NO. 30049
IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Tax Appeals of JOHN M. CORBOY, STEPHEN GARO AGHJAYAN, GARRY P. SMITH, EARL F. ARAKAKI and J. WILLIAM SANBORN Plaintiffs-Appellants vs. DAVID M. LOUIE, in his official capacity as Acting Attorney General, State of Hawaii; the COUNTY OF MAUI; the COUNTY OF KAUAI; the CITY AND COUNTY OF HONOLULU; the COUNTY OF HAWAII and the STATE OF HAWAII, Defendants-Appellees	**TAX APPEAL CASE NOS. 07-0086; 07-0099; 07-0102; 08-0039; 08-0040; 08-0041; 08-0042; 08-0043 (CONSOLIDATED)** APPEAL FROM: **1) FINAL JUDGMENT August 7, 2009;** **2) ORDER GRANTING STATE'S AND ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT June 26, 2009;** **3) ORDERS GRANTING EACH COUNTY'S JOINDER IN STATE'S MOTION FOR SUMMARY JUDGMENT June 15, 2009 and August 7, 2009; and** **4) ORDER DENYING PLAINTIFFS-APPELLANTS' COUNTER MOTION FOR SUMMARY JUDGMENT July 29, 2009** JUDGE GARY W. B. CHANG

PLAINTIFFS-APPELLANTS' (TAXPAYERS') MOTION FOR RECONSIDERATION,
DECLARATION OF COUNSEL, CERTIFICATE OF SERVICE

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PLAINTIFFS-APPELLANTS' (TAXPAYERS') MOTION FOR RECONSIDERATION

Taxpayers move under HRAP 40 for reconsideration of the Opinion of the Court by Recktenwald C.J. (Opinion), and the Concurring Opinion by Acoba (Concurring Opinion), both filed April 27, 2011.

Points of Law or Fact Overlooked or Misapprehended and Brief Argument

Taxpayers respectfully contend that:

The Concurring Opinion would correctly hold that Taxpayers allege pecuniary loss because their ability to compete on an equal basis for the special tax exemption is denied on ancestral grounds; and, accordingly, Taxpayers have standing. But in concurring with the dismissal of Taxpayers' case, the Concurring Opinion says the 9th Circuit *Carroll-Barrett* [1]decision is "instructive" so the United States is an indispensable party.

By relying on *Carroll-Barrett's* over-generalized dicta, both the Concurring Opinion and the Opinion overlook that neither Section 4 of the Admission Act nor the HHCA require the tax exemption after the first seven years of the original term of each homestead lease. Rather, as to those 92 years (or 192 years if the lease term has been extended to the maximum[2]) HHCA Section 208(7) requires the homestead lessee to pay all taxes assessed upon the tract and improvements thereon."

Invalidating by court order the race-based county ordinances to the extent they apply the exemption beyond the first seven years of the homestead leases, would comply with, not amend, the HHCA. Thus, as to those years, in order to redress Taxpayers' pecuniary losses, there is no need to obtain the consent of the United States or to name it as a party to this action.

Equivalent exemptions for Taxpayers and all homeowners similarly situated in their respective counties for that huge number of years would significantly reduce Taxpayers' future pecuniary losses and not violate or require any amendment of the HHCA or the Admission Act.

The Opinion, by focusing on the homestead lease eligibility provisions, apparently misapprehends this as a suit by Taxpayers seeking award of homestead leases. In fact, Taxpayers seek equivalent exemptions, not homestead leases.

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[1] *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003) affirming *Carroll v. Nakatani*, 188 F.Supp. 1219 (D. Haw. 2001).

[2] Under HHCA §208(2) the [homestead] leassee shall pay a rental of $1 a year for the tract and the lease shall be for a term of ninety nine years; except that the department may extend the term of any lease; provided that the approval of any extension shall be subject to the condition that the aggregate of any initial ninety-nine year term and any extension granted shall not be for more than one hundred ninety-nine years.
Under HHCA § 208(7) The lessee shall pay all taxes assessed upon the tract and improvements thereon. … (8) … provided that an original lessee shall be exempt from all taxes for the first seven years after commencement of the term of the lease.

The Opinion also overlooks the injury-in-fact suffered by Taxpayers because their respective county ordinances deny each of them an exemption.

The Opinion also overlooks that no Federal law forbids the counties from giving Taxpayers and all homeowners tax exemptions equivalent to that given to homestead lessees.

