No. 08-16769

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES I. KUROIWA, JR., *et al.,*
Plaintiffs-Appellants,

v.

LINDA LINGLE, in her official capacity as
Governor of the State of Hawaii, *et al.*,
Defendants-Appellees,

HAUNANI APOLIONA, in her official capacity as
Office of Hawaiian Affairs Chair, *et al.*
Defendants-Appellee.

On Appeal from the United States District Court for the District of Hawai`i
Honorable J. Michael Seabright, District Judge
Case No. CV08-00153 JMS KSC

APPELLEES OHA DEFENDANTS' ANSWERING BRIEF

CERTIFICATE OF SERVICE

MCCORRISTON MILLER MUKAI MACKINNON LLP

ROBERT G. KLEIN 1192-0
LISA W. CATALDO 6159-0
BECKY T. CHESTNUT 7756-0
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawai`i 96813
Telephone: (808) 529-7300

Attorneys for Appellees OHA Defendants

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ISSUES PRESENTED FOR REVIEW 1

III. STATEMENT OF THE CASE 3

IV. STATEMENT OF THE FACTS 3

A. The Hawaiian Homes Commission Act 3

B. The Admission Act 4

C. The Office of Hawaiian Affairs 5

D. Arakaki v. Lingle 6

1. The Arakaki District Court's Initial Orders Regarding Standing 7

2. Carroll v. Nakatani 9

3. Arakaki's Petition of Writ of Certiorari and Remand to the Ninth Circuit 10

4. Arakaki, 477 F.3d 1048 11

V. SUMMARY OF ARGUMENT 12

VI. STANDARD OF REVIEW 13

A. Motions to Dismiss for Lack of Standing 13

B. Motions for Judgment on the Pleadings 13

C. Joinder Determinations 13

VII. ARGUMENT 14

A. The United States is an Indispensable Party 14

1. Plaintiffs Challenge Substantive Terms of the Admission Act, Making the United States an Indispensable Party Under Controlling Precedent 14

2. The United States Is an Indispensable Party 21

3. Arakaki Is Binding Precedent 23

4. Arakaki Does Not Alter Established Trust Law 26

B. Plaintiffs Have No Standing to Sue the United States 27

1. The APA Does Not Confer Standing and is Inapplicable 27

2. Plaintiffs' Arguments Regarding Rough Comparability to § 1983 are, at Best, Unpersuasive 30

C. Plaintiffs' Arguments Regarding Trust Income Are Irrelevant to the Issues on Appeal 31

D. Plaintiffs' Discrimination and Trust Law Arguments are Irrelevant to the Issues on Appeal 31

VIII. CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

CASES

Ahuna v. Dep't of Hawaiian Home Lands,
64 Haw. 327, 640 P.2d 1161 (1982) 3

Arakaki v. Cayetano,
198 F. Supp. 2d 1165 (D. Haw. 2002) 7, 8

Arakaki v. Cayetano,
299 F. Supp. 2d 1090 (D. Haw. 2002) 8, 9

Arakaki v. Lingle,
299 F. Supp. 2d 1114 (D. Haw. 2003) 10

Arakaki v. Lingle,
305 F. Supp. 2d 1161 (D. Haw. 2004) 10

Arakaki v. Lingle,
423 F.3d 954 (9th Cir. 2005), vacated by 547 U.S. 1189 (2006) 11

Arakaki v. Lingle,
477 F.3d 1048 (9th Cir. 2007) ..... passim

Arakaki v. Lingle,
547 U.S. 1189 (2006) 11

Carlson v. Tulalip Tribes of Washington,
510 F.2d 1337 (9th Cir. 1975) 22, 23

Carroll v. Nakatani,
342 F.3d 934 (9th Cir. 2003) 9, 25

E.E.O.C. v. Peabody W. Coal Co.,
400 F.3d 774 (9th Cir. 2005) 14

Fajardo v. County of L.A.,
197 F.3d 698 (9th Cir. 1999) 13

Flast v. Cohen,
392 U.S. 83 (1968) 31

Graham v. FEMA,
149 F.3d 997 (9th Cir. 1998) 13

Hart v. Massanari,
266 F.3d 1155 (9th Cir. 2001) 24

Jackson v. Sims,
201 F.2d 259 (10th Cir. 1953) 23

Kescoli v. Babbitt,
101 F.3d 1304 (9th Cir. 1996) 13

Makah Indian Tribe v. Verity,
910 F.2d 555 (9th Cir. 1990) 14

Matheson v. Progressive Specialty Ins. Co.,
319 F.3d 1089 (9th Cir. 2003) 2

McGlinchy v. Shell Chem. Co.,
845 F.2d 802 (9th Cir. 1988) 13

Minnesota v. Hitchcock,
185 U.S. 373 (1902) 22

Nuclear Data, Inc. v. Atomic Energy Comm'n,
344 F. Supp. 719 (N.D. Ill. 1972) 30

Presbyterian Church (U.S.A.) v. United States,
870 F.2d 518 (9th Cir. 1989) 29

Price v. Akaka,
928 F.2d 824 (9th Cir. 1990) 18

Rice v. Cayetano,
528 U.S. 495 (2000) 3

Sciolino v. Marine Midland Bank-Western,
463 F. Supp. 128 (D.C.N.Y. 1979) 28

Sierra Club v. Morton,
405 U.S. 727 (1972) 30

South Suburban Safeway Lines, Inc. v. Chicago,
416 F.2d 535 (7th Cir. 1969) 30

Stanton v. Ash,
384 F. Supp. 625 (D.C. Ind. 1974) 29, 30

Takhar v. Kessler,
76 F.3d 995 (9th Cir. 1996) 13

Town of Okemah, Okl. v. United States,
140 F.2d 963 (10th Cir. 1944) 23

United States ex rel. Morongo Band of Mission Indians v. Rose,
34 F.3d 901 (9th Cir. 1994) 14

