No. 08-17287

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES I. KUROIWA, JR.; et al., Plaintiffs-Appellants
and H. WILLIAM BURGESS, Appellant

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 – Appellees.

On Appeal from the United States District Court
for the District of Hawaii
Honorable J. Michael Seabright, District Judge

REPLY BRIEF BY APPELLANT H. WILLIAM BURGESS *PRO SE* AND FOR KUROIWA PLAINTIFFS–APPELLANTS

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Introduction and overview.[1]

State Defendants' answering brief leaves no doubt that they want, desperately, to portray James Kuroiwa and his fellow plaintiffs as "attacking" the constitutionality of Admission Act § 5(f) itself. "The key point" say State Defendants at 3, is that plaintiffs' challenge "necessarily does attack the constitutionality or legality of Section 5(f) …"

But that is simply not so. Misinterpretation and misapplication of § 5(f) are what bother Plaintiffs. Plaintiffs strongly support § 5(f) and the Ceded Lands Trust it reaffirmed for the benefit of all the people of Hawaii, including but not limited to those of Hawaiian ancestry. It is the basis for Plaintiffs' suit. The Ceded Lands Trust reiterated and continued by § 5(f)[2] governs 29% of all the lands in the State

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1. Appellant H. William Burgess *pro se* and for Kuroiwa Plaintiffs-Appellants presents this reply brief and pursues this appeal as warranted by non-frivolous arguments for modifying or reversing the law of this case as determined by the district court or for establishing new law.

2. "The concept that the public lands of Hawaii were impressed with a special trust, implicit in the joint resolution of annexation, See 22 Op. Atty Gen. 574, was reiterated in section 5(f) of the Admission Act." *Trustees of OHA v. Yamasaki*, 69 Hawaii 154, 160 (1987).

"The federal government has always recognized the people of Hawaii as the equitable owners of all public lands; and while Hawaii was a territory, the federal government held such lands in "special trust" for the benefit of the people of

of Hawaii. Backed by the Supremacy Clause, it is the "check and balance", the bulwark, that protects individual citizens against unlimited power of the political branches in Hawaii to do as they wish.[3] The Trust's 1.2 million acres dominate every major island in Hawaii, from the highest peak at the summit of Mauna Kea to the depths of its territorial waters, and regularly touch or affect the life of every citizen in Hawaii.

The sanctions at issue in this appeal are one manifestation of the growing concentration of power supporting racial separatism in Hawaii. OHA finances a major part of this separatism using trust dollars. The result has been that Hawaii is becoming less and less the one state under the Constitution of the United States and the principles of the Declaration of Independence, promised by the Admission Act.[4]

Hawaii." *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977). "Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in the public trust since that time." Id at 125.

3. Even in their answering brief filed in this court, State Defendants seem unaware of their fiduciary duty to *all* the people of Hawaii. At page 3 they insist that § 5(f) "expressly authorizes use of the ceded lands (or their proceeds and income) for the betterment of the conditions of native Hawaiians, without limitation."

4. Admission Act § 3. The constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

The State's mistaken premise.

The State asserts in its Answering Brief at 2, the "essential 'fact' is that plaintiffs in this suit seek to challenge the legality of the State and OHA using Admission Act Section 5(f) ceded lands (or their proceeds and income) for the special benefit of native Hawaiians." and at page 3, "The key point is that this challenge necessarily does attack the constitutionality or legality of section 5(f) of the Admission Act …."

That premise is incorrect. The suit which underlies this appeal challenges the OHA laws and the Trustee State's distributions *only* to OHA of receipts from the 1.2 million acres corpus of the Ceded Lands Trust (also known as the "§ 5(f) Trust" and the "Public Land Trust."). Admission Act 5(f) does not mandate or even permit distribution of receipts from the 1.2 million acres *only* to OHA or *only* to or for native Hawaiians or any other class of persons selected by using a racial classification. If § 5(f) is construed or applied as doing so, it would be unconstitutional or at least raise grave constitutional doubts. *Rice v. Cayetano*, 528 U.S. 495, 514-516 (2000).

