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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES I. KUROIWA, JR., et al, Plaintiffs-Appellants, v. LINDA LINGLE, et al, State Defendants–Appellees, and HAUNANI APOLIONA, et al, OHA Defendants–Appellees.	No. 08-16769 D.C. NO. 1:08-CV-00153-JMS-KSC **KUROIWA PLAINTIFFS–APPELLANTS' REPLY TO STATE'S OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL;** **CERTIFICATE OF SERVICE**

KUROIWA PLAINTIFFS–APPELANTS' REPLY TO STATE'S OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL

Parsing the precedent. The State's flawed *Arakaki v. Lingle* argument.

The crux of this case, dismissed by the State as frivolous in footnote 2 on page 2 of its opposition, is that *Arakaki* is not good law because it took out of context and relied on *dictum* in *Carroll*. The house of cards built on one over-

generalized sentence in *Carroll* illustrates the importance of carefully parsing the precedent.[1]

In life as in the law, drawing general rules from past experience can be tricky business. Child psychologists refer to behavior in children as "overgeneralizing" --- as when a child greets not just dogs but also cats and pigeons with "bow wow."[2] Voltaire warned, "All generalities are false, including this one."

This reply begins by parsing *Carroll.* Patrick Barrett, one of the two plaintiffs in the consolidated *Carroll-Barrett* case, was a non-ethnic Hawaiian

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[1] Controlling authority has much in common with persuasive authority. Using the techniques developed at common law, a court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule announced. Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis. Courts occasionally must reconcile seemingly inconsistent precedents and determine whether the current case is closer to one or the other of the earlier opinions. *See, e.g., Mont. Chamber of Commerce v. Argenbright,* 226 F.3d 1049, 1057 (9th Cir.2000).

Hart v. Massanari, 266 F.3d 1155, 1172 (9th Cir. 2001).

[2] Jared Diamond, *The Third Chimpanzee*: *The Evolution and Future of the Human Animal*, Harper Perennial, reissued in 2006, at 149.

who, among other things, sought a Hawaiian Homestead lease.[3] In a deposition Barrett apparently answered that, no, he was not suing the United States and he did not challenge the constitutionality of the Admission Act. Section 4 of the Admission Act required, as a condition of statehood, that the Hawaiian Homes Commission Act, 1920 be adopted as a provision of the Constitution of the new State of Hawaii, subject to amendment or repeal only with the consent of the United States; and prohibiting change in qualifications of lessees except with the consent of the United States. In compliance, Article XI, entitled "**HAWAIIAN HOME LANDS**" with sections 1 "**HAWAIIAN HOMES COMMISSION ACT,"** 2 "**COMPACT WITH THE UNITED STATES"** and 3 "**AMENDMENT AND REPEAL**" became part of the Constitution of the new State of Hawaii.[4]

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[3] Barrett did challenge Haw. Const, Sec. 7, "Traditional and Customary Rights" and he did apply for a $10,000 loan from OHA to start a copy business. The district court found, and this Court affirmed, that Barrett failed to demonstrate any deprivation of traditional and customary rights or an injury in fact from the OHA loan program. Because Barrett lacked injury in fact, the first prong of standing, the decision as to those claims played no part in the analysis of his claim for a Homestead lease, which was denied for lack of the third prong, redressability.

[4] In 1978, the Hawaii Constitution was amended to renumber Article XI as Article XII "**HAWAIIAN AFFAIRS",** re-title section 2 as "**ACCEPTANCE OF COMPACT,**" re-title section 3 as "**COMPACT ADOPTION; PROCEDURE AFTER ADOPTION**" and add section 4 "**PUBLIC TRUST**," section 5 "**OFFICE OF HAWAIIAN AFFAIRS; ESTABLISHMENT OF BOARD OF TRUSTEES**," section 6 "**POWERS OF BOARD OF TRUSTEES**" and section 7 "**TRADITIONAL AND CUSTOMARY RIGHTS**".

The court in *Carroll* reasoned that the Department of Hawaiian Home Lands ("DHHL") could not issue a Hawaiian Homestead lease to Barrett without the consent or presence of the United States; and his claim for a Homestead lease was therefore not redressable. The Court said of Barrett in *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003),

> His claim, on its own, presented without the United States as a party and never challenging the constitutionality of the Admissions Act renders his claim not redressable. …
>
> We also affirm the district court's holding that Barrett's claim challenging the HHC homestead lease program is not redressable because he failed to join the United States or challenge the Admissions Act.

