No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

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,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Hawaii

PETITION FOR A WRIT OF CERTIORARI

H. WILLIAM BURGESS
Counsel of Record
Attorney at Law
2299C Round Top Drive
Honolulu, Hawaii 96822
(808) 947-3234
hwburgess@hawaii.rr.com

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Is the Supreme Court of Hawaii's order denying injunction pending appeal a "final judgment or decree" for purposes of this Court's jurisdiction, since it involves a right "separate from and collateral to" the merits of the underlying case and has finally determined the merits during the period of appellate review which in the normal course might take years to complete?

Do each of the four counties of the State of Hawaii, by giving Hawaiian homestead lessees special exemptions from real property taxes but depriving Petitioners and other similarly situated homeowners of equivalent exemptions, violate the Fourteenth Amendment, other constitutional and civil rights laws of the United States, and/or their (the counties') fiduciary duties arising under the Hawaii Annexation Act/Admission Act?

LIST OF PARTIES

Petitioners are John M. Corboy, Stephen Garo Aghjayan, Garry P. Smith, Earl F. Arakaki and J. William Sanborn.

Respondents are Mark J. Bennett, County of Maui, County of Kauai, City and County of Honolulu, County of Hawaii and State Of Hawaii.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTIONS

STATUTES, LEGISLATIVE MATERIALS AND COURT RULES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

ORDERS AND OPINIONS BELOW

The Order Denying Motion for Injunction Pending Appeal was dated and filed January 14, 2010 in Supreme Court of Hawaii No. 30049, *Corboy v. Bennett* (eight consolidated cases on appeal from the State of Hawaii Tax Appeal Court) and has not been published in the Hawaii Reports or Pacific Reporter system.

Pursuant to Hawaii Rules of Appellate Procedure 8(a) Petitioners had applied for an injunction pending appeal in the first instance in the Hawaii Tax Appeal Court, which denied the application November 23, 2009. That order also has not been published in the Hawaii Reports or Pacific Reporter system.

True copies of said orders below are in App. 1 and App. 4.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

The Hawaii Supreme Court order denying injunction pending appeal is a "final judgment or decree" for purposes of this Court's jurisdiction, since it involves a right "separate from and collateral to" the merits of the underlying case; and it has finally determined the merits during the period of appellate review which, in the normal course, might take a year or more to complete. *National Socialist Party v.*

Skokie, 432 U.S. 43, on remand 366 N.E.2d 347, 9 Ill.Dec. 90, 51 Ill.App.3d 279 (1977).

The normal course in the Hawaii Court might be considerably longer than one year, as shown more fully below in the Argument under the heading, "I. The compelling reason to review as 'final' the denial of injunction pending appeal."

The Tax Appeal Court's jurisdiction is based on HRS §§23-11 and 23-13.

The Tax Appeal Court granted the State's motion for summary judgment and, in separate orders, granted each of the counties' motions joining in the State's motion, denied Petitioners' counter-motion for summary judgment, and entered final judgment August 7, 2009.

Petitioners on September 8, 2009 timely appealed the summary judgment orders to the Hawaii Supreme Court in No. 30049; and filed their opening brief on January 20, 2010. The State and its Attorney General filed their answering brief in No. 30049 April 5, 2010.

The jurisdiction of the Hawaii Supreme Court is based on HRS §602-5 (a)(1).

PROVISIONS INVOLVED

HRAP **Rule 8. Stays, supersedeas bonds, or injunctions pending appeal.**

(a) Motions for . . . injunction in the appellate courts. A motion for . . . an order granting an injunction during the pendency of an appeal shall ordinarily be made in the first instance to the court . . . appealed from.

A motion for such relief on an appeal may be made to the appellate court before which the appeal is pending . . . but if the appeal is from a court the motion shall show . . . that the court appealed from has denied an application, or has failed to afford the relief the applicant requested, with the reason given by the court appealed from for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits, declarations or other sworn statements or copies thereof.

United States Constitution, Article I, Sec. 10,

> No State shall . . . pass any . . . law impairing the obligation of contracts. . . .

United States Constitution, Amendment V,

> No person shall be . . . deprived of life, liberty, or property without due process of law. . . .

United States Constitution, Amendment XIV, Sec. 1,

. . . 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. . . .

Hawaiian Homes Commission Act, 1920 (Act of July 9, 1921, c 42, 42 Stat. 108)

§201. Definitions . . .

"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.

§208. Conditions of leases. Each lease made under the authority granted the department by section 207 of this Act, and the tract to which the lease 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 . . .

(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 . . .

(7) The lessee shall pay all taxes assessed upon the tract and improvements thereon . . .

(8) The lessee shall perform such other conditions, not in conflict with any provisions 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.

Resolution No. 55 of July 7, 1898, 30 Stat. 750 (known as the "Annexation Act" or "Newlands Resolution")

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: PROVIDED, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Hawaii Organic Act April 30, 1900 c 339, 31 Stat. 141,

§73(e) All funds arising from the sale or lease or other disposal of public land shall be appropriated by the laws of the government of the Territory of Hawaii and 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 Admission Act, An Act to Provide for the Admission of the State of Hawaii into the Union (Act of March 18, 1959, Pub L86-3, 73 Stat. 4)

§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

. . .

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(f). The lands granted to the State of Hawaii by subsection (b) of this section . . . 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, . . .

State of Hawaii Constitution
Article XII Hawaiian Affairs

Hawaiian Homes Commission Act

§1 . . . The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of such act.

Acceptance of Compact

§2. The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States relating to the management and disposition of the Hawaiian home lands . . . 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.

Office of Hawaiian Affairs;
Establishment of Board of Trustees

§5. There is hereby established an Office of Hawaiian Affairs.

Powers of Board of Trustees

§6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law; to manage and administer

the proceeds from the sale or other disposition of the lands . . . including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; . . .

The Civil Rights Act, 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

County taxpayers seek equal protection, privileges and immunities under the law, including exemptions from real property taxes comparable to the special exemptions given to Hawaiian homestead lessees.

Petitioners 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 "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands

previous to 1778." Petitioner J. William Sanborn is of part, but less than 25%, Hawaiian ancestry.

Under HHCA §208(1), none of Petitioners are, or ever can be, eligible to compete for award of a Hawaiian homestead lease, or for the benefits that go with being a Hawaiian homestead lessee such as the special exemption.[1]

Each Petitioner filed a timely complaint in the State of Hawaii Tax Appeal Court for refund of real property taxes paid under protest to his county for tax year 2007-2008; and also a timely notice of appeal of real property tax assessment for tax year 2008-2009. The complaint of Petitioners Smith and Arakaki also timely sought refund from the City and County of Honolulu for taxes paid under protest for tax year 2006-2007.

Petitioners filed these eight consolidated cases in the State Tax Appeal Court following the roadmap drawn by this Court in *California et al. v. Grace Brethren Church*, 457 U.S. 393 (1982):

> "State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell*, 428 U.S. 465, 494, n. 35, 96

[1] Unless the context clearly indicates otherwise, the terms "special exemption," "homestead exemption" or "Hawaiian homestead exemption" as used in this petition refer to the special exemption from real property taxes given to Hawaiian homestead lessees, whether given by the HHCA or a county ordinance.

> S.Ct. 3037, 3052, n. 35, 49 L.Ed.2d 1067 (1976) . . . The error in this argument is its premise as *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 101 S.Ct. 2142, 68 L.Ed.2d 612 (1981), demonstrates, the Federal Government need not be a party in order for the appellees to litigate their statutory and constitutional claims. Footnotes 37 and 38, *California et al. v. Grace Brethren Church,* 457 U.S. 393, 417 (1982).
>
> Accordingly, because the appellees could seek a refund of their state unemployment insurance taxes, and thereby obtain state judicial review of their constitutional claims, we hold that their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act. *Id.*
>
> If the taxpayer is unsuccessful at trial, he may appeal the decision to higher state courts and ultimately seek review in this Court. Nothing in this scheme prevents the taxpayer from "rais[ing] any and all constitutional objections to the tax" in the state courts. *Rosewell v. LaSalle Nat'l Bank,* 450 U.S., at 514, 101 S.Ct., at 1229. *Id.* at 414.

In each case the petitioner sent Notice of Constitutional Question to the attorneys general of the United States and the State of Hawaii that the case calls into question the constitutionality of State of Hawaii laws including Art. XII, §§1-3 of the Constitution of the State of Hawaii and the HHCA; and federal laws including §4 of the 1959 Hawaii Admission Act which required as a condition of statehood

that the State adopt HHCA and still requires the State to continue to carry out the HHCA and forbids its repeal or amendment without the consent of the United States. (App. 9). The State Attorney General or the State subsequently intervened in each of these cases. The Attorney General of The United States did not.

The relief sought in each case is a refund to each Petitioner and to each and every other homeowner similarly situated, of all real property taxes he or she paid in excess of the amount that would have been payable if he or she had an exemption equivalent to that given to Hawaiian homestead lessees in his or her county for the years in question. They also seek declaratory and injunctive relief against further such deprivations, plus costs, attorney's fees and such other and further relief as is just.

The specific injunctive relief sought pending appeal and permanently would enjoin each county from depriving Petitioners and every other homeowner similarly situated in his or her respective county, of an exemption equivalent to the most favorable provided to Hawaiian homestead lessees. For example, in years in which some homestead lessees are assessed no real property taxes, the counties would each be enjoined from depriving Petitioners and others similarly situated of the same immunity from any real property taxes.