> The doctrine of constitutional avoidance requires that " 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *Rust v. Sullivan,* 500 U.S. 173, 190 (1991) (quoting *DeBartolo Corp.,* 485 U.S. at 575, (emphasis omitted)).

Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 730 -731 (9th Cir. 2003)

OHA, of course, did not even exist until 19 years after admission of Hawaii into the Union. The idea that the United States is an indispensable party because § 5(f) requires distributions *only* to OHA even when there is no net income, cannot possibly be valid. The 1.2 million acres, as this court has held and the State itself has acknowledged recently to the Supreme Court of the United States, are for *all* the people of Hawaii, not just for native Hawaiians. The requests of James Kuroiwa and his fellow Plaintiffs for declaratory and injunctive relief can be fully redressed without changing or invalidating one word of § 5(f) and with or without the United States as a party.

(Section 4 of the Admission Act is the compact requiring the State to adopt the Hawaiian Homes Commission Act ("HHCA") and to use the approximately 200,000 acres of the ceded lands designated as "available lands" only in carrying out the HHCA. Those Hawaiian home lands are administered by the Hawaiian Homes Commissioners and the Department of Hawaiian Home Lands ("DHHL") and are not at issue in the underlying case or this appeal.[5])

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5 See Complaint, ER 16 in 08-16769 at 405, fn 4. "These Six Non-ethnic Hawaiians also believe that the designation of the 200,000 acres as 'available lands' for the HHCA and their use for the exclusive benefit of native Hawaiians or

The practice during the first 19 years of statehood.

Appellant Burgess, a delegate to the 1978 Constitutional Convention, and Kuroiwa Plaintiffs understand that the words in § 5(f), "for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended" refer only to the management and disposition of the 200,000 or so acres of ceded lands set aside as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended. That was the general understanding before 1978 as evidenced by DHHL's use of the 200,000 acres of available lands to carry out the HHCA; and the practice of the State during those years to channel the proceeds and income of the 1.2 million acres by and large to the Department of Education to benefit school children of all races.

> In the first decades following admission, the State apparently continued to administer the lands that had been set aside under the Hawaiian Homes Commission Act for the benefit of native Hawaiians. The income from the balance of the public lands is said to have "by and large flowed to the department of education." Hawaii Senate Journal, Standing Committee Rep. No. 784, pp. 1350, 1351 (1979).

Rice v. Cayetano 528 U.S. 495, 508, 120 S.Ct. 1044, 1052 (U.S.,2000)

That course of conduct belies the argument that § 5(f) requires or permits the State as Trustee to distribute receipts from the 1.2 million acres to OHA even

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Hawaiians, violate both Federal common law of trusts and the U.S. Constitution. That however, is not the subject of this suit; and plaintiffs reserve the right to challenge the HHCA and the compact in § 4 of the Admission Act in other litigation."

though there is no annual net income. State law changed in 1978 and, under color of that State law, the distributions only to OHA began in 1980 and have continued every year since with no distributions exclusively for the other beneficiaries.

Plaintiffs challenge § 5(f) only to the extent it is construed or applied in a way that would allow the State or OHA to violate trust law or the U.S. Constitution.

In the prayer of their complaint filed April 3, 2008 paragraph A.3., page 28 (ER 16 in No.08-16769) James Kuroiwa and his fellow plaintiffs seek declaratory judgment,

> To the extent that § 5(f) of the Admission Act has been or is construed or applied to require or authorize the State of Hawaii or its officials to give persons of Hawaiian ancestry any right, title or interest in the ceded lands trust, or the income or proceeds there from, or any other rights not given equally to other citizens of Hawaii, it violates the common law of trusts applicable to federally created trusts and the Equal Protection component of the Fifth Amendment to the Constitution of the United States; and is invalid.

See also Statement of the Case at pages 4 and 5 of the Opening Brief in this appeal filed January 29, 2009 showing that and other provisions of the complaint limiting their challenge to the State's and OHA's misinterpretation and misapplication of § 5(f), not its substantive terms.

Not just a question of the State choosing one permissible use or another.

