COURT JUDGE: Gary W.B. Chang

STATEMENT OF RELATED CASES

Intervenor-Defendant-Appellee-Appellee State of Hawaii, and Defendant-Appellee Mark J. Bennett, in his capacity as Attorney General of Hawaii, are unaware of any related cases pending in the Hawaii courts or agencies.

DATED: Honolulu, Hawaii, April 5, 2010.

Girard D. Lau

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

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing document were served on April 5, 2010, by U.S. mail, first class, postage prepaid, on the following persons as addressed below:

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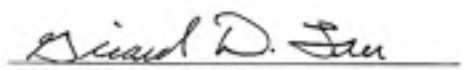

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