Petitioners do not seek, either pending appeal or permanently, to prevent or restrict the counties from

acting in their legislative capacities. The power of taxation in Hawaii is essentially a legislative power. *Hawaii Insurers Council v. Lingle*, 117 Haw. 454, 462-3, 184 P.3d 769, 777-78 (2008). Nor do Petitioners seek to prevent or restrict the counties from assessing and collecting real property taxes. Rather the injunction Petitioners 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 in his or her respective county of an exemption equivalent to that provided to 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.

Injunction could benefit counties. The injunction sought 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 be in compliance with the Constitution and civil rights laws of the United States as well as its fiduciary duties (to treat beneficiaries impartially and **not** to comply with trust terms that are illegal or violate public policy) but would enjoy *increased* real property tax revenues.

For example, the approximately 3,933 parcels leased to Hawaiian homesteaders on Oahu would begin paying their share of the cost of City and County of Honolulu's services and infrastructure. Simple arithmetic shows that, if the approximately 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 an additional approximately $6.7 million per year. (See App. 11 Irreparable Harm/Benefit analysis and App. 12 DHHL pg. 14 Lease Report.)

The actual aggregate benefit of eliminating the special exemption to the City and County of Honolulu and the other counties would be considerably higher because of the accelerated pace of awards of new homestead leases since 2003. Under HHCA §208(8) an "original lessee shall be exempt from all taxes for the first seven years after commencement of the term of the lease."

The most recent DHHL Annual report for FYE 2008 at page 13 (App. 14) shows 83 new homestead lease awards in 2004; 427 in 2005; 604 in 2006, 698 in 2007 and 438 in 2008 for a total in those five years of 2,242 new homestead leases.

Page 6 of the same annual report for FYE 2008 lists as a primary goal for DHHL, "Over the next five years, deliver 5,000 homestead awards through the development of various award programs." (App. 15)

If that goal is achieved, it would mean that in 2011, 2012 and 2013, some 7,000 new homestead lessees

are likely to pay *no* real property taxes. If the injunction requested by Petitioners is granted, and all the counties decide to discontinue the special exemption and treat all residential, agricultural and pastoral real property taxpayers equally, the aggregate new real property taxes going to the four counties would likely be over $10 million annually in addition to all the new millions of real property tax revenues that would flow in from the 8,000 or so homestead leases which have been in effect for more than 7 years.

Historical background. 1898 – *Race-neutral* Ceded Lands Trust established "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

In 1897 the Republic of Hawaii adopted a treaty of annexation proposing to cede to the United States all its public, government or crown lands (about 1.8 million acres) 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." Another condition was that the United States would assume the public debts of the Republic up to $4 million. (App. 16, Art. 7 IV).

In 1898 the United States accepted the offer including both the trust terms and the debt assumption

by *Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States,* known as the *Newlands Resolution,* approved July 7, 1898, Annexation Act, 30 Stat. 750. (App. 20).

Thus began the Ceded Lands Trust (also known as the "Public Land Trust" and as the "§5(f) trust)." About 350,000 to 400,000 acres were retained by the United States for its naval, military and civil purposes, including national parks. The remaining approximately 1.4 million acres are, or should be, held by the State as Trustee for all the people of Hawaii, including but not limited to or especially for those of Hawaiian ancestry.

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); *State v. Zimring* 58 Haw. 106, 124, 566 P.2d 725 (1977) and *OHA v. Yamasaki*, 69 Haw. 154, 159, 737 P.2d 446, 449 (1987); see also Hawaii Attorney General Opinion July 7, 1995 (A.G. Op. 95-03) 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."

ARGUMENT

I. The compelling reason to review as final the denial of injunction pending appeal.

> The [U.S. Supreme] Court decides for itself whether the decision of the state court is a final judgment. State law and state practice are of importance in determining what has been done and what may still be done **within** the state judicial system, but the Court then will make its own determination of whether under those circumstances the judgment has that finality requisite for Supreme Court review. 20 Federal Practice & Procedure Deskbook §114, citing in FN 32, *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 479 n 8 (1975).
>
> [I]t is now quite settled that the Court may look not only to the opinion but also to any other relevant matter, in or out of the record, in determining finality. *Id.* citing FN 35.

In *National Socialist Party v. Skokie,* 432 U.S. 43 (1977) the Court *per curium* reviewed as final the Illinois Supreme Court's order denying a stay,

> [W]e grant certiorari and reverse the Illinois Supreme Court's denial of a stay. That order is a final judgment for purposes of our jurisdiction, since it involved a right "separable from, and collateral to" the merits, . . . It finally determined the merits of petitioners' claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of

> appellate review which, in the normal course, may take a year or more to complete. (Internal citations omitted.)

The Hawaii Court's denial of injunction pending appeal involves a right "separate from, and collateral to" the merits of the underlying case and it has "finally determined the merits" of Petitioners' claim that the counties' special exemptions deprive Petitioners of equal rights, privileges and immunities protected by the Constitution and laws of the United States "during the period of appellate review" which in Hawaii in a case challenging special privileges for native Hawaiians might take *four* or more years to complete.

Office of Hawaiian Affairs v. State, 96 Hawaii 388, 401, 31 P.3d 901, 914 (September 12, 2001) illustrates the point. The period of appellate review there was over four years and still did not address the merits.

State Circuit Judge Daniel G. Heely granted partial summary judgment to OHA in October 1996. Prominent attorneys were quoted as estimating the potential liability to the State as high as $1.2 billion. The State, with the permission of the Circuit Court, took an interlocutory appeal in November 1996.

Citizens later demanded that the State raise constitutional and breach of trust defenses to OHA's claims. Receiving no response, they then moved to intervene in the Hawaii Supreme Court on April 29, 1999 with their proposed brief raising such defenses. The Hawaii Court denied intervention but allowed

Citizens to file an amicus brief, which they did. On March 28, 2000, a little over a month after this Court's landmark *Rice v. Cayetano*, 528 U.S. 495 (2000) decision was entered, the citizens renewed their motion to intervene with a proposed brief based on the *Rice* holding that "Hawaiian" and "native Hawaiian" are racial classifications. One of the citizens who moved to intervene on March 28, 2000 is a Petitioner in this case.

Almost five years after the appeal was taken, the Hawaii Court, on September 12, 2001, dismissed the case as "non-judiciable" and suggested the legislature try again.[2] By disposing of the case in that manner, the Hawaii Supreme Court made no ruling on the merits of OHA's claims and left citizens with nothing to appeal. The end result was that the diversion of public trust funds using the test this Court called "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, *continued and increased*. 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

[2] "Now, more than twenty years later, as we continue to struggle with giving effect to that enactment, we trust that the legislature will re-examine the State's constitutional obligation to native Hawaiians and the purpose of HRS §10-13.5 and enact legislation that most effectively and responsibly meets those obligations." Final sentence of the decision in *Office of Hawaiian Affairs v. State*, 96 Hawaii 388, 401, 31 P.3d 901, 914 (2001).

. . . the instrument for generating" racial "prejudice and hostility." *Rice,* 528 U.S. at 517.

The only reference to this Court's Feb. 23, 2000 landmark *Rice* decision was in a footnote that the *Rice* decision "had no effect on the outcome" of the appeal.[3]

The spreadsheet below beginning at page 34 shows the annual distributions of revenues from the Ceded Lands Trust to OHA as income and proceeds from the pro rata portion of the trust for native Hawaiians, were picked up and increased, unfazed by *Rice* and by the absence of any discoverable standard to determine the amounts to be distributed. During those years and since then, the State has made *no* distributions in cash or property from the pro rata portion of the Ceded Lands Trust exclusively for the other beneficiaries.

With such an atmosphere (not unlike the resistance in the South following *Brown v. Board of Education*, 347 U.S. 483 (1954)), there is no reason to expect the period of appellate review of this case to be short. A more likely prospect, if this Court does not

---

[3] We note that the decision by the United States Supreme Court in *Rice v. Cayetano,* 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000), holds the voting restriction in article XII, section 5 unconstitutional because its limitation of those qualified to vote in OHA elections to Hawaiians or native Hawaiians violates the Fifteenth Amendment to the United States Constitution. The *Rice* decision, however, has no effect on the outcome of this appeal. *Id.* at 96 Hawaii 391, 31 P.3d 904.

grant certiorari, is for slow going while the HHCA and the counties' prolongation of the HHCA-enabled special exemption continue to burden Petitioners and others similarly situated with paying for county infrastructure and services to support the favored few.

The difference between the average $1,800 per year paid by residential homeowners in the City and County of Honolulu; and the *no* real property tax paid by the many new Hawaiian homestead lessees for the first seven years of the lease term, is huge in terms of the total short fall it causes to the City. If the special exemption is discontinued and all residential owners including Hawaiian homestead lessees each pays his or her share, the average annual bill would be reduced by only a small, but still measurable amount. That, however, is enough to vindicate the important right of equal protection, privileges and immunities under the law during the period of appellate review.

In *Warth v. Seldin*, 422 U.S. 490, 501 (1975), a municipal taxpayer action in which the Court discussed the standing rules in federal courts applicable to federal, state and municipal taxpayers, this Court explained that a plaintiff must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. E.g., *United States v. SCRAP*, 412 U.S. 669 (1973). But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the

general public interest in support of their claim. E.g., *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972); *FCC v. Sanders Radio Station*, 309 U.S. 470, 477 (1940).