State Defendants argue at Ans. Brf. 6, even assuming it applies, the Hawaii Uniform Trustee's Powers Act --- forbidding trustees whose trust duties and

individual interests conflict from exercising the trust power without court authorization -- has no bearing here, because … the State's decision to use some of the ceded land proceeds for the benefit of native Hawaiians -- which 5(f) expressly authorizes – and some of the proceeds for other 5(f) purposes, does not in any way conflict with the "individual interests" of the State.

That is not the point. Kuroiwa Plaintiffs do not challenge the State's uses of or improvements to the ceded lands for the general public such as schools, state or county buildings, parks, roads, airports, harbors or other infrastructure; nor as noted do they challenge in this suit the State's use of the 200,000 acres of ceded lands set aside for native Hawaiians under the Hawaiian Homes Commission Act; and they do **not** attack the constitutionality or legality of the substantive terms of § 5(f) itself.

Specifically, they challenge the Trustee State of Hawaii's *distributions* of receipts from the 1.2 million acres of the Ceded Lands Trust exclusively to OHA for native Hawaiians. As this court said August 7, 2007, "the lands ceded in the Admission Act are to benefit '*all* the people of Hawaii,' not simply Native Hawaiians." *Day v. Apoliona*, 496 F.3d 1027, 1034, FN 9 (9th Cir. 2007) (emphasis in original) citing Justice Breyer's concurring opinion in *Rice v. Cayetano* 528 U.S. 495, 525, (2000),

> But the Admission Act itself makes clear that the 1.2 million acres is to benefit *all* the people of Hawaii. The Act specifies that the land is to

> be used for the education of, the developments of homes and farms for, the making of public improvements for, and public use by, *all* of Hawaii's citizens, as well as for the betterment of those who are "native." (Emphasis in original.)

This court in *Day*, 496 F.3d 1034, FN 9 continued,

> Our discussions of standing, rights of action, and the scope of the § 5(f) restrictions have arisen in cases brought by Native Hawaiian individuals and groups. But neither our prior case law nor our discussion today suggests that as a matter of federal law § 5(f) funds must be used for the benefit of Native Hawaiians or Hawaiians, at the expense of other beneficiaries.

Just four months ago, the State itself argued at page 26 in its merits brief [6] to the U.S. Supreme Court in *State of Hawaii v. Office of Hawaiian Affairs,* No. 07-1372 that its "public trust" obligations run to *all* the citizens of Hawaii, not just to Native Hawaiians;" and at page 19 that the Newlands Resolution vested absolute and unreviewable title in the United States; the Organic Act of 1900 confirmed the extinguishment of any Native Hawaiian or other claims to the ceded lands; and at page 46,

> But neither the Apology Resolution nor any other source of law, state or federal, authorizes any court to tell Hawaii's political branches that they *may not* alienate those lands on the theory that Native Hawaiians may have enforceable legal rights to them. The Newlands Resolution and subsequent federal enactments confirm that no such rights exist, and the Supremacy Clause precludes any court decision based on a contrary premise.

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6. http://www.inversecondemnation.com/files/07-1372_petitioner_merits.pdf

By making distributions only to OHA exclusively for native Hawaiians and **no** distributions exclusively to or for the other beneficiaries, when there is no net income or proceeds from which distributions could lawfully be made to or for any beneficiaries, the State breaches the trust. These misapplications of trust funds and assets have been going on for almost three decades. By mid 2007 OHA reported that its assets traceable to the ceded lands reached almost half a billion Dollars, in addition to the real estate transferred to OHA. During all that time, the State, until June 4, 2008, never disclosed, even when asked repeatedly,[7] that the 1.2 million acres had never generated any annual net income.

Thus, and for the additional reasons spelled out in the Kuroiwa Plaintiffs' opening brief at 22 - 25, nothing in § 5(f) of the Admission Act requires or authorizes the State as Trustee of the federal Ceded Lands Trust to make

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7. SER 5 in 08-16769. Hawaii Bar Journal July 2001 *The Ceded Lands Case by H. William Burgess and Sandra Puanani Burgess,* page 90 "20% Of Gross Revenues Or Net After Expenses?" It is important to know the actual revenues that the State, as trustee of the public land trust, receives from the ceded lands, as well as the expenses the State incurs in connection with those lands and in generating those revenues before making or agreeing to any "pro rata" distribution to any beneficiaries. Under general trust law, beneficiaries are only entitled to receive shares of net income, not gross. We have asked for this information. But the State has declined to furnish it, saying the negotiations with OHA are confidential.