The *dictum* originated in this single sentence in *Carroll*, 342 F.3d at 944:

> Article XII of the Hawaii Constitution cannot be declared unconstitutional without holding Section 4 of the Admission Act unconstitutional.

This sentence is a classic example of over-generalizing. Only Haw. Const. Art. XII sections 1, 2 and 3 (relating to HHCA) were required by Section 4 of the Admission Act and only those sections were relevant to non-ethnic Hawaiian Barrett's demand for a Hawaiian Homestead lease. The other four sections, 4, 5, 6 and 7 of Haw. Const. Art. XII, (the OHA sections and the Traditional and Customary Rights section), were added to the Hawaii Constitution 19 years after admission, do not change or apply to the HHCA and were irrelevant to Barrett's demand for a Hawaiian Homestead lease.

Therefore, to the extent that the *Carroll* decision is applied to the OHA sections of Hawaii Constitution Article XII, it is *dicta*, unnecessary to that judgment, an unintended over-generalization and of no value as precedent.

That same sentence was taken out of context by *Arakaki v. Lingle*, 477 F.3d 1048, 1060-61 (9th Cir. Feb. 9, 2007) and applied to dismiss the plaintiffs' trust beneficiary claims; and, in turn, adopted as binding by the district court in this case April 8, 2008 ("the United States remains an indispensable party to a suit challenging the trust, and Plaintiffs have no standing to sue the United States." ER 2 at 9 in No. 08-16769) denying the temporary restraining order and on July 3, 2008 in entering judgment on the pleadings "mooting" Kuroiwas' motion for a preliminary injunction.

Thus, the denial of the TRO, judgment on the pleadings and "mooting" of the motion for preliminary injunction below, and the State's (and OHA's) present opposition to injunction pending appeal, all rest on a house of cards built on *dictum*, a classic unintended over-generalization.

The State's "miniscule" argument.

The State's opposition at 13 and 14 argues that the harm to each individual plaintiff would be "miniscule," "at most less than $12 per plaintiff."

Kuroiwa Plaintiffs-Appellants incur considerably more irreparable injury than that. Each of them, just as much as each native Hawaiian citizen of Hawaii, is

a beneficiary of the Ceded Lands Trust; and entitled to equal protection, privileges and treatment under the laws, including the basic principles of trust law.

Assuming about 20,000 "native Hawaiians" (50% or more blood quantum) now live in Hawaii,[5] the State's ongoing distributions of $15.1 million of trust receipts per year to OHA for native Hawaiian beneficiaries, benefit each of them by about $755 annually; and the aggregate past distributions to OHA of over $400 million, favored each native Hawaiian by about $20,000. To make "pono" (the Hawaiian word for goodness, correct or proper) the State, if it continues distributing $15.1 million annually to OHA for native Hawaiian beneficiaries, should also distribute about $755 annually to or for each of the about 1,280,000 non-native Hawaiian beneficiaries. That would require an aggregate annual distribution of $966.4 million exclusively for non-native Hawaiian beneficiaries. If the State does not wish to recover from OHA the $400 million or so OHA still holds traceable to past distributions, the State must now distribute exclusively to or for non-native Hawaiian beneficiaries about $25.6 billion.

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[5] The population of descendants of not less that one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778 is not counted by the U.S. Census Bureau or any other authority. OHA has estimated it at 80,000 and others believe it to be 5,000 or less. The exact number is not essential for this analysis since this is not a suit for damages. Even if the number of native Hawaiians living in Hawaii today is 80,000, each Kuroiwa plaintiff is short-changed by $189 per year; and an aggregate annual distribution of $241.6 million exclusively for all non-ethnic Hawaiians living in Hawaii would be required to provide equal treatment for each beneficiary.

The State's claim that economic injury is not irreparable.

The State opposition at 12 argues that even if plaintiffs suffer injury it would not be irreparable, citing *Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc*. 944 F.2d 597, 603 (9th Cir. 1991) which provides, "It is true that economic injury alone does not support a finding of irreparable harm, because such injury can be remedied by a damage award." But this is a suit on behalf of James Kuroiwa and his fellow plaintiffs and all beneficiaries similarly situated to enjoin the trustees from committing further breaches of trust. Damages would not provide an adequate remedy.