The Court has allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see *Baker v. Carr*, 369 U.S. 186, 300 (1962); a $20 fine, see *McGowan v. Maryland*, 366 U.S. 420, 455 (1961); and a $1.50 poll tax, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, FN 1 (1972).

And, without injunction pending appeal, the day of reckoning when this Court rules on the constitutionality of the HHCA's costly imposition of the odious racial classification on the citizens of the State of Hawaii will again be postponed.

II. The compelling reasons to grant certiorari.

The Hawaii Supreme Court, by denying injunction pending appeal, has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A. The important federal question.

Whether, during the period of appellate review which, in the normal course, may take four or more years to complete, all homeowners are entitled to exemptions from real property taxes comparable to those given in their respective counties to Hawaiian homestead lessees (when only persons of "not less

than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778" are eligible to compete for award of Hawaiian homestead leases).

B. The conflicts with this Court's relevant Equal Protection decisions.

The Hawaii Court's order denying injunction pending appeal, which allows the deprivation of the special exemptions to all but the favored few, to continue, conflicts with the following relevant Equal Protection decisions of the Court:

Rice v. Cayetano, 528 U.S. 495, 514-516 (2000) held that "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 (Haw. Rev. Stat. §10-2.")) are racial classifications.

"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. Pena,* 515 U.S. 200, 227, 229-30 (1995); *Richmond v. J.A. Croson,* 448 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, 643-644 (1993).

For 89 years, the HHCA has restricted the award of homestead leases and eligibility for the special exemption from real property taxes, to "descendants of not less-than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." The HHCA's imposition of that racial classification on the State of Hawaii and its citizens is "presumptively invalid and can be upheld only upon an extraordinary justification." During those 89 years no governmental actor has ever demonstrated that the HHCA does or can pass strict scrutiny.

By not presuming the HHCA to be invalid when considering the motion for injunction pending appeal; and without requiring the State or counties to show an extraordinary justification for it, the Hawaii Supreme Court's denial order conflicts with this Court's Equal Protection decisions.

C. The conflicts with the Court's relevant Equal Footing decisions.

The Hawaii Supreme Court's failure to apply the Equal Footing Doctrine (to invalidate the Admission Act compact and the HHCA) conflicts with this Court's decision in *Coyle v. Smith*, 221 U.S. 559 (1911).

In *Coyle,* the Court held that Congress's power under Admission Clause is limited by the Equal Footing Doctrine: a new state can only be admitted on

equal footing with all others. Congress's admission power "is not to admit political organizations which are less or greater, or different in dignity or power from those political entities which constitute the Union"; rather, it is the "power to admit *states*." *Coyle*, 221 U.S. at 566 (emphasis added). There is only one class of states.

In Prof. Tribe's terminology, the Equal Footing Doctrine is an "internal" or "structural" limit on Congress' power to admit states, arising from the nature of that power itself and the nature of the federal union. TRIBE, AMERICAN CONSTITUTIONAL LAW at 794-95. This limit is additional to the "external" limitations of the Bill of Rights, including equal protection, that restrain all of Congress' powers.

Because being a state is all or nothing, Congress cannot condition a prospective new state's admission on its agreement to enter the Union on terms different than the original states did. In *Coyle*, this 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. Gardner*, 107 F.3d 1314 (9th Cir. 1997), 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 Petitioners 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, this 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 that violates the Constitution is illegal and unenforceable. *Pennsylvania v. Board of City Trusts*, 353 U.S. 989, 77 S.Ct. 1281 (1957). Neither the federal nor the state government can write itself an exemption from constitutional equal protection by agreeing to act as a trustee for a racially discriminatory trust. Even if a trust is assumed to be valid, the courts can still consider and invalidate State's use of race-based

classifications to promote trust purposes. *Rice*, 528 U.S. at 521-23.

D. Failure to apply the Contracts clause and basic trust law.

The Hawaii Court's failure to apply Article I, §10 of the Constitution of the United States, "No State shall . . . make any law impairing the obligation of contracts . . . " and basic trust law to invalidate the HHCA and the counties' special exemptions, conflicts with this Court's decision in *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 by the Chief Justice, this Court held that the royal charter had "every ingredient of a complete and legitimate contract." He ruled that the trustees' powers continued perpetually 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, (App. 16) 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." (App. 16).

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. (App. 20).

As this Court held in *Trustees of Dartmouth College*,

> 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. 518, 566.

That basic principle of trust law enforcing legitimate contractual obligations under which a state places 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 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.
>
> (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 Akaka bill 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.

E. The conflict with this Court's relevant trust law decisions.

The Hawaii Court's denial of injunction pending appeal to prevent further irreparable harm caused by the HHCA to Petitioners and others similarly situated, also decided an important federal question in a way that conflicts with relevant trust law decisions of this Court, including *U.S. v. Mason*.

The government as trustee has the same fiduciary duty as private trustees. *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161, 1189 (1982) (the conduct of the government as trustee is measured by the same strict standards applicable to private trustees, citing *United States v. Mason,* 412 U.S. 391 (1973). See also *Price v. Akaka*, 928 F.2d 824, 827 (9th Cir. 1991) citing the Restatement 2d of the Law of Trusts as applicable to conduct of the State of Hawaii as trustee of Hawaii's Public Land Trust.

Mason dealt with the fiduciary duty of the United States for the income from minerals on former Osage tribal land held in trust by the United States for certain individual tribal members. As this Court said at 412 U.S. 398,

> There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust. . . . As Professor Scott has written, 'A trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.' (Internal citations omitted.)

In 1920, the United States, as Trustee of Hawaii's Ceded Lands Trust, held about 1.4 million acres of Hawaii's ceded lands subject to the requirement that the revenues from and proceeds of those lands were to be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

The United States' adoption in 1921 of the HHCA for the first time injected partiality and race into about 200,000 acres of the previously impartial and race-neutral Ceded Lands Trust.

Prior to the adoption of HHCA, each of the then 255,912 citizens of the Territory of Hawaii[4] equitably owned about 5.471 acres as his or her pro rata portion of the approximately 1.4 million acres (the areas remaining from the original 1.8 million acres after deducting the about 400,000 acres used for civil, military or naval purposes of the U.S.). Immediately upon enactment of HHCA and designation of some 200,000 acres of the ceded lands as "available lands" for the exclusive benefit of "native Hawaiians," the pro rata portion equitably owned by each of the native Hawaiian beneficiaries increased to approximately 9.48 acres; and the pro rata portion equitably owned by each of the other beneficiaries decreased to approximately 4.689 acres.[5]

From its inception, the HHCA deprived and still deprives *non*-native Hawaiian beneficiaries of eligibility to compete for homestead leases and the benefits that go with the homestead leases, including the exemption from real property taxes and to share in the benefit of the income and proceeds from the 200,000 acres. The most recent Annual Report of the

---

[4] *Historical Statistics of Hawaii*, Schmitt, 1977, U. of Hawaii Press at 25.

[5] The number of native Hawaiians, i.e., persons of 50% or more Hawaiian ancestry, is not reported by Schmitt or otherwise available. For 1920, Schmitt reports 23,723 as Hawaiian and 18,027 as Part Hawaiian. The calculations for 1920 assume that all 41,750 are native Hawaiians. It is highly probable that the actual number is less, and the pro rata acreage equitably owned by each native Hawaiian as a result of HHCA is probably higher.

Department of Hawaiian Home Lands "DHHL" FYE 2008 shows annual income from Industrial, Commercial and other leases, permits and licenses: $10.369 million. (App. 25).

Thus, the adoption of the HHCA by Congress in 1921 violated not only the Equal Protection component of the Fifth Amendment but also the United States' fiduciary duty as Trustee of the Ceded Lands Trust established in 1898 to hold the revenues and proceeds "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

For the same reasons, the imposition of the HHCA on the State in 1959; and the State's and counties' adoption and implementation of the HHCA since then; and the federal mandate that the State continue to do so, continues the breach.

The failure of the Hawaii Court to grant injunction pending appeal to avoid further fiduciary breaches, thus conflicts with this Court's relevant decisions applying basic principles of trust law.

The following spreadsheet shows, in the third column, the annual distributions from the State Ceded Lands Trust to OHA as shown on OHA's annual reports from fiscal years ending June 30, 1981 through FYE 2009. As shown, during those 28 years the State distributed to OHA almost $400 million as "the income and proceeds from that pro rata portion of the" Ceded Lands Trust "for native Hawaiians." See Constitution of Hawaii Art. XII §6 the OHA trustees

to manage and administer "including all income and proceeds from that pro-rata portion of the trust [the 1.2 million acres of the Ceded Lands Trust] for native Hawaiians. It made *no* distributions of cash or property from the pro rata portion of the Ceded Lands Trust for the other beneficiaries.

State's cash distributions to OHA FYE 1981-2009
(Per Fiscal Year as shown on OHA annual reports.)

FYE 6/30	General Fund	Public Land Trust	Interest/ Dividends Earned
1981	225,000	1,553,935	35,909
1982	415,466	1,117,005	252,572
1983	540,785	1,380,037	190,613
1984	535,861	1,493,209	167,526
1985	567,178	1,368,834	290,876
1986	589,310	1,452,541	210,219
1987	596,881	1,691,827	214,347
1988	1,297,395	1,188,960	249,635
1989	1,347,638	1,238,429	312,421
1990	2,080,692	1,616,181	363,996
1991	2,052,962	10,800,153	671,492
1992	3,590,887	8,993,725	842,856
1993	3,854,524	139,957,130 *	1,181,983
1994	4,026,704	18,747,890	5,216,977
1995	3,584,625	25,087,967	8,199,984
1996	3,496,698	12,329,159	8,802,574

* Includes $134,584,489 paid in 1993 for 6/16/80-6/30/91.