United States v. Bowen,
172 F.3d 682 (9th Cir. 1999) 14

United States v. SCRAP,
412 U.S. 669 (1973) 30

United States v. Thorson,
2004 WL 869452, 1 (W.D. Wis. Apr. 22, 2004) 29

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,
454 U.S. 464 (1982) 32

Ventress v. Japan Airlines,
486 F.3d 1111 (9th Cir. 2007) 13

Warth v. Seldin,
422 U.S. 490 (1975) 13, 32

Whelpley v. Knox,
176 F. Supp. 936 (D.C. Minn. 1959) 22

Whitmore v. Arkansas,
495 U.S. 149 (1990) 31, 32

STATUTES

5 U.S.C. § 551(1).....29

5 U.S.C.A. § 702 28

Admission Act, Pub. L. 86-3, § 4, 73 Stat. 4 (1959).....5

Admission Act, Pub. L. 86-3, § 5(b), 73 Stat. 4 (1959) 5

Admission Act, Pub. L. 86-3, § 5(c), 73 Stat. 4 (1959) 5

Admission Act, Pub. L. 86-3, § 5(f), 73 Stat. 4 (1959).....5

Admission Act, Pub. L. 86-3, §5(d), 73 Stat. 4 (1959).....5

Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959) 4

Haw. Rev. Stat. § 10-13.5 6

Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921).....4, 16

Newlands Act, 1898, 30 Stat. 750.....4

Organic Act, 1900, 31 Stat. 159.....4

RULES

Fed. R. Civ. P. 12(c) 13

OTHER AUTHORITIES

1979 Haw. Sess. L. Act 196, § 2.....6

1979 Haw. Sess. L. Act. 196, § 8.....6

Haw. Const. Art. XII § 2.....5

Restatement (Second) of Trusts § 199 (1959) 27

Restatement (Third) of Trusts § 64 (2008).....26

APPELLEES OHA DEFENDANTS' ANSWERING BRIEF

I. INTRODUCTION

Despite the fact that the issues in this case are identical to those in Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007), Plaintiffs appeal the district court's order holding that Arakaki is controlling and dispositive here. Plaintiffs attempt feebly to distinguish the nature of their challenge here to avoid the result in Arakaki, and make the extraordinary argument that Arakaki is not binding on the district court. Their arguments are not only unpersuasive, they are frivolous. For all the reasons set out in detail herein, Plaintiffs' complaint was properly dismissed, and the decision of the court below should be affirmed.

II. ISSUES PRESENTED FOR REVIEW

Plaintiffs have presented and argued only two issues that properly may be raised here. As numbered in the Opening Brief, these are: (1) Whether the United States is an indispensable party to a suit for breach of trust brought by individual beneficiaries of Hawai`i's federally-created Ceded Lands Trust, challenging the distributions and expenditures of trust revenues by the responsible officials of the trustee, State of Hawai`i, and the Trustees of the Office of Hawaiian Affairs ("OHA"), a State agency; and (1.c) Whether such beneficiaries can sue the United States for non-monetary relief challenging section 5(f) of the Admission Act of March 18, 1959 § 4, Pub. L. No. 86-3, 73 Stat. 4 ("Admission Act") to the extent it is construed or applied as causing, requiring, authorizing, permitting, encouraging,

aiding, abetting, or assisting the State or its officials, or the OHA Trustees, in their breach of the Ceded Lands Trust, or to the extent the United States is acting in concert with such officials or Trustees in the breach. See Opening Brief at 2-4.

Plaintiffs have listed as questions for review, but have not argued and have therefore waived, the questions of whether, under Rule 19(a)(2) of the Federal Rules of Civil Procedure ("FRCP"), the court must order that the United States be made a party; and whether, in light of the United States' decision not to intervene, the action should proceed among the existing parties. See Opening Brief at 3 (subparts a and b to Question 1).

Questions 2, 3 and 4 go directly to the merits of Plaintiffs' claims and are improperly raised here. See Opening Brief at 3-4. As discussed below, the district court granted the defendants' motions for judgment on the pleadings for lack of jurisdiction, and therefore never reached the merits of Plaintiffs' claims. There is, therefore, no appellate jurisdiction over the merits of the case. Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003) ("We have an ongoing obligation to be sure that jurisdiction exists. If the district court lacked jurisdiction, we would have jurisdiction to correct the jurisdictional error, but not to entertain the merits of an appeal.").

III. STATEMENT OF THE CASE

OHA Defendants do not dispute the procedural history of the case as set out in the Opening Brief. However, as discussed in greater detail below, OHA Defendants disagree with Plaintiffs' characterization of their claim. Although Plaintiffs state that their complaint "calls into question the constitutionality of an act of Congress to the extent that it is construed or applied in a way that would make it unconstitutional," Opening Brief at 5, they are, in fact, challenging the constitutionality of explicit provisions of the Admission Act.

IV. STATEMENT OF THE FACTS

A. The Hawaiian Homes Commission Act

This factual background of this case is the history of the Hawaiian people, which has been recounted in numerous cases. See, e.g., Rice v. Cayetano, 528 U.S. 495 (2000); Arakaki, 477 F.3d 1048; Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982). The sources cited in these cases confirm that, at the approach of the Twentieth Century, native Hawaiians were facing extinction. Their numbers had dwindled due to introduced diseases, they had lost homesteads to wealthy interests and speculators, and many were in poverty. See Ahuna, 64 Haw. at 336, 640 P.2d at 1167 (citing testimony of Former Secretary of the Interior Franklin L. Lane before the House Committee on the Territories, H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920)).

In 1898, President McKinley signed a joint resolution, known as the Newlands Resolution, annexing Hawai`i to the United States. Act of July 7, 1898, 30 Stat. 750. Under the Newlands Resolution, the Republic of Hawai`i was deemed to have ceded, in absolute fee, all crown and public lands to the United States. Id. The Act required that revenues from public lands be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Id. Two years later, the Organic Act established the Territory of Hawai`i and put the ceded lands in the control of the Territory of Hawai`i "until otherwise provided for by Congress." Act of April 30, 1900, 31 Stat. 159.

In response to its concern over the condition of native Hawaiians, Congress in 1921 enacted the Hawaiian Homes Commission Act ("HHCA"), which provided more than 200,000 acres of ceded public land for the rehabilitation of native Hawaiians. See HHCA, Pub. L. No. 67-34, 42 Stat. 108 (1921). The HHCA created programs for loans and long-term leases for native Hawaiians, which the HHCA defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Id.

B. The Admission Act

As a condition of its statehood, Congress required the new State of Hawai`i to adopt the HHCA as part of its own constitution, and granted to the State the approximately 200,000 acres set aside under the HHCA. See Admission Act. The

United States, however, reserved to itself the power to enforce the trust created by the HHCA, and the right to consent to any amendment or repeal of the HHCA, or to any change in the qualifications of lessees under the program. See id. § 4. Article XII, section 1 of the Hawai`i Constitution adopts the HHCA as a law of the State, and recognizes that the consent of the United States is required for the HHCA's amendment or repeal. See also Haw. Const. Art. XII § 2 (accepting the terms of the HHCA as a compact with the United States).