Day v. Apoliona, 496 F.3d 1027, 1033 (9th Cir. 2007) reaffirmed that basic trust law principles apply to the Ceded Lands Trust and that each individual beneficiary has the right to maintain a suit, for example, to enjoin the trustee from committing a breach of trust.

> The instant case involves a public trust, and under basic trust law principles, beneficiaries have the right to "maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the trustee to redress a breach of trust." Restatement 2d of the Law of Trusts, § 199; *see also id.* § 200, comment a.

The past diversions of over $400 million to OHA , to the extent OHA has spent or invested and lost them, are gone forever. Plaintiffs, and all other beneficiaries similarly situated have been irreparably deprived of the benefit of

those trust funds. Damages are not an adequate remedy. As the above calculations demonstrate, to make pono the diversion of $400 million exclusively for one small class of beneficiaries would require $25.6 billion exclusively for the rest of the beneficiaries. Since plaintiffs and those similarly situated make up about 95% of the equitable owners of the trust, they would be paying damages to themselves.

Even more threatening is the possible harm to plaintiffs' civil rights resulting from OHA's and, to some extent, the State's lobbying for the Akaka bill and other similar separatist measures under which a new sovereign government would be carved out of the State of Hawaii.

The State's *Morton v. Mancari* defense.

At Opp. page 4, footnote 4, the State suggests "it is certainly not 'likely' that plaintiffs can overcome *Morton v. Mancari*, 417 U,S, 535 (1974) upholding preferences in hiring by the BIA of members of recognized Native Americans and Alaska Natives. In the briefing for *Rice v. Cayetano*, 528 U.S. 495 (2000) the State and OHA argued that, under *Mancari,* it does not matter that native Hawaiians are not a tribe. The Supreme Court in effect said, yes it does. "If Hawaii's restriction were to be sustained under *Mancari* we would be required … to conclude that Congress … has determined that native Hawaiians have a status like that of Indians in organized tribes. *Rice* 528 U.S. at 518. As the State of Hawaii acknowledged, the tribal concept has no place in the context of Hawaiian

history. *Rice v. Cayetano*, Respondent's Brief in Opposition to Petition for Writ of Certiorari (Dec. 29, 1998). See also OHA's attorney, Jon Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale Law & Policy Review 95 (1998) ("Native Hawaiians have never organized themselves into tribal units").

Concurring in Rice, Justice Breyer noted that the State's definition of "Hawaiian" in § 10-2 H.R.S. is "not analogous to the membership in an Indian tribe" and to define "membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members . . . goes well beyond any reasonable limit." Rice, 528 U.S. at 526, 527.

The State's claim that "an even higher standard" applies.

The State suggests at 18-19 because plaintiffs are seeking an injunction to alter the status quo their request "is held to an even higher standard." Such a hard and fast rule was recently rejected by this court. Rather, "The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo."

> The Association contends that the City must meet a higher standard than that articulated in *Lopez* and *Winter* because, in its view, a stay would change the status quo. We disagree that a higher standard applies.
>
> First, the Supreme Court in *Hilton* did not include preservation of the status quo among the "factors regulating the issuance of a stay." *See* 481 U.S. at 776, 107 S.Ct. 2113; *see also Abbassi v. INS,* 143 F.3d 513, 514 (9th Cir.1998). Rather, the Court recognized that "the traditional stay factors contemplate individualized judgments in each case, [and]

> the formula cannot be reduced to a set of rigid rules." *Hilton,* 481 U.S. at 777, 107 S.Ct. 2113. Maintaining the status quo is not a talisman. As the Fifth Circuit wrote in *Canal Authority of Florida v. Callaway,* 489 F.2d 567, 576 (5th Cir.1974):
>
> It must not be thought ... that there is any particular magic in the phrase 'status quo.' The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury.... The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.
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> *See also Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F.2d 804, 809 (9th Cir.1963) (observing that the principle that a preliminary injunction should preserve the status quo is "not to be understood as ... [a] hard and fast rule[ ], to be rigidly applied to every case regardless of its peculiar facts").

Golden Gate Restaurant Ass'n v. City and County of San Francisco, 512 F.3d 1112, 1116 (9th Cir. 2008).

Respectfully submitted,

DATED: Honolulu, Hawaii, March 27, 2009.

/s/ H. William Burgess

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2009, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: Honolulu, Hawaii, March 27, 2009.

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