1997	2,772,596	7,124,122	9,513,999
1998	2,808,201	15,106,347	10,857,620
1999	2,729,382	15,100,000	10,626,578
2000	2,550,922	8,238,109	10,798,857
2001	2,519,663	8,261,921	11,465,433
2002	2,619,663	6,535	9,909,545
2003	2,532,663	17,543,804	8,444,469
2004	2,532,647	9,740,578	3,492,365
2005	2,498,960	10,798,706	6,339,076
2006	2,755,011	32,599,833	11,417,954
2007	2,828,458	15,100,000	16,940,017
2008	3,043,921	15,100,000	**
2009	2,965,721	15,100,000	**
	$63,960,414	$399,836,937	$137,009,893

F. The State's June 4, 2008 revelation.

On June 4, 2008 in *Day v. Apoliona*, CV05-00649 SOM/BMK in the U.S. District Court for the District of Hawaii, the State of Hawaii, apparently for the first time in history, publicly accounted, at least in part, for and acknowledged that the Ceded Lands Trust costs the State many times more annually than the 1.2 million acres bring in. The State also acknowledged that this disparity between trust expenses and receipts has occurred in every year since statehood; and that the State has never before disclosed this information to the District Court or to the Ninth Circuit Court of Appeals.

** Investment losses: 2008 – ($24,542,791); 2009 – ($79,639,530).

The State's motion for summary judgment filed June 4, 2008, together with the accompanying memorandum in support are ER 5 in No. 08-16668, Docket #142; the concise statement of facts and declarations by Georgina K. Kawamura, Director of Budget and Finance of the State of Hawaii, and Arthur J. Buto, State Land Information Systems Manager are ER 6 in No. 08-16668, #143.

The State's memorandum in support summarizes the new disclosure as follows:

At page 1, "We show in this memorandum that every year the State has spent billions for at least two of section 5(f)'s purposes – 'the support of the public schools and other public educational institutions' and 'the making of public improvements.'" (App. 26).

At page 9, "First, the State has never previously made the instant argument, and so neither this Court nor the Ninth Circuit has had to pass upon it. Second, that as a factual matter the State would have prevailed on summary judgment had it made this argument (i.e., in every year since Statehood, the State has spent far more on permissible section 5(f) purposes than it has received in public land trust income.)" (App. 28).

Exhibit H to Ms. Kawamura's Declaration (App. 30) shows interest paid on bonds for various capital improvement projects for the five most recent fiscal years. As an example, the interest paid for FYE 2007 was **$237,494,513**. Mr. Buto's declaration reports total receipts from the §5(f) lands for that year as

$128,480,574, less airports receipts of $41.8 million, also less affordable housing developments receipts of $4.8 million, also less reimbursements and pass-throughs of $21.6 million for the adjusted total receipts from the ceded lands of **$60,280,573**. (App. 31). Thus, the interest expense of $237.48M paid by the State for capital improvement bonds alone (presumably for capital improvements to the ceded lands) for FYE 2007 was almost four times the $60.28M total ceded lands receipts.

G. Trust law as to distributions to income beneficiaries.

As the State of Hawaii not only acknowledged but vigorously and correctly argued in its May 2, 1997 Appellant's Amended Opening Brief in *OHA v. State*, Civ. No. 94-0205-1 before the Hawaii Supreme Court,

> it is a well-established principle of the law of trusts that beneficiaries are entitled only to the net income from the trust. *In re Bernice P. Bishop Estate,* 36 Haw. 403, 427 (1943) (Kemp, C.J.) (noting that "'annual income' clearly refers to the net annual income"): *id* at 464 ("[t]he word 'income' as employed in the will *unquestionably* means net income") (Peters, J., concurring in part and dissenting in part: emphasis added).
>
> 2A SCOTT & FRATCHER, THE LAW OF TRUSTS §182, at 550 (4th ed. 1987) (trustee's duty to pay income to beneficiary is limited to paying "the net income, after

> deducting from the gross income the expenses properly incurred in the administration of the trust").
>
> Thus, where the trust consists of an on-going business enterprise, the trustee's duty to pay income to the beneficiaries relates only to the net income, *i.e.,* the income remaining after the trust has paid for the costs of goods and services needed to operate the business or administer the trust. 3A SCOTT & FRATCHER, *supra,* §244, at 324-325.
>
> In addition to operating expenses, net income also takes into account depreciation or amortization of the capital cost of improvements that the State has constructed at taxpayer expense on ceded land. 3A SCOTT & FRATCHER, *supra,* §244, at 325.

(App. 34).

Thus, the State itself has proved that the 1.2 million acres of the Ceded Lands Trust have cost the State every year since statehood many times more than they brought in. Since the trust generated no net income for any on those years, the Trustee State's distributions to OHA for the betterment of native Hawaiian beneficiaries of almost $400 million during those three decades have all been unlawful.

This is serious misconduct. Misapplication of entrusted property is a misdemeanor under HRS §§708-874; and failure to make required disposition of funds constitutes the felony of theft under HRS §§708-830.

When sued for prospective relief, a state official in his official capacity is considered a "person for 1983 purposes." *Flint v. Dennison,* 488 F.3d. 816, 825 (9th Cir. 2007).

The Restatement of the Law, Trusts 3d §29 entitled "Purposes and Provisions That Are Unlawful or Against Public Policy," states:

> An intended trust or trust provision is invalid if:
>
> (a) its purpose is unlawful or its performance calls for the commission of a criminal or tortious act;
>
> (b) it violates rules relating to perpetuities; or
>
> (c) it is contrary to public policy.

Commentary f. Consistency with law and public policy. at Restatement of the Law, Trusts 3d §28, Charitable Purposes, provides:

> f. Consistency with law and public policy. Like other trusts, charitable trusts are subject to the rule of §29 that trust purposes and provisions must not be unlawful or contrary to public policy.
>
> . . . .
>
> When a scholarship or other form of assistance or opportunity is to be awarded on a basis that, for example, explicitly excludes potential beneficiaries on the basis of membership in a particular racial, ethnic, or

> religious group, the restriction is ordinarily invidious and therefore unenforceable. Thus, a trust to provide land and maintenance for a playground from which Black children are excluded, or a trust to support a scholarship program for which no Roman Catholic may apply, is not enforceable under those terms as a charitable trust. Similarly, although the exclusions are not explicit, a trust to provide research grants for which only "white, Anglo-Saxon Protestants" may apply is invidious and noncharitable.

And there is more. In 1995 the Hawaii legislature by Act 14 (App. 39) Special Session of 1995, (purportedly to resolve controversies over thousands of acres of Hawaiian home lands allegedly used, disposed of, or withdrawn from the trust by territorial or state executive actions) established the Hawaiian Home Lands Trust Fund and required the State to pay $600 million to that trust by 20 annual payments of $30 million each. The DHHL Annual Report for 2008 (App. 14 page 13) states the annual payments as of June 30, 2008 had been made as required. That indicates a total of $390 million to that date. Assuming the $30 million was paid for fiscal years 2009 and the current year, 2010, the total would be $450 million with an additional $150 million still to be paid in the future.

Even if the $10 million income from the DHHL general leases, permits and licenses is added in, the total 1.4 million acres of the Ceded Lands Trust including the 200,000 acres of "available lands" did

not come close to generating any net income. Thus, there could be no legal claim by a State commission or agency such as the Hawaiian Homes Commission, Department of Hawaiian Home Lands or the racial class of native Hawaiians to the $450 million already paid to the Hawaiian Home Lands Trust Fund.

The declaratory and injunctive relief to redress the three decades of wrongdoing should, at a minimum, stop the wrongdoing. The injunction pending appeal is the first step to begin doing so.

H. Hawaii on the brink.

The seed of official federal-mandated racial discrimination planted in the Territory of Hawaii in 1921 by the HHCA and imposed on the new State of Hawaii in 1959 as a condition of statehood, has multiplied, is pervasive and entrenched.

Now, the Akaka bill,[6] lobbied for with millions of dollars illegally diverted from the Ceded Lands Trust, threatens to permanently segregate the Aloha State. Even Senator Akaka has acknowledged his bill could eventually lead to secession.

The Constitution "looks to an indestructible union, composed of indestructible States." *Texas v. White*, 74 U.S. 700 (1869). If the Akaka bill is enacted

---

[6] S. 1011/H.R. 2314 Native Hawaiian Government Reorganization Act pending in Congress and supported by the President).

and carried out, Hawaii as an indestructible state of the indestructible Union may cease to exist.

These are among the most important issues of our time for the 1.4 million citizens of the United States who reside in Hawaii and for all the citizens of the United States.

Granting this petition for certiorari will immediately give positive reinforcement to a point that many in high positions seem to have forgotten:

> One of the necessary beginning points [as Hawaii seeks political consensus] is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

Justice Kennedy speaking for the Court. *Rice v. Cayetano*, 528 U.S. 495, 524 (February 23, 2000).

CONCLUSION

The petition should be granted, the order denying injunction pending appeal reversed and an injunction pending further proceedings issued as follows:

Enjoin each of the four counties of the State of Hawaii from depriving any Petitioners and any other real property taxpayers in their respective counties, of an exemption from real property taxes equivalent

to the most favorable exemption each county provides for Hawaiian homestead lessees.