Footnote 7 in the Concurring Opinion. In answer to the query in footnote 7 of the Concurring Opinion, Taxpayers specifically challenge on the following theory, the counties' vast expansion of the duration of the special exemptions:

Assuming the counties or one or more of them, continue to give the exemptions only to homestead lessees; and assuming that only native Hawaiians remain eligible for award of homestead leases; then the racial classification embodied in the HHCA's definition of "native Hawaiian" will continue to exclude all non-native Hawaiians from competing on an equal basis for the special exemption.

As to the first seven years. Although the HHCA calls for the tax exemption for homestead lessees during the first seven years of each lease, it does not forbid the counties from providing for all residential, pastoral and agricultural real property owners in their respective counties exemptions equivalent to whatever exemption they give to Hawaiian homesteaders in the future. Thus, full redress to Taxpayers can be accomplished without the consent of the U.S. and without changing a word of any federal law.

Taxpayers seek equivalent exemptions, not homestead leases.

The Opinion at page 32 notes that "Taxpayers' allegations concerning the constitutionality of the tax exemption challenge those provisions of the HHCA that set forth the lease eligibility requirements. We therefore construe Taxpayers' challenge to the tax exemption afforded to homestead lessees as a challenge to those lease eligibility provisions."

"The record does not establish that the taxpayers are interested in participating in the homestead lease program; and taxpayers accordingly have not established an injury-in-fact sufficient to confer standing and warrant the exercise of the tax appeal court's jurisdiction." (Opinion pages 4 and 32-41.)

Thus, in analyzing the first prong of standing, whether Taxpayers allege an injury-in-fact, the Opinion turns a blind eye to the distinct and palpable injuries Taxpayers allege they have suffered and continue to suffer because the counties, by restricting the exemption to homestead lessees, use a racial classification which deprives Taxpayers and other homeowners similarly situated of the ability to compete on an equal basis for the exemptions.

Taxpayers brought these eight cases in the tax appeal court, seeking from their respective counties real property *tax exemptions* equivalent to the exemptions given to homestead lessees. It is impossible to construe Taxpayers' claims here as seeking awards of homestead leases. No such a claim is found in any of Taxpayers' pleadings. In response to repeated arguments by opposing counsel that Taxpayers do not "want" or are not "interested in" the leases. Taxpayers

have consistently maintained that they have not applied for a homestead lease and do not in this case ask for an award of a homestead lease.

As the Concurring Opinion notes, the State emphasized that it was "not arguing that Taxpayers do not have standing to challenge the tax exemption in general – i.e., to challenge the fact that homesteaders receive the exemption, while non-homesteaders do not." This would seem to be an absolute concession by the State that Taxpayers have standing to do exactly what they are doing: challenging the fact that homesteaders receive the exemption, while non-homesteaders do not.

Construing Taxpayers' pleadings as if they allege no pocketbook injuries from being denied the tax exemption, violates Hawaii's and Federal appellate jurisprudence which requires, when reviewing grants of summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. In addition, since denial of equal protection of the laws is alleged, strict scrutiny generally applies and "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw v. Reno,* 509 U.S. 630, 643-44 (1993).

The order or relief sought by Taxpayers.

Taxpayers respectfully request that the judgment of the tax appeal court be vacated and this case remanded for adjudication on the merits with instructions that Taxpayers have standing and that the standard of review for the special real property tax exemptions in question is strict scrutiny.

In addition, Taxpayers request that this court temporarily enjoin each of the four counties, pending final judgment, from directly or indirectly depriving Taxpayers and all other residential, pastoral and agricultural real property owners similarly situated of an exemption equivalent to that granted to Hawaiian homestead lessees.

Dated: Honolulu, Hawaii, May 9, 2011.

/s/ H. WILLIAM BURGESS
Attorney for Plaintiffs-Appellants

DECLARATION OF COUNSEL
IN SUPPORT OF PLAINTIFFS-APPELLANTS' (TAXPAYERS')
MOTION FOR RECONSIDERATION

H. WILLIAM BURGESS, hereby declares under penalty of perjury as follows:

I am an attorney licensed to practice law in the federal and state courts located in the State of Hawaii. I am the attorney for Plaintiffs-Appellants and make this declaration in support of Plaintiffs-Appellants' (Taxpayers') motion for reconsideration.

That this motion for reconsideration is presented in good faith and not for purposes of delay.

Dated: Honolulu, Hawaii, May 9, 2011.

/s/ H. WILLIAM BURGESS
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following parties via the Hawaii Judiciary Electronic Filing System or U.S. Postal Service, postage prepaid on May 9, 2011:

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