Also SER 4 in 08-16769 State Defendants Answers to Interrogatories *Arakaki v. Lingle* 4-1-03, page 82, d. During that same period, [from July 1, 1994 to March 2002] did the public land trust break even, or operate at a profit, or operate at a loss?
Objection, irrelevant: …

distributions only to OHA for native Hawaiian beneficiaries for almost three decades and none exclusively to or for the other beneficiaries when the 1.2 million acres in all that time never generated any annual net income. The grievance of James Kuroiwa and his fellow plaintiffs on behalf of themselves and the 1 million or so other citizens of the State of Hawaii and United States similarly situated is redressable without changing a word of § 5(f) and without the United States as a party.

So also, and long overdue, is the relief sought both in Kuroiwas' complaint and in their counter-motion for sanctions: To order the State and OHA to do what they should have done long ago. For the State, stop the diversions of trust funds and assets to OHA until final judgment instructing State officials as to their conflicting duties and interests. For OHA, stop the misapplications of trust funds and assets until final judgment instructing them as to their conflicting duties and interests. For both the State and OHA, stop spending public funds from any source to aid or abet separatism which threatens to deprive Kuroiwa Plaintiffs, and others similarly situated, of their civil rights.

Plaintiffs' counter motion for sanctions.

State Defendants' Answering brief beginning at page 7 argues that Plaintiffs' sanctions motion was frivolous as they repeated the same arguments the district court had already rejected; and "obviously" were not applicable to State

Defendants who did not file any sanctions motion. Both those points are misplaced.

The district court in the July 3, 2008 order granting judgment on the pleadings (ER 2 -18) did not reach, much less reject, the merits of Plaintiffs' complaint, pleadings or oral arguments in any respect except as to standing and to the application of *Arakaki* v. Lingle. To the contrary, the trial court said it accepted as true all material allegations of the complaint (ER 7); held that *Arakaki* controls; the United States is an indispensable party and Plaintiffs lack standing to sue the United States, and therefore lack standing to bring counts I and III (ER 8,9); declined to exercise supplemental jurisdiction over Count II (ER 16) and granted Defendants' motions for judgment on the pleadings. (ER 16, 17).

Defenses to imposition of sanctions; and compulsory counter-claim.

State Defendants ask this court, under FRAP 38, to "deem plaintiffs' appeal of the denial of plaintiffs' sanctions motion to be equally, if not more, frivolous." (State Ans. Brf. at 4.) They argue that plaintiffs' sanctions motion was frivolous because it essentially repeated the very same arguments made by plaintiffs in the underlying case, and the District Court had already thrown out the underlying case on indispensable party/standing grounds.

But see *Blue v. U.S. Dept. of Army,* 914 F.2d 525, 548 (4th Cir. 1990), cert. denied, 499 U.S. 959 (1991) ("Litigants should be able to defend themselves from

the imposition of sanctions without incurring further sanctions."). Plaintiffs and their attorney have, throughout this and the three related appeals now pending, respectfully presented the issues, claims, contentions and briefs as warranted by non-frivolous arguments for modifying or reversing the law of these cases as adjudicated by the trial courts or establishing new law.

The July 3, 2008 order granting OHA defendants' motion for sanctions and denying plaintiffs' counter motion for sanctions, did not adjudicate the merits of the plaintiffs' or their attorney's defenses to the sanctions motions or the merits of the counter motion for sanctions against defendants. Rather, the July 3 order merely rejected that Plaintiffs have *standing* to bring such claims. (ER 2 in No. 08-16769 at 8).

> Defendants argue that Count I must be dismissed with prejudice because the United States is an indispensable party who has not consented to suit. Based on *Arakaki*, the court agrees.
>
> Also at 9-10, "Plaintiffs have no standing to sue the United States, and therefore lack standing to bring this claim."