Respectfully submitted,

H. WILLIAM BURGESS
Attorney at Law
2299C Round Top Drive
Honolulu, Hawaii 96822
(808) 947-3234

April 14, 2010 *Attorney for Petitioners*

NO. 30049

IN THE SUPREME COURT
OF THE STATE OF HAWAI'I

(Filed Jan. 14, 2010)

T.A. NO. 07-0086
JOHN M. CORBOY and STEPHEN GARO AGHJAYAN, Plaintiffs-Appellants,

vs.

MARK J. BENNETT, in his official capacity as Attorney General, State of Hawai'i; COUNTY OF MAUI; and COUNTY OF KAUAI, Defendants-Appellees.

T.A. NO. 07-0099
GARRY P. SMITH and EARL F. ARAKAKI, Plaintiffs-Appellants,

vs.

MARK J. BENNETT, in his official capacity as Attorney General, State of Hawai'i; and CITY AND COUNTY OF HONOLULU, Defendants-Appellees.

T.A. NO. 07-0102
J. WILLIAM SANBORN, Plaintiff-Appellant,

vs.

MARK J. BENNETT, in his official capacity as Attorney General, State of Hawai'i; and COUNTY OF HAWAII, Defendants-Appellees.

T.A. NO. 08-0039
In the Matter of the Tax Appeal of
STEPHEN GARO AGHJAYAN, Appellant-Appellant,

and

STATE OF HAWAI'I, Intervenor-Appellee/Appellee.

T.A. NO. 08-0040
In the Matter of the Tax Appeal of
JOHN M. CORBOY, Appellant-Appellant,

and

STATE OF HAWAI'I, Intervenor-Appellee/Appellee.

T.A. NO. 08-0041
In the Matter of the Tax Appeal of GARRY P. SMITH,
Appellant-Appellant,

and

STATE OF HAWAI'I, Intervenor-Appellee/Appellee.

T.A. NO. 08-0042
In the Matter of the Tax Appeal of
WILLIAM J. SANBORN, Appellant-Appellant,

and

STATE OF HAWAI'I, Intervenor-Appellee/Appellee.

T.A. NO. 08-0043
In the Matter of the Tax Appeal of
EARL F. ARAKAKI, Appellant-Appellant,

and

STATE OF HAWAI'I, Intervenor-Appellee/Appellee.

APPEAL FROM THE TAX APPEAL COURT
(Tax Appeal Case No. 07-0086 (Consolidated Nos. 07-0086, 07-0099, 07-0102, 08-0039, 08-0040, 08-0041, 08-0042, 08-0043))

ORDER DENYING MOTION FOR INJUNCTION PENDING APPEAL
(By: Moon, C.J., Nakayama, Acoba, Duffy, and Recktenwald, JJ.)

Upon consideration of appellants' motion for injunction pending appeal filed on December 16, 2009, the papers in support and in opposition and the record,

IT IS HEREBY ORDERED that the motion for injunction pending appeal is denied.

DATED: Honolulu, Hawai'i, January 14, 2010.

/s/ C.S. Moon

/s/ [Illegible] Nakayama

/s/ [Illegible] Acoba

/s/ James E. Duffy, Jr.

/s/ J.J. Reckterwald

MARK J. BENNETT 2672
Attorney General
State of Hawaii

GIRARD D. LAU 3711
CHARLEEN M. AINA 1899
Deputy Attorneys General
425 Queen Street
Honolulu, Hawaii 96813
Telephone: (808) 586-1360

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

IN THE TAX APPEAL COURT OF THE

STATE OF HAWAII

JOHN M. CORBOY and STEPHEN GARO AGHJAYAN, Plaintiffs, vs. MARK J. BENNETT, in his official capacity as Attorney General, State of Hawaii; the COUNTY OF MAUI; and the COUNTY OF KAUAI, Defendants.	T.A. NO. 07-0086 CONSOLIDATED (Other Civil Action) ORDER DENYING PLAINTIFFS-APPELLANTS' MOTION FOR STAY AND INJUNCTION PENDING APPEAL (Filed Dec. 24, 2009)

GARRY P. SMITH and EARL F. ARAKAKI, Plaintiffs, vs. MARK J. BENNETT, in his official capacity as Attorney General, State of Hawaii; and the CITY AND COUNTY OF HONOLULU, Defendants.	HEARING DATE: November 23, 2009 TIME: 3:00 p.m. JUDGE: Gary W.B. Chang T.A. NO. 07-0099 CONSOLIDATED (Other Civil Action)
J. WILLIAM SANBORN, Plaintiff, vs. MARK J. BENNETT, in his official capacity as Attorney General, State of Hawaii; and the COUNTY OF HAWAII, Defendants.	T.A. NO. 07-0102 CONSOLIDATED (Other Civil Action)
IN THE MATTER OF THE TAX APPEAL OF STEPHEN GARO AGHJAYAN, Appellant, and STATE OF HAWAII, Intervenor-Defendant-Appellee.	T.A. NO. 08-0039 CONSOLIDATED (Other Civil Action)

IN THE MATTER OF THE TAX APPEAL OF JOHN M. CORBOY, Appellant, and STATE OF HAWAII, Intervenor-Defendant-Appellee.	T.A. NO. 08-0040 CONSOLIDATED (Other Civil Action)
IN THE MATTER OF THE TAX APPEAL OF GARRY P. SMITH, Appellant, and STATE OF HAWAII, Intervenor-Defendant-Appellee.	T.A. NO. 08-0041 CONSOLIDATED (Other Civil Action)
IN THE MATTER OF THE TAX APPEAL OF WILLIAM J. SANBORN, Appellant,	T.A. NO. 08-0042 CONSOLIDATED (Other Civil Action)

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

ORDER DENYING PLAINTIFFS-APPELLANTS' MOTION FOR STAY AND INJUNCTION PENDING APPEAL

Plaintiffs-Appellants filed Plaintiffs-Appellants' Motion for Stay and Injunction Pending Appeal on September 4, 2009. The Court heard oral argument on the motion on November 23, 2009, with H. William Burgess appearing for Plaintiffs-Appellants Taxpayers, Girard D. Lau, Deputy Attorney General, appearing in opposition for Intervenor-Defendant-Appellee State of Hawaii and Defendant-Appellee Mark J. Bennett, in his official capacity as Attorney General of Hawaii, Lee M. Agsalud, Deputy Corporation Counsel, appearing in opposition for the City

and County of Honolulu, Richard B. Rost, Deputy Corporation Counsel, appearing in opposition for the City and County of Maui, and Craig T. Masuda, Deputy Corporation Counsel, appearing in opposition for the County of Hawaii.

Having heard oral argument, reviewed the subject motion and supporting and opposing papers, and being duly advised of the record and file herein, and for good cause shown, the Court hereby DENIES Plaintiffs-Appellants' Motion for Stay and Injunction Pending Appeal, as to all eight consolidated cases herein.

DATED: Honolulu, Hawai'i, DEC 24 2009.

/s/ GARY W.B. CHANG [SEAL]
HONORABLE GARY W.B. CHANG
JUDGE OF THE ABOVE-
ENTITLED COURT

NOTICE OF CONSTITUTIONAL QUESTION

TO THE ATTORNEY GENERAL OF THE UNITED STATES AND THE ATTORNEY GENERAL OF THE STATE OF HAWAII

Please take notice that this action draws into question the constitutionality of State of Hawaii laws and Federal laws (including §4 of the 1959 Hawaii Admission Act which required as a condition of statehood that the State of Hawaii adopt the Hawaiian Homes Commission Act, "HHCA"; still mandates that the State of Hawaii continue to carry out the HHCA; and forbids its repeal or amendment without the consent of the United States) See F.R.Civ.P. 5.1(a) and Hawaii R.Civ.P. 24(d).

> "State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell, 428 U.S. 465, 494, n. 35, 96 S.Ct. 3037, 3052, n. 35, 49 L.Ed.2d 1067 (1976)*. . . . as *St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 101 S.Ct. 2142, 68 L.Ed.2d 612 (1981)*, demonstrates, the Federal Government need not be a party in order for the appellees to litigate their statutory and constitutional claims. Footnotes 37 and 38. *California et al. v. Grace Brethren Church*, 57 U.S. 393, 417 (1982).
>
> Accordingly, because the appellees could seek a refund of their state unemployment insurance taxes, and thereby obtain state judicial review of their constitutional claims, we hold

that their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act. *Id.*

If the taxpayer is unsuccessful at trial, he may appeal the decision to higher state courts and ultimately seek review in this Court. Nothing in this scheme prevents the taxpayer from "rais[ing] any and all constitutional objections to the tax" in the state courts. *Rosewell v. LaSalle National Bank*, 450 U.S., at 514, 101 S.Ct., at 1229. *Id.* at 414.

DATED: Honolulu, Hawaii, August 31, 2007.