Also under the Admission Act, the United States granted Hawai`i title to all public lands in the State, except for those reserved for use by the federal government. Admission Act § 5 (b)-(d). The Act declared that these public lands, together with the proceeds from their income or their sale or other disposition, were to be held by the State as a public trust (the "Ceded Lands Trust") for one or more of five public purposes, which included "the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended." Id. § 5(f). Section 5(f) also provided that use of the public lands "for any other object shall constitute a breach of trust for which suit may be brought by the United States."

C. The Office of Hawaiian Affairs

In 1978, Hawai`i held a Constitutional Convention, at which time it clarified its trust obligations to native Hawaiians. Article XII, section 4 of the Constitution

now provides that the lands granted to the State of Hawai`i by section 5(b) of the Admission Act, except for the lands conveyed under the HHCA, "shall be held by the State as a public trust for native Hawaiians and the general public." Article XII, section 5 created OHA and charged it with managing the property and funds designated for the benefit of native Hawaiians; Article XII, section 6 created the OHA Board of Trustees.

Article XVI, section 7 of the Hawai`i Constitution requires the State to enact legislation regarding its trust obligations. In 1979, legislation was enacted to set forth the purposes of OHA and describe the powers and duties of the trustees, which are now codified at Hawai`i Revised Statutes ("HRS") chapter 10. See 1979 Haw. Sess. L. Act 196, § 2 at 398-99, § 8 at 406. HRS section 10-13.5 provides: "Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by [OHA] for the purposes of this chapter." OHA therefore administers funds principally received from a twenty percent share of any revenue generated by the Ceded Lands Trust, and revenue from the state general fund. See Arakaki, 477 F.3d at 1055 (citing HRS § 13.5).

D. Arakaki v. Lingle

The Arakaki plaintiffs filed their Complaint for Declaratory Judgment and for an Injunction on March 4, 2002. With the exception of Garry P. Smith, each of the Plaintiffs herein was a plaintiff in Arakaki. Moreover, counsel for Plaintiffs

here was counsel for the plaintiffs in Arakaki. As here, the defendants in Arakaki included the State and OHA; the Arakaki complaint named the Hawaiian Homes Commission and the Department of Hawaiian Homes Lands as well.

The claims asserted in Arakaki were also substantively identical to the claims asserted here: plaintiffs, claiming status as beneficiaries of a public lands trust and as taxpayers, alleged that they were injured by diversions of land and revenues to DHHL and OHA, and that various programs of DHHL and OHA violated the Equal Protection Clause of the Fourteenth Amendment. See Arakaki, 477 F.3d at 1055.

1. The Arakaki District Court's Initial Orders Regarding Standing

On March 18, 2002, the United States District Court for the District of Hawai`i denied the Arakaki plaintiffs' motion for a temporary restraining order, which, inter alia, sought to enjoin certain OHA expenditures and to restrain the State from making payments to OHA, the goals of which plaintiffs characterized as racially discriminatory. See Arakaki v. Cayetano, 198 F. Supp. 2d 1165, 1169 (D. Haw. 2002) ("Arakaki I"),[1] aff'd in part, rev'd in part on other grounds, Arakaki, 477 F.3d 1048. With regard to plaintiffs' public trust doctrine claims, the district court held that plaintiffs had no standing to bring claims as trust beneficiaries

[1] The use of identifiers "Arakaki I," etc., herein corresponds with their use for each opinion as ultimately cited in Arakaki, 477 F.3d 1048.

because, rather than attempting to enforce the terms of a trust, plaintiffs were "arguing that the trustees should ignore certain terms of those laws and instead comply with what Plaintiffs allege is the 'true' trust created in 1898 by the Newlands Resolution." Arakaki I, 198 F. Supp. 2d at 1180. The district court held that this was "not a claim that a trust beneficiary may pursue on trust mismanagement grounds." Id.

On May 8, 2002, the district court issued its Order Granting in Part and Denying in Part Motions to Dismiss on Standing Grounds. Arakaki v. Cayetano, 299 F. Supp. 2d 1090 (D. Haw. 2002) ("Arakaki II"), aff'd in part, rev'd in part on other grounds, Arakaki, 477 F.3d 1048. In that order, the district court determined that plaintiffs had state taxpayer standing, which was limited to claims that challenged direct expenditures of tax money. Id. The district court dismissed plaintiffs' claim of breach of trust obligations because, inter alia, while they might have had standing to *enforce* the terms of a trust established by the Admission Act, plaintiffs instead sought to have one of the terms of section 5(f) declared unconstitutional. "Trust beneficiaries have standing to allege a breach of trust, but that is not what Plaintiffs are alleging. Instead, as 'inhabitants' of Hawaii, Plaintiffs are demanding that the State ignore an express trust purpose, which Plaintiffs say violates the Equal Protection clause. Allowing such a challenge would make a nullity of standing requirements." Arakaki II, 299 F. Supp. 2d at

1103. "Plaintiffs' breach of the public land trust' claims are nothing more than a 'generalized grievance' under the Equal Protection Clause for which Plaintiffs lack standing." Id. at 1103-04.

On September 3, 2002, the district court filed its Order Granting Defendant United States of America's Motion to Dismiss, holding that, because the scope of a state taxpayer challenge is limited to direct expenditures of state tax revenues, plaintiffs could not challenge the Hawaiian Homelands program or OHA in toto. Consequently, because none of the remaining claims could be asserted against the United States, the district court dismissed the United States as a defendant.

2. Carroll v. Nakatani

The Ninth Circuit filed its opinion in Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003) on September 2, 2003. The Court in Carroll held, among other things, that the plaintiff lacked standing to challenge the Hawaiian Home Lands lease program because such a challenge required the participation of the United States, which was not a party. Carroll, 342 F.3d at 944.