Dismissal for lack of standing must be without prejudice. *Fleck and Associates, Inc. v. Phoenix, City of, an Arizona Mun. Corp.* 471 F.3d 1100, 1103 (9th Cir. 2006) held,

> Because Fleck lacked standing to assert its customers' rights, the district court lacked subject matter jurisdiction over the claim and should have dismissed on that basis without discussing the merits.

and at 471 F.3d at 1106 -1107,

> We therefore vacate the district court's order and remand with instructions to dismiss without prejudice. *See Steel Co.* 523 U.S. at 94, 118 S.Ct. 1003 *1107 (if court lacks jurisdiction it is powerless to reach the merits); *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 235, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *Brereton v. Bountiful City Corp.,* 434 F.3d 1213, 1216-20 (10th Cir. 2006) (dismissal for want of standing must be "without prejudice").

Thus plaintiffs and their attorney have the right to defend themselves from the imposition of sanctions. Also under F.R.Civ.P. 13, they *must* file as a counter-claim any claim they have against any opposing parties arising out of the same transaction. They did so; and the merits of their defenses and counter motion for sanctions against defendants have not yet been adjudicated.

At the hearing July 1, 2008, the trial court said, in response to plaintiffs' attorney's offer of proof, "I'm granting the motion for judgment on the pleadings. That doesn't entail any evidence. ... If you go from here to the Ninth Circuit, it will be a legal issue you will be addressing to the Ninth Circuit based on my granting of the motion for judgment on the pleadings." (ER 3 in No. 08-16769 at 50-51.) As covered in the Opening Brief filed1/29/2009 at 21 under Standards of review, this court reviews *de novo* a district court's grant of judgment on the pleadings; and takes all the allegations in the non-moving party's pleadings as true. *Ventress v. Japan Airlines*, 486 F.3d 1111, 1114 (9th Cir. (Hawaii) 2007).

Admission Act § 5(f) of course does not require the imposition of sanctions on any parties to this case; and the United States, whatever the decision in the underlying case may be, is not an indispensable party to this satellite litigation. It is therefore appropriate to adjudicate on the merits plaintiffs' counter motion for sanctions against defendants and plaintiffs' attorney's defenses to the sanctions motion on the merits.

State Defendants initiated the sanctions litigation, drafted the motion and acted in concert with its agency OHA.

State defendants (Ans. Brf. at 8) claim some of the sanction requested are "obviously not applicable to State defendants, who did NOT file any Rule 11 sanctions motion. (The State defendants did serve plaintiffs with a Rule 11 sanctions motion … but chose not to file it in court.)

On May 15, 2008, State Defendants served on Appellant Burgess their motion for Rule 11 Sanctions against him personally and informed him the motion would not be filed in court until, at the earliest, 21 days after service, and then only if plaintiffs' counsel does not withdraw the complaint or "concede that Arakaki is both binding precedent upon this United States District Court, and that it is applicable to and bars plaintiffs' claims in this case." (ER 84 – 94.) At that point there had been only one court appearance, a status conference on April 8, 2008 in which the court denied plaintiffs' motion for a TRO "without prejudice, Mr. Burgess, to you making every effort to show I'm incorrect on this." (ER 210.) On

May 21, 2009 OHA Defendants served on Burgess their Joinder in State Defendants' Motion for Rule 11 Sanctions under a cover letter informing Burgess that, "in the event you do not withdraw the Complaint or expressly make the concessions as urged in the State Defendants' letter of May 1, 2008, we will file the Joinder after the expiration of 21 days of this letter."

On May 27, 2008 Burgess served but did not file Plaintiffs' Counter Motion for Sanctions against Defendants and their Attorneys. (See ER 61.) On July 3, 2008 the district court granted State defendants' and OHA defendants' motions for judgment on the pleadings. On July 14, 2008 OHA Defendants filed in court the State Defendants motion for Rule 11 sanctions as an attachment to their filing. Although State defendants themselves did not file their motion in court, their agency OHA did. Judging by the absence of any objection or disavowal by the State, and the State's subsequent briefing supporting OHA's filing as "justified," it appears they acted in concert to intimidate. If so, State defendants would be liable jointly with OHA defendants under 42 U.S.C. § 1985(3) conspiracy to interfere with civil rights or § 1986 for neglect to prevent conspiracy. State officials may be sued in their official capacities for prospective relief under § 1983. *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007). To stop such unacceptable conduct the federal court can and should enjoin the State from further distributions and OHA defendants from further expenditure of trust funds.

Update on Akaka bill.

Stripped of many of the safeguards in earlier versions, the 2009 Akaka bill (S. 381/H.R. 862) introduced in the 111th Congress February 4, 2009 proposes to:

Create a privileged class in America by "finding" the U.S. "has a special trust relationship to promote the welfare of native people of the United States, including Native Hawaiians;" and a "special political and legal relationship" that "arises out of their status as aboriginal, indigenous, native people of the United States". §§1(3), (21) & (22) and §§2(1) & (7);

Define "Native Hawaiian" as anyone with at least one ancestor indigenous to Hawaii, §2(7)(A);

"Reaffirm" that "Native Hawaiians are a unique and distinct aboriginal, indigenous, native people" with "an inherent right" of "self-governance" and to "reorganize a Native Hawaiian government", §3(a)(1) & (4); and

Provide a process (with elections and referenda at which only Native Hawaiians may vote) to create a Native Hawaiian government. §7.

Automatic recognition of new government. Once the new government is created, the United States is deemed to have officially recognized it as the "representative governing body of the Native Hawaiian people." §7(d)(2).

Negotiations. The bill would then authorize the United States to negotiate with the State of Hawaii and the Native Hawaiian government for the transfer of

lands, resources, and assets dedicated to Native Hawaiian use under existing law, to the Native Hawaiian government. §9(b).

No requirement for prior consent or later ratification. The bill does not require the prior consent to the process by the people of Hawaii; or that any agreement negotiated for transfers to the new government shall be subject to their ratification.

Casinos, traffic, national security and future lawsuits. The bill disclaims any settlement. §10. The new version does not ban casinos; or protect U.S. military bases or training in Hawaii; or guarantee free flow of traffic on roads or in the air space or territorial waters or utility lines across the territory of the new government. Nor does it ban illegal drugs, illegal immigration or hostile military forces or civil and criminal jurisdiction.

For a comprehensive update see Dr. Kenneth Conklin's site at http://tinyurl.com/d2k82v .

The State's "No net income" revelation.

State Defendants in a footnote on the last page of their answering brief call "baseless" the conclusion based on the June 4, 2008 filing by the State itself in the companion *Day v. Apoliona* case, in which the highest financial and legal officials of the State of Hawaii have shown by undisputable facts and undisputable law that the 1.2 acres has never since 1959 generated annual net income from which

distributions could lawfully be made to OHA. That footnote itself underlines the urgent need to grant the counter motion for sanctions to compel State officials to perform their fiduciary duties, and stop the plunder that has been going on for almost three decades.

OHA's answering brief.

Kuroiwa plaintiffs believe the assertions in OHA's brief are sufficiently covered in Kuroiwa Plaintiffs' and their attorney's opening brief and in this reply.

Conclusion.

The trial court's imposition of sanctions on plaintiffs' attorney personally; and the implicit threat to sanction James I. Kuroiwa, Jr. and his fellow plaintiffs, vests them with standing to defend themselves in federal court. Rule 13 compels them to "state as a counter-claim any claim" they have against an opposing party if the claim arises out of the same transaction.

The stage is set. A single order granting plaintiffs' counter motion for sanctions can begin to restore in Hawaii the Constitution of the United States and the principles of the Declaration of Independence.

DATED: Honolulu, Hawaii, March 19, 2009.

/s/ H. William Burgess
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains no more than 5,465 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(ii).

DATED: Honolulu, Hawaii, March 19, 2009.

/s/ H. William Burgess
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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2009, I electronically filed the foregoing Attorney *Pro* Se and Kuroiwa Plaintiffs–Appellants' Reply Brief to OHA's and State's Answering Briefs with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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