/s/ H. William Burgess
H. WILLIAM BURGESS,
Attorney for Plaintiffs

Plaintiffs' exhibit for use in oral argument 11/23/2009 Corboy v Bennett TA No. 07-0086 etc Consolidated

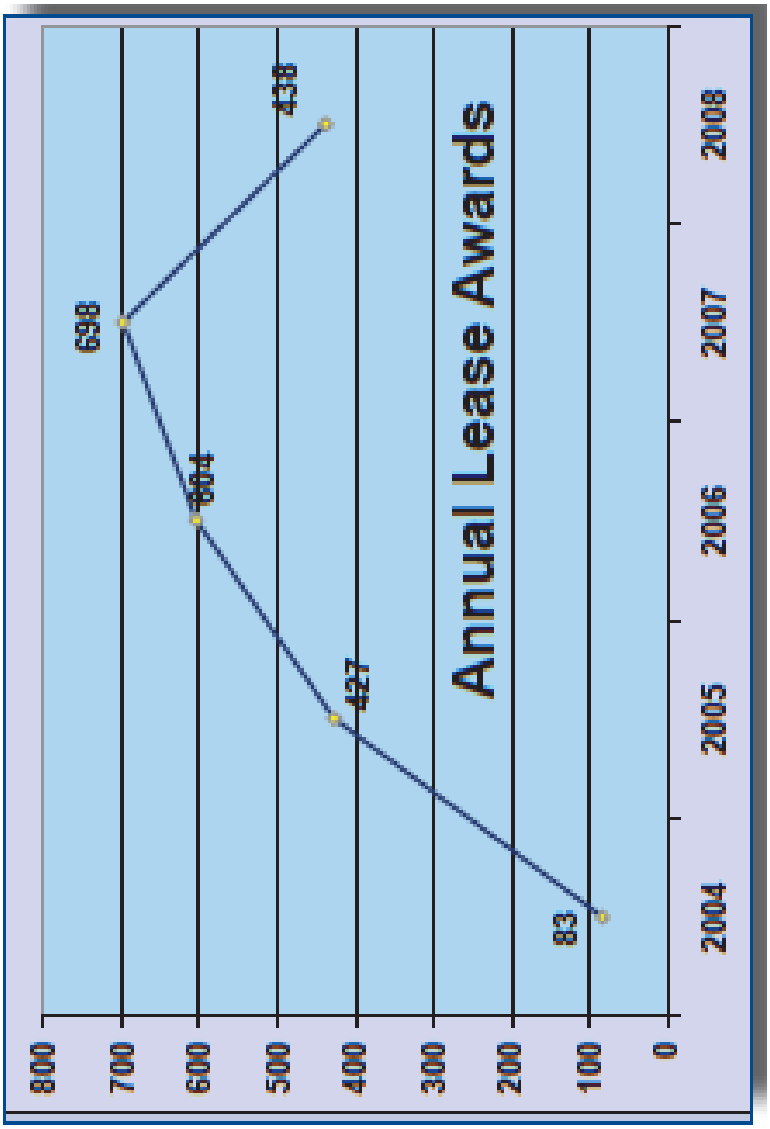
Real Property tax Oahu, 2008-2009
Irreparable harm-benefit analysis of exemption for Homestead lessees

$459,957,000	Projected total RPTax revenue 2009-2010 Residential per Gary Kurohawa C&C RPTax Admr
253,185	Total residential parcels on Oahu, same source
$1,817	Average RP tax per residential parcel
$100	Rptax paid per annum by DHHL lessees
$1,717	Annual harm to each Plaintiff resulting from deprivation of same exemption as DHHL lessees
3,933	Approx total residential Homestead leases on OAHU per DHHL Ann Report 6/30/2008
<2%	Residential homestead parcels on Oahu/total residential parcels = .015534 Refunds will not make Ps & others sim situated whole: >98% paid by them.
$6,751,716	BENEFIT: Additional RP tax revenue to C&C if DHHL lessees pay their share.
$836,448,000	C&C projected TOTAL RPTx revenues for 2009-2010
$459,957,000	C&C projected RESIDENTIAL RPTx revenues for 2009-2010
55%	Portion of total RPTx revenues contributed by Residential property owners.

Lease Report
As of June 30, 2008

	Residential	Agricultural	Pastoral	Total
O'AHU:				
Kalawahine	92	0	0	92
Kapolei	348	0	0	348
Kaupe'a	324	0	0	324
Kewalo	251	0	0	251
Lualualei	150	32	0	182
Malu'ohal	156	0	0	156
Nanakuli	1,051	0	0	1,051
Papakolea	65	0	0	65
Princess Kahanu	272	0	0	272
Walahole	0	16	0	16
Wal'anae	425	11	0	436
Waimanalo	799	1	0	800
TOTAL	**3,883**	**80**	**0**	**3,993**
MAUI:				
Hikina	1	0	0	1
Kahikinui	0	0	76	76
Keokea	0	65	0	104
Leial'i	104	0	0	58
PaukOkaio	181	0	0	181
Walehu 1	39	0	0	39
Walehu 2	109	0	0	109
Walehu 3	115	0	0	115
Walehu 4	79	0	0	79
Walohull	641	0	0	641
TOTAL	**1,288**	**86**	**76**	**1,409**
EAST HAWAI'I				
Discovery Harbour	2	0	0	2
Kama'oa	0	1	25	26
KaOmana	36	0	0	36
Keaukaha	472	0	0	472
Kurtistown	3	0	0	3
Maku'u	0	125	0	125
Pana'ewa	0	257	0	257
Pl'lhonua	17	0	0	17
Pu'u'eo	0	11	0	11
University Heights	4	0	0	4
Walakea	298	0	0	298
TOTAL	**832**	**384**	**26**	**1,251**
WEST HAWAI'I				
Honokala	0	0	23	23
Humu'ula	0	0	5	5
Kamoku	0	0	12	12
Kaniohale	224	0	0	224

Kawaihae	214	0	0	214
La'l Opua	300	0	0	300
Nienie	0	0	11	11
Pu'ukapu/Walmea	116	112	227	455
Pu'upulehu	33	0	0	33
TOTAL	**887**	**112**	**278**	**1,277**
KAUA'I				
Anahola	529	47	0	576
Hanapepe	45	0	0	45
Kekaha	117	0	0	117
Fu'u Opae	0	0	2	2
TOTAL	**681**	**47**	**2**	**740**
MOLOKAI				
Ho'olehua	156	347	21	524
Kalama'ula	161	74	3	238
Kapa'akea	46	0	3	49
Mo'omomi	0	3	0	3
One All'l	29	0	0	29
TOTAL	**382**	**424**	**27**	**843**
LANAI	26	0	0	26
TOTAL	**28**	**0**	**0**	**28**
STATEWIDE TOTAL	**8,030**	**1,102**	**407**	**8,638**


Annual Lease Awards
800
700
600
500
400
300
200
100
0
2004
2005
2006
2007
2008
83
427
604
698
438

The strategic plan outlines five primary goals:

1- *Provide every qualified native Hawaiian on the waiting list with an opportunity to homeownership or land stewardship on homestead lands. Over the next five years, deliver 5,000 homestead awards through the development of various award programs.*

2- *Provide beneficiaries with the necessary tools for long-term homeownership sustainability by supporting capacity building programs to assist in strengthening homestead communities.*

3- *Strive to improve overall operational efficiency and delivery of services to beneficiaries of the Trust.*

4- *Pursue financial self-suffiency* [sic] *by 2013 replacing Act 14 financial settlement of $30 million per year and generating significant non-government revenues to support DHHL's housing program.*

5- *Continue to effectively manage and protect the Trust to ensure perpetuity for future generations of native Hawaiians and fufill* [sic] *our responsibility as long-term stewards.*

Treaty of Annexation of Hawaii, Negotiated in 1897

The United States and the Republic of Hawaii, in view of the natural dependence of the Hawaiian Islands upon the United States, of their geographical proximity thereto, of the preponderant share acquired by the United States and its citizens in the industries and trade of said islands and of the expressed desire of the government of the Republic of Hawaii that those islands should be incorporated into the United States as an integral part thereof and under its sovereignty, have determined to accomplish by treaty an object so important to their mutual and permanent welfare.

To this end the high contracting parties have conferred full powers and authority upon their respectively appointed plenipotentiaries, to-wit:

The President of the United States, John Sherman, Secretary of State of the United States.

The President of the Republic of Hawaii, Francis March Hatch, Lorrin A. Thurston, and William A. Kinney.

ARTICLE I.

The Republic of Hawaii hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies;

and it is agreed that all territory of and appertaining to the Republic of Hawaii is hereby annexed to the United States of America under the name of the Territory of Hawaii.

ARTICLE II.

The Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, government or crown lands, public buildings, or edifices, ports, harbors, military equipments, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition. Provided, that all revenues from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

ARTICLE III.

Until Congress shall provide for the government of such islands all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this treaty nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

ARTICLE IV.

The public debt of the Republic of Hawaii, lawfully existing at the date of the exchange of the ratifications of the treaty, 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 $4,000,000. So long, however, as the existing government and the present commercial relations of the Hawaiian Islands are continued, as herein before provided, said government shall continue to pay the interest on said debt.

ARTICLE V.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States, and no Chinese by reason of anything herein contained shall be allowed to enter the United States from the Hawaiian Islands.

ARTICLE VI.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonable and practicable, recommend to Congress such legislation for the Territory of Hawaii as they shall deem necessary or proper.

ARTICLE VII.

This treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate, on the one part; and by the President of the Republic of Hawaii, by and with the advice and consent of the Senate, in accordance with the Constitution of said Republic, on the other; and the ratifications hereof shall be exchanged at Washington as soon as possible.

In witness whereof the respective plenipotentiaries have signed the above articles and have hereunto affixed their seals.

Done in duplicate at the city of Washington, this sixteenth day of June, one thousand, eight hundred and ninety-seven.