In response to that opinion, the Arakaki district court vacated its September 3, 2002 order dismissing the United States and invited the parties to submit briefs on the impact of Carroll to the issues in Arakaki. After a hearing on the resulting motions, the court on November 21, 2003, held that plaintiffs were without standing to challenge the Admission Act; their only injury was as

taxpayers, which was insufficient to confer standing. The Court stated: "Because Plaintiffs' Hawaiian Home Lands lease program claim necessarily involves a challenge to the Admission Act, a challenge that cannot be brought by a party with only state taxpayer standing, the court dismisses the claim." Arakaki v. Lingle, 299 F. Supp. 2d 1114, 1127 (D. Haw. 2003), aff'd, 477 F.3d 1048. The district court held that a challenge to the Hawaiians Home Lands lease program necessarily required examination of the Admission Act, which required more than an assertion of a generalized grievance. Id. The district court stated: "Carroll teaches that any challenge to the lessee requirements of the Hawaiian Home Lands lease program necessarily involves a challenge to the Admission Act, which is a federal law." Arakaki, 299 F. Supp. 2d at 1118. The district court held, "State taxpayer standing is too limited to permit a challenge to a federal law and therefore does not allow Plaintiffs to challenge the Hawaiian Home Lands lease program, which is mandated by both state and federal law." Id.

3. Arakaki's Petition of Writ of Certiorari and Remand to the Ninth Circuit

On January 14, 2004, the district court issued its Order Dismissing Plaintiffs' Remaining Equal Protection Claim, on grounds that the sole remaining issue presented a political question, and entered final judgment for the State. Arakaki v. Lingle, 305 F. Supp. 2d 1161 (D. Haw. 2004), rev'd, 477 F.3d 1048. The Ninth Circuit issued it opinion, see Arakaki v. Lingle, 423 F.3d 954 (9th Cir.

2005), vacated by 547 U.S. 1189 (2006), and Plaintiffs petitioned the Supreme Court for writ of certiorari, which was granted. The Supreme Court then vacated the Ninth Circuit opinion and remanded for consideration in light of its recently-filed opinion in DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006). Arakaki v. Lingle, 547 U.S. 1189 (2006).

4. Arakaki, 477 F.3d 1048

On remand, the Ninth Circuit held, among other things, that the United States could not be sued on plaintiffs' trust beneficiary theory. However, with respect to claims against the State, the United States is an indispensable party to any challenge to the lease eligibility requirements because, pursuant to the Admission Act, the consent of the United States is required for modification to lease requirements. Arakaki, 477 F.3d at 1058-59. With regard to plaintiffs' standing to challenge OHA programs, the Court held: "Plaintiffs cannot prevail on their trust beneficiary theory of standing because the United States is an indispensable party to a suit challenging the trust, and Plaintiffs have no standing to sue the United States." 477 F.3d at 1061. Significantly, the Ninth Circuit affirmed those parts of the district court's opinions in Arakaki I and Arakaki II that are relevant here, as discussed below.

V. SUMMARY OF ARGUMENT

The district court was correct in dismissing Plaintiffs' complaint because Plaintiffs' claims are foreclosed by this Court's opinion in Arakaki, 477 F.3d 1048, which is on all fours with the instant case. Plaintiffs make a feeble attempt to distinguish this case from Arakaki by arguing that they challenge only the State's "interpretation" of the Admission Act as unconstitutional, but that argument is plainly without merit, based upon the Admission Act's language that specifically permits trust proceeds to benefit native Hawaiians especially.

Plaintiffs' argument that they have standing to sue the United States is completely foreclosed by Arakaki. Moreover, as discussed below, Plaintiffs' arguments regarding the Administrative Procedure Act and immunity are without merit. The Administrative Procedure Act is wholly inapplicable here, and Plaintiffs' arguments regarding immunity are of no help to them, as their complaint was dismissed in part for lack of standing, not because the United States was held immune from suit.

Arakaki's holdings – that the United States is an indispensable party to a challenge to the terms of the Admission Act, and that Plaintiffs are without standing to sue the United States on a trust theory – are controlling and dispositive, and the district court's holdings to this effect were correct and should be affirmed.

VI. STANDARD OF REVIEW

A. Motions to Dismiss for Lack of Standing

"For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Graham v. FEMA, 149 F.3d 997, 1001 (9th Cir. 1998) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)). "A plaintiff has the burden of establishing the elements required for standing." Takhar v. Kessler, 76 F.3d 995, 1000 (9th Cir. 1996).

B. Motions for Judgment on the Pleadings

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings is evaluated according to virtually the same legal standard as a motion to dismiss under Rule 12(b)(6). See McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988). Under FRCP Rule 12(c), "judgment on the pleadings is proper 'when, taking all the allegations in the non-moving party's pleading as true, the moving party is entitled to judgment as a matter of law.'" Ventress v. Japan Airlines, 486 F.3d 1111, 1114 (9th Cir. 2007) (quoting Fajardo v. County of L.A., 197 F.3d 698, 699 (9th Cir. 1999).

C. Joinder Determinations

This Court has held that joinder determinations are reviewed for abuse of discretion. In Kescoli v. Babbitt, 101 F.3d 1304, 1309 (9th Cir. 1996), the Court

stated that "[t]he joinder determination is 'a practical one and fact specific.' We generally review for an abuse of discretion the district court's joinder determinations under Rule 19." (Citing Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990), United States ex rel. Morongo Band of Mission Indians v. Rose, 34 F.3d 901, 907 (9th Cir. 1994)). Legal conclusions underlying joinder determinations, however, are reviewed de novo. See E.E.O.C. v. Peabody W. Coal Co., 400 F.3d 774, 778 (9th Cir. 2005); United States v. Bowen, 172 F.3d 682, 688 (9th Cir. 1999).

VII. ARGUMENT

A. The United States is an Indispensable Party

1. Plaintiffs Challenge Substantive Terms of the Admission Act, Making the United States an Indispensable Party Under Controlling Precedent

Contrary to Plaintiffs' assertion, Plaintiffs' challenge in this case is not to the States' *interpretation* of the Admission Act; it is instead a challenge to an explicit and substantive provision of the Admission Act. Consequently, Plaintiffs' primary claim fails for the very same reason it previously failed in Arakaki.[2]

[2] The district court dismissed Plaintiffs' claim under 42 U.S.C. § 1985(3) because of the absence of a requisite claim under § 1983. See ER at p. 15 (Tab 2 at p. 14). The district court declined to exercise supplemental jurisdiction over Plaintiffs' claim for breach of state public trust. See ER at p. 16 (Tab 2 at p. 15). Plaintiffs have not appealed the dismissal of either of these claims.

Plaintiffs' assertion that they merely challenge the State's interpretation of the Admission Act, and not its provisions, is plainly incorrect. The district court accurately noted the fallacy of this characterization. See Order (1) Granting State Defendants' Motion for Judgment on the Pleadings, and (2) Granting OHA Defendants' Motion for Judgment on the Pleadings, filed July 3, 2008 ("Order Granting Judgment on the Pleadings"), at 11 n.3 (ER at p. 12 n.3 (Tab 2 at p. 11 n.3)) ("Because the plain language of the Admission Act requires that trust proceeds be used for 'the betterment of native Hawaiians,' Plaintiffs are indeed challenging the terms of the Admission Act regardless of how they couch their argument.").

Indeed, Plaintiffs explicitly requested that the district court certify to the Attorney General of the United States that the case "does question the constitutionality of a federal statute." ER at p. 157 (Tab 11). Moreover, the claims challenge an explicit term of the Admission Act. The Admission Act established the Ceded Lands Trust for one or more of five public purposes, one of which is "the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended." By this provision, the Admission Act anticipates that the Ceded Lands Trust may specially benefit, explicitly, "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA.

Plaintiffs appear to argue that use of the Ceded Lands Trust proceeds to benefit all citizens of Hawai`i (for example, through the Department of Education) would necessarily benefit native Hawaiians as well, but this argument ignores the Admission Act's establishment of the native Hawaiian people as a distinct group of beneficiaries. See Opening Brief at 19-20 (quoting argument of Plaintiffs' counsel at the July 1, 2008 hearing). Plaintiffs' suggestion that the State should simply ignore this provision because it is allegedly unconstitutional, Opening Brief at 21, is without merit.[3] The provision of which Plaintiffs complain is explicit; the obligation to benefit native Hawaiians, specifically, is a substantive term of the Admission Act and is not the product of the State's "interpretation."[4]

Plaintiffs argue that, despite the plain language of the Admission Act, the use of any income or proceeds from the Ceded Lands Trust to benefit native Hawaiians to the exclusion of non-native Hawaiians is a breach of the State's

[3] It is also confusing. Apparently, Plaintiffs suggest that the district court should have compelled the State and OHA to disregard this express trust term because it is allegedly unconstitutional, without actually making a finding that the term is unconstitutional.

[4] Of course, the State of Hawai`i is given flexibility in the manner by which it satisfies the trust provisions of the Admission Act, e.g., the State may benefit native Hawaiians through the instumentality of OHA under programs that benefit Hawaiians as well. Thus, the Admission Act at Section 5(f) recites that "[s]uch 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 . . . ."

obligations as Trustee. The flaws of the claim were thoroughly addressed in Arakaki. There, the Ninth Circuit affirmed the dismissal of the same trust claims, holding that plaintiffs were without trust beneficiary standing to sue the United States, because pursuant to the Admission Act, the United States had relinquished any role it might previously have had as a trustee of the Ceded Lands Trust. 477 F.3d at 1057-58. The Ninth Circuit further held that plaintiffs were without trust beneficiary standing to sue the state defendants:

> Although the United States cannot be sued on Plaintiffs' trust beneficiary theory, Plaintiffs nevertheless argue that they may at least sue the state defendants on the same theory. Plaintiffs point to several cases in which we have held that native Hawaiians, as trust beneficiaries, could bring suit under 42 U.S.C. § 1983 against the State to enforce the terms of the trust. E.g., Price v. Akaka, 928 F.2d 824 (9th Cir. 1990); Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467 (9th Cir. 1984); see also Price v. Akaka, 3 F.3d 1220, 1223-25 (9th Cir. 1993). Those cases involved claims that the state was improperly administering the trust and sought to enforce the trust's terms.
>
> We believe that this argument is disposed of easily. Those cases differ from the present challenge in a fundamental way: although those previous § 1983 cases have involved suits to enforce the express terms of the trust, this suit, by contrast, asks the court to prohibit the enforcement of a trust provision. That is, Plaintiffs now raise a § 1983 claim that is unique in that it does not seek to *enforce* the substantive terms of the trust, but instead challenges at least one of those terms as constitutionally *unenforceable*.
>
> We have recently held that in any challenge to the enforceability of the lease eligibility requirements, the United States is an indispensable party. In Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003), a non-native Hawaiian citizen challenged the homestead lease program administered by DHHL/HHC. The plaintiff sued the relevant state

> actors, but failed to sue the United States. We held that Section 4 of the Admissions Act "expressly reserves to the United States that no changes in the qualifications of the lessees may be made without its consent." Carroll, 342 F.3d at 944. We reasoned that because the qualifications for the DHHL/HHC leases cannot be modified without the United States' approval, the United States is an indispensable party to any lawsuit challenging the DHHL/HHC leases, and the Plaintiff's failure to sue the United States meant that his injury was not redressable. Id. at 944.
>
> Here, unlike in Carroll, Plaintiffs properly named the United States as a party. Carroll's logic nonetheless applies. Plaintiffs lack standing to sue the United States, but the United States is an indispensable party to any challenge to the lease eligibility requirements. Plaintiffs therefore cannot maintain their challenge to the lease eligibility requirements against the State. Accordingly, the district court properly dismissed the Plaintiffs' trust beneficiary claim against the state defendants.

Arakaki, 477 F.3d at 1058-59; see also id. at 1060 ("Our decision in Carroll effectively holds that any challenge to Article XII is a challenge to Section 4 of the Admission Act, and no challenge to the Admission Act may proceed without the presence of the United States.").

With regard to plaintiffs' claims of standing as trust beneficiaries to sue OHA specifically for its receipt and expenditure of trust revenue, the Court held that the United States was also an indispensable party, as "we have previously held that the expenditure of trust revenue is governed by the Admission Act." Arakaki, 477 F.3d at 1065 (quoting Price v. Akaka, 928 F.2d 824, 827 (9th Cir. 1990)).

> Any challenge to the expenditure of trust revenue brought by alleged trust beneficiaries must challenge the substantive terms of the trust, which are found in the Admission Act. For the reasons we explained

> in Part III.A.2, supra, *the United States is an indispensable party to any challenge to the Admission Act. Accordingly, although the United States is not an indispensable party with respect to challenges to OHA's expenditure of tax revenue, it remains indispensable with respect to challenges to the expenditure of trust revenue.*
>
> Plaintiffs' attempt to challenge OHA's expenditure of trust revenue thus suffers from the same fatal flaw as its challenge to the DHHL/HHC lease eligibility requirements. The United States is an indispensable party to the challenge to the expenditure of trust revenue, and yet Plaintiffs cannot establish standing to sue the United States either as taxpayers or as trust beneficiaries.

Arakaki, 477 F.3d at 1065-66 (emphasis added).

In the instant matter, the district court correctly held that Arakaki was controlling, and required that Plaintiffs' complaint be dismissed "because the United States is an indispensable party who has not consented to suit." ER at p. 9 (Tab 2 at p. 8). The district court noted that Plaintiffs allege that disbursements by the State and OHA only for native Hawaiian beneficiaries constitute a breach of "their fiduciary duty of impartiality and duty not to comply with illegal [§ 5(f)] trust terms." Id. (quoting Complaint ¶ 52). "By challenging the expenditure of trust revenue, Count I challenges the substantive terms of the Admission Act and makes the United States an indispensable party for this claim. Plaintiffs have no standing to sue the United States, and therefore lack standing to bring this claim." ER at pp. 9-10 (Tab 2 at pp. 8-9).

The district court's conclusion was correct. In this case, Plaintiffs challenge, as they did in Arakaki, the constitutionality of transfers from the State to OHA for the benefit of native Hawaiians, and the same analysis applies. Plaintiffs allege, again, that the terms of the Admission Act are illegal. Plaintiffs allege, again, that the State and OHA have breached their duty by failing to be impartial as between native and non-native Hawaiian beneficiaries and by failing ***not*** to comply with the federally-created trust terms. Plaintiffs, again, do not allege that Defendants have failed to comply with the terms of the trust.

The Ninth Circuit's reasoning in Arakaki therefore applies in exactly the same way here; the United States cannot be sued as a trustee of the Ceded Lands Trust, but it is an indispensable party to any challenge to the Admission Act. Indeed, although Plaintiffs have not named the United States as a party, Plaintiffs nevertheless concede that they are challenging the conduct of the United States and, specifically, an act of Congress. For example, Plaintiffs allege:

> Redress for these Six Non-ethnic Hawaiians and others similarly situated requires, in addition to the relief sought against Defendants, declaratory judgment that the reference to the 'betterment of the conditions of native Hawaiians' in § 5(f) of the Admission Act, is unconstitutional to the extent that it is construed as requiring or authorizing that native Hawaiians be given any pro rata portion of the income or proceeds or other benefit, right title or interest in the ceded lands not given equally to the other beneficiaries. Such declaratory relief is appropriate because the United States, while it held the ceded lands in trust, first injected race and partiality into the ceded lands trust, and it still participates in the ongoing breach of trust by the State of Hawaii and the OHA trustees by requiring that the State continue to

> implement the Hawaiian Homes Commission Act, by making grants to OHA and otherwise aiding, abetting or acting in concert with the State or its officials and with OHA or its trustees or officials in their breach of the trust.

ER at 419 (Tab 16 at ¶ 50).

Because Plaintiffs challenge the Ceded Lands Trust, they challenge the Admission Act, and the United States is an indispensable party to such a challenge. Plaintiffs cannot establish standing as trust beneficiaries to sue the United States, and they therefore lack standing to sue the State and OHA. Plaintiffs likewise cannot establish standing to challenge any expenditure about which they complain, as each arises from the Admission Act. Plaintiffs failed to allege facts to suggest standing to assert their claims, and therefore failed to assert facts to raise a right to relief above the speculative level. The district court was therefore correct in its conclusions.

2. The United States Is an Indispensable Party

Plaintiffs' argument that the United States is not an indispensable party to this action is directly contrary to established law, which Plaintiffs fail even to attempt to distinguish. In Arakaki, 477 F.3d at 1058-59, the Court held that "in any challenge to the enforceability of the [Hawaiian Homes Commission Act] lease eligibility requirements, the United States is an indispensable party" and noted further that its decision in Carroll "effectively holds that any challenge to Article XII is a challenge to Section 4 of the Admission Act, *and no challenge to*

the Admission Act may proceed without the presence of the United States." Id. at 1060 (emphasis added). With regard to this dispositive holding, Plaintiffs fail completely to demonstrate any distinction between the facts in the instant case and those in Arakaki.

Moreover, the holding in Arakaki is not anomalous. In Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337, 1339 (9th Cir. 1975), the Court held that, when an interest of the federal government is involved in a suit and a judgment cannot be rendered without affecting that interest, the government must be made a party to the action without its consent *where authorized by statute*. Otherwise, the United States may be regarded as an indispensable party under FRCP Rule 19(b) and the action dismissed. Carlson, 510 F.2d at 1339 (see also Whelpley v. Knox, 176 F. Supp. 936, 937-38 (D.C. Minn. 1959) (holding that tax liens were the property of the United States, thereby making the United States a necessary and indispensable party in any action affecting the liens, and quoting Minnesota v. Hitchcock, 185 U.S. 373, 387 (1902) for the proposition that "[t]he question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.").

To render the United States an indispensable party, the United States' interest in the matter need not be pecuniary. In Carlson, the interest at issue was

the United States' obligation to protect Indian lands against alienation. See Carlson, 510 F.2d at 1339 (affirming dismissal where judgment could not be rendered without affecting an interest of the United States, which refused to be made a party; the United States was regarded as an indispensable party under Rule 19(b) and the action properly dismissed); see also Jackson v. Sims, 201 F.2d 259, 262 (10th Cir. 1953) (same); Town of Okemah, Okl. v. United States, 140 F.2d 963, 964 (10th Cir. 1944) (same). Where the United States has such an interest, and refuses to be joined as a party, the litigation can not properly proceed and the action is properly dismissed. Carlson, 510 F.2d at 1339.

The district court was therefore correct in holding that the United States was an indispensable party and, without it as a party, the case could not properly proceed.

3. Arakaki Is Binding Precedent

Plaintiffs' argument regarding res judicata, in the Opening Brief at pages 23 through 27, is without merit, as the district court explicitly did not rely on the doctrine. In its Order Denying Plaintiffs' Motion for Reconsideration of Order Denying Plaintiffs' Motion for Temporary Restraining Order, filed April 25, 2008, the court emphasized its lack of reliance on res judicata, stating: "The court . . . did not consider whether Arakaki had preclusive effect on the instant case; instead, the court applied the holding in Arakaki and determined that Plaintiffs lacked standing

in the instant action." ER at p. 72 (Tab 8 at p. 6). Subsequently, in its Order Granting Judgment on the Pleadings, the court observed that it "need not . . . consider whether Arakaki has preclusive effect on the instant case; instead the court applies the holding in Arakaki and determines that Plaintiffs lack standing to bring Count I." ER at p. 14 (Tab 2 at p. 13). The record is therefore absolutely clear that the court did not apply res judiciata.

As to stare decisis, Plaintiffs have not shown why the doctrine should not be applied in this case. As the district court recognized in the Order Granting Judgment on the Pleadings, any argument Plaintiffs may make that Arakaki is not binding is foreclosed by settled law. In Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001), the Court held:

> A district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority of the Court. Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point *is* the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.

As Plaintiffs concede through the quotation of Hart in the Opening Brief at page 27, distinctions in cases may be made based on "factual differences," but here, there are no such factual differences. As in Arakaki, Plaintiffs challenge the expenditure of revenues of the trust established by section 5(f) of the Admission

Act to the extent such expenditures benefit native Hawaiians specifically. This Court has held such a challenge to be a challenge to a substantive term of the trust, and thus to the Admission Act, which renders the United States an indispensable party, but Plaintiffs have no standing to sue the United States. Arakaki, 477 F.3d at 1065. There is no factual distinction to be made here; Arakaki is controlling.

Plaintiffs also attempt to convince this Court that the holding in Carroll, 342 F.3d 934, on which Arakaki relied, is "dicta with no precedential application to the issues of this case," because the plaintiff in Carroll challenged Article XII of the Hawai`i Constitution to the extent it created the Hawaiian Homes Commission, not the Admission Act itself. Opening Brief at 31-33. This is yet another distinction without a difference. The Admission Act's definition of "native Hawaiian" for the Ceded Lands Trust is taken directly through a reference to the Hawaiian Homes Commission Act, and the two laws further a common purpose. Moreover, Article XII of the Hawai`i Constitution provides for the establishment of OHA and adopts the HHCA. As the Ninth Circuit held in Carroll: "Article XII of the Hawaii Constitution cannot be declared unconstitutional without holding [section 4] of the Admission Act unconstitutional." Arakaki, 477 F.3d at 1060 (quoting Carroll, 342 F.3d at 944); see also id. (noting Carroll's holding that "no challenge to the Admission Act may proceed without the presence of the United States . . . .").

Moreover, Arakaki is now settled law, and the district court properly held it to be controlling.

4. Arakaki Does Not Alter Established Trust Law

Plaintiffs boldly argue that Arakaki would bar all trust beneficiary suits.[5] This is both unsupported and incorrect. There is no established law permitting a beneficiary to bring an action to prohibit enforcement of the terms of the Ceded Lands Trust. See Arakaki, 477 F.3d at 1058. Indeed, such a concept is contrary to trust law. The Restatement (Third) of Trusts § 64 (2008) provides that, with limited exceptions inapplicable here, "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." Here, there are no such provisions permitting modification of the key trust term without the consent of the United States. The United States, by virtue of the consent requirement in the Admission Act, is a necessary party to a challenge to trust terms.

On the other hand, as recognized in Day v. Apoliona, 496 F.3d 1027 (9th Cir. 2007), trust beneficiaries have the right to bring an action to enforce trust terms. This is consistent with the Restatement (Second) of Trusts § 199 (1959),

[5] Plaintiffs argue that Arakaki would bar all trust beneficiary suits in any forum "on sovereign immunity grounds." Opening Brief at 33. The source of the reference to sovereign immunity is unclear, as the district court hade no holding regarding sovereign immunity in its Order Granting Judgment on the Pleadings. See generally ER at pp. 2-18 (Tab 2).

which provides that beneficiaries "can maintain a suit (a) to compel the trustee to perform his duties as trustee; [or] (b) to enjoin the trustee from committing a breach of trust . . . ." Because, under such circumstances, beneficiaries are attempting to enforce, rather than to challenge, the terms of the Ceded Lands Trust, there is no requirement that the United States be a party to the action. Cf. Day (United States not a party to an action to enforce terms of Ceded Lands Trust). Consequently, Plaintiffs' arguments in this regard are without merit.

B. Plaintiffs Have No Standing to Sue the United States

1. The APA Does Not Confer Standing and is Inapplicable

Plaintiffs argue, for the first time on appeal, that they have *standing* based upon the Administrative Procedure Act, 5 U.S.C. § 702 (1982) ("APA"). As an initial matter, Plaintiffs' failure to raise this argument previously precludes its consideration by this Court. Even if this were not the case, however, the argument fails because Plaintiffs cannot establish standing by virtue of the APA alone, as the APA merely provides, under very limited circumstances, a waiver of sovereign immunity. In contrast, the Court in Arakaki held that plaintiffs had no trust beneficiary standing to sue the United States because the United States is no longer a trustee of the Ceded Lands Trust. Arakaki, 477 F.3d at 1057-58. This lack of standing was the basis of the Order Granting Judgment on the Pleadings here. See

ER at pp. 8-10 (Tab 2 at pp. 7-9). The APA is therefore irrelevant on this basis alone.

Moreover, Plaintiffs make no allegations whatsoever about any federal agency, and fail completely to allege that any agency, officer, or employee acted or failed to act in violation of the law. Yet such allegations are essential to a claim under the APA. The APA states, in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages *and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority* shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C.A. § 702 (emphasis added).

Consequently, even if standing existed, there could be no jurisdiction here under the APA. Cf. Sciolino v. Marine Midland Bank-Western, 463 F. Supp. 128, 130 (D.C.N.Y. 1979) (Holding that plaintiff's claim of jurisdiction under 5 U.S.C. § 702 "can be dismissed out of hand. Such section applies only to a governmental agency's action and the jurisdiction of district courts to review such action. Nothing in the federal complaint speaks of agency action and no review of any such action is sought."); United States v. Thorson, 2004 WL 869452, 1 (W.D. Wis.

Apr. 22, 2004) ("An action brought under 5 U.S.C. § 702 must be a challenge to some agency action.").

The sole federal governmental entity with any role in the facts of Plaintiffs' complaint is the United States Congress, which is explicitly excluded from the definition of "agency" in the APA. See 5 U.S.C. § 551(1) ("'Agency' means each authority of the Government of the United States . . . but does not include . . . the Congress . . . ."). Plaintiffs' citation to Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518 (9th Cir. 1989) is therefore unavailing. Presbyterian Church does not stand for the proposition that, after the 1976 amendment to the act, no federal agency need be involved in the facts of a case brought under the APA; instead, the case explicitly holds that "On its face, the 1976 amendment is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which *governmental agencies* are accountable." Presbyterian Church, 870 F.2d at 525.

Moreover, the APA may waive immunity in certain circumstances, but it cannot be used independently to create standing. "To be classified as a person aggrieved under the Administrative Procedures Act, the party seeking to prove his standing must show that he has suffered an injury in fact, and, that his alleged interests are those sought to be protected by the statute involved." Stanton v. Ash, 384 F. Supp. 625, 630 (D.C. Ind. 1974) (citing, inter alia, United States v. SCRAP,

412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972)). "The Administrative Procedures Act cannot confer jurisdiction on the Court in excess of its Article III power." Id. (citing South Suburban Safeway Lines, Inc. v. Chicago, 416 F.2d 535 (7th Cir. 1969); Nuclear Data, Inc. v. Atomic Energy Comm'n, 344 F. Supp. 719 (N.D. Ill. 1972)). The APA therefore offers no help to Plaintiffs.

2. Plaintiffs' Arguments Regarding Rough Comparability to § 1983 are, at Best, Unpersuasive

Plaintiffs' arguments as to the relevance of 42 U.S.C. § 1983 are unclear to the point that OHA Defendants are unable to respond meaningfully. See Opening Brief at 40-42. However, to the extent Plaintiffs attempt to argue that they have standing to sue the United States here because, by analogy to § 1983, the United States is not immune from suit, the argument is again completely misdirected. The district court's Order Granting Judgment on the Pleadings did not hold that the United States was immune from Plaintiffs' claims; it held that the United States was an indispensable party to any claims challenging the Ceded Lands Trust, but Plaintiffs have no standing to sue the United States. See Order Granting Judgment on the Pleadings, ER at p. 9 (Tab 2 at p. 8) (quoting Arakaki, 477 F.3d at 1061, 1065.

C. Plaintiffs' Arguments Regarding Trust Income Are Irrelevant to the Issues on Appeal

As they did below, Plaintiffs argue that the Ceded Lands Trust generates no income, and that this purported fact somehow has significance to the preclusive effect of Arakaki. Despite ample opportunity to explain this significance to the district court and now to the Ninth Circuit, Plaintiffs still have failed, completely, even to attempt to demonstrate how the quantity of trust proceeds concerns their lack of standing. See ER at pp. 36-38 (Tab 3 at pp. 18-20); Opening Brief at 42-50.

D. Plaintiffs' Discrimination and Trust Law Arguments are Irrelevant to the Issues on Appeal

Plaintiffs include additional substantive arguments in section IV of their Opening Brief at pages 51 through 54, but these arguments are improperly made, as the district court never reached the substance of Plaintiffs claims, based on Plaintiffs' lack of standing. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968).

The Supreme Court has held that "[i]t is well established . . . that before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." Whitmore v. Arkansas, 495 U.S. 149, 154 (1990). Article III "gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing

serves to identify those disputes which are appropriately resolved through the judicial process." Id. at 155 (citing Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471-76 (1982)). A court's threshold inquiry into standing "in no way depends on the merits of the [plaintiffs'] contention that particular conduct is illegal." Id. (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)). Plaintiffs' arguments regarding the merits are therefore improperly made here.

VIII. CONCLUSION

For the foregoing reasons and based on the foregoing authorities, OHA Defendants request that this Honorable Court affirm the district court's Summary Judgment Order.

Dated: Honolulu, Hawai`i, December 31, 2008.

/s/ Robert G. Klein
ROBERT G. KLEIN
LISA W. CATALDO
BECKY T. CHESTNUT

Attorneys for Appellees OHA Defendants Haunani Apoliona, Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey, Jr., Colette Y. Machado, Boyd P. Mossman, Oswald Stender and John D. Waihee IV

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE, RULE 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 08-16769

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Court Rule 32-1, the attached answering brief is proportionally-spaced, has a typeface of 14 points or more and contains 7,995 words.

Dated: Honolulu, Hawai`i, December 31, 2008.

/s/ Robert G. Klein
ROBERT G. KLEIN
LISA W. CATALDO
BECKY T. CHESTNUT

Attorneys for Appellees OHA Defendants Haunani Apoliona, Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey, Jr., Colette Y. Machado, Boyd P. Mossman, Oswald Stender and John D. Waihee IV

STATEMENT OF RELATED CASES

I certify that the following cases on appeal are related to this case in that the first arises out of the same case in the district court, and the others involve some of the same constitutional provisions, statutes and parties:

Burgess v. Lingle, No. 08-17287

Day v. Apoliona, No. 08-16668

Day v. Apoliona, No. 08-16704

Dated: Honolulu, Hawai`i, December 31, 2008.

/s/ Robert G. Klein
ROBERT G. KLEIN
LISA W. CATALDO
BECKY T. CHESTNUT

Attorneys for Appellees OHA Defendants Haunani Apoliona, Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey, Jr., Colette Y. Machado, Boyd P. Mossman, Oswald Stender and John D. Waihee IV

No. 08-16769

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES I. KUROIWA, JR., *et al.,*
Plaintiffs-Appellants,

v.

LINDA LINGLE, in her official capacity as
Governor of the State of Hawaii, *et al.*,
Defendants-Appellees,

HAUNANI APOLIONA, in her official capacity as
Office of Hawaiian Affairs Chair, *et al.*
Defendants-Appellee.

On Appeal from the United States District Court for the District of Hawai`i
Honorable J. Michael Seabright, District Judge
Case No. CV08-00153 JMS KSC

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2008, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

H. WILLIAM BURGESS, ESQ.
2299C Round Top Drive
Honolulu, HI 96822
hwburgess@hawaii.rr.com

Attorney for Kuroiwa Plaintiffs-Appellants

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

MARK J. BENNETT
Attorney General
CHARLEEN M. AINA
GIRARD D. LAU
Deputy Attorneys General
State of Hawaii
Department of the Attorney General
465 South King Street, Suite 300
Honolulu, HI 96813

Attorneys for State Defendants-Appellees

Dated: Honolulu, Hawai`i, December 31, 2008.

/s/ Robert G. Klein
ROBERT G. KLEIN
LISA W. CATALDO
BECKY T. CHESTNUT

Attorneys for Appellees OHA Defendants Haunani Apoliona, Walter M. Heen, Rowena Akana, Donald B. Cataluna, Robert K. Lindsey, Jr., Colette Y. Machado, Boyd P. Mossman, Oswald Stender and John D. Waihee IV