JOHN SHERMAN. [SEAL.]
FRANCIS MARCH HATCH. [SEAL.]
LORRIN A. THURSTON. [SEAL.]
WILLIAM A KINNEY. [SEAL.]

* * *

Joint Resolution

TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES.

PUBLIC RESOLUTION No. 51,
55th CONGRESS, 2nd SESSION.

Whereas, the Government of the Republic of Hawaii having, in due form, signified its consent, in

> the manner provided by its constitution, to cede absolutely and without reserve to the United States of America, all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States, the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: PROVIDED, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government,

shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

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. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore, provided said Government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

Sec. 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

Sec. 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the

President of the United States of America, for the purpose of carrying this joint resolution into effect.

SERENO E. PAYNE,
Speaker of the House of Representatives
Pro Tempore.

GARRET A. HOBART,
Vice-President of the United States
and President of the Senate

Approved July 7th, 1898. WILLIAM McKINLEY

Land Use Summary

Land Use Summary By Island June 30, 2008

ACREAGE*

USE	HAWAI'I	KAUA'I	LANA'I	MAUI	MOLOKA'I	O'AHU	TOTAL
Homesteads	29,885	906	14	2,682	11,005	1,111	46,603
General Leases	12,765	27	–	512	1,763	67	15,133
Licenses	17,811	87	–	7,326	720	319	26,263
Others	57,089	19,545	36	21,276	12,281	5,999	116,226
TOTALS	**117,550**	**20,565**	**50**	**31,796**	**25,769**	**7,495**	**203,225**

Land Use Summary By Disposition June 30, 2006

	HOMESTEAD USE				GENERAL USE		
USE	HOMES	FARMS	RANCHES	LEASES	LICENSES	OTHERS	ACREAGE
Acreage*	3,563	12,340	29,700	15,133	26,263	116,226	203,225

Income Summary By Use And Island June 30, 2008

USE**	HAWAI'I	KAUA'I	LANA'I	MAUI	MOLOKA'I	O'AHU	TOTAL
Industrial Leases	$1,796,396	$0	$0	$0	$0	$2,016,778	$3,813,174
Commercial Leases	2,253,130	0	0	0	0	378,750	2,631,880
Pasture/Agriculture Leases	69,571	0	0	70,400	13,000	4,150	157,121
Other Leases***	95,831	481	0	0	236,493	90,343	423,148
Revocable Permits	188,844	114,852	$696	161,496	17,136	2,043,630	2,526,654
Right of Entry Permits	0	0	0	0	200	0	200
Licenses	310,764	32,457	0	12,002	17,483	44,924	817,631
TOTAL	**$4,714,535**	**$147,791**	**$696**	**$243,898**	**$284,312**	**$4,978,575**	**$10,369,807**

* Figures have been rounded to the nearest whole acre.

** Figures have been rounded to the nearest dollar.

*** Includes Leases for Utilities, Public Service and Government Purposes.

MARK J. BENNETT 2672
Attorney General
State of Hawaii
WILLIAM J. WYNHOFF 2558
Deputy Attorney General
465 South King Street, Suite 300
Honolulu, Hawaii 96813
Telephone No.: (808) 587-2993
Fax No.: (808) 587-2999
Email: Bill.J.Wynhoff@hawaii.gov

Attorneys for Defendant State of Hawaii

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

VIRGIL E. DAY, MEL HOOMANAWANUI, JOSIAH L. HOOHULI, PATRICK L. KAHAWAIOLAA, and SAMUEL L. KEALOHA, JR. Plaintiffs, vs. HAUNANI APOLIONA, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiin Affairs; ROWENA AKANA; DANTE CARPENTER; DONALD CATALUNA; LINDA KEAWE'EHU DELA CRUZ; COLLETTE Y. PI'IPI'I	CIVIL NO. CV05-00649SOM/BMK STATE OF HAWAII'S MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF STATE OF HAWAII'S MOTION FOR SUMMARY JUDGMENT; CERTIFICATE OF SERVICE (Filed Jun. 4, 2008) HEARING: DATE: _____ TIME: _____ JUDGE: The Honorable Susan Oki Mollway

MACHADA; BOYD P. MOSSMAN; OSWARD STENDER; and JOHN D. WAIHE'E IV, individually and in their official capacities as Trustees of the Office of Hawaiian Affairs; and CLAYTON HEE and CHARLES OTA, individually,

Defendants.

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

I. INTRODUCTION.

In what remains of their complaint in this case, plaintiffs allege that OHA has improperly expended income from the public land trust appropriated to OHA, for purposes other than "for the betterment of the conditions of native Hawaiians." Plaintiffs claim this alleged improper spending violates 42 U.S.C. § 1983.

As a matter of law, the claim posits the wrong question. For purposes of a suit brought pursuant to § 1983, the question is whether *the State as a whole* has expended at least as much as it received from the ceded lands on the purposes set forth in section 5(f) of the Admission Act. We show in this memorandum that every year the State has spent billions for at least two of section 5(f)'s purposes – "the support of the public schools and other public educations institutions" and "the making of public improvements."

This suit, therefore, cannot succeed, and defendants are entitled to judgment as a matter of law.[1]

II. ARGUMENT.

* * *

Any contrary holding by this Court would impose on the State, as a matter of *federal* law, an accounting system that could trace particular dollars taken in, to particular dollars spent. Such a holding would clearly be directly contrary to *Price*.

Plaintiffs may argue that the Court should reject the argument the State now urges because such an argument would have been dispositive with regard to all of the cases in which the Ninth Circuit recognized a private right of action under § 1983 with regard to alleged improper spending of public land trust income. The State's response is, again, a simple one. First, the State has never previously made the instant argument, and so neither this Court nor the Ninth Circuit has had to pass upon it. Second, that as a factual matter the State would have prevailed on

---

[1] Alternatively, because plaintiffs challenge the expenditure of only that portion of ceded land receipts transferred to OHA and used by OHA for certain objected to purposes (including, e.g., promotion of the Akaka Bill), the question is whether the State has expended non-ceded land receipts on proper 5(f) purposes in an amount at least as much as the share of ceded land receipts transferred to OHA and used by OHA for the objected to purposes. If it has, then the State has fully "made up" for any alleged improper OHA expenditures.

summary judgment had it made this argument (i.e., that in every year since Statehood, the State has spent far more on permissible section 5(f) purposes than it has received in public land trust income) is irrelevant – the State has never presented the *facts*[7] justifying this essentially fact-based summary judgment motion before.

* * *

III. CONCLUSION.

The entirety of plaintiffs' remaining claims under federal law allege that public trust land income appropriated to OHA is being spent other than for one of the permissible section 5(f) purposes. More particularly, plaintiffs allege that OHA is required to spend that money "for the betterment of the conditions of native Hawaiians," that OHA is not doing so, and thus that the OHA Trustees' conduct is actionable pursuant to 42 U.S.C. § 1983. Because the State of Hawaii as a whole, however, spends far more on permissible section 5(f) purposes than the total amount it receives in public land trust income, the Court need not reach the question presented by plaintiffs' complaint. The Court should find, as a

[7] This motion is fact-based at its heart. If the public trust land income exceeded State spending on permissible section 5(f) purposes (instead of the reverse), or the State expended non-ceded land monies on permissible section 5(f) purposes in amounts totaling less than the share of ceded land receipts transferred to OHA and used by OHA for objected to purposes, *see*

* * *

matter of undisputed fact, that because the State does spend far more on permissible section 5(f) purposes than the total amount it receives in public land trust income, no person can make out a § 1983 claim based on

* * *

General Obligation Bonds
Historical Debt Service

Fiscal Year	**Principal**	**Interest**	**Total Annual Debt Service**
2002-2003	$236,580,151.00	$192,876,029.00	$429,456,180.00
2003-2004	$128,865,000.00	$194,938,912.47	$323,803,912.47
2004-2005	$136,445,000.00	$208,278,463.00	$344,723,463.00
2005-2006	$286,639,334.00	$212,024,207.00	$498,663,541.00
2006-2007	$310,119,530.00	$237,494,513.00	$547,614,043.00

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

VIRGIL E. DAY, MEL HOOMANAWANUI, JOSIAH L. HOOHULI, PATRICK L. KAHAWAIOLAA, and SAMUEL L. KEALOHA, JR. Plaintiffs, vs. HAUNANI APOLIONA, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs; ROWENA AKANA; DANTE CARPENTER; DONALD CATALUNA; LINDA KEAWE'EHU DELA CRUZ; COLLETTE T. PI'IPI'I MACHADO; BOYD P. MOSSMAN; OSWARD STENDER; and JOHN D. WAIHE'E IV, individually and in their official capacities as Trustees of the Office of Hawaiian Affairs; and CLAYTON HEE and CHARLES OTA, individually, Defendants.	CIVIL NO. CV05-00649SOM/BMK DECLARATION OF ARTHUR J. BUTO

DECLARATION OF ARTHUR J. BUTO

1. I am the State Land Information Systems Manager in the Land Division of the Department of

Land and Natural Resources, and am the project leader for the Act 178 ceded land reporting project that the Department of Land and Natural Resources is responsible for establishing under Act 178, Session Laws of Hawaii 2006. I make this declaration from personal knowledge obtained in that capacity.

2. When fully implemented, the Act 178 reporting system will electronically collect, store, and compile information from all of the state agencies that collect receipts from the ceded lands that is necessary for preparing and publishing the annual accounting report required by Act 178.

3. Since July 1, 2006, the Department of Land and Natural Resources has compiled and prepared a report of receipts collected from lands described in section 5(f) of the Admission Act for the prior fiscal year pursuant to section 5 of Act 178. The total receipts reported for the fiscal year 2005-2006 was $116,385,149. *See* http://state.hi.us/dlnr/reports/land/FY2006-Agency-Reports-Consolidated.xls. The total receipts reported for fiscal year 2006-2007 was $128,480,574. *See* http://hawaii.gov/dlnr/reports/2008/administrative-services-office/FY2007-Agency-Report-Consolidated.xls.

4. The total receipts reported for fiscal years 2006 and 2007 include receipts from the Department of Transportation's Airports Division (DOT) (FY 2006, $40.1+ million; FY 2007, $41.8+ million). In their report, DOT cited a federal law that prohibits them

from transferring a pro rata share of these receipts to OHA.

5. In addition, the total receipts reported for fiscal years 2006 and 2007 include receipts from the State's affordable housing development programs (FY 2006, $396,000+; FY 2007, $4.8+ million).

6. Furthermore, according to surveys conducted in late 2007, subsequent interviews with some agency staff, and information received after the reports were filed, it appears that some agencies included in their total receipts, receipts from the use of non-ceded lands, reimbursements and pass-throughs for services and goods provided by the agencies and third parties, including public utilities, and receipts from the use of ceded lands attributable to prior fiscal periods but collected in those fiscal years. While these figures are unaudited, the additional receipts appear to total in excess of $18.6 million and $21.6 million for fiscal years 2006 and 2007, respectively.

7. We are currently working with the agencies to refine the system to assure that data collection is complete, accurate, and better documented. We expect to have the system fully responsive to the requirements of Section 5 of Act 178 by December 31, 2008.

I, Arthur J. Buto, do declare under penalty of perjury that the foregoing is true and correct.

/s/ Arthur J. Buto 6/4/08
ARTHUR J. BUTO

NO. 20281

IN THE SUPREME COURT
OF THE STATE OF HAWAII

OFFICE OF HAWAIIAN AFFAIRS and the BOARD OF TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS, Plaintiffs-Appellees, vs. STATE OF HAWAII, Defendant-Appellant, and JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, ROE "NON-PROFIT CORPORATIONS 1-10, and ROE GOVERNMENTAL ENTITIES 1-10, Defendants.	CIVIL NO. 94-0205-01 APPEAL FROM 1) ORDER FILED OCTOBER 24, 1996, DENYING DEFENDANT STATE OF HAWAII'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, 2) ORDER FILED OCTOBER 24, 1996, GRANTING PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT. (Filed May 6, 1997) FIRST CIRCUIT COURT

APPELLANT'S AMENDED OPENING BRIEF

APPENDICES A-C

CERTIFICATE OF SERVICE

MARGERY S. BRONSTER 4750
Attorney General of Hawaii
CHARLEEN M. AINA 1899
DOROTHY SELLERS 4069
Deputy Attorneys General
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

ANDREW L. FREY
(Admitted Pro Hac Vice)
Mayer, Brown & Platt
1675 Broadway
New York, N.Y. 10019
(212) 506-2500

Attorneys for Appellant
State of Hawaii

MAY 2, 1997

* * *

the ceded lands upon which improvements have been constructed. OHA has no legitimate claim, however, to any of the income from the improvements themselves, which are not a part of the trust.

B. "Revenue" Includes Only Net Income, Not Gross Receipts.

Even if OHA's 20% share were to be calculated on a basis that included income from improvements as well as from the land, the partial summary judgments for OHA would still be inappropriate. Under Act 304, "'Revenue' means all proceeds, fees, charges, rents, or **other income,** or any portion thereof, derived from [various specified sources]." Thus, "revenue"

refers to types of "income," a treatment consistent with the delineation of the trust in Section 5(f) of the Admission Act as consisting of the "lands and the income therefrom." And the word "income," although not specifically defined in the statute, has a settled meaning in the law generally and in the law of trusts in particular.

"Income" – and therefore "revenue" – does not mean gross receipts, as the Circuit Court apparently assumed. To the contrary, it is a well-established principle of the law of trusts that beneficiaries are entitled only to the **net** income from the trust. *In re Bernice P. Bishop Estate*, 36 Haw. 403, 427 (1943) (Kemp, C.J.) (noting that "'annual income' clearly refers to the net annual income"): *id*. at 464 ("[t]he word 'income' as employed in the will *unquestionably* means net income") (Peters, J., concurring in part and dissenting in part; emphasis added). 2A SCOTT & FRATCHER, THE LAW OF TRUSTS § 182, at 550 (4th ed. 1987) (trustee's duty to pay income to beneficiary is limited to paying "the net income, after deducting from the gross income the expenses properly incurred in the administration of the trust"). Thus, where the trust consists of an on-going business enterprise, the trustee's duty to pay income to the beneficiaries relates only to the net income, *i.e.*, the income remaining after the trust has paid for the costs of goods and services needed to operate the business or administer the trust. See *In re Sulzer's Estate*, 185 A. 793, 796 (Pa. 1936); *Smith v. Jones*, 162 So. 496, 498 (Fla. 1935); *Woodard v. Wright*, 22 P. 1118, 1119 (Cal.

1889): 3A SCOTT & FRATCHER, *supra*, § 244, at 324-325 ("[i]t is obvious that the cost of administering a trust should be borne by the trust estate and not by the trustees personally if those costs are properly incurred"); *id*. at 323.

In addition to operating expenses, net income also takes into account depreciation or amortization of the capital cost of improvements that the State has constructed at taxpayer expense on ceded land. 3A SCOTT & FRATCHER, *supra*, § 244, at 325. There is no dispute that the State had the right to construct improvements upon the ceded land; not even OHA claims that the State breached its fiduciary duties by constructing, say, the Honolulu International Airport, public housing, or hospitals on ceded land.

What this means, then, is that OHA is not entitled to 20% of the gross receipts of the Hilo Hospital or the public housing, but only to 20% of the net income (if any) from those facilities (unless they are sovereign functions, see subpoint C, *infra*). Any other interpretation leads to absurd results. For example, if the State were to operate a race track, a lottery outlet, or even a credit union on ceded lands, OHA's interpretation would entitle it to 20% of the wagers made at the race track, amounts paid for lottery tickets, or deposits made at the credit union.

Moreover, most businesses – to say nothing of government agencies operating public housing and hospitals for the poor – never achieve a 20% profit. Consequently, OHA's claim to 20% of the gross revenue

could be satisfied only by allocating additional taxpayer revenue from the general fund. In the end, a "gross receipts" approach would massively discourage the State from using the ceded lands for any activity that both generated high receipts and incurred substantial expenses, even if such were otherwise the highest and best use of the ceded lands.

Absent compelling evidence of a contrary legislative intent – and there is none – it is untenable to conclude that the Legislature meant in adopting Act 304 to depart from settled principles of trust law and to mandate such a fiscally imprudent state of affairs.

- **U.S. Department of Housing and Urban Development, Native American Housing and Self-Determination Act (NAHASDA) Program:** DHHL works closely with its Congressional delegation and the HUD Office of Native American Programs to secure re-authorization and annual appropriations for NAHASDA. The law provides that NAHASDA grant funds can be used on Hawaiian home lands to support homeownership for low to moderate income families.

PROTECTING THE TRUST:

Several lawsuits have been filed in recent years challenging the legal basis for various native Hawaiian rights and policies. These lawsuits and the philosophy they represent can have serious ramifications for the Hawaiian home lands trust and other resources and services that benefit native Hawaiians. The political status of native Hawaiians needs to be clarified at the federal level to protect the Hawaiian home lands trust.

- **Federal Recognition:** The Hawaiian Homes Commission reaffirmed its support of legislation to express the United States' policy regarding its relationship with Native Hawaiians and provide a process for the recognition of a Native Hawaiian governing entity.
- **Coordination:** The Planning Office also provided support for DHHL to meet quarterly with leaders from homestead and applicant organizations in order to discuss and coordinate plans, strategies and actions.

- **Resolution of Trust Claims:** The Planning Office is responsible for completing and monitoring the various provisions of agreements reached with the state and federal governments to restore the Hawaiian Home Lands trust. State of Hawai'i – Act 14, SpSLH 1995, was passed to resolve claims filed by the Hawaiian Homes Commission involving compensation due for the past use of and title to Hawaiian home lands. Act 14 requires that the state take certain actions to restore the Hawaiian home lands trust.

Accomplishments during the reporting period from July 1, 2007, through June 30, 2008. included:

- Hawaiian Home Lands Trust Fund: Act 14 established a Hawaiian Home Lands Trust Fund with the requirement that the state make 20 annual deposits of $30 million into the trust fund for a total of $600 million. To date, payments have been made as required by law. These funds have been used for homestead land acquisitions and capital improvement projects. (See the Hawaiian Home Lands Trust Fund financial statement in this report.)

- Waimãnalo Regional Settlement: Completed.

- Anahola Regional Settlement: The claims against private use of Hawaiian home lands remains.

- Public Uses of Hawaiian Home Lands: No change.

- Nominal Compensation Controvers: No change.

- Roads and Highways: No change.

- Land Transfer Acquisitions – Act 14 authorizes the transfer of 16,518 acres of public lands to DHHL to be designated as Hawaiian home lands, which will bring its inventory to 203500 acres. As of June 30, 2008 15,195.462 acres (92 percent) have been conveyed to